EMPLOYMENT TRIBUNALS

Claimant: Mrs L Lewis

Respondents: (1) Kings Monkton School Limited
(2) Mrs K Norton

Heard at: Cardiff **On:** 26, 27, 28, 29 & 30 June 2023

Before: Employment Judge S Jenkins
Mrs M Farley
Mrs L Thomas

Representation:
Claimant: Ms M Stanley (Counsel)
Respondents: Mr D Flood (Counsel)

RESERVED JUDGMENT

The Claimant's claims; of unfair dismissal, wrongful dismissal, direct discrimination because of disability, discrimination arising from disability, failure to make reasonable adjustments, and harassment related to disability; all fail and are dismissed.

REASONS

Background

1. The hearing was to deal with the Claimant's claims of: unfair dismissal, pursuant to Section 94 of the Employment Rights Act 1996 ("ERA"); wrongful dismissal; direct discrimination because of disability, pursuant to Section 13 of the Equality Act 2010 ("EqA"); discrimination arising from disability, pursuant to Section 15 EqA; failure to make reasonable adjustments, pursuant to Sections 20 and 21 EqA; and harassment related to disability, pursuant to Section 26 EqA.

2. We heard evidence from the Claimant on her own behalf, and considered sections of witness statements of two of her former colleagues, Gianpaulo Carpanini and James Williams, the content of which was agreed.

3. The evidence of Mr Williams and Mr Carpanini, and also that of two other former colleagues of the Claimant, was the subject of a preliminary application which we considered at the commencement of the hearing. The Respondents contended that the contents of the witness statements of the four witnesses were irrelevant, other than five paragraphs of Mr Carpanini's statement, and should be excluded.

4. We gave oral judgment on the application at the start of the hearing, and gave oral reasons at the time which we do not repeat here. In addition to the acceptedly relevant paragraphs of Mr Carpanini's statement, we also considered that one paragraph of Mr Williams's statement was relevant and should be admitted. We considered that the statements of the other two witnesses, and the other paragraphs of the statements of Mr Carpanini and Mr Williams, were insufficiently relevant to the issues we had to decide, taking into consideration the guidance provided by Underhill LJ in HSBC Asia Holdings BV and another -v- Gillespie [2011] ICR 192 at paragraph 13.

5. On the Respondents' side, we heard evidence from Paul Norton, Director and Co-owner of the First Respondent; Karen Norton, the Second Respondent and also a Director and Co-owner of the First Respondent; and Steven Gatenby, Member of the First Respondent's Academic Board.

6. We considered the documents in a hearing bundle spanning 1,278 pages to which our attention was drawn, and we also took into account the parties' representatives' closing submissions.

Issues

7. The issues to be determined at this Final Hearing had been clarified following a Preliminary Hearing on 2 March 2023 before Employment Judge Bromige, and were as follows.

Discrimination Jurisdictional issues

1) The Claimant entered ACAS Early Conciliation on 8th June 2022. Therefore any act prior to 9th March 2022 is potentially out of time.

2) Did any act of discrimination occur prior to 9th March 2022?

3) If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted (i.e. on or after 9th March 2022)?

4) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

a) Why were the complaints not made to the Tribunal in time?

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

Disability status (s.6 Equality Act 2010)

5) The mental impairment relied upon by the Claimant is generalised anxiety disorder.

6) At all relevant times, did this mental impairment have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities?

7) If so, did the Respondent[1] know, or could the Respondent have reasonably been expected to know that the Claimant was disabled at all relevant times?

Duty to Make Reasonable Adjustments (Sections 20 and 21 Equality Act 2010)

7) Did the Respondents apply or operate the following alleged Provisions, Criteria or Practices ("PCPs"):

i) Investigation process (including but not limited to: the arrangements for meetings; right to be accompanied; the conduct of any meetings; and the application of sanctions);

ii) Disciplinary process (including but not limited to: the arrangements for meetings; right to be accompanied; the conduct of any meetings; and the application of sanctions); and

iii) Arrangements for covering classes where teachers are absent.

8) Did the Respondents apply the above PCPs to employees who are not disabled?

[1] We noted that the List of Issues regularly referred to "Respondent" and not to "First Respondent" or "Second Respondent". We approached matters on the basis that those references generally should be taken to refer to the First Respondent, and that it was only the harassment claim which involved the Second Respondent individually.

9) *Did the PCPs put the Claimant at a substantial disadvantage in that she (i) was unable to cope, focus or concentrate on the demands placed upon her as well; (ii) suffered exacerbated symptoms; (iii) was unable to properly prepare herself?*

10) *Did the Respondent take such steps as were reasonable to avoid the disadvantage to the Claimant? The Claimant alleges that the Respondent ought to have taken the following steps to avoid the disadvantage:*

a) *Notified the Claimant that she could be accompanied to the investigatory and/or disciplinary hearing by someone other than the categories of individuals permitted by the statutory provisions (the Claimant recognises there is no statutory right to be accompanied at an investigation hearing, and accepts that she never asked to be accompanied at either the investigation or disciplinary meeting, but claims that the First Respondent should have taken proactive steps to notify her of these opportunities).*

b) *Providing the Claimant with sufficient time in advance of the disciplinary hearing to review the evidence relating to the allegations;*

c) *Managing the Claimant's removal from the school premises upon the termination of her employment sensitively, instead of subjecting her to a publicly escorted removal from site;*

d) *Offering the Claimant regular breaks throughout the course of the hearing(s);*

e) *Covering the Claimant's classes on the day of the disciplinary hearing to give her the time and/or head space to prepare for the hearing, instead leaving her to arrange her own cover in order to be able to attend the hearing;*

f) *Offering any form of pastoral support;*

g) *Seeking medical input on what adjustments may be useful or helpful to accommodate the Claimant's disability during a stressful process;*

h) *Considering a lesser disciplinary sanction;*

i) *Reconvening the appeal hearing;*

j) Managing the appeal process in a sensitive, neutral and unbiased way instead of making unnecessary expressions of "disappointment" and falsely accusing the Claimant of being untruthful.

12) Has the Respondent shown that they did not know and could not reasonably have been expected to know that:

a) The Claimant had the alleged disability; and/or
b) The Claimant was likely to be placed at the above substantial disadvantage(s) compared with persons who are not disabled?

Direct disability discrimination

13) Who is the Claimant's comparator (actual or hypothetical) whose circumstances must be material the same as the Claimant's? The Claimant relies upon the actual comparator of John Byrne in respect of allegation 14(a), and a hypothetical comparator for both allegations 14(a) and 14(b).

14) Was the Claimant treated less favourably than the comparator was or would have been? The Claimant alleges that the less favourable treatment was:

a) Her dismissal by the Respondent (in support of this she relies upon the alleged act of harassment below by the Second Respondent as evidence of discriminatory motivation at the disciplinary hearing);

b) The First Respondent's failure to properly protect her from harassment by [the student's] father in that the First Respondent failed to take appropriate action to safeguard her from treatment of this nature and/or make it clear that such actions would not be tolerated in the school setting.

15) If so, was the reason for the treatment the Claimant's disability?

Discrimination arising from disability

16) The Claimant alleges that the following arise as a consequence of her disability: (i) her instances of sickness absence related to her disability (including her situation on 11th March 2022 when she text the Respondent to inform them of her health); and (ii) her symptoms of anxiety.

17) Was the Claimant treated unfavourably because of something arising as a consequence of her disability? The Claimant relies on her

dismissal as the unfavourable treatment (this is on the basis that the Second Respondent's alleged harassment and reference to the Claimant being "incapable of doing her job" and therefore the dismissal was not because of misconduct, but because of her disability).

18) *What are the legitimate aims relied upon by the Respondent? The Respondent relies upon the aim of safeguarding its pupils (realistically, this point is otiose, since if the dismissal was due to disability and not misconduct, it is difficult to see how such a dismissal could be justified on safeguarding grounds).*

19) *Has the Respondent shown that the alleged unfavourable treatment above is a proportionate means of achieving the legitimate aim(s) above?*

20) *Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it?*

21) *Has the Respondent shown that they did not know and could not reasonably have been expected to know that the Claimant had the alleged disability?*

Harassment

22) *The Claimant alleges that Karen Norton of the Respondent asked the Claimant whether her disability meant that she was "incapable of doing her job" during the disciplinary hearing and that this amounted to unwanted conduct relating to her disability.*

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

24) *If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.*

Unfair dismissal

25) *Was the reason for the dismissal of the Claimant a potentially fair reason under section 98 ERA 1996? The Respondent relies upon conduct as the reason for the Claimant's dismissal.*

26) *Did the Respondent genuinely believe the Claimant to be guilty of the misconduct alleged?*

27) *Did the Respondent have reasonable grounds for that belief?*

28) *Was the Respondent's belief based upon a reasonable investigation?*

29) *Was the dismissal of the Claimant within the range of reasonable responses open to a reasonable employer? In particular the Claimant relies upon the disciplinary sanction given to Mr Byrne, namely a final written warning, arising from (on the Claimant's case) the same factual circumstances.*

30) *In all the circumstances, did the Respondent act reasonably in treating the reason as a sufficient reason for dismissal, having regard to equity and the substantial merits of the case? The Claimant has further particularised the specific allegations of unfairness at paragraph 23(a) – 23(r) of the Particulars of Claim. Such matters are not individually determinative of this issue, however will be a useful reference for the Tribunal.*

Wrongful dismissal

31) *What notice pay was the Claimant contractually entitled to?*

32) *Did the Claimant commit a repudiatory breach of contract entitling the Respondent to dismiss her summarily without notice?*

Remedy

33) *Have the parties complied with the ACAS Code? If not, should any compensation be increased or reduced to take into account any unreasonable failure by the parties to comply with the ACAS code? If so, to which party should this apply and by what percentage?*

34) *What is the Claimant's basic award?*

35) *What, if any, loss of earnings is the Claimant entitled to?*

36) *To what extent, if any, has the Claimant mitigated her losses?*

37) *What if any, injury to feelings award is the Claimant entitled to?*

38) *What, if any, award of aggravated damages should be made to the Claimant?*

39) *Should there be any deduction to any award on the grounds of Polkey or contributory fault?*

8. In the event, during the course of this hearing it was agreed that we would focus on deciding matters relating to liability and would not deal with any remedy points, other than paragraph 39, i.e. whether there should be any deduction to any award on the grounds of Polkey or contributory fault.

9. Further minor modifications to the List of Issues were made during the course of the hearing. Ms Stanley, on behalf of the Claimant, accepted that John Byrne could not be a relevant comparator for the purposes of the Claimant's direct disability discrimination claim as referenced in paragraph 13 of the List of Issues. Mr Flood, on behalf of the First Respondent, confirmed that it was not relying on any justification defence in relation to the discrimination arising from disability claim as referenced in paragraphs 18 to 20 of the List of Issues.

