



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimants** and

**Respondent**

1. Miss Megan Crew
2. Miss Jo Mason

**Three Milestone Education Ltd**

**Held at: Exeter by Video**

**On: 20, 21, 22, 23, 24, 27, 28 March 2023**

**Before: Employment Judge Smail  
Mr P. English  
Mrs P. Skillin**

## **Appearances**

**Claimants:** Miss R. Jiggins (Just Reasonable Ltd)

**Respondent:** Miss K. Gardiner (Counsel)

**JUDGMENT** having been sent to the parties on 12 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The Claimants were Teaching Assistants at the Respondent school. The school is called Oaktree, it is in Truro, it caters for children with special or additional needs in the 7 to 16 age group. Examples of the additional needs include autistic spectrum conditions, attachment difficulties, early year challenges and moderate learning difficulties.
2. Miss Crew's length of service was between 4 September 2018 – 27 August 2021 and Miss Mason's length of service was between 6 January 2020 – 16 August 2021. Whilst Miss Crew has been named the first Claimant for case management purpose with Miss Mason as the second Claimant, it is sensible to deal with Miss Mason's claim first because she is more central to events.

3. Miss Mason was dismissed with effect from 16 August 2021 for gross misconduct: first, that she knowingly had class A drugs delivered to the school during working hours (the drug was cocaine). Secondly, that she knowingly asked another member of staff (Miss Crew) to remove the drugs from her car to stop them being found by a police search of her vehicle which was imminent.
4. Miss Crew was dismissed with effect from 27 August 2021 for gross misconduct. First, discussing drugs and making gestures about drugs with Miss Mason in the school. Originally, this allegation was that this happened in front of children but that was dropped in the course of proceedings within the school. Secondly, that she knew that class A drugs (cocaine) were being delivered to the school (all these events taking place on 23 July 2022). Thirdly, most importantly, that she colluded with Miss Mason to remove the drugs from Miss Mason's vehicle to stop them being found.
5. The cases are closely interrelated. Findings of fact that we make in respect of the chronology under Miss Mason's case will also be relevant to Miss Crew's case but we will do our best to separate the treatment of the two Claimants as best we can and as is relevant.

### **THE ISSUES**

6. The issues were identified and set down at a case management hearing before Employment Judge Midgley on 7 September 2022, they were subsequently amended so as to better reflect what had been agreed and it is the amended list of issues which we have been working with, except that they have been refined both before and in court in the course of the hearing as follows:
  - a) Importantly, the Respondent has accepted before the hearing that Miss Mason was disabled by reason of suffering from anxiety and depression at all material times for the purposes of our case. The Respondent concedes knowledge from 26 February 2020, which is in advance of the important events in this case.
  - b) The Claimants have withdrawn a claim of indirect discrimination and the particular allegations at 7.5.2, 8.1.1 and 8.1.6 of the issues. Those related to one allegation in respect of the reasonable adjustments claim and to two allegations of harassment.
7. The Amended Issues we have considered are at Appendix 1 below.
8. It is worth pointing out that an unfair dismissal claim is brought by Miss Crew only because Miss Mason did not have two years' service. Both Claimants claim wrongful dismissal, being dismissed without notice pay. Miss Mason only brings a claim of discrimination arising from disability under Section 15 of the Equality Act 2010. Miss Mason only brings a claim of failure to make reasonable adjustments under Sections 20 and 21 of the Equality Act 2010. Both Claimants bring claims of harassment related to disability under Section

26 of the Equality Act 2010, although both Claimants rely on the disability of Miss Mason in that regard.

## **THE LAW**

### Unfair dismissal of Miss Crew

9. The Tribunal has had regard to section 98 of the Employment Rights Act 1996 by Section 98(1) it is for the employer to show the reason, or if more than one the principal reason for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason. By Section 98(4) where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reasons shown by the employer:
  - (a) depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.
  - (b) Shall be determined in accordance with equity and the substantial merits of the case.
10. The predecessor to this provision has been interpreted by the seminal case of British Home Stores v Burchell 1978 IRLR 379 EAT as involving the following questions.
  - (a) Was there a genuine belief in misconduct?
  - (b) Were there reasonable grounds for that belief?
  - (c) Was there a fair investigation and procedure?
  - (d) Was dismissal a reasonable sanction open to a reasonable employer.
11. We have reminded ourselves of the guidance in Sainsbury's Supermarkets v Hitt 2003 IRLR 23 Court of Appeal that all stages of the enquiry the Tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer, bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Food v Jones 1982 IRLR 439 EAT to the effect that the starting point should always be the words of Section 98(4) themselves. In applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether the Employment Tribunal consider the dismissal to be fair. In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many though not all cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view whilst another quite reasonably take another. The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer

might have adopted. If the dismissal falls within the band the dismissal is fair. If the dismissal is outside the band it is unfair.

### Wrongful Dismissal

12. An employee is entitled to notice of dismissal or compensation in lieu unless as a matter of fact as determined objectively by the Tribunal on the balance of probability the employee committed a repudiatory breach of contract entitling the employer to dismiss without notice by way of acceptance of the breach. The burden is on the employer to prove this.

### Claims under the Equality Act 2010

13. Turning then to the Equality Act provisions, both parties have set these out in their written submissions. I turn to the Claimants' submissions which conveniently comes to hand.

### Section 15 of the Equality Act 2010 discrimination for something arising as a consequence of disability.

14. Section 15 provides that (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 that the treatment is a proportionate means of achieving a legitimate aim.
15. There has been guidance as to the matter of causation. Causation is an objective test not necessarily dependent on the thought processes of the alleged discriminator. There are two stages, "the because of" stage, involving A's explanation for the treatment, conscious and unconscious reasons for it; and the "something arising in consequence" stage involving consideration of whether as a matter of fact rather than belief the something was a consequence of the disability.
16. Mr Justice Langstaff in Basildon and Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN guided the Tribunal by saying it did not matter precisely in which order the questions are addressed; depending on the facts a Tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to something that caused the unfavourable treatment.

### Section 20 of the Equality Act 2010 relates to the duty to make reasonable adjustments

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17. By subsection (2) the duty comprises of the following three requirements. We are concerned with the first only which is provided for at subsection (3). The first requirement is a requirement where a provision, criterion or practice (PCP) 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 avoid the disadvantage. Substantial here means more than minor or more than trivial.

Section 26 relates to harassment under the Equality Act 2010.

18. We are concerned with alleged harassment relating to disability. By Section 26(1) a person A harasses another B if:
- (a) A engages in unwanted conduct related to a relevant protected characteristic.
  - (b) The conduct has the purpose or effect of (1) violating B's dignity or (2) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

By subsection (4) in deciding whether the conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account.

- (a) the perception of B.
  - (b) The other circumstances of the case.
  - (c) Whether it is reasonable for the conduct to have that effect.
19. Burden of proof is important in cases under the Equality Act 2010, it is right that the Tribunal reminds itself of that. Section 136 is entitled "Burden of Proof".
- (1) This section applies to any proceedings relating to a contravention of this Act.
  - (2) If there are facts from which the court could decide in the absence of any other explanation that a person A contravenes the provision concerned, the court must hold that the contravention occurred.
  - (3) Subsection (2) does not apply if A shows that A did not contravene the provision.
20. This means in practice that a Claimant has to adduce a prima facie case that there might have been discrimination. If that is the case, the burden transfers to the Respondent to show that discrimination played no role whatsoever.

This is not a criminal case

21. This is a civil not a criminal prosecution of the Claimants in relation to which the burden of proof would be that the prosecution proves the matters beyond

reasonable doubt and there would be strict rules of evidence. This is a civil case whereby it is the Claimants who are suing the Respondent, and as regards what happened in the past, the relevant standard is the balance of probability; that is to say what was more likely than not; what makes more sense than not. Hearsay is admissible in civil cases and feeds into the balance of probability.

22. The context we are dealing with is a school dedicated to special or additional needs and it is common ground in this case that it was an expectation of the staff that they would act as role models for the children who themselves face challenging circumstances.