10. Notably, during the course of the hearing, it was accepted by the Respondents that the Claimant had been disabled at the relevant times, for the purposes of Section 6 EqA, and that the Respondents had had knowledge of that disability at all relevant times. Knowledge of any substantial disadvantage for the purposes of the Claimant's reasonable adjustments claim, as referenced in paragraph 12 of the List of Issues, remained in dispute.

Law

Unfair dismissal

11. The first matter for us to consider was whether the First Respondent, the burden being on it, could satisfy us that it had dismissed the Claimant for a potentially fair reason, i.e. a reason falling within sections 98(1) or (2) of the Employment Rights Act 1996 ("ERA"). In this case, the First Respondent contended that the dismissal was by reason of the Claimant's conduct, which falls under section 98(2)(b) ERA.

12. In relation to the reason for dismissal, the Court of Appeal made clear, in Abernethy v Mott, Hay and Anderson [1974] ICR 323, that the reason for dismissal is "*… a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.*"

13. If we were not satisfied that the reason for the dismissal was the Claimant's conduct, her unfair dismissal claim would succeed. If we were so satisfied, we would then need to go on to consider whether dismissal for that reason was fair in all the circumstances, within the meaning of section 98(4) ERA. That provides that whether a dismissal is fair or unfair. "*… 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 [the reason] as a sufficient reason for dismissing the employee".

14. In relation to dismissals by reason of conduct, the approach to be taken by an employment tribunal is underpinned by two touchstone Employment Appeal Tribunal ("EAT") decisions of over forty years' vintage; British Home Stores v Burchell [1978] IRLR 379, and Iceland Frozen Foods v Jones [1982] IRLR 439. The guidance provided by those two authorities was combined by the EAT in JJ Food Service Limited v Kefil [2013] IRLR 850, at paragraph 8, as follows:

    "*8. In approaching what was a dismissal purportedly for misconduct, the Tribunal took the familiar four stage analysis. Thus it asked whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct.*"

15. That range of reasonable responses test was also directed to apply in relation to the consideration of the reasonableness of the investigation by the EAT, in Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23.

16. The appellate courts have also made clear, in many cases over many years, that an employment tribunal should take care not to substitute its decision for that of the employer, or to "step into the employer's shoes".

17. Finally, with regard to assessing the fairness of the dismissals, we would also need to be satisfied that appropriate procedural steps had been followed, in particular the relevant provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Wrongful dismissal

18. The Claimant was summarily dismissed, i.e. without notice. The question for us therefore was whether the Claimant had committed a repudiatory breach of contract, i.e. an act of gross misconduct, such as to justify the First Respondent treating the contract as at an end and summarily dismissing the Claimant. The EAT, in the case of Sandwell and West Birmingham Hospitals NHS Trust -v- Westwood **(**UKEAT/0032/09), indicated that the Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct. That is an objective test on the facts of the case considered on the balance of probability.

Direct discrimination

19. Section 13(1) Equality Act 2010 provides that:

> "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

20. Section 23(1) then notes that there must be "*no material difference between the circumstances relating to each case*" when undertaking the comparison, with section 23(2) noting that where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

21. The Court of Appeal summarised the approach to be taken in relation to section 13, and in particular the required degree of causation arising from the words, "because of", in Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425, and stated, at paragraph 12:

> "*Both sections use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B.*"

22. The House of Lords also noted, in Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 that, in relation to causation, the Tribunal must identify "*the real reason, the core reason, the causa causans, the motive*".

23. Section 136 Equality Act 2010 deals with the burden of proof and provides as follows:

> "*(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) contravened the provision concerned, the court must hold that the contravention occurred.*

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

24. A two stage test was therefore involved. First, the Claimant had to prove facts from which we could decide that discrimination had taken place, and secondly, if so, the burden of proof would then shift to the Respondents who would have to prove, on the balance of probability, a non-discriminatory reason for the treatment in question.

25. With regard to the first stage of the test, i.e. the conclusion that there were facts from which, in the absence of a non-discriminatory explanation, discrimination could be concluded, the EAT made clear, in Qureshi v Victoria University of Manchester [2001] ICR 863, that the Tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that the respondent has treated the complainant less favourably on the protected ground.

26. The Court of Appeal made clear however, in Madarassy v Nomura International PLC [2007] ICR 867, that something more than less favourable treatment compared with someone not possessing the Claimant's protected characteristic is required. In that case, Mummery LJ noted, at paragraph 56, in relation to the burden of proof:

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

Discrimination arising from disability

27. Section 15(1) of the Equality Act 2010 (EqA), which is headed '*Discrimination arising from disability*', provides that,

"*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.*"

28. In Pnaiser v NHS England and anor [2016] IRLR 170, the EAT summarised the proper approach to establishing causation under section 15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring

examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then establish whether the reason was "something arising in consequence of the claimant's disability", which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

Failure to make reasonable adjustments

29. Our focus here would be, as identified by the EAT in Environment Agency -v- Rowan [2008] IRLR 20, on identifying:

    (i) The provision criterion or practice applied by or on behalf of an employer;

    (ii) The identity of non-disabled comparators, where appropriate; and

    (iii) The nature and extent of the substantial disadvantage suffered by the Claimant, in comparison to the non-disabled comparators.

30. In this regard, the Claimant was relying on a hypothetical non-disabled comparator. The focus was again an objective one, assessing whether a PCP had indeed been applied, whether the employee was, as a result, placed at a substantial disadvantage, and then whether the employer had taken such steps as were reasonable to avoid any disadvantage caused.

Harassment

31. Section 26 EqA notes that:

    "*(1) A person (A) harasses another person (B) if –*

    a. A engages in "unwanted conduct related to a relevant protected characteristic, and
    b. The conduct has the purpose or effect of –
    i. violating B's dignity, or
    ii. *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*"

32. In assessing whether that had taken place in this case, we would first have to assess whether the matters asserted had taken place, and whether they amounted to "unwanted conduct", which the EAT, in Thomas Sanderson Blinds Ltd v English (UKEAT/0316/10), confirmed should largely be assessed subjectively, i.e. from the employee's point of view.

33. If we were satisfied that there had been unwanted conduct, we would then

need to consider whether it had related to the Claimant's disability, "related to" having a broad meaning, certainly wider than "because of" or "on the ground of".

34. Finally, if we were satisfied that there had been unwanted conduct which related to the Claimant's disability, we would need to consider whether it had had the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

35. In relation to violating dignity, the EAT, in Richmond Pharmacology v Dhaliwal [2009] ICR 724, noted that dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.

36. In deciding whether the Respondents' conduct, if it took place, had the effect of violating the Claimant's dignity or of creating an intimidating etc. environment for her, section 26(4) EqA notes that three matters are to be taken into account; the Claimant's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have had that effect, a test which therefore has both subjective and objective elements.

Findings

37. We set out our findings of fact below, reached on the balance of probability where there was any dispute. The Claimant's dismissal arose out of a single incident involving a specific pupil in February 2022 and the Claimant's claims arise from that incident and the way it was subsequently handled by way of investigation and disciplinary action. Before recording our findings on those matters, we briefly record some background facts.

Background

38. The Claimant is a qualified teacher, specialising in secondary physical education. She qualified as a teacher in 2007. She started working for the First Respondent as a PE Teacher in September 2015, and was appointed Head of Faculty for PE in September 2017. In that regard, she formed part of the First Respondent's Middle Leadership Group.

39. The First Respondent is a limited company which owns and operates Kings Monkton School, a private school based in central Cardiff, which operates across the entire primary and secondary education spectrum, having some 300 pupils between the ages of 3 and 18.

40. The school has been in existence for over 150 years, and the ownership of the school effectively passed to Mr and Mrs Norton in May 2019 following a

management buyout. Both had been previously involved in the school, Mr Norton joining as Principal in June 2013 and Mrs Norton joining as Vice Principal in August 2015. They were described as co-owners of the school, although we were not informed of the precise holdings the two held of the shares in the company. As was clear from the job titles, Mr Norton was organisationally more senior to Mrs Norton, but it appeared to us that they largely divided the operation of the school between them, with Mrs Norton focusing on the primary years and Mr Norton focusing on the secondary years.

41. Whilst the primary classes were generally taught all subjects by one teacher, the Claimant, and the other male PE teacher, taught PE across the school, including the primary classes. Where this involved external sports or games, where there was a need for playing fields, due to the city centre location of the school those lessons took place at external locations, with pupils being transported by bus or mini bus as required.

The Claimant's disability

42. The issue of whether or not the Claimant was disabled for the purposes of section 6 EqA was conceded during the course of the hearing. We did not therefore need to make any findings about the Claimant's disability, or the condition underpinning it. However, as parts of the Claimant's case involved an assertion that her condition impacted on her ability to participate in the disciplinary processes, we recorded certain findings about it.

43. The condition involved is Generalised Anxiety Disorder, which the Claimant first started to suffer from in Summer 2018, when she had a panic attack whilst driving to school. In the aftermath of that, the Claimant was absent for much of the remainder of 2018 and for most of January 2019. She has been taking medication for the condition since 2018.

44. Since 2018 the Claimant has suffered from panic attacks on a regular basis. They affect her sleep, which causes fatigue.

45. The condition also impacts on the Claimant's emotional state. Indeed, she was tearful on several occasions whilst giving evidence before us, which led to several short breaks. Overall, however, the Claimant managed to give her evidence to us in a reasonably clear manner, particularly in the latter stages.

46. The condition also impacts on the Claimant's short-term memory, and she finds it hard to concentrate for prolonged periods of time.

47. The First Respondent referred the Claimant to occupational health on two occasions. The first was in October 2018, during the Claimant's lengthy

period of absence in the second half of that year. The second was in May 2021, in light of stress the Claimant was experiencing at work, although she had only been absent for a short period at that time.

48. The first report noted that the Claimant was unfit for work, but that, with further time and treatment, the condition was likely to become controlled over the following three months, as appeared to have ultimately been the case as the Claimant returned to work at the end of January 2019. The report noted that when the Claimant's symptoms become controlled she should be able to provide reliable service and attendance in the long run. The practitioner noted that there were no adjustments to support the Claimant at work that she could advise at that stage.

49. The second report, produced by the same practitioner, noted that the Claimant was fit to work, and that if any long-term solution to the work issue (principally the stress of having to make off-site bookings) could be identified, the Claimant's recurrent absences could be stopped in the short and long term. The practitioner confirmed that no adjustments to support the Claimant at work were required.

The pupil

50. The incident on 28 February 2022 involved one specific child, aged 8. He had very specific medical issues which had been encapsulated in a written Medical Needs Care Plan. He was noted as having a severe milk and derivatives allergy, which was touch sensitive; a severe nut allergy; and asthma. He was also noted as having a suspected mustard allergy and did not eat foods containing gluten.

51. The child's Care Plan noted that, being touch sensitive to milk and derivatives, he could have a reaction not only by way of ingestion. The plan noted, "*Even if a surface has had milk spilled on it and it's no longer visible but it has not been washed clean, he can have a reaction*".

52. The Care Plan noted, in a section headed "*Care Requirements and Emergency Action needed to be taken*", that, if the child had an allergic reaction to milk or nuts, "*then he must take 10mls of Cetirizine Hydrochloride immediately followed by 6 puffs of his Ventolin Inhaler*". The Plan noted that the medicine was to be found in the child's yellow first aid bag, which was with him at all times, and that duplicate medicines were also kept in the school office.

53. The Plan noted, in red, that if the child had any allergic reaction from eating or drinking anything then a 999 ambulance had to be called immediately, with the operator being told that the child had severe dairy and nut allergies and that anaphylaxis was possible.

54. The Plan noted that the child had an Epipen that would need to be administered in severe reactions, and that the Care Plan, the Epipen, the Cetirizine Hydrochloride, the Ventolin Inhaler, and a spacer were kept in the child's yellow first aid bag which was kept in the child's class. The Plan noted, "*Staff must take it with them wherever [the child] goes within and outside of the school*".

55. The Plan also noted that, as the child was atopic, he could have an allergic reaction to something unknown, in which case he would again need 10mls of Cetirizine Hydrochloride immediately followed by 6 puffs of his Ventolin Inhaler, with an ambulance then being called. The Plan noted that permission did not need to be sought for administering that medication "*as swift intervention is critical in suppressing the reaction*".

56. With regard to the child's asthma, the Plan noted that his symptoms were largely controlled by a daily steroid preventer administered at home, but that he may need an inhaler, particularly when he has a cold or is running about a lot.

57. The Plan noted that the child's parents were to be called immediately when the child had an asthmatic episode, and that several staff members were able to medicate the child. A list of those staff members was included, which did not include the Claimant.

58. The Claimant was familiar with the child and his specific medical needs, having taught him in prior years. The child was one of a handful of pupils within the school whose medical needs were sufficient to require the preparation of a specific medical care plan.

Relevant policies

59. The First Respondent, as would be anticipated, operated many written policies and procedures. These included a general Staff Handbook, which contained its Disciplinary Procedure, and a specific PE Department Handbook. It also operated a Health and Safety Policy and a First Aid Policy. The Claimant, whilst not being required to act as such as part of her contractual duties, was a registered and trained first aider.

60. In terms of the policies applicable to the particular child, and the catering for his medical needs both inside and outside school, in our view only the child's Care Plan had direct relevance.

The incident

61. On 28 February 2022, the Claimant was in overall charge of an off-site

games lesson taking place at Cardiff University's playing fields at Talybont, some 15 minutes' drive from the School. She was supported by the male PE teacher and by several teaching assistants or learning support assistants.

62. The protocol for taking the children to the external site involved the class teacher, in this case Mr John Byrne, taking the class from their classroom to the School's yard or, if raining, the School's canteen, where the pupils were handed over to the PE Department, who would then supervise their departure to the external venue, supervise their activities at that venue, and then supervise their return to the school by bus. In the case of the particular child, it was understood by Mr Byrne that he would supervise the child up to the point of handover, and that his supervision included ensuring that the child had his medical bag with him.

63. On the particular afternoon however, due to being distracted at the point that the children were leaving the classroom, Mr Byrne did not check that the child had his medical bag with him, and did not observe that he did not, in fact, have the bag with him. Mr Byrne confirmed, in a subsequent disciplinary investigation meeting with Mr Norton, that he was aware of the need to ensure that the child had his medical bag with him at all times, and observed himself that the implications of the child not having the bag with him were potentially catastrophic. In this meeting he noted that he took full responsibility for his failures.

64. Whilst there was no specific procedure requiring an individual involved in the PE lesson, whether identified by name or job role, to check that the child had his medical bag with him, the Care Plan did make clear that the child must take the bag with him wherever he goes, whether within or outside of the School. Bearing in mind that the child was 8 at the time, in our view that imposed an obligation on the PE staff to ensure that the child's medical bag was with him when he left the School and stayed with him at all times. No check was however made by the Claimant, or any other member of the PE staff, at the point of handover, to ensure that the child had his medical bag with him. The Claimant confirmed in subsequent meetings that she had not delegated the responsibility for that check to any other member of her department.

65. During the course of the PE lesson, the child became distressed, having been hit on his back by a ball. The incident was not observed by the Claimant, who was supervising other children at the time. The child wished to use his inhaler and, when it transpired that the medical bag was not there, became distressed. At this point the Claimant became involved, along with other members of staff. One of the assistants noted that another pupil had a Ventolin Inhaler with them and suggested that it be used. The Claimant, as the person in charge confirmed that the inhaler should be

used, and it was then wiped down and given to the child who administered the inhaler himself. No adverse consequences arose from doing so, and after a short time the child re-joined the lesson.

66. At the time of the incident the Claimant made a call to the School and spoke to the Receptionist, Jane Hughes. Mrs Hughes had been the Receptionist for many years, and she appeared to be someone looked upon as a source of advice in relation to first aid, having been a registered nurse many years previously.

67. The Claimant contended that she sought authority from Mrs Hughes for the use of the inhaler. Mrs Hughes, who did not give evidence before us herself, noted, in a statement she provided to Mr Norton during his investigation, that her permission had not been sought, and that the call from the Claimant had been made to ensure that Mrs Hughes could pass information about the incident on to the child's parents. Mrs Hughes was spoken to a second time by Mr Norton, in light of the Claimant's contentions, and herself sent a further follow up email having then thought about matters further.

68. Taking into account the Claimant's evidence before us and Mrs Hughes's statement, we considered that, on balance, the Claimant had not sought consent for the use of the inhaler. Mrs Hughes was someone who appeared to be deferred to in relation to first aid issues, it seemed to us largely because being based in reception and not involved in teaching she was readily available at a regular location if first aid matters arose, and also due to her nursing background. However, she had no particular designation under the School's First Aid Policy, and she had not been a registered nurse for over 30 years, and therefore could not be relied upon with any confidence as having specific medical expertise. Furthermore, the Claimant's initial response when asked by Mr Norton to describe what had happened, referred to the administration of the inhaler, only contending that permission had been sought from Mrs Hughes later in that discussion.

69. Mrs Hughes called the Claimant back a few minutes after the initial call, and the Claimant confirmed to her that the child appeared to be fine. In that second conversation, Mrs Hughes said words to the effect that the Claimant had done the right thing, but, in our view, that arose in the context of circumstances where the child appeared to have calmed down and recovered, and with no allergic reaction. Mrs Hughes then spoke to the child's mother, which led to the father visiting the School shortly later, at the end of the school day.

70. On return to the School, the Claimant and Mr Byrne were challenged by the child's father, in strong terms, about the incident and the fact that the child's medical bag had been left at the school. Mr Norton, having been called out

of a meeting, then spoke to the child's father and to the Claimant and Mr Byrne. He spoke to the two teachers again the following morning and decided to carry out three connected investigations; disciplinary investigations in relation to the actions of Mr Byrne and the Claimant, and an investigation into the complaint by the child's father. Neither Mr Byrne nor the Claimant was suspended while those disciplinary investigations were undertaken.

<u>The investigation</u>

71. Mr Norton confirmed that he undertook the investigation because he was the person who had received the child's father's complaint, and that it then made sense for him to investigate matters, both from the potential disciplinary perspective and from the perspective of addressing the complaint.

72. The First Respondent uses an external HR consultancy to provide HR services, and Mr Norton was supported by that company in his investigation. He confirmed that he did not consider asking that consultancy to undertake the investigation independently, thus leaving him in reserve to deal with any disciplinary hearing or appeal. He also confirmed that he did not consider that it would be appropriate for other members of the Senior Leadership Team to undertake the investigation. One, the Assistant Principal, was available as a source of pastoral support to the Claimant, although it did not appear that she provided much pastoral support until later on in the proceedings. Another, the Assistant Headteacher, had only recently joined the School and had not been trained in carrying out an investigation, and the third, the Director of Finance and Operations did not have expertise in educational matters. Mrs Norton was not aware of the incident, and Mr Norton therefore felt that she would be the person to deal with the disciplinary hearing if matters progressed that far. The Claimant did not raise any concerns or queries at the time over the investigation being undertaken by Mr Norton.

73. Mr Norton met Mr Byrne and the Claimant separately on 28 February 2022 on an informal basis, and then at formal investigation meetings on 2 March 2022, following the provision of letters formally inviting them to that meeting the day before.

74. In the Claimant's case she was informed that the meeting was to investigate two specific allegations of misconduct namely:

"1. That you failed to ensure that a pupil had his medical bag with him whilst taking part in an off-site games lesson.

2. That you failed to ensure that the members of your department were

aware of and took responsibility for ensuring that this particular pupil had his medical bag with him at all times during PE/Games lessons."

75. The Claimant was informed that Mr Norton would chair the investigatory meeting, and would be accompanied by HR support to take notes. The letter confirmed that, as the meeting did not form part of a formal disciplinary procedure, the Claimant did not have a right to be accompanied by a colleague of trade union representative. Mr Norton pointed out however, that if the Claimant had a disability that may affect her ability to participate fully then she should contact him and he would make appropriate arrangements. The Claimant did not raise any concerns or request any adjustments.

76. The meeting with the Claimant took place at 1.30pm on 2 March 2022 and lasted approximately half an hour. During the meeting the Claimant confirmed that she was aware of the child's Care Plan, and that he had a medical bag and that the bag needed to be with the child at all times. She confirmed that there were no policies or procedures for checking that the bag was handed over in relation to an off-site games lesson.

77. As far as the incident on 28 February 2022 was concerned, the Claimant confirmed that it was known that another pupil had an asthma inhaler, and that it was administered by the pupil himself. She confirmed that she quickly realised that the child had not actually had an asthma attack, but had been hit by a ball and had become a bit winded.

78. The Claimant confirmed that she would make amendments to the registration processes to ensure that attention was given to the child having his bag with him.

79. The discussion moved on to the angry exchange with the child's father on the date of the incident, with the Claimant describing herself as having been intimidated and that the situation had been very stressful, and with Mr Norton noting that he did not want his staff shouted at, and that he did not expect them to undergo that type of event.

80. The Claimant queried the points that the parents had raised, and Mr Norton responded by noting that the parents had made clear that the child was only 8 and was not therefore responsible for ensuring that he had his medical bag, and that that was the responsibility of staff. He commented that the parents were concerned about the procedures for ensuring the child had the bag, and about how it had been missed on the day. Mr Norton also commented that the parents felt that using an inhaler from another pupil had been dangerous because of food intolerances and COVID.

81. The Claimant commented that she felt that her actions had been

appropriate in the circumstances. She also commented that she did not think that the fact the child was without his bag had been solely her responsibility, as Mr Byrne should have ensured that the bag was with the child when handed over to the PE staff. She observed that she thought Mr Byrne was at fault and that that fault had now put her in a difficult position.