### **FINDINGS OF FACT ON THE ISSUES**

23. Concerns about the Claimants discussing the supply and taking of drugs were reported by members of staff to the Head Teacher Dan Stockton and the Teacher who acts as the safeguarding lead, Michelle Pascoe at 13:30 and 13:40 on 23 July 2021. Mr Stockton prepared a summary of events at the latest by the end of three working days afterwards. The events happened on a Friday, a report was put in the following Tuesday. Substantial challenge has been attempted at least in submission by the representative of the Claimants of the reliability of Mr Stockton's record. It is right that Mr Stockton has not been called in evidence to confirm his note but we find on the balance of probability, that is to say it is more likely than not, that the content of these notes are accurate. The notes represent a brief chronological summary of events but they are more likely to be accurate than wrong. They are corroborated as we shall see by statements taken from colleagues. It is the same summary of events that is relevant in both cases but the one put in in Miss Mason's investigation report appears at page 246.

23 July 2021.

- 13:30 Concern raised by Roland O'Neill to Luke Balsin regarding a conversation around supply and taking of drugs between Miss Crew and Miss Mason.
- 13:40 Katy Chapman disclosed and confirmed discussion that took place between Miss Crew and Miss Mason, Michelle Pascoe gathered guidance from HR.
- 14:10 Discussion with Miss Mason who initially denied any involvement with drugs and turned her bag out. Michelle Pascoe asked about the purse. Miss Mason explained this was in the car and at this point admitted there was cocaine in the car. Miss Mason also disclosed her ex boyfriend delivered the drugs near/on the school grounds during work time.
- 15:15 HR communicated the necessary process. Police were notified.
- 15:30 Mr Stockton handed Miss Mason a letter of suspension and police arrived.
- 15:45 – 17:50 Police searched Miss Mason and car resulting in no evidence. Miss Mason then disclosed the bag had been taken by Miss Crew, intentionally due to the contents being in the bag. Police also spoke to Miss Mason about other concerns relating to her relationship. Mr Stockton spoke with Carmel of HR to give updates and seek guidance. Mr Stockton contacted Miss Crew via her mobile and explained she would now be suspended due to an event that had happened this PM and her name had been connected.

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- 17:50 Miss Mason was upset and again concerned about what was going to happen, discussed the situation with Michelle Pascoe and Mr Stockton regarding importance of sticking to the suspension letter protocols.
- 18:00 Miss Mason left the site at 19:00.
- 19:00 Mr Stockton emailed suspension letter to Miss Crew.

24. Alongside Mr Stockton that afternoon was Michelle Pascoe, the Safeguarding Lead. Ms Pascoe is trained in taking evidence that is relevant to a safeguarding issue and we have a written record prepared by her. Again, this was prepared at the latest within three working days of 23 July 2021 and its contents are likely to be accurate. We will look at whether Miss Mason challenges in fact the accuracy of the notes in the disciplinary process. Again because they are central to matters I set out here the record in full.

Michelle Pascoe and Dan Stockton spoke with Katy Chapman. Katy Chapman had overheard a conversation between Jo Mason and Megan Crew. It was about the staff party and getting some bevs. There was an action of Miss Crew holding her finger at her nose and sniffing in. There was some conversation about drugs being collected from school. Katy Chapman found this conversation annoying and made a comment to Miss Crew and Miss Mason about this being a school. Miss Mason went on to say that her mum was coming to school to bring her purse which she needed.

Michelle Pascoe spoke with Jo Mason. Mr Stockton talked about the allegations that had been brought to us. Miss Mason denied all of it saying that she did not have that conversation. "I cannot believe someone would say that, it is not true". Michelle Pascoe told Miss Mason that they had been in contact with HR and they have suggested that we ask Miss Mason to empty the contents of her bag on the desk. Miss Mason did this confidently pointing to the small pocket and saying "they are my fags". Michelle Pascoe checked through the bag and noticed a cotton bag. Michelle Pascoe asked "what was in the bag" to which Miss Mason replied "lady things you can check". Michelle Pascoe checked the cotton purse and it contained sanitary products. Michelle Pascoe asked Miss Mason "where is your purse, as you have said that this is what you went out to get". Miss said "it is in my car". Michelle Pascoe said "we might have to check your car". Miss Mason "I am not going to lie", there are things in my car". Michelle Pascoe "things"? Miss Mason "Cocaine".

Mr Stockton is recorded as saying "thank you for telling us Jo we will now phone our HR and get some guidance". Michelle Pascoe left the room. Laura Horne sat with Mr Stockton and Miss Malone. Michelle Pascoe asked Carmel of HR to get guidance. She phoned Laddo [The safeguarding organisation]. They will send us a form to complete. Michelle Pascoe phoned the police. The police arrived and did a search, then went to the car, the keys were on the wheel. The officers were looking at all parts of the car. Michelle Pascoe asked Miss Mason "where was the cocaine"? Miss Mason replied "in the glove compartment". The officer asked Miss Mason "was it in the glove compartment" to which Miss Mason replied "yes". The officer asked Miss Mason "who moved your car"? Miss Mason said "I do not know I told Phil Jacobson". Mr Stockton asked is that when you were on the phone to Megan Crew"? Miss Mason replied "Yes". The officer asked "could she have moved your car". Miss Mason replied "yes". The officer asked "did you give Miss Crew permission to take your purse/drugs from your car or did she steel them"? Miss Mason "I told her to take my purse out of the car". Mr Stockton and Michelle Pascoe witnessed the police officer checking text messages on Miss Mason's phone. Mr Stockton heard that the messages were sent between Miss Mason and Miss Crew. The officers asked to speak to Miss Mason on their own. Michelle Pascoe and Mr Stockton returned to the school. Miss Mason returned to school and completed a visit and Dash referral with the police. [Those relate to matters of domestic abuse we understand].

When the police left, Miss Mason said that she felt the small amount of pressure to get the drugs from Miss Crew and [another member of staff; we will not name him because he has not had the opportunity of giving evidence and so defending himself.] She wanted to clarify

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that she had no knowledge of the other staff mentioned other than what Miss Crew had texted her.

25. Stepping back from this record of events, it includes admissions made by Miss Mason that cocaine was in the car, that she expected the cocaine to be in the glove compartment, that Miss Crew had moved the car and that Miss Mason had told Miss Crew to take the purse out of the car and that she had felt under pressure to get the drugs from Miss Crew and another member of staff.
26. Miss Mason's car was parked on land rented by the school for use as an overspill carpark. There is another carpark nearby which is secured by railings, as we understand it, but her car was on premises rented by the school.
27. In an effort to divide labour - which may have been a good intention - but was misconceived for the purposes of a satisfactory procedure, it was advised by HR that Laura Horne would investigate Miss Mason as investigating officer and sit as the decision maker in Miss Crew's case. Mr Abbott was to do vice versa. Mr Abbott was Deputy Head of Oaktree; Miss Horne was the Head Teacher of sister school Redmoor. Mr Abbott was to investigate Miss Crew and sit as the decision maker in Miss Mason's case.
28. Because the matters are so closely related, this structure ran the risk of contamination in the sense that if the intention was that the decision maker on a disciplinary would come to the matter afresh, then that was almost impossible because that decision maker had been involved in the investigation of the other teaching assistant's case. We understand that the school had limited resources and dividing the matter up was not easy but in our judgment this solution offended ACAS guidance and the ACAS code of conduct in that there should be best efforts to keep the decision maker separate from the investigation. Here the risk of cross contamination was real.
29. Nonetheless, the investigators conducted interviews with note takers of the two Claimants plus relevant witnesses and the notes of those interviews are reliable records of what was said and are likely to be accurate.
30. Jo Mason was interviewed on 28 July 2021 by Laura Horne. Miss Mason accepted she admitted to the police having cocaine in the car. Laura Horne asked "...from the report I have read through you did admit to having cocaine in your car. Can you explain that for me?" Miss Mason replied "Yeah so it just felt like that is what they wanted to hear and obviously my ex's history is with drugs. He was obviously in rehab and stuff and I had obviously talked to him about stuff like that but I know that is not the right place or anything like that so I told him not to." Laura Horne continued "Ok so whereas on Friday to the police and the staff here you said that there had been cocaine delivered and there was cocaine in your car you are now saying that is not the case." There was no answer. Miss Horne pushed Miss Mason saying "I am sorry to have to push this on you Jo but I am really sorry but this is critical I really understand what you are telling me." Miss Mason replied "It was never really there. I felt so ..... There were four police officer there I was really scared." Miss Mason then went on to deny that she had asked Miss Crew to



remove the drugs from the car. Miss Horne asked the question “but it is really clear that you admitted to Dan and Michelle that you had cocaine in your car before the police came on site. Can you explain why you admitted to Dan and Michelle before the police got there that there was cocaine in your car.” Miss Mason replied “I don’t know I just felt that .... I don’t know ...I don’t know I am sorry I don’t know.” It is likely that in the course of this interview Miss Mason was upset. She was upset before us in the course of giving evidence. Miss Horne continued “Jo I feel like I keep asking you the same questions it is just so I can be really clear and get the story clear. On Friday when you were asked about this you denied that you had drugs in your car or that you had drugs delivered to the school up until the point where they asked to have a look in your car and when you did say there were drugs in your car. I really need to get some clarity on why there was that change because obviously that has changed again today and that is not what happened....” Miss Mason replied “It’s because I thought my ex could have done something like that.... He didn’t.”

31. In respect of Miss Crew taking the purse out of the car. Miss Mason said “Yeah I obviously did know neither of us knew how long I would be and she was going to get more alcohol for us because I did not realise I was not going to be allowed to go to the party at that point.” Miss Horne accepted that at the point she was in the office being interviewed by Mr Stockton and Miss Pascoe. She arranged for Miss Crew to obtain the keys to move the car and take the purse out of the car.

32. What is significant, however, about this interview with Miss Mason is that she does not challenge that on 23 July she did tell Mr Stockton, Miss Pascoe and the police that drugs were in the car. In other words, the accuracy of the notes by Mr Stockton and Michelle Pascoe were not challenged. Similarly, in her witness statement for us at paragraph 12 on the topic of why it was that she made these admissions. She tells us –

“I remember being scared and I remember crying and you know just being as honest as I could. I remember being sat in the office for a long time. It felt like hours I am freezing now thinking about this just being very scared. I was just terrified I did not know what was going to happen. They had already said they were ringing the police, so obviously that terrified me but I was ok with that because you know protocol and I knew there was nothing to worry about.”

The reference to being as honest as she could is something the Respondent points to, to corroborate the accuracy of the notes taken by Mr Stockton and Michelle Pascoe.

33. On 28 July 2021, in relation to the investigation of Miss Crew Mr Abbott took statements from Katy Chapman and Roland O’Neill and Phil Jacobson. These were not served on Miss Mason prior to her disciplinary but they were mentioned by Mr Abbott in the course of the disciplinary. If Mason had a claim for unfair dismissal, this would have been procedurally unfair. However, it is appropriate to record the content of the statements taken from Katy Chapman, Ronald O’Neill and Phil Jacobson because they form part of the overall evidence that was available to the school and to the Tribunal.

Katy Chapman

34. Turning first of all to the statement of Katy Chapman. It summarised at the end of her statement then she mentions the fact that Sharon Eddison had walked back into the classroom and Roland turned to her and said “did she actually just say that? I said yes. Sharon said what so I said Jo has got drugs delivered to school. Sharon was nearly in tears saying that oh my God this needs to be reported. Roland said I am already on it.” That is the end of her statement, we have gone through the entirety of her statement taking care to establish its meaning.
35. She records Miss Mason saying “yeah I had to go and get it earlier because he would not meet me. He wanted to meet me at my house but I am not going home am I so he had to meet me here.” Mr Abbott asked do you know who that was?” Katy Chapman replied “the person giving her drugs.” She was asked “do you know who the name of her boyfriend?” Katy Chapman replied “no I know that she spoke prior to this conversation about having to get something from another member of staff and she said she needed to get it from her boyfriend but I don’t think this was her boyfriend I don’t think.” OK name that other member of staff.” Katy Chapman confirmed “Yes AAA<sup>1</sup>.” “Yes prior to this as well she said that whatever she was getting on that day was for other members of staff as well but did not name them.” She said “other people had asked her to get stuff. AAA was an event prior because she said she needed to meet her boyfriend for that.” Mr Abbott asked “Ok so the initial conversation was when Megan came in the classroom and they mentioned about getting some bevs for tonight and some other stuff they also made the gesture to their nose as if they were snorting.” Katy Chapman replied “yes.” “Then you sort of challenged them on it and said that is really, really naughty.” Katy Chapman replied “I just smiled at them and said that is naughty and she thought I was joking around and I cannot honestly remember if it went straight into the other conversation and they may have just left and maybe that is when Nigel took HWA up. She then said she had to go and get it earlier because he wanted to meet her at her house but she couldn’t.”
36. The interview goes on in that manner. The effect of it is that Miss Mason was telling her that she was getting cocaine delivered to the school for herself and for others. When Katy Chapman understood the full extent of what was being said Katy Chapman said to Miss Mason “it’s a school get your act together. Still in that jokey way but she could tell I was flabbergasted at what had just been said.”

Ronald O’Neill

37. It is fair to say that Katy Chapman’s statement is not as clear as for example Mr O’Neill’s statement. Mr O’Neill told Mr Abbott the following. “Jo Mason then came in. She was kind of chatting and floating around and then she said “I managed to get that stuff delivered here” Katy said what do you mean?” She then said as she rubbed her nose “I could not get it delivered last night so I got it delivered here instead.” Katy then said “is that why you went outside earlier on then?” Miss Mason replied “yes.” Mr O’Neill said he was just kind of listening in and not saying a lot. He continues “then Megan Crew came into the room and she said “its come, its come” and also did that

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<sup>1</sup> This is the member of staff whom we considerate imprudent to identify as he has had no involvement in the proceedings

as well. Roland rubbed his nose showing the action Megan had made. He records Katy Chapman addressing Miss Mason "I think you should sort your life out mate." He then records that he and Katy both sat there quietly when Sharon Eddison entered the room.

Phil Jacobson

38. A statement was also taken from Phil Jacobson, he stated that he went into the office where Charlie Tucker and Megan Crew were: 'Megan Crew said she needed to move Jo Mason's car because her car was blocked in. Jo Mason and Laura Horne were in the Headmaster's office and Megan was too scared or appeared too scared to go and ask. I said to her "I am not scared I will go and get them for you." I knocked on the door and Laura Horne invited me to come in. I said excuse me but Megan Crew needs to move Jo Mason's car because she is blocked in. Could I have Jo Mason's keys please? I could not see Jo Mason as she was sat around the corner but she passed me the keys. I then walked out of the room and gave the keys to Megan Crew. I did not think anything of it as obviously I would not have [any reason to]. I gave her the keys and that is the last I knew of it." Mr Abbott asked "Ok so did Megan tell you what the emergency was?" Mr Jacobson said "she did not actually say that she basically said I need to move her car because she is has blocked me in, I think. She seemed too scared or nervous to go and get the keys so I just said you know me being me I'm not scared I will do it. I knocked on the door, Laura let me in, I got the keys and gave them to her. She did not say it was a family emergency."