82. Following the meetings with the Claimant, and Mr Byrne, Mr Norton reviewed the First Respondent's policies. He noted various provisions regarding duties of care and matters of health and safety within the Education Workforce Council Code of Professional Conduct, the School's First Aid Policy, the School's Educational Visits Policy, and the PE Staff Handbook which contained an Offsite Registration (Safeguarding) Procedures section. He noted in particular the terms of the child's Care Plan.

83. Mr Norton also interviewed Mrs Hughes, who confirmed that the Claimant had called her to ask her to call the child's mother to let her know that he had had an asthma attack, and that he had not had his medical bag with him, and she had given him another child's inhaler to use. Mrs Hughes confirmed that she had then spoken to Mr Byrne to clarify the whereabouts of the medical bag, and had confirmed, both to the Claimant during her initial call and to Mr Byrne directly, that there was a need to ensure that the child had his medical bag at all times. Mrs Hughes then called the Claimant back to see how the child was and the Claimant confirmed that he was fine. Mrs Hughes then rang the child's mother.

84. The content of the record of the discussion with Mrs Hughes very much accorded with an email she had sent to Mr Norton on the afternoon of the day of the incident itself.

85. Following the various meetings, Mr Norton completed investigation reports in relation to both Mr Byrne and the Claimant. With regard to Mr Byrne, Mr Norton noted that he had failed to ensure that the pupil in his care had his medical bag with him as outlined in the child's medical plan, and that he noted that that was a serious failing which had potentially life-threatening consequences, He recommended that the formal disciplinary procedure be instigated.

86. Mr Norton made similar comments with regard to the Claimant. He noted that she had failed to ensure that a pupil in her care had his medical bag with him whilst taken offsite, that she had been aware of the importance of that, but however had felt that it was not her responsibility. He noted that the Claimant had not delegated responsibility for the medical bag to another member of staff. In addition, Mr Norton noted that the Claimant had administered another pupil's inhaler without authorisation from the pupil's parents or under medical guidance. He noted that using another child's

inhaler was extremely dangerous which could have resulted in anaphylactic shock. He noted that those were serious failings which had potentially life-threatening consequences. He again recommended that the formal disciplinary procedure be followed.

Disciplinary hearing

87. With regard to Mr Byrne, a disciplinary hearing took place before Mrs Norton, as a result of which, despite Mrs Norton concluding that the matters amounted to gross misconduct, a final written warning was imposed.

88. With regard to the Claimant, Mr Norton wrote to her on 8 March 2022 giving her notice of a disciplinary hearing on 11 March 2022 at 2.00pm. He confirmed that the Hearing would consider three specific allegations:

> "1. *That you failed to ensure that a pupil had his medical bag with him whilst taking part in an off-site games lesson.*
>
> *2. That you failed to ensure that the members of your department were aware of and took responsibility for ensuring that this particular pupil had his medical bag with him at all times during PE/Games lessons.*
>
> *3. That you administered another pupil's prescribed inhaler to the pupil without authorisation or medical guidance to do so.*"

89. Mr Norton enclosed his investigation report, which included copies of the notes of meetings and other policy documents. He noted that it was not intended that any witnesses be called, but that if the Claimant wished to call relevant witnesses she should provide him with their names as soon as possible. He also confirmed that if there were any further documents the Claimant wished to be considered then she should provide copies as soon as possible. He noted that if the Claimant was found guilty of gross misconduct then she could be issued with a final written warning or could be dismissed without notice or pay in lieu of notice.

90. Mr Norton confirmed that the hearing would be conducted by Mrs Norton, who would be accompanied by a representative of the external HR consultancy for advice, and another individual from that company as a notetaker. The Claimant was notified of her entitlement to be accompanied by a colleague or trade union representative. The Claimant was finally asked to acknowledge receipt of the letter, and to confirm that she would attend, and was told that, if she had any specific needs at the hearing as a result of a disability, or if she had any other questions, she should contact Mr Norton as soon as possible. The Claimant did not raise any specific needs or ask any particular questions.

91. The Claimant replied to Mr Norton on 10 March 2022 confirming that she would attend the hearing and would be accompanied by a colleague. She noted that she would require some time with the colleague prior to the meeting to brief him, and that she would also like to forward witness statements from members of her Faculty for consideration. A statement, from the male PE teacher, was provided shortly afterwards. That statement did not provide any material additional information other than to note that, whilst the Claimant was on the phone with the school, i.e. to Mrs Hughes, one of the learning support assistants administered the inhaler. He did not reference any request for permission for the use of the inhaler.

92. Prior to her email confirming her attendance at the disciplinary hearing, early in the morning of 10 March 2022, at 7.06am, the Claimant had texted Mr Norton as follows: "*Paul, I can't come in today or tomorrow to do my lessons, the stress of this situation is causing me so much anxiety that I'm not fit to work. I'm worried I would make another mistake because of this. I will attend the hearing at 2pm*".

93. Mr and Mrs Norton confirmed in their evidence, that, whilst they had consciously not discussed the incident between themselves, Mrs Norton was aware of that text, as it arrived whilst they were travelling together to the School and was read out via Mr Norton's in-car facility.

94. The meeting took place as planned at 2.00pm, and a short adjournment took place, at the Claimant's request, between 2.37pm and 2.45pm. The meeting then continued until 3.00pm. Mrs Norton then returned at 3.55pm noting that she had, in the intervening period, spoken to Mrs Hughes and the learning support assistant, but that their statements would have to be written up first and be given to them to check before being given to the Claimant. Mrs Norton confirmed that the HR consultant would do that first thing on the following Monday, and would then get Mrs Hughes and the assistant to sign them, and the meeting could then reconvene at 12.30pm. The meeting then ended at 4.00pm.

95. During the meeting, the Claimant made very much the same points as she had made to Mr Norton. She did however note from the outset that she had asked Mrs Hughes if it was in order to use the other pupil's inhaler, and that Mrs Hughes had said that it was, or, at least, that she had not said that it was not. Then, in answer to a question from Mrs Norton as to whether the pump had been administered before permission had been granted the Claimant replied that it had happened simultaneously. In answer to a question from Mrs Norton as to why the Claimant did not just ring 999 and get advice, the Claimant replied that she did not think that the asthma attack was sufficiently severe.

96. The Claimant confirmed that she had not delegated responsibility for

checking that the medical bag was with the child to anyone at any time, but felt that she was not solely responsible for checking that the child had the bag, and felt that there were shortcomings in terms of a lack of any formal procedure.

97. Towards the end of the meeting, the notes record that Mrs Norton said, "*I know it's distressing and you text in and you said you were afraid you didn't want to make a mistake and didn't want to come to work, are you ok in your role?*", to which the Claimant replied "*What do you mean?*", and then the HR consultant commented, "*I think what KN [Mrs Norton] is trying to ask is whether you are confident that going forward, this wouldn't happen again*". The Claimant then went on to talk about how she had raised concerns with Mr Norton and the Assistant Principal about how she and the male PE teacher felt that there was pressure in effectively undertaking school trips several times a week, and that, as someone with a mental health condition, if she had come into work as she then was, being stressed and anxious by the disciplinary hearing, then mistakes would have happened.

98. In the adjournment of the meeting with the Claimant at 3.00pm, Mrs Norton spoke to the learning support assistant about what had happened. She commented that the Claimant had been on the phone with Mrs Hughes and had said that it was fine to administer the inhaler. She confirmed that she had not heard the Claimant ask Mrs Hughes if it was in order to administer the other child's inhaler, and she also confirmed that Mrs Hughes had called the Claimant back and had said that they had been right to use the other child's inhaler.

99. Mrs Hughes, when spoken to by Mrs Norton, confirmed that she had not given permission for the use of the inhaler, but may have said on the second call something along the lines of, "*you had no other choice*". Mrs Norton asked Mrs Hughes hypothetically as to how she would have reacted if she had been asked for permission, and Mrs Hughes commented that it would depend on the child's asthma attack and that there would have been "*more of a conversation because of [the child's] allergies*".

100. Following the meeting, Mrs Hughes emailed Mrs Norton, noting that her recollection of her initial conversation with the Claimant had been that the inhaler had already been administered, and that that was still her understanding of that conversation. She confirmed however that the discussion she had had with Mrs Norton had been with very little notice and that she had problems with memory recall. She confirmed that she had thought again about the point put to her that she had said that the Claimant had done the right thing by giving the inhaler, and confirmed that, the more she thought about it, she thought that she had said that. She observed that that was said after being told that the asthma attack had stopped.

101. Despite the fact that Mrs Norton had indicated at the close of the meeting on Friday 11 March 2022 that the statements from the learning support assistant and Mrs Hughes would be available first thing on the morning of Monday 14 March, they were not provided to her until the middle of the morning, being sent as attachments to emails at 11.02am and 11.19am. The Claimant was still teaching during that morning as, although Mrs Norton had arranged cover for the lesson, which we understood had been anticipated to be done by the male PE teacher teaching both girls and boys for the relevant period, it did not seem that that had filtered down to the Claimant and the male PE teacher, such that the Claimant continued to teach.

102. The Claimant then emailed Mrs Norton at 12.31pm, a minute after the reconvened meeting was due to take place, saying that she would like the hearing postponed until she had received the minutes and had time to read over them. Mrs Norton replied at 12.35pm noting that it was only the statements that were due to be sent, and that the meeting that day was a continuation of the meeting on the previous Friday and that minutes would be sent after the hearing was concluded.

103. Mrs Norton apologised if she had been misunderstood, and asked if the Claimant had had a chance to read the two statements. The Claimant replied at 12.45pm noting that there had been a misunderstanding as she had thought that she should have the minutes. She commented that she would attend the meeting in a few minutes and was just gathering her notes as she had continued teaching. The meeting then reconvened at 12.53pm.

104. At the start of the meeting Mrs Norton asked the Claimant if she had had a chance to read the statements, which were just over two pages long in the case of Mrs Hughes's statement and, effectively, just over a page long in the case of the assistant's statement, and whether she had any questions on them. The Claimant replied that she had read the statements and did not have any questions.

105. The Claimant asked for an adjournment to discuss matters with her companion at 1.00pm and the meeting reconvened five minutes later. The meeting then continued for a further five minutes and then adjourned for just under an hour.

106. During that period Mrs Norton considered her decision and took advice from the HR consultant. She then returned to provide her decision. In that, she noted the Claimant's role and that, with that, came accountability for off-site games lessons. She confirmed that the Claimant had understood the policies and the child's Care Plan and that there was nothing on that Plan regarding the sharing of inhalers.

107. Mrs Norton commented that throughout the process she did not feel that the Claimant had taken any responsibility, and that she felt that that highlighted concerns over whether the issue could occur again in the future. She noted that, despite the evidence in the investigation pack, the Claimant was still convinced that she had taken the correct action which was a huge concern for her. She observed that she did not think that the Claimant realised how serious the situation was and could have been, and that the Claimant had failed to take responsibility for the medical bag.