Sharon Eddison

39. We record here for the sake of completeness that this was not a statement referred to in the Jo Mason investigation. It was a statement obtained by Ms Horne at the conclusion of Miss Crew's disciplinary investigation indeed at the suggestion of Miss Crew. A statement was obtained from Sharon Eddison on 23 August 2021, one month after the event and Sharon Eddison says in relation to Jo Mason "Jo Mason said she had left her purse at home and that she would need to leave her phone on loud. She said this to me and Nigel first thing in the morning. Would it be an issue if she had her phone on loud? She had forgotten her purse. She needed it for the evening. She would have to pop out at 9.30am. Obviously, we were like yeah that's fine, don't worry and she got the call, went out came back in, didn't think anything else of it. End of the school day arrives and I have taken Ashley up to his taxi. I had come back down. There was Heidi, Jo, Nigel, Roland and Katy sat in the classroom. Then Heidi's taxi was called. Jo and Nigel took Heidi to their taxi and I was sat in the middle of the classroom with Roland on my left, Katy on my right and Roland said - I'm not going to do an Irish accent - Did she just say what I think she fucking said and I said guys what has happened and Katy said "yes she did" and I said "what has happened" and he said "Jo has just said she got drugs delivered to the school this morning. Sorry I am getting upset." Ms Eddison continues "She had drugs delivered to the school this morning and I was just like what? I said guys you can't tell me that because I can't sit here and not take that further. I have got to go and speak to somebody because that is safeguarding way up there and Roland said no, no I will go and speak because I heard the conversation. It was me first hand and you are absolutely right. Katy then went on to say that

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other staff in the school had asked Jo to bring stuff in along with whatever for I do not know if it is for herself or whatever. Then Luke came down and spoke to Katy and took her off and then Michelle Pascoe came in at the end of the day briefing meeting and said Jo can I have a word.

40. We got to the party and obviously I was aware that things were going to happen but my gob was shut well and truly. Then Luke arrived, he was very friendly with Jo and Megan and I said where are the girls? and he said there has been a family emergency. I thought OK they are covering it that's fine. Later in the night Yasmin England who was with us told me what had happened." It was the case that on the evening of 23 July 2021 and end of term party was planned and we return to that later.
41. That is all the primary evidence that is available to the Respondent at the disciplinary hearings.

### Miss Mason disciplinary

42. The disciplinary hearing with Miss Mason took place on 16 August 2021. It was heard by Mike Abbott the Deputy Head Teacher. At the outset of the hearing, Miss Mason attended with her mother. Mr Abbott noted that it seemed as though Miss Mason was represented but he then established that the person purporting to represent was Miss Mason's mother. This was a hearing by video. Miss Mason's plan was her mother would sit next to her in the course of the disciplinary hearing but Mr Abbott essentially asked Miss Mason's mother to leave the room because the rules of the Respondent were that only colleagues or union representatives could represent. It is right to say that Miss Mason did not push this matter at the time but nonetheless the Respondent knew that the Claimant was a disabled person and this matter does form the subject of a claim for reasonable adjustments.
43. Miss Mason maintained that she had a conversation about getting alcohol. She did not remember Megan Crew doing a gesture. "We did have the conversation and in the classroom and children could have been present so yes it was silly to do it." She said that she was admitting only a conversation about alcohol. There was no snorting gesture made. The statements of Katy Chapman and Roland O'Neill were put to her. Mr Abbott put to her that Katy also states in her statement that "you said that is where I was earlier" and when Katy asked "what" you stated "yeah I had to go and get it earlier because he would not meet me. He wanted to meet me at my house but I am not going home am I so he had to meet me there". That was a quote from Katy Chapman. "Can you explain to me" asked Mr Abbott "what you were talking about Jo". Miss Mason said "Yes it was my wallet". My ex boyfriend was bringing my wallet for me as he would not bring it to the school so I went in the carpark to meet him." Then Roland O'Neill's statement was put to her. Mr Abbott says "Ok so in a further statement after the children had gone home Roland O'Neill stated you came into the room where he and Katy were and you stated I managed to get that stuff delivered here. Katy then asked what do you mean and you relied by rubbing your nose and saying I could not get it delivered last night so I got it delivered here instead. Katy then asked "is that why you went outside earlier on?" You replied "yes it was just my wallet again I don't remember the rest". Mr Abbott said "Ok so your ex boyfriend delivered your wallet in the carpark to you that day." Miss Mason "yes." Mr

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Abbott “where did you put your wallet once he had given it to you?” Miss Mason “I put it in my car in the glove box then returned back to school.” Mr Abbott “Ok so at this point the concerns were raised by the other members of staff and you were asked to come into the office to discuss it is that right?” Miss Mason said “yes I was asked about conversations around alcohol and my wallet I went into panic mode and shock. They asked me to search my bag and I just said what I thought they wanted me to say at the time. They checked my bag which was fine. They then asked to check my car. I told them that they may find cocaine in the car.”

44. Mr Abbott then put the statement from Mr Jacobson that he came into the office to collect the keys for your car as you were blocking Megan in. He states that Megan was too nervous to come in and ask for the keys so he did do you remember”? Miss Mason replied “yes he just came in and got my keys I hadn’t spoken with Megan so I did not know my car was blocking hers in. I did know I was blocking Emily and Courtney’s cars, not sure if they wanted to move it for them. I just said to Phil to take my purse and go and buy the alcohol. I didn’t speak to Megan I got a text from her with an address and asking how long I was going to be which I showed to the police and they took a picture of the message.” Mr Abbott stated “ok, so Megan stated that she moved the wallet out of the glove box intentionally, was that because of the contents inside the wallet”. Miss Mason “I told her to take it to go and buy alcohol.” The keys were left in the car. She was asked by Mr Abbott “was that an odd thing to do?” Miss Mason replied “not really it was in the school so it is quite safe I was on site till about 6.00pm. My ex boyfriend has a history of being in that field. He had to break into my house to get my wallet. He has a history of breaking into my house. He has been arrested a few times for assault on me so did a risk assessment with the police which came back as medium risk just because I wanted to make sure I was safe as I was massively vulnerable. I love my job, it is the only thing that keeps me going. If you want me to do daily or weekly drug tests I will do as I do not take drugs.” She was asked “is there anything else you want to add?” Miss Mason said “just that I want to apologise because this is all stupid and I really hope I get to keep my job.”
45. Mr Abbott then made the decision to dismiss her for gross misconduct. Ms Jiggins is right that his dismissal letter is not fully reasoned in contrast for example, with the reasoning of Miss Horne in Miss Crew’s case but it is clear that - and we accept from him from his witness evidence - he found the allegations proved. He dismissed for gross misconduct.

### Miss Mason appeal

46. Turning then to the matter of appeal. The Claimant was given five days in which to make an appeal in the event the appeal came in two and a half months later.
47. On 22 October 2021, Miss Mason sent in an email with Heads of Appeal. Mr Craig Ribbons was appointed the Appeal Manger. Mr Ribbons was a Regional Director of Acorn Care & Education Limited, a company in the same group as the school. His responsibilities are in the south east so he was not in the line of management for the south west. A meeting was proposed for 22 November 2021, invitation was sent on 16 November 2021. On the same

day Just Reasonable Limited sent in additional grounds of appeal. (Pages 446 – 449 of the bundle).

48. The first ground was that Miss Mason was not provided with the full evidence against her and was not given any opportunity to respond to evidence that was used to make the decision to dismiss her.
49. The second ground was that the reasons for the decision to uphold the disciplinary allegations and for deciding that dismissal was a reasonable sanction were not provided in the outcome letter.
50. The third ground was Jo Mason was denied the reasonable adjustment of having her mum accompanying her to the video hearing.
51. There was then a substantial written submission made which records much of the argument made by the representative on behalf of Miss Mason, Ms Jiggins, before us also. Ms Jiggins submitted in this document:

Considered in the round, and on the basis of only the few documents that have been provided to Jo which it is clear are only a partial set of the documents gathered during the investigation, Jo's dismissal was because she said that there may be drugs in the purse her ex boyfriend had dropped off to school for her. Jo made clear consistently in the investigation interview and disciplinary hearing that she said what she thought was expected of her in a particularly stressful situation connected to her abusive ex boyfriend. Jo's anxiety and experience of abuse at the hands of the person who had dropped her purse into her car can make her say things that are not necessarily accurate when under pressure but to try and placate the situation to avoid further harm and abuse to herself. In this situation Jo was anxious because her abusive ex boyfriend was a known drug user to the police and Jo was aware that he was capable of leaving drugs in her purse intentionally to cause her problems. In her heightened state of anxiety Jo's judgement was impaired and she responded that there may be drugs in her car because she did not want to be dishonest. Jo's anxious communication appears to be inaccurately received as her admitting actual knowledge that there were drugs in her purse at the time and her later attempts to clarify the position were considered as evidence against her credibility in the investigation report. Jo repeated the clarification in the disciplinary hearing and it is supported by the lack of police action. Therefore, the single agreed fact in this case that Jo did say there maybe cocaine in the purse, her ex boyfriend dropped off to the school at the time was something that arose as a consequence of anxiety and therefore dismissal for that reason amounts to unlawful discrimination for something arising as a consequence of disability in breach of Section 15 of the Equality Act 2010.

52. The history of the appeal is not satisfactory. If Miss Mason were able to argue unfair dismissal, what happened at this appeal would be under even more scrutiny. The dates of 22 November 2021 were not suitable and the video meeting was cancelled beforehand. Mr Ribbons out of caution did login to see if anyone was there, no-one was there. Just Reasonable asked for an appeal in writing on 23 November 2021 and they attached the very specific procedure they put forward as a reasonable adjustment. The procedure involves as a first step questions to be asked by the Respondent. On 24 November 2021, the Respondent accepted that the appeal could be in writing but they asked for written submissions to be submitted. No submissions having been submitted, Mr Ribbons gave his appeal outcome rejecting the appeal, not addressing Ms Jiggins' grounds of appeal which had been forwarded to him, but the original grounds of appeal being put forward by Miss Mason which he rejected. The whole situation here is confusing and unsatisfactory.

53. The best angle for the Respondent is that they did agree to conduct the appeal in writing. They then asked for written submissions and they got no written submissions. On 21 December 2021, Mr Ribbons wrote his decision. It is right that Just Reasonable did not write back and say when they were asked for written submissions that they had already sent in additional grounds. However, it does seem as though the Respondent failed to consider the points put forward by Ms Jiggins in her additional grounds of appeal.
54. It is for the Claimant accurately to formulate her challenge as to what happened. As we say, if she had the right to claim unfair dismissal, we have little doubt that we would look long and hard at these events. The primary challenge however has been an alleged failure to make reasonable adjustments on the basis of a failure to conduct an appeal in writing. That however, they did concede. The Respondent did conduct an appeal in writing, albeit an unsatisfactory one.

The Claimant's disability

55. The Respondent accepts that Miss Mason has been disabled with anxiety and depression at all material times and they concede knowledge since 26 February 2020. Miss Mason states and it is not contradicted that this stems from an abusive relationship with her former partner referred to as H. We know that Miss Mason accepts that H delivered the purse on the morning at 9.30ish on 23 July 2021. The Respondent says Miss Mason has admitted that purse contained cocaine. We are told that H has extensive history with drugs and has access to drugs.
56. We have not been referred to any medical records. There is no medical opinion from a medical or psychological expert. We have heard from Miss Mason's friend Joanna Lewitt who is a public health specialist but as Miss Lewitt herself volunteered she is not an expert in anxiety and depression. Insofar as her evidence was adduced to plug a gap of expert evidence it simply does not work. Miss Lewitt expresses some views. We acknowledge she describes herself as a loyal expert friend but she does not give evidence upon which we can rely to sustain the submission that is made on Miss Mason's behalf. This is an important finding in the case. The argument put to us by Ms Jiggins is that the admissions made by Miss Mason to the school are unreliable because it is an aspect of her anxiety and depression that she will make a fawning response otherwise known as people pleasing. It was clear that this was the argument from the additional grounds of appeal that Ms Jiggins put to the school. The argument is that those admissions that she did make to the school as recorded by Mr Stockton and the Ms Pascoe, in charge of safeguarding, are unreliable.

Fawning response as arising from anxiety and depression not proved and rejected

57. The Claimant has not established that as a matter of fact on the balance of probability in this case based upon relevant evidence that would be necessary for us to make that finding. It has been repeatedly asserted on her behalf by Ms Jiggins that the anxiety and depression suffered by the Claimant gives rise to a fawning response, people pleasing, such that any admission made is not reliable. This has not been proved by the Claimant. There would usefully be reliable expert opinion to say that in the context of a

disciplinary event such as this, against the background of conversations alluded to by her colleagues Katy Chapman and Roland O'Neill, that any admission of the possession of cocaine would be sensibly regarded as unreliable. The conversations attested to by Katy Chapman and Ronald O'Neill were volunteered by the Claimant; they place in a situation which was not a pressured situation for Miss Mason. There was no pressure on her to say that she had arranged for drugs to be delivered. Miss Mason found herself in the Head Teacher's office because those Teachers reported a conversation that they witnessed.

58. We find on the balance of probability that what Katy Chapman said and what Roland O'Neill said were accurate. They had no reason to make up the conversations that they witnessed. The statements were given after the staff party on the Friday evening of 23 July. It does seem likely to us that the police raid was discussed at that party. It has not been proved by the Claimants that there was any confidentiality breached by anyone in the senior leadership. It is not surprising that the fact that the police were there was discussed and that information about it was discussed. There is no proven breach by the senior leadership team.
59. The fact that the matter was discussed at the party on the Friday does not mean that the subsequent statements taken from Miss Chapman, Mr O'Neill are likely to be unreliable. It is noted from the beginning of Mr Stockton and Ms Pascoe's notes that this matter was raised with them on 23 July. We do not find it likely that those statements are inaccurate.
60. We reject the fawning response case advanced by Ms Jiggins on behalf of Miss Mason. There is no cogent evidence that the anxiety and depression suffered by her manifests itself in such a way. There is a more likely explanation for the admissions she made, namely that they are true. We note that in her interviews she did not challenge the accuracy of the notes, statements, records of Mr Stockton and Miss Pascoe. We also note her own witness statement where she said she was trying her best to be honest.

## **CONCLUSIONS IN MISS MASON'S CASE**

### Discrimination arising from disability

61. The premise behind the case advanced by Ms Jiggins is the matter arising set out at paragraph 5.2.1. It is advanced on Miss Mason's behalf that her anxiety disorder is intimately connected with the trauma of the abuse she experienced and continued to experience from her former partner at the material times. One of Miss Mason's learnt trauma responses arising from this abuse is said to be a form of fawning (Walker 2013) more colloquially known as people pleasing. That manifests in an extreme form of anticipatory compliance in saying, doing what Miss Mason's anxiety caused her to believe was what was wanted by more powerful party with a view to avoiding punishment for saying or doing the wrong thing that could trigger further abuse. The following matters arose from that scenario submits Miss Jiggins: JM saying there maybe cocaine in her car; any inconsistency on 23 July 2021 and subsequent accounts that there was not cocaine in her car; JM's



inability to more clearly communicate the connection with her disability during the disciplinary process.

62. The Tribunal rejects on the facts that her anxiety and depression involved that fawning condition. We reject the submission on the relevant matter arising. The alleged unfavourable treatment we further find was not because of something arising from disability. It was because of the admitted misconduct of bringing cocaine into the school premises and asking a colleague to remove it to avoid discovery. The claim under Section 15 of the Equality Act fails.

### Reasonable Adjustments

63. The written appeal. Whilst the execution of the appeal in writing leaves a lot to be desired, the PCP put forward was a refusal to hear an appeal conducted in writing. The school did not do that. It agreed to the appeal being conducted in writing. It gave a deadline for written submissions. It received no written submissions and therefore it proceeded to deal with the Claimant's first version of the grounds of appeal. If we had unfair dismissal jurisdiction we would look very carefully at the conduct of the written appeal. The PCP is not made out, however.
64. Did the Respondent apply a PCP that an employee could only be represented by a trade union representative or colleague during disciplinary hearings? Yes it did. Did that PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? Substantial means more than trivial, more than minimal. In our judgement the Respondent knew that the Claimant was disabled as it accepts with depression and anxiety and that the Claimant might need support. The suspension letter had forbidden communication with colleagues. It may well be that had the Claimant pressed for a particular colleague to act as a representative, then permission would be forthcoming. The Claimant with a known disability for stress and anxiety appeared at the hearing with her mother and asked for her mother to act as representative, which was refused. In our judgement this was an easy adjustment to make. She was more than minimally disadvantaged by that decision. We hear what Mr Abbott says about there not having been significant argument about the matter at the time, but nonetheless he should have known. He should have been briefed by HR that the Claimant was disabled with anxiety and depression and that this very easy adjustment should have been made because she was more than minimally disadvantaged compared with others. The claim of failure to make reasonable adjustments in the form of representation by her mother succeeds.