108. Mrs Norton confirmed that the outcome was that the Claimant was guilty of gross misconduct on all allegations, and that her decision was to dismiss the Claimant and that her employment would end that day. She informed the Claimant of her right to appeal that decision.

109. Following the imparting of the dismissal decision by Mrs Norton on 14 March 2022, the Claimant left the room. Mrs Norton and the Claimant's companion both separately went to look for her, and Mrs Norton found her in the gym, which also served as the Claimant's office, with her companion and the male PE teacher. The Claimant was distressed at this time and looked to identify her belongings, and was told by Mrs Norton that she could collect them subsequently. The Claimant then left and headed through reception, through the playground, and out of the gate.

110. The Claimant contended that this involved being escorted off the premises by Mrs Norton, indeed that she was "frogmarched" off the premises. She also asserted that this all happened during the lunch break when primary school pupils and staff were outside on the playground.

111. Mrs Norton's evidence was rather different, in that she confirmed that, after giving the Claimant some time to make her way through reception and outside the school, she followed her to reception and observed her walk across the playground and out through the school gate. She confirmed that, other than some nursery children and staff, no-one else was in the playground.

112. On balance, we preferred Mrs Norton's evidence. The Claimant was understandably upset at the time, and her recollection was therefore likely to be less than clear. Also, when it was put to her by the Tribunal that being frogmarched effectively meant someone walking alongside or immediately behind, she confirmed that that had not been the case.

113. The Claimant notified Mr Norton by email on 15 March 2022 that she wished to appeal the dismissal decision. She asked for a copy of the statement read out to her by Mrs Norton at the meeting on 14 March and a copy of the notes of all meetings. Mr Norton replied on the same day noting that a letter would be prepared and sent to her, together with the notes from

the meetings. He asked the Claimant, when she had the letter, to put together grounds for appeal and informed her that then an appeal hearing could be arranged. Mrs Norton then sent her outcome letter to the Claimant on 17 March 2022. She enclosed copies of the notes of both disciplinary hearings with the letter.

114. In the letter, Mrs Norton confirmed that all three allegations had been made out. She focused, with regard to the first two allegations, on the Claimant's status as the lead member of staff in relation to the off-site games lesson, and on her concern that the Claimant had not accepted any responsibility for failing to ensure that the child's medical bag was present.

115. With regard to the third allegation, Mrs Norton observed that the Claimant was aware of the severity of the pupil's allergies and the fact that he was touch sensitive to some substances. She observed that, with that knowledge, if the Claimant considered that it was necessary to administer another child's inhaler then she should have called 111 or even 999 for guidance from the medical profession. She noted that in allowing the child to use another pupil's inhaler the Claimant had put him at risk of anaphylactic shock, as wiping the inhaler down was not guaranteed to be sufficient to remove any traces of substances to which the child was allergic.

116. Mrs Norton observed that she felt that it was extremely concerning that, despite having all the evidence and having had failings clearly explained to her, the Claimant still maintained that she had acted correctly. She also noted that it was concerning to her that the Claimant had stated that she could not understand why the allegation was being raised with her as she felt she had acted in the child's best interests. She observed that she felt that that demonstrated a clear lack of understanding on the Claimant's part of how dangerous it was to administer a different inhaler due to the child's extreme allergies. She noted that she felt that, given that the Claimant had steadfastly maintained that she acted correctly and continued to show no accountability for her actions or appreciation for how serious the situation could have been, she did not trust that the Claimant would not, in the future, again put a pupil in a life-threatening situation.

117. Whilst it was not specifically referred to in Mrs Norton's dismissal letter, we noted that within the School's Disciplinary Procedure, in a list of non-exhaustive examples of gross misconduct, one example was; "*a serious breach of the schools' [sic] safety rules or a single error due to negligence which causes, or could have caused, significant loss, damage or injury to the school, its colleagues or pupils*".

Appeal

118. The Claimant submitted an appeal on 18 March 2022, having been helped to do so by a family friend who was a trade union official. The document was not particularly easy to follow. It spanned eleven pages, but much of it seemed to focus on prevailing health and safety legislation and the role of the School and its senior management team, the contention being that the School itself had failed in its corporate legal duties.

119. Upon receipt of the Claimant's initial indication that she intended to appeal, Mr Norton contacted Mr Gatenby by email, noting that the School was in a difficult position as there were no members of staff in a position to consider an appeal. He noted that he himself had done the initial investigation, that Mrs Norton had done the disciplinary hearing, that Mrs Price line managed the Claimant, and that the Head of Finance did not have the authority to overturn a decision of a director. He therefore asked if Mr Gatenby, as an independent member of the School's Academic Board, would be prepared to handle the appeal.

120. Mr Gatenby replied promptly, confirming that he was happy to deal with the appeal, but noting that he would be away in Canada between 21 March and 7 April.

121. The Academic Board of the school operated as a form of non-executive board, which considered the actions of the Executive Team and advised on the conduct of the School. The School, as an independent school, had no obligation to have a governing body. Most of the Academic Board was made up of parents, but there were two independent members, one of whom was Mr Gatenby. He had however previously had a child at the school who had been taught by the Claimant, albeit without any issues arising.

122. Before the appeal could be considered, the Claimant sent a further document, entitled "*Addendum to Appeal*" dated 22 April 2022. This was quite similar to the Claimant's ultimate Tribunal Claim, noting what the Claimant considered to be procedural deficiencies and substantive deficiencies. As the appeal hearing had not been scheduled by that time, both documents were then considered together.

123. Mr Norton wrote to the Claimant on 29 April 2022 noting that the appeal hearing had been scheduled for 10 May 2022. Picking up on comments made by the Claimant in her Addendum that she was experiencing anxiety, Mr Norton confirmed that the hearing would be held externally in the offices of the First Respondent's HR advisers, so that the Claimant did not have to attend the School site. He noted however that if the Claimant preferred that the appeal take place at the School or at another location then she should

let him know.

124. Mr Norton confirmed that the hearing would be chaired by Mr Gatenby, who would be assisted by an external HR adviser, different to the one who had advised at the disciplinary stage, and that an external notetaker would also be in attendance.

125. Mr Norton also confirmed the Claimant's entitlement to be accompanied by a former work colleague or trade union representative, but also noted that, by way of a further adjustment to the School's usual policy, the Claimant could bring a close family member with her for moral support or to act as her companion in place of a former work colleague or trade union representative. He concluded the letter by saying that if the Claimant had any specific needs at the hearing as a result of her disability, or if she had any other questions, then she should speak to him as soon as possible.

126. The Claimant wrote to Mr Norton on 6 May 2022 welcoming the proposal that the hearing be held off site, but noting her regret that no such adjustments had been considered earlier. She also welcomed the opportunity to be accompanied by a union representative and her father.

127. The Claimant observed that Mr Gatenby was well known to her as she had previously taught his daughter, and commented that it was her view that his appointment represented an obvious conflict of interest.

128. The Claimant also referenced that the comment Mrs Norton had made at the disciplinary hearing, about her severe anxiety and whether or not she could do her role, had not been included in the notes, and commented that she felt that that did not reflect the reality of what had been said.

129. The Claimant also attached the Staff Handbook, which we took to be a reference to the PE Department's Staff Handbook rather than the entire Staff Handbook, which she had received from her predecessor when she commenced in her role as Head of PE. She commented that she felt that that was a relevant document and would seek to draw it to the Appeal Chair's attention.

130. Mr Norton replied to the Claimant on the same day, noting that he was aware that Mr Gatenby was known to her, but that he was independent in relation to the appeal and therefore there was no conflict of interest.

131. With regard to the Claimant's comment regarding the amendment of notes, Mr Norton asked the Claimant to send him the amended section of notes that she would like changed, and he would then attach them to the original notes so that both versions were available. The Claimant then provided her alternative wording to Mr Norton by email dated 9 May 2022. As we have

noted with regard to the relevant comment, the actual notes stated as follows:

"*KN: I know it's distressing and you text in and you said you were afraid you didn't want to make a mistake and didn't want to come to work, are you ok in your role?*"

The wording that the Claimant contended reflected the exchange was as follows:

"*KN read out a private message to Paul from myself, indicating that I would be unable to come to work Thursday and Friday due to severe anxiety caused by my current situation.*

She then proceeded to ask me "Does this mean you can't do your job?"."

132. Relevant documentation regarding the appeal was provided to Mr Gatenby on 3 May 2022. That included evidence relating to Mr Byrne's disciplinary proceedings and the transcript of Mr Byrne's disciplinary hearing, which the Claimant had requested as part of her appeal. Following the provision of authority by Mr Byrne, Mr Gatenby then sent those documents to the Claimant on 6 May 2022.

133. On 10 May 2022, prior to the appeal meeting, Mr Gatenby spoke to the HR consultant who had been present at the Claimant's disciplinary hearing and had taken the notes of it, in order to understand her perspective on the Claimant's contention that the notes did not accurately reflect what had been said by Mrs Norton. The consultant confirmed that Mrs Norton had not read the text message directly, but had referred to it. She confirmed that her recollection of the exchange had been as recorded in her notes, and that she had felt that the question had been focused on assessing whether something like the incident that had occurred would happen again.

134. The appeal hearing then took place in the afternoon of 10 May 2022. The Claimant was accompanied by a trade union representative and by her father. The meeting commenced just after 2.00pm and there was a five minute adjournment at 2.50pm, at the Claimant's request; a further adjournment between 2.58pm and 3.01pm at the Claimant's father's suggestion; a further longer adjournment between 3.45pm and 4.04pm, suggested by Mr Gatenby; and the meeting then concluded at 5.10pm.

135. In the meeting the Claimant's appeal was discussed in detail, and Mr Gatenby went over the allegations she had faced and Mrs Norton's conclusions. The Claimant's union representative and father then made concluding comments before the meeting ended. Mr Gatenby confirmed that he would need to undertake further investigations and would try and

conclude matters as soon as he could.

136. Following the hearing, Mr Gatenby then undertook further investigations to consider the points raised by the Claimant in more detail. He spoke to the Claimant's companion at the disciplinary hearing, who confirmed that the minutes of the meeting were an accurate representation, and that he did not remember Mrs Norton looking at a device to read a text message and that she had just referred to the message.

137. On 17 May 2022, the HR consultant, at Mr Gatenby's direction, emailed the Claimant to note that he was working through the information the Claimant had provided at the appeal meeting and was arranging to interview individuals at the school. She noted however, that due to annual leave commitments the interviews would have to take place the following week. It was confirmed that Mr Gatenby would be in touch as soon as possible after those meetings.

138. The Claimant replied the same day, noting her disappointment that meetings were not taking place until the following week. The HR consultant replied later the same day, noting that the notes from the appeal hearing were lengthy and took several days to be finalised and checked, and that Mr Gatenby had identified seven people he wished to interview, was being extremely thorough and did not wish to miss anything. She passed on Mr Gatenby's comment that he wished the Claimant to know that he would undertake a full and thorough investigation of all the evidence presented at the appeal hearing, and would try to progress matters as quickly as possible.