### Harassment

65. The claims in respect of suspending the Claimant, excluding her from the staff party informing the disclosure and barring service of concerns around her suitability to work with children fail because those decisions were not in

relation to the Claimant's protected characteristic. This argument again is dependent on Ms Jiggins' submission that the fawning and people pleasing response explains the admissions. We reject that case. What explains the Claimant's admissions are their likely truth.

66. There is a claim for harassment relating to the failure to make reasonable adjustments that we have already upheld. It may be that this harassment claim adds very little. However, we analyse it as we must. Refusing to permit Miss Mason's mother to act as her companion during the disciplinary hearing was unwanted conduct. It did relate to the disability. It certainly did not have an intended effect, Mr Abbott did not intend to do anything but did it have the effect of creating an intimidating environment for the Claimant. The Claimant was already in an intimidating environment but not being allowed to have her mother there will have increased the intimidating nature of the environment by a degree. On balance we find that her claim of unintended harassment is upheld.
67. The claim for refusing to permit the appeal to be conducted as a written process as proposed by Miss Mason: we have already found the Respondent did not refuse to conduct the appeal process in writing. It set a deadline for submissions, it did not get the submissions and it went on to decide the appeal in writing in her absence. The claim for harassment in that regard also fails.

#### Wrongful Dismissal

68. There is no claim for unfair dismissal but there is a claim for wrongful dismissal. The Tribunal has to find objectively speaking what was likely to have happened and whether the Claimant repudiated her contract of employment. There are express terms in the various policies which seem to apply here. There is a code of conduct, an ethics policy relating to all employees of the Respondent (6.12). Colleagues should not bring drugs or alcohol to any Outcome First group premises. There is in the disciplinary procedure a bar on acting in a way likely to bring the Respondent into disrepute. They are in effect express terms. There is also the implied term that the Claimant will faithfully serve the employer.
69. On balance, we find that Miss Mason was in breach of those terms and she is not entitled to a notice payment. On the balance of probability, what Mr O'Neill and Katy Chapman say is correct. What Miss Mason admits to Mr Stockton and Ms Pascoe is correct. This on the balance of probability means that at 9.30 in the morning of 23 July, Miss Mason went out to meet her ex-boyfriend H to receive a purse from him containing cocaine. She was planning to use that cocaine at the party that evening. She is likely to have brought that cocaine in for the use of Miss Crew also. Having been overheard boasting of that matter, she was taken to the Head Teacher's office where ultimately, she admitted that cocaine was in the car. She admitted asking Miss Crew to remove the purse and the timing of her communication with Miss Crew was during the meeting with Mr Stockton and Miss Pascoe when she was on the phone. It was more likely that she was on the phone by texting, when she asked Miss Crew to remove the purse. Miss Crew, with

the assistance of Mr Jacobson, got the keys and did remove the purse. Miss Mason admitted the presence of cocaine both to the school and then the police. She then discovered the purse had been removed by Miss Crew. At the end of the day, she admitted Miss Pascoe and Mr Stockton to feeling pressure, she says, to bring the drugs into the school; pressure from Miss Crew and from another colleague. We find on the balance of probability that what happened is precisely what her colleagues overheard and what Miss Mason admitted.

### **MISS CREW'S CASE**

70. Miss Crew brings three complaints: unfair dismissal; wrongful dismissal; harassment under the Equality Act 2010. The harassment claim is dependent on Miss Mason's disability. It is the case that much of the Respondent's case against Miss Crew depended on admissions made by Miss Mason to Mr Stockton and Miss Pascoe. We have rejected the contention that the admissions were the product of an aspect of Miss Mason's anxiety and depression; in particular an alleged fawning response/people pleasing. Miss Crew's harassment claim is contingent upon the fawning response being a factual part of Miss Mason's disability. As we reject that on the facts, then Miss Crew's harassment claim falls.

### **ADDITIONAL FINDINGS OF FACT IN MISS CREW'S CASE.**

71. As we have found above but remind ourselves here Miss Crew was dismissed by letter dated 27 August 2021 for gross misconduct namely (1) discussing drugs and making gestures about drugs with Miss Mason in the school but not in front of children; (2) She knew that class A drugs, namely cocaine, were being delivered to the school on 23 July 2021; (3) She colluded with Miss Mason to remove the drugs from Miss Mason's vehicle to stop them being found. The decision to dismiss was made by Laura Horne, the Head Teacher of Redmoor School which is a partner school of Oaktree school.
72. The investigation was undertaken by Mr Abbott, Deputy Head Teacher at Oaktree school. Miss Horne had before her Mr Abbott's investigation report which included the Stockton and Pascoe notes; also the interview notes with Katy Chapman, Roland O'Neill and Phil Jacobson. The interviews with Miss Mason were also included. In addition to those matters Laura Horne took a statement from Sharon Eddison on 23 August 2021 but she did not share that with Claimant. Mr Abbott's investigation included an interview with Miss Crew on 28 July 2021
73. Ms Horne set out her reasoning in the dismissal letter:  
Allegation 1
74. "It is alleged a discussion was had between yourself and Miss Mason around drinking, and gestures were made around the use of drugs." The allegation originally was that this was undertaken in front of children. Ms Horne: "it is clear from all the statements in the investigation report and from your own

statements during the disciplinary hearing that a discussion took place in the classroom about drinking. I believe that this conversation did not take place in front of children and this is supported by statements from yourself, Katy and Roland. Whilst you denied having discussed the delivery of drugs to the school site or having made gestures around the taking of drugs during these conversations, there are two members of staff Katy and Roland whose statements make it clear that they believed this did take place. It is also clear from the initial statements from Jo Mason, Dan Stockton and Michelle Pascoe that all parties believed you were aware of there being drugs on site. On the balance of probability given a number of employees who have stated this took place I believe this conversation and the actions around drug taking did take place but cannot conclusively say that these conversations took place in front of children.

Allegation 2

75. It was alleged that she knew that class A drugs were being delivered to the school on 23 July 2021. Ms Horne: “there are multiple statements from staff that indicate you knew there were class A drugs delivered to the school site on 23 July. Katy states that you were part of a conversation early in the day where you made gestures to your nose as if you were snorting. Roland states that later that same day he witnessed you entering the classroom saying “its come its come” and again states that you made gestures of rubbing your nose. Jo Mason has also stated that you intentionally removed her purse from her car knowing the contents of the class A drugs. This is further supported by the statements from Dan Stockton and Michelle Pascoe. Sharon Eddison stated that she had not witnessed any conversations involving yourself about drugs being delivered to the school and only found out about your involvement afterwards. You have stated that you knew nothing about drugs being delivered to the school. On a balance of probability, she found, given the number of staff who have stated this took place, I believe you did know of class A drugs being delivered to the school.”

Allegation 3

76. That Miss Crew colluded with Miss Mason to remove these drugs from her vehicle to stop them from being found. Ms Horne stated: “You intentionally removed her purse from her car knowing there were class A drugs. This is supported by the statements from Dan Stockton and Michelle Pascoe. Jo Mason did later deny this statement saying you had removed her purse to buy alcohol which is also the statement that you have made. When asked why you did not return the keys to the school site and left them with the care staff, you have stated that you did this due to feeling intimidated and because you were running out of time to go out. Again, on the balance of probability considering all statements from all staff interviewed I believe that this collusion did take place. Throughout the interviews and investigation you have denied all knowledge of drugs being delivered to the school and have maintained that you are not involved in any such discussions or actions that have been alleged. You have been a teaching assistant at Oaktree school for three years and have had no previous issues raised regarding your conduct. With all performance management meetings having positive outcomes and you working successfully with a range of students. In respect

of the investigation you requested that I spoke to Sharon Eddison who had not previously been interviewed in respect of events of 23 July 2021. In speaking to Sharon, she was able to confirm that she had been made aware on her return from escorting young people to taxis, that a conversation had taken place around possible drug use and drugs having been delivered to the service, however she did witness the discussion directly. However, further to her accounts of the day in question, Sharon also shared that she had been made aware that you had been in contact with staff at the site in respect of the allegations and asked them to share specific information as part of the investigation. [That is, in breach of the terms of the suspension]. I must note that such actions further bring into question your integrity within the course of the investigation.” Miss Crew was dismissed.

### Appeal

77. Like Miss Mason, Miss Crew lodged an appeal significantly outside the time for appealing. She raised an appeal on 20 October 2021. It contained similar grounds to the original grounds put forward by Miss Mason before those grounds were added to by Ms Jiggins. Miss Crew said ‘the reasons I am appealing as there is no actual evidence to this. It is all word against word. No evidence throughout found from the police or spoken to from the police, privacy and confidentiality broken, a senior staff spoke about me at a staff party regarding this incident.’ She wanted to have her name cleared.
78. An appeal was set up by Teams on 22 November 2021. Invitations were sent out on 16 November for 3 December 2021. That same day Miss Crew said she could not attend because she was “out of the country.” A date was rearranged with the appeal to be reheard on 8 December 2021. There was no further communication from Miss Crew about this appeal. She did not engage with it any further. We understand she had concentrated her resources on getting her DBS bar removed. We understand she has been successful in that.
79. Mr Ribbons then dealt with this appeal in writing and his reasoning on the appeal grounds that she had brought were within the range of reasonable responses. The appeal point number 1 was no evidence and it was all word against word. Mr Ribbons noted that within the decision making process much of the evidence had been based around statements submitted “by your colleagues within the school with a number of statements having set out that they had overheard you engaging in inappropriate discussions around school and drug use. Significantly, during the investigation undertaken by Mike Abbott whereby you stated ‘Jo then turned around said Oh I am not eating either I am just going to get wasted and I said so am I. I then done like a spin spun around the classroom.’ I further note that Laura was explicit in her findings that these discussions had not taken place in front of pupils. However, based on reasonable investigation, multiple statements were provided by staff which all set out there was a genuine belief that drugs had been brought onto site with the intention of personal use. These allegations in large part were upheld on the balance of probability.”
80. Mr Ribbons there makes reference to the statements we have made reference to extensively above. As to the point that the police had not got further involved. Mr Ribbons stated “criminal offence is one thing but what

the school was concerned with was professional conduct and suitability to work with children in one of the schools.” Mr Ribbons was right to make a distinction between criminal matters on the one hand and civil on the other. We have alluded to that above and the fact that there were no criminal charges is not conclusively relevant on the civil questions. The police work to different standards of proof. They have to assess whether any prosecution is likely to succeed and also is desirable in the public interest. They work to different standards and tolerances and guidelines.

81. The third appeal point was that privacy and confidentiality had been broken. Mr Ribbons found no evidence that this took place. In her communications Miss Crew had not indicated who the senior member of staff was. He was not able to consider the point further. Had she attended the appeal hearing, that matter could have been further explored. We find Mr Ribbons’ treatment of the appeal was within the range of reasonable responses.

### **CONCLUSIONS IN MISS CREW’S CASE**

82. There was a belief in misconduct as a matter of fact. There were reasonable grounds given the content of Miss Mason’s admissions to Mr Stockton and Miss Pascoe and the statements from the colleagues.
83. The challenge for the Respondent is the fairness of the procedure. We find there were two material flaws in the procedure which rendered this dismissal procedurally unfair. First of all, is the confusion between decision maker and investigator between Miss Horne and Mr Abbott. The two cases were closely connected. If one was acting as an investigator, one was not coming to a disciplinary hearing afresh; that is the idea behind the desirability in the code of practice to separate the investigation from decision makers. Here the decision maker had been an investigator in the other case. We understand why at some point this might have been a way of maximising resources. It was in our judgement unreasonably flawed from the outset and outside the band of reasonable responses. Further, having got the statement from Sharon Eddison, including the material suggesting that Miss Crew had been in contact with another member of staff and asking a member of staff to put in some false information in the investigation, that matter could only fairly be raised with Miss Crew before a final decision to dismiss was made. In those two ways there was procedural unfairness and we find that Miss Crew was procedurally unfairly dismissed.
84. However, how far does that get Miss Crew? We find, that had the Respondent done this properly and had a new decision maker and had served all evidence including Miss Eddison’s statement on Miss Crew, there was nonetheless an inevitability, a one hundred percent chance that Miss Crew would have been fairly dismissed, and if we are wrong about that she contributed to her own dismissal in the same degree.
85. We make the findings of one hundred percent Polkey reduction, alternatively one hundred percent contributory fault, because as we have found in Miss Mason’s case, what is likely to be the correct position here as regards what

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happened is what is alleged on the one hand by Katy Chapman, Roland O'Neill and Phil Jacobson corroborated by Sharon Eddison and on the other the admissions made by Miss Mason. It is the case that Miss Mason's admissions incriminate in the civil sense Miss Crew in this regard and those admissions are relevant to her. We find that what is likely to have happened is, as we found with Miss Mason, that there was conversation in the morning between Miss Mason and Miss Crew about the delivery of cocaine. That when Miss Mason was called into the Head Teacher's office there was text communication with Miss Crew to remove the drugs out of the car. It would be easy for Miss Mason to delete any incriminating texts. Miss Crew managed to get the purse out of the car. Miss Mason said she felt pressure from Miss Crew (and another member of staff) to get the drugs and she was encouraged at least by Miss Crew and that member of staff to get cocaine for use at the party at the end of the day. Again, what we say is likely is what the colleagues alleged in their statements and what Miss Mason accepted. We note that Miss Crew makes no admissions - we reject her evidence as we reject Miss Mason's evidence where denials are concerned. Those denials are self serving and are outweighed by the likely truth of the contents of the statements from the colleagues and the admissions from Miss Mason. On the balance of probability, Miss Crew was in on this as Ms Horne found.

86. Whilst Miss Crew was procedurally unfairly dismissed, there was a hundred percent chance she would be fairly dismissed anyway in due course and she contributed in the alternative one hundred percent to her own dismissal.
87. She was in repudiatory breach of contract and so is not entitled to a notice payment. The code of ethics was not to be involved with drugs at school and in any event, she was party to conduct that was likely to bring the school into disrepute.
88. We do acknowledge however, that Miss Crew's role was less central at least on the facts that we have found than Miss Mason. Miss Mason arranged for the supply of the cocaine on the balance of probability from H. Miss Crew did encourage that, however.

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Employment Judge Smail

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Date 11 June 2023

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REASONS SENT TO THE PARTIES ON

14 June 2023

FOR THE TRIBUNAL OFFICE

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**Appendix**



List of Issues

**1. Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide: 1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

**2. Unfair dismissal (Miss Crew only)**

2.1 Was the Claimant dismissed? It is admitted that the Claimants were dismissed

2.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

2.3 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts? The burden of proof is neutral here, but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

2.3.1 Laura Horne and Michael Abbott were assigned as investigator for one Claimant and disciplinary chair for the other Claimant. Michael Abbott chaired JM's disciplinary and repeatedly referred to the investigation interviews he had carried out for MC's investigation in the hearing, JM was not given copies of the notes of the investigation interviews Michael Abbott referred to and so was not able to respond to evidence against her that was clearly in the mind of the dismissing officer.

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2.3.2 In MC's disciplinary case MPa's notes are falsely identified as a witness statement from JM of 23rd July and DS's notes are identified only as Chronology, the lines in JM's evidence pack identifying those documents as "statement of events from ..." MPa and DS, had been deleted in MC's evidence pack.

2.3.3 No consideration was made of the Police decision to take no further action and not speaking to MC, who was alleged to have the drugs in her possession having removed JM's purse from the car. Conversely, in both investigation reports reliance is placed on the number of staff who reported believing the allegations to be true for supporting the allegations.