139. Mr Gatenby then met with one of the other teaching assistants who had been present on 28 February, and with Mrs Hughes. He also met separately, on 6 June 2022, with Mr Norton and Mrs Norton.

140. Whilst it was not entirely clear from the hearing bundle, it appeared that the statements taken during those meetings were sent to the Claimant shortly afterwards. That was not directly confirmed by the documentation in the hearing bundle, but the Claimant wrote to the HR consultant on 15 June 2022 and referenced some of the statements taken by Mr Gatenby.

141. In her email the Claimant noted that she had given her appeal considerable thought and referred to a delay in writing to the HR consultant. The Claimant confirmed that she had made the decision not to participate in any further meetings relating to her appeal, noting that she had devoted a significant amount of time to the matter at an ongoing cost to her health. She referred to the latest documentation that she had received demonstrating to her that her time had been completely wasted, with the process being one-sided and transparently unfair. She then made

comments about the statements of Mr Norton, Mrs Norton, and the HR adviser, and to other documents to which reference had been made.

142. Mr Gatenby had previously suggested meeting the Claimant again for the reconvened appeal meeting on 10 June, or on 14 June if she required more time. In light of her comment that she did not wish to attend a further meeting, he then considered it appropriate to conclude his appeal. In light of the Claimant's comments, he asked further questions of both Mr Norton and Mrs Norton, and they provided their written answers on 24 June 2022 and 27 June 2022 respectively. Mr Gatenby then considered all the documentation and wrote to the Claimant with his appeal outcome decision on 29 June 2022.

143. In the letter, which spanned eleven pages, Mr Gatenby dealt with the individual sections of the Claimant's appeal letter and addendum. He concluded that the allegations were made out, and that he had found no evidence to overturn the original findings.

144. A focus of Mr Gatenby's decision appeared to be the wording of the First Respondent's Offsite Registration (Safeguarding) Procedures document, which appeared within the PE Staff Handbook and also existed as a stand-alone document. This was a procedure to be followed for taking the register of pupils being taken off-site, which expressly included pupils regularly being taken off-site for games and PE.

145. A significant amount of time was taken in relation to this issue in evidence before us. We did however observe that the document played no part in Mrs Norton's dismissal decision, and only came to be viewed by Mr Gatenby in the course of the appeal following the Claimant's indication that she wished to refer to the Handbook. To that extent therefore, the document had no bearing on our assessment of the fairness of the original dismissal decision taken by Mrs Norton.

146. With regard to the document itself, whether as a stand-alone document or as part of the PE Handbook, it was clear that the Claimant had amended it on 7 March 2022, i.e. after the incident in question, following a request from Ms Price that she provide the relevant documents. The extent of the amendments was not however clear.

147. The document had, underneath the title of "*OFFSITE REGISTRATION (SAFEGUARDING) PROCEDURES*" the wording of "Updated 2019". It then had some sections highlighted in yellow, and some sections in red font. It also included the following paragraph in normal font and without highlighting:

"*PE staff are to ensure that handover of pupils includes all medication for*

those pupils before leaving site. Individual care plans must be followed for off-site visits, this procedure will remain in place for each off-site facility. High risk pupils will be individually identified on the paper registers while they remain high risk."

The last sentence of that paragraph was not included in the version contained in the PE Staff Handbook.

148. As part of her appeal, the Claimant maintained that the Handbook and Offsite Registration Procedures document had not made any reference to PE staff ensuring that medication was available prior to the 28 February 2022 incident, and that she had inserted that particular paragraph herself on 7 March 2022. Mr Gatenby's assessment however, was that the reference to the document having been updated in 2019 indicated that that paragraph had been in place since then, and that there had therefore been an express obligation on PE staff to ensure that children in need of medication had it with them for off-site visits.

149. During the course of this hearing, the Claimant clarified that it was not only the sections of the document highlighted in yellow or in red font that had been added by her in March 2022, but also the paragraphs either side of those sections, including the paragraph quoted at paragraph 147 above. Mr Gatenby confirmed however, that what he considered to be a logical reading of the document suggested that the paragraph had been added prior to the incident in February 2022, focusing on the words, "*Updated 2019*".

150. Whilst, as we have noted, the point was not relevant for our assessment of the fairness of Mrs Norton's decision, we were also of the view that a logical reading of the document, and particularly its reference to having been updated in 2019, with no indication as to what had been updated at that time, was that the relevant paragraph had been included prior to the incident in February 2022.

151. Following the Claimant's evidence at this hearing, we accepted that Mr Gatenby's specific reference to the Offsite Registration document as imposing a specific responsibility on PE staff was mistaken. However, because of his conclusion in relation to the first allegation, i.e. that the Claimant had failed to ensure that the pupil had his medical bag with him whilst taking part in an off-site games lesson, was that the Claimant had been aware that the pupil had a care plan and was aware of the contents of that plan, the confusion over the Offsite Registration Procedures document did not impact on his ultimate decision.

Conclusions

152. Taking into account our findings and the applicable legal principles, we set out below our conclusions in relation to the issues we had to determine. We dealt first with the unfair dismissal claim, as our decision on the reason for dismissal would have a bearing on one element of the Claimant's direct discrimination claim and on her claim of discrimination arising from disability. We then moved on to consider the wrongful dismissal claim, before then considering the discrimination claims.

Unfair dismissal

153. We first needed to assess whether the reason for dismissal had been a potentially fair reason under Section 98 ERA. In that regard we noted the Court of Appeal's guidance, in Abernethy, that our focus was on the set of facts known to, or the beliefs held by, the employer, which caused them to dismiss the employee. Our principal focus was therefore on the reasons or beliefs of Mrs Norton as the dismissing officer, but we also took into account the facts and beliefs held by Mr Gatenby who took the decision to uphold that decision.

154. Our reading of the disciplinary and appeal outcome letters was that the reason bearing on the mind of both decision makers was the Claimant's conduct, a potentially fair reason falling within Section 98(2)(b) ERA. We noted that elements within Mrs Norton's dismissal letter potentially pointed towards a different or additional reason, as she referenced a lack of understanding or insight on the part of the Claimant into her actions on 28 February 2022. That suggested to us that one of the beliefs held by Mrs Norton, which led her to dismiss the Claimant, was a concern about her ability to trust the Claimant in the future, which could potentially then have fallen within the "some other substantial reason" provisions of Section 98(1)(b) ERA.

155. However, we noted that Mrs Norton's references to that lack of insight and potential inability to trust that the Claimant would not, in the future, again put a pupil in a life-threatening situation, was simply an emphasis in her mind of her concerns about the Claimant's conduct.

156. The Claimant asserted that the motivation for her dismissal was her disability, or that it was something arising as a consequence of her disability, focusing particularly on Mrs Norton's question at the Disciplinary Hearing as to whether the Claimant was "*ok in [her] role?*". As we have noted in our findings above, the Claimant asserted that Mrs Norton had asked, "*Does this mean you can't do your job?*", but, for the reasons we have already outlined, we did not accept that that had been said. We then did not consider that the words we concluded had been said, i.e. "*Are you*

ok in your role?", was evidence of the Claimant's condition having been a motivating factor in Mrs Norton's decision. We considered that the words focused on the impact the Claimant's indication in her text message that she was unwell could have had on her duties in the immediate future, and was not an indication of a concern on the part of Mrs Norton that the Claimant was unreliable due to her condition.

157. Ultimately, we were not satisfied that there had been any motivation for the dismissal other than the allegations and conclusions about the Claimant's conduct. We were therefore satisfied that the Claimant had been dismissed for a potentially fair reason falling within Section 98 ERA.

158. We then moved to consider whether dismissal for that reason was fair in all the circumstances, considering the Burchell test as set out at paragraphs 26 to 28 of the List of Issues.

159. We were satisfied that the First Respondent had genuinely believed the Claimant to be guilty of the misconduct alleged. As we noted in relation to the reason for dismissal, we did not consider that the First Respondent had any ulterior motive for the dismissal.

160. In addition to the allegation made by the Claimant relating to Mrs Norton's comment at the appeal hearing, which we have addressed at paragraph 156 above, she raised a broader assertion that the First Respondent had been looking to dismiss the Claimant in view of her sickness absence. However, we noted that, whilst the Claimant had a significant period of sickness absence in 2018, such that she was absent for much of the second half of 2018 and for most of January 2019, and that she had sickness absences after that, the overall record from 2019 onwards was not particularly excessive.

161. The Claimant had four days' absence in the remainder of 2019, nine days' absence in 2020, six and a half days' absence in 2021, and one day's absence in the first two months of 2022. We did not consider that the Claimant's sickness absence record over the last three years of employment would have been likely to have led her employer to be concerned, and we did not see any evidence that the First Respondent had had any such concerns in fact.

162. With regard to the questions of whether the First Respondent had reasonable grounds for its belief, and whether those had arisen from a reasonable investigation, we considered the investigation first.

163. We noted that the First Respondent, in the form of Mr Norton, had undertaken an investigation into the events of 28 February 2022 by speaking to Mr Byrne and the Claimant, and also by speaking to Mrs

Hughes, who was the person referred to by the Claimant as having had some involvement in the issue. Whilst Mr Norton did not speak to other members of staff who had been physically present at the incident on 28 February 2022, the circumstances were sufficiently clear from the Claimant's version of events for that not to be necessary. In any event, Mrs Norton subsequently spoke to one of the other members of staff present on the day, and Mr Gatenby spoke to yet more members of staff during the course of the appeal. Those other members of staff were spoken to at the Claimant's instigation and she did not, whether during the internal proceedings or before us, indicate that any other lines of enquiry should have been made.

164. We were mindful that our approach in relation to the assessment of the reasonableness of the investigation was to look at it from the perspective of the range of reasonable responses. We saw nothing to lead us to conclude that the investigations undertaken were outside that range.

165. With regard to the reasonableness of the grounds for the First Respondent's belief of the Claimant's guilt, we noted that the circumstances of the events of 28 February 2022 were clear. Mr Byrne had committed the initial error in not ensuring that the child had his medical bag with him when he left his classroom. Equally however, the Claimant, as the person in charge of the off-site games visit, committed an error in not ensuring that the child had the medical bag, whether by checking herself or by delegating that task to one of the other members of staff present. Whilst it could be said that the other members of staff were themselves at fault, as the child's Care Plan referred to "staff" generally and not to any specific person or person fulfilling a particular role, the Claimant confirmed, at all stages, that she was familiar with the child and his needs, and was familiar with the terms of his Care Plan. She also confirmed that she was in overall charge of the off-site games lesson.