2.3.4 The Respondent failed to adopt or engage with the Claimant's proposal for the appeal to be conducted in writing.

2.4 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects; 2.4.1 Laura Horne and Michael Abbott were assigned as investigator for one Claimant and disciplinary chair for the other Claimant. Michael Abbott chaired JM's disciplinary and repeatedly referred to the investigation interviews he had carried out for MC's investigation in the hearing, JM was not given copies of the notes of the investigation interviews Michael Abbott referred to and so was not able to respond to evidence against her that was clearly in the mind of the dismissing officer.

2.4.2 There were no notes of interviews with DS or MPa taken as part of either investigation and no notes taken on the day of the incident itself, 23rd July, were provided or referred to.

2.4.3 In MC's disciplinary case MPa's notes are falsely identified as a witness statement from JM of 23rd July and DS's notes are identified only as Chronology, the lines in JM's evidence pack identifying those documents as "statement of events from ..." MPa and DS, had been deleted in MC's evidence pack.

2.4.4 The Respondent failed to make reasonable adjustments to the disciplinary process to account for JM's disability. In particular, JM raised in her investigation interview with Laura Horne about her anxiety, that she had been worried about what her former partner might have done and that she had difficulty explaining herself because she said what she thought people wanted to hear when she was stressed. Laura Horne responded by directing JM to raise with the police if someone was pressuring her to say things that were not true.

2.4.5 Staff were openly discussing as if proven, the allegation that JM had drugs at the school, at the staff party on 23rd July. The Respondent sought evidence from staff only after the party, when the subject had been the subject of gossip.

2.4.6 In the interview notes it is evident that Michael Abbott was seeking only evidence that went against MC (and thus JM as he relied on these interviews when chairing JM's disciplinary hearing).

2.4.7 In both investigation reports reliance is placed on the number of staff who reported believing the allegations to be true for supporting the allegations.

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2.5 If it did not use a fair procedure, what is the percentage chance that the Claimant would have been fairly dismissed in any event and, if so, when would that have occurred?

2.6 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant committed the misconduct alleged.

### 3. Wrongful dismissal (notice pay) (both Claimants)

3.1 It is admitted the Claimants were not paid notice pay because they were summarily dismissed.

3.2 Did the Claimants commit gross misconduct or was their conduct was so serious that the Respondent was entitled to dismiss without notice?

### 4. Disability (Miss Mason only)

4.1 Did the Miss Mason have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide: 4.1.1 Whether the Claimant had a physical or mental impairment. The Claimant argues that anxiety and depression were a mental impairment amounting to a disability.

4.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

4.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide: 4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

### 5. Discrimination arising from disability (Equality Act 2010 section 15) (Miss Mason only)

5.1 Did the Respondent treat the Miss Mason unfavourably by: 5.1.1 Initiating the disciplinary procedure,

5.1.2 Suspending her and / or excluding her from the staff party

5.1.3 Dismissing her

5.1.4 Informing Disclosure and Barring Service of concerns around her suitability to work with children;

5.2 Did the following things arise in consequence of the Miss Mason disability? The Claimant's case is that the following matters arose from Miss Mason's Disability:

5.2.1 Miss Mason argues that her anxiety disorder is intimately connected with the trauma of the abuse she experienced and continued to experience from her former partner at the material times. One of JM's learned trauma responses arising from this abuse was a form of 'fawning' (Walker, 2013) more colloquially known as 'people pleasing' that manifests in an extreme form of anticipatory compliance in saying / doing what JM's anxiety state caused her to believe was what was wanted by a more powerful party with a view to avoiding punishment for saying / doing the 'wrong' thing that could trigger further abuse. The following matters arose from that scenario:

5.2.1.1 JM saying there may be cocaine in her car, and / or

5.2.1.2 any inconsistency between so saying on 23rd July 2021, and subsequent accounts that there was not cocaine in her car, and / or

5.2.2 JM's inability to more clearly communicate the connection with her disability during the disciplinary process

5.3 Was the unfavourable treatment because of any of those things?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

5.4.1 The need to safeguard children and/or;

5.4.2 To comply with regulatory safeguarding obligations

5.5 The Tribunal will decide in particular:

5.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

5.5.2 Could something less discriminatory have been done instead?

5.5.3 How should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

## **6. Indirect Discrimination (Withdrawn)**

**7. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21) (Miss Mason only)**

7.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7.2 A "PCP" is a provision, criterion, or practice. Did the Respondent apply a PCP that:

7.2.1 an employee could only be represented by a trade union representative or colleague during disciplinary hearings?

7.2.2 Appeals would not be conducted in writing?

7.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant's disability, anxiety and depression) meant that:

7.3.1 PCP 1: she was less able to identify and challenge inadequate elements of the Respondent's investigation, identify evidence referred to by Mr Michael Abbott which was not shared with her, manage her emotions in a stressful situation, and/or make herself understood more readily by the hearing chair?

7.3.2 PCP 2: she was less able to participate in the appeal process (as detailed in respect of the disadvantages in relation to PCP 1 above) due to the consequent levels of distress and the exacerbation of her mental health symptoms?

7.4 Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

7.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

7.5.1 Permitting the Claimant's mother to remain as companion during the disciplinary hearing.

~~7.5.2 Permitting the Claimant to contact colleagues to seek a permitted companion in circumstances where a Union rep was not available to her.~~

7.5.3 Following the template process for procedures in writing by taking the step of providing written questions to the Claimant for her written response.

7.5.4 Providing an auxiliary service to provide the support required by the Claimant to avoid causing the disadvantage(s).

7.6 Was it reasonable for the Respondent to have to take those steps and when?

7.7 Did the Respondent fail to take those steps?

**8. Harassment related to disability (Equality Act 2010 s. 26) (Both Claimants)**

8.1 Did the Respondent do the following things:

~~8.1.1 Initiating the disciplinary procedure;~~

8.1.2 Suspending the Claimant's and / or excluding them from the staff party

8.1.3 Dismissing them

8.1.4 Informing Disclosure and Barring Service of concerns around their suitability to work with children;

8.1.5 Refusing to permit Miss Mason's mother to act as her companion during the disciplinary hearing;

~~8.1.6 refusing to permit Miss Mason to contact a colleague to seek a permitted companion in the circumstances where a Union Representative was not available to her;~~

8.1.7 Refusing to permit the appeal to be conducted as a written process as proposed by Miss Mason.

8.2 If so, was that unwanted conduct?

8.3 Did it relate to the Miss Mason's protected characteristic, namely disability?

8.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8.5 If not, did it have that effect? The Tribunal will consider the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

**9. Remedy**

9.1 The Claimants do not wish to be reinstated and/or re-engaged

9.2 What basic award is payable to the Claimants, if any?

9.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimants before the dismissal? If so, to what extent?

9.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

9.4.1 What financial losses has the dismissal caused the Claimants?

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9.4.2 Have the Claimants taken reasonable steps to replace their lost earnings, for example by looking for another job?

9.4.3 If not, for what period of loss should the Claimants be compensated?

9.4.4 Is there a chance that the Claimants would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

9.4.5 If so, should the Claimants' compensation be reduced? By how much?

9.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent unreasonably fail to comply with it by sharing the information upon which the decision to dismiss was made with the Claimants and/or failing to identify the reason for dismissal in the letter providing notice of dismissal? If so, is it just and equitable to increase any award payable to the Claimant and, if so, by what proportion up to 25%?

9.4.7 If the Claimants were unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the compensatory award? By what proportion?

9.4.8 Does the statutory cap of fifty-two weeks' pay or £89,493 apply?

9.5 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

9.6 What financial losses has the discrimination caused the Claimant?

9.7 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.8 If not, for what period of loss should the Claimant be compensated for?

9.9 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

9.10 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

9.11 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.12 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent unreasonably fail to comply with it by failing to provide the Claimant with the information upon which the decision to dismiss was taken and/or failing to inform the Claimants of the reason for dismissal in the letter providing notice of dismissal? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

9.13 Should interest be awarded? How much?