166. In terms of applicable policies, we noted the Claimant's contention, both in the internal proceedings and before us, that the lack of a specific policy or procedure which fixed her with the obligation to ensure that the child's medical bag was with him meant that it was unreasonable for the First Respondent to criticise her for not ensuring that the child had the medical bag. In our view, the First Respondent's procedures could have been clearer, and indeed the Claimant's subsequent amendments to the Offsite Registrations Procedure demonstrated that. However, we noted that the Care Plan did make clear that the medical bag had to be taken by the child wherever he went within and outside of the school.

167. Bearing in mind the young age of the child, it was not at all appropriate for the child to be relied upon himself, and, in our view therefore, the Care Plan made it clear that there was responsibility on staff taking the child outside of

the School to ensure that the child had the bag with him. In our view, that did therefore fix the Claimant with responsibility for ensuring that the check had been made, as the most senior member of staff involved.

168. In any event, bearing in mind the understood overall duty of care that the Claimant owed in relation to the health and safety of the child, and bearing in mind her knowledge of his condition and acute susceptibility, we did not consider that the lack of any form of procedure would have led to the First Respondent's conclusion being unreasonable.

169. With regard to the use of the inhaler, the Care Plan did make reference, albeit in the context of an allergic reaction, to the child using "*his*" Ventolin inhaler. We did not consider that that was sufficiently clear to amount to an express direction that no other inhaler was to be used by the child. However, the particular and significant susceptibility of the child meant that the use of another inhaler (other than where it may have come out of fresh packaging) was fraught with danger and potentially life-threatening.

170. We also noted the Claimant's lack of appreciation or insight into the potential dangers that had arisen from her actions, and that that was a factor in the dismissal decision. That, in our view, contributed to the reasonable grounds that the First Respondent had for its belief in the Claimant's guilt. Overall therefore, we were satisfied that the First Respondent had satisfied the Burchell test.

171. With regard to the reasonableness of the sanction of dismissal, our focus, as noted in paragraph 29 of the List of Issues, was on whether the dismissal decision was within the range of reasonable responses open to a reasonable employer. In that regard, we have noted that the First Respondent's Disciplinary Procedure contained a specific example of something which could amount to gross misconduct as, "*a serious breach of the schools' [sic] safety rules or a single error due to negligence which causes, or could have caused, significant loss, damage or injury to the school, its colleagues or pupils.*". Whilst the child's Care Plan may not necessarily have directly fallen within the scope of the School's "safety rules", its terms did introduce an expectation of the steps that would be taken to ensure the health and safety of the specific child. We were satisfied that it could be said that the Claimant's failure to ensure that the child had his medical bag with him in relation to the off-site games lesson was therefore a serious breach of safety rules.

172. That applied equally to Mr Byrne, who had not fulfilled his responsibilities under the Care Plan, and who therefore had also committed a serious breach of safety rules. Indeed we were conscious that the Claimant contended that part of the reason for what she considered to be the unfairness of her dismissal was the difference in sanction imposed on Mr

Byrne, i.e. that he was subjected to the imposition of a final written warning. We noted that Mr Byrne had accepted full responsibility for his role in the events on the day, which appeared to have been part of the rationale for Mrs Norton's decision to impose a final written warning, and that that acceptance of responsibility was not forthcoming from the Claimant. We did not consider however that that lack of acceptance of responsibility by the Claimant would have justified the differential in treatment.

173. However, the failure to ensure that the child had his bag with him was the only disciplinary allegation faced by Mr Byrne. By contrast, the Claimant also faced the allegation regarding the use of the other child's inhaler. For completeness, we noted that the Claimant was the subject of a further allegation regarding the failure to ensure that members of her department were aware of the need for the child to have the medical bag with him and took responsibility for that. However, we did not consider that that allegation materially added to the first allegation, i.e. that the Claimant herself had failed to ensure that the child had his medical bag with him. In our view, the second allegation really operated to remove any ability that the Claimant might otherwise have had to avoid being held responsible for the failure to ensure that the child had his medical bag with him by asserting that she had delegated responsibility for that action.

174. Regarding the use of the other child's inhaler however, our view was that that was the most severe of the two effective allegations the Claimant faced. Had the incident during the games lesson not arisen then the fact that the child did not have his bag with him would have had no further consequences, albeit it could still then have been considered that the breach could have caused injury to the child, referencing the example within the School's Disciplinary Procedure. However, when the incident arose, it was the Claimant's actions in directing the use of the inhaler, without parental approval or medical guidance, that more directly involved potential harm to the child. In our view, whilst it might have been open to the First Respondent to have been more sympathetic to the Claimant, we did not consider that its conclusion, that the Claimant's actions amounted to gross misconduct and merited summary dismissal, was outside the range of reasonable responses.

175. We also considered procedural matters, both those that should be applied generally through the ACAS Code and the school's own Disciplinary Procedure, and the specific matters raised in paragraph 23 of the Claimant's Particulars of Claim.

176. With regard to general procedures, we noted that the Claimant was informed of the disciplinary investigation and took part in an investigatory process, which we considered complied with the ACAS Code and the School's own procedure. The Claimant was then notified in writing of the

disciplinary hearing, and was provided with relevant documentation. She was informed of her ability to be accompanied at that hearing, and was indeed accompanied.

177. The Claimant was then informed of the outcome of the disciplinary hearing, following some additional investigations and the reconvening of the disciplinary hearing. The decision was confirmed in writing, and the Claimant was informed of her right to appeal. An appeal hearing then took place, at which the Claimant was again accompanied, and following which further investigations were undertaken. Whilst the Claimant did not then attend a reconvened appeal hearing following those investigations, that was her decision, and we did not consider that there was any procedural deficiency in Mr Gatenby then concluding his investigation without holding any further meeting. Overall, we did not consider that there were any failures on the part of the First Respondent to comply with the terms of the ACAS Code or the School's own Disciplinary Procedure.

178. With regard to the particular contentions raised in paragraph 23 of the Claimant's Particulars of Claim, our views are set out below, using the lettering of the sub-paragraphs.

(a) The investigation and disciplinary processes were indeed conducted by a husband and wife team. This was an unusual state of affairs, but the ownership and management structure of the First Respondent was itself unusual.

We noted that the First Respondent made use of external HR consultants, and considered that it may have been better served by allowing that external consultancy to undertake the initial investigation, leaving Mr and Mrs Norton then free to be decision makers. Whilst we recognised that it may not be appropriate for owners of small businesses to abdicate responsibility for their decisions to third parties, it would not be unusual for actions short of final decision making, i.e. in this case the investigation, to be outsourced.

However, we did not think that the fact that a husband and wife team were involved in these processes took the First Respondent's actions outside the range of reasonable responses. We noted that both Mr and Mrs Norton were steadfast in their maintenance of their position that they were scrupulous in avoiding discussing matters between themselves, and, other than the fact that Mrs Norton heard the Claimant's text to Mr Norton whilst they were travelling together in his car, there was no evidence to suggest any form of discussion or collusion between them. As we have already commented, we did not consider that it would be incumbent upon a small employer to outsource important decisions regarding staff to a third party, or even reasonable to expect that it should. We did not consider therefore that

the fact that Mr and Mrs Norton were a husband and wife team, and that both played parts in the disciplinary process, involved any unfairness.

(b) The subject matter of the parents' complaint about the incident on 28 February 2022 was the subject matter of the disciplinary investigations in relation to Mr Byrne and the Claimant. As we have noted, the First Respondent could have outsourced those disciplinary investigations, but we did not consider that it was unreasonable for it not to do so. Indeed, the fact that a parental complaint had been made, which merited investigation by the School's Principal, contributed to our conclusion that it was not inappropriate for the same person, i.e. Mr Norton, to undertake both investigations.

(c) Whilst Mr Norton did use the word "findings" within his investigation report, they were, in reality, the facts he concluded had occurred once he had completed his investigation. We did not consider therefore that the reference to them as findings had any bearing on the subsequent procedures or on the fairness of the Claimant's dismissal.

(d) & (e) Whilst the Claimant was not provided with documents relating to the disciplinary process relating to Mr Byrne until the appeal stage, this made no difference to her defence. Indeed, we felt that her complaint about that was indicative of the Claimant's lack of understanding or insight into her actions and the case against her.

Whilst Mr Byrne did commit misconduct in failing to ensure that the pupil had his medical bag with him when he was handed over to the PE staff, that did not obviate the obligations on the PE staff, and in particular the Claimant, to then check that the bag was with the pupil, and remained with him or in the nearby vicinity, whilst he was away from the School.

The fact that Mr Byrne had responsibility at an earlier stage, and accepted full responsibility for that, did not detract from the obligations on the Claimant thereafter. The fact that the material relating to the disciplinary proceedings involving Mr Byrne, in which he accepted full responsibility for his actions was not provided to the Claimant, had no bearing on the fairness of the Claimant's disciplinary procedure or the ultimate decision that she be dismissed.

(f) The focus of the Claimant's concerns here was on the fact that Mr Norton had said that the Claimant had sourced another inhaler from another pupil, wiped it down and used it, commenting that those statements were untrue. Strictly, the Claimant's contentions were accurate, in that the Claimant did not directly source the inhaler, wipe it down or utilise it. That was done by one of the teaching assistants, but it was done with the Claimant's knowledge and authority.

(g) The Claimant appears to be referring here to the time given to her to consider the two additional statements prior to the reconvening of the disciplinary hearing on 14 March 2022. Prior to the initial disciplinary hearing on 11 March, the Claimant was given two days' notice. That was to consider Mr Norton's investigation report, which although being made up of 52 pages in total, itself spanned only five pages, with the remainder being appendices. Within those appendices, only some seven pages, the minutes of the investigative meetings, were ones that the Claimant had not previously seen, the remainder being policies with which the Claimant was already familiar. To the extent that the Claimant may have been complaining about the lack of time afforded to her in advance of that first meeting, we did not consider that the time given was unreasonable.

With regard to the reconvened meeting on Monday 14 March 2022, it had been intended that the Claimant would receive notes of the two meetings undertaken on Friday 11 March early on the Monday morning. In fact, the notes were not provided to her until 11.02am and 11.19am respectively. However, those witness statements spanned five pages in total and in reality contained material which covered only just over three pages. The reconvened meeting was due to take place at 12.30pm but in the end commenced at 12.53pm. At the commencement of that meeting the Claimant was asked if she had had a chance to read the statements, and she confirmed that she had. There was nothing to suggest that had the Claimant asked for more time she would not have been granted it.

In the circumstances, whilst the amount of time the Claimant had available to consider the two statements prior to the reconvened hearing was short, she would only have needed a matter of a few minutes to have read the statements, and neither contained material with which she was unfamiliar. In the circumstances, we did not consider that insufficient time was provided to her to consider the evidence.

(h) We noted that the Claimant was not suspended and permitted to continue in her role prior to the Disciplinary Hearing. However we also noted that the ACAS Code provides that suspensions should be as brief as possible, and that the Court of Appeal, in Crawford and another -v- Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, noted that suspension "*should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is*".

The Claimant's particular concern in this paragraph was that Mrs Norton's outcome letter referred to not having trust in the Claimant to safeguard students. That however only arose following the conclusion of the disciplinary procedure, and particularly in the context of the Claimant's lack of acceptance of responsibility in her disciplinary hearing.

The First Respondent contended that it was, "damned if it did and damned if it didn't" with regard to the suspension of the Claimant, in that had it suspended the Claimant she would no doubt have complained about that. We could understand the First Respondent's perspective on that. Overall, we did not consider that the fact that the Claimant was not suspended impacted on the fairness of the dismissal decision.

(i) This largely repeats the contentions of paragraph (f). To the extent that it was alleged that the Claimant herself had administered another pupil's prescribed inhaler then she is correct that that was incontrovertibly wrong. However, whilst the wording used could have been more accurate, the Claimant understood at all times that the allegation was that she had authorised and directed the inhaler to be used. The specific wording used did not impact on the fairness of the dismissal decision.

(j) & (k) We have noted above that we were of the view that the child's Care Plan put an obligation on the Claimant, as the member of staff in charge of the off-site visit, under a particular obligation regarding the medical bag. In our view, the obligation was clear from the Care Plan. However, in any event, due to the Claimant's knowledge of the pupil and the requirements of his Care Plan, and her overarching duty of care, the obligation did not, in our view, need to have been boiled down to a specifically worded policy before the Claimant was fixed with responsibility.

With regard to the PE Handbook and the Offsite Registration Procedure, as we noted in our findings, that document did not bear on Mrs Norton's decision, and only arose at the appeal stage because the Claimant referred to it. As we also noted in our findings, whilst, after some lengthy discussion before us, it became clear that the Claimant added the particular paragraph which made specific reference to the obligations of PE staff after the incident occurred, we could understand how Mr Gatenby logically read the document as indicating that the paragraph was already within the document.

(l) By the time Mr Gatenby referred to the Claimant having been dismissed in meetings with other employees in June 2022, the Claimant had already been dismissed for some two and a half months. It is difficult to see how the Claimant's former colleagues would not have been aware that she had been dismissed by that stage. In any event, Mr Gatenby's referencing of the Claimant's dismissal had no bearing, and could have had no bearing, on the fairness of the Claimant's dismissal.

(m) As we have noted with regard to the Burchell test and the reasonableness of the sanction of dismissal, we did not consider that the Claimant was held to an impossible standard. It was clear that the Claimant had authorised the

use of another pupil's inhaler without seeking the consent of the child's parents or without getting any form of medical guidance. That was in circumstances where, even by the Claimant's own evidence, she did not consider that the child had been particularly adversely affected from the perspective of his asthma. In circumstances where the potential ramifications of the child coming into contact with a substance to which he was allergic were well known to the Claimant, the failure to seek parental consent or get medical advice was, in our view, an obvious one.

(n) & (o) We saw nothing unfair or unreasonable about Mr Gatenby obtaining input from Mr Norton and Mrs Norton on two occasions. He met with both of them separately, and recorded what they told him. Subsequently, when the Claimant saw the minutes of those meetings and made further comments about them, he sought further clarification from them. That was, in our view, an entirely expected and reasonable step. It would then have been open to the Claimant to have discussed what Mr and Mrs Norton subsequently said, and to have discussed any documents they subsequently produced, had she attended the reconvened appeal hearing.

(p) We have addressed the comparison of the Claimant's treatment with that of Mr Byrne at paragraphs 172 and 173 above. We did not consider that the references to other circumstances, or to the lack of any formal procedures, had any material bearing on the fairness of the dismissal decision.

(q) The Claimant did not produce any evidence regarding the termination of employment of other employees following disciplinary proceedings in the previous two and a half year period. None of the additional witnesses, whether those whose statements were, to a limited extent, allowed to be admitted, or those who were not, had themselves been dismissed following disciplinary processes.

(r) We have dealt with the changes to the PE Handbook at paragraphs 144 to 151 above. We did consider that Mr Gatenby's comment about his disappointment that the Claimant's statement had not reflected the truth had any bearing on the fairness of his decision.

<u>Wrongful dismissal</u>

179. As we have set out in our findings, we concluded that the Claimant had committed acts of misconduct, both in the form of not ensuring that the child had his medical bag with him whilst attending the off-site games lesson, and in permitting the use of another child's inhaler. As we also noted, the Claimant's actions fell squarely within the terms of one of the examples of gross misconduct set out in the First Respondent's Disciplinary Procedure.

180. However, regardless of that, the use of the other inhaler had potentially

catastrophic consequences for the child, and its use, without either parental consent or medical guidance, was, in our view, a very serious act of misconduct. In our view, it was, viewed objectively, an act of gross misconduct, and therefore the Claimant was not wrongfully dismissed.

Direct discrimination

181. Two areas of less favourable treatment were contended as having taken place by the Claimant. The first was her dismissal. We have noted above, our view that the dismissal of the Claimant was not motivated by her condition. We did not therefore consider that the Claimant's dismissal was because of her disability for the purposes of her direct discrimination claim. In any event, we considered that a hypothetical comparator, i.e. one in the same circumstances as the Claimant, including her abilities or lack of them, but who did not qualify as disabled, would have been treated in exactly the same way.

182. With regard to the second allegation of less favourable treatment, the incident between the Claimant and the pupil's father occurred without any member of the First Respondent's knowledge. It could not have been foreseen, and therefore could not have been prevented, so we did not consider that the First Respondent had failed to properly protect the Claimant from harassment, even if the pupil's father's actions could be portrayed in that manner.

183. Even if this allegation is viewed prospectively however, i.e. in relation to the action taken by the First Respondent after the incident with the parent took place, the evidence from Mr Norton was clear that he had investigated the matter, concluded that it did not involve harassment, but nevertheless spoke to the parent about the need to treat teachers with respect.

184. Again, even if we had considered that what had happened involved an element of failure or wrongdoing on the part of the First Respondent, we could not see how that could be said to have been because of the Claimant's disability. Furthermore, we again could not see that a hypothetical comparator would have been treated any differently. The Claimant's direct disability discrimination claims therefore failed.

Discrimination arising from disability

185. We have largely dealt with this claim above in our conclusions relating to the reason for dismissal. We did not consider that the reason for dismissal was the Claimant's disability, or anything arising in consequence of that disability, in the form of her absences or her symptoms of anxiety. In the circumstances, the Claimant's claim of discrimination arising from disability failed and fell to be dismissed.

Harassment

186. We have dealt with the specific aspect of unwanted conduct raised by the Claimant as part of her harassment claim in our findings above. As a matter of fact, we did not consider that Mrs Norton had questioned whether the Claimant was capable of doing her job. In our view, the point was raised by Mrs Norton out of concern for the Claimant's wellbeing and the duties that she would have been due to undertake in the immediate aftermath of the hearing had she not been dismissed, and we noted that the Claimant, subsequent to asking what Mrs Norton had meant by the question, engaged further with the discussion.

187. It seemed to us that the nature of that subsequent discussion indicated that the question posed was due to Mrs Norton's concern about the Claimant's health and the work she was due to be doing. We did not consider that it was unwanted conduct. If anything, in fact, we considered that it potentially supported Mrs Norton's contention that she had not made up her mind at that point, and was looking at the Claimant's ability to undertake her role in forthcoming days.

188. Even if we had considered that the comment had amounted to unwanted conduct, we would not have considered that it had the purpose or effect of violating the Claimant's dignity or of creating an intimidating etc. environment for her. We saw nothing to suggest that Mrs Norton had such a purpose in making the comment. With regard to the effect, whilst it was clear that the Claimant, certainly subsequently, perceived that the comment violated her dignity, in the context of the Claimant's text message the day before, and the fact that it was anticipated that she would return to her duties the following week, we did not consider that it could reasonably be said that the comment had had that effect.

189. The Claimant's claim of harassment therefore failed and fell to be dismissed.

Failure to make reasonable adjustments

190. We first had to consider whether the First Respondent had applied or operated the stated PCPs. Ultimately, that was not disputed.

191. Our focus then moved to whether those PCPs put the Claimant at a substantial disadvantage in comparison with persons who were not disabled.

192. The Claimant contended that she was placed at a substantial disadvantage in that she was unable to cope or concentrate on the demands placed upon

her as well as a non-disabled person would have, that she suffered exacerbated symptoms, and was unable to properly prepare herself. However, we saw no evidence to suggest the Claimant was materially disadvantaged in those ways, let alone that she was substantially disadvantaged.

193. The minutes of the various meetings, whilst indicating that on occasions the Claimant required a break, certainly in relation to the appeal hearing, indicated that the Claimant played a full part and engaged fully with what was being put to her. Whilst disciplinary investigations and hearings are inherently stressful, and would no doubt be more stressful for someone with the Claimant's condition, we did not see, from the evidence before us, that the Claimant had any materially impaired ability to focus or concentrate on the proceedings. We did not see that she was materially disadvantaged in comparison with a non-disabled person.

194. We saw no evidence that the Claimant suffered exacerbated symptoms; indeed, the Claimant did not specify what exacerbation of her symptoms occurred.

195. With regard to any inability on the part of the Claimant to properly prepare, we again saw no evidence that that arose to a material extent, let alone to a substantial extent. In particular, we noted that the Claimant's case in relation to the allegations against her was expressed during the course of these proceedings in a very similar manner to the way it was expressed during the internal proceedings. That did not, in our view, indicate that the Claimant had, in any sense, been unable to prepare herself for the meetings and hearings during the disciplinary process.

196. Overall therefore, we did not consider that the Claimant had been put at any substantial disadvantage in relation to the application of the First Respondent's policies in comparison with a non-disabled person and, on that basis, her reasonable adjustments claim failed.

197. For completeness, we considered it appropriate to address the particular adjustments that the Claimant had contended would be reasonable. We dealt with those in order

(a) The Claimant had been specifically informed by Mr Norton, in his letters inviting her to both the investigation meeting and the disciplinary meeting, that, if she had a disability which might affect her ability to participate fully then she should contact him and he would make appropriate arrangements. The Claimant made no such contact and made no such suggestion.

Whilst we recognise that the duty to make reasonable adjustments fell on the First Respondent, without possible adjustments needing to have been

raised by the Claimant, we nevertheless considered that the First Respondent's opening up of the prospect of discussing adjustments put something of an onus on the Claimant to suggest adjustments that she felt would have assisted her. We saw nothing to suggest that, notwithstanding our views on the lack of substantial disadvantage, the First Respondent would have done anything other than to implement any adjustments that were reasonably requested.

(b) We did not consider that this could have removed any disadvantage from the application of any of the PCPs, due to the fact that the disciplinary process had been concluded by this stage. In any event, as we have noted above, we did not consider that the Claimant was publicly escorted from site.

(c) We noted that the investigation meeting and the disciplinary hearing meetings were short, with no session lasting for more than an hour. Where the meeting was longer, in the case of the appeal hearing, several breaks occurred, with one arising at Mr Gatenby's instigation. We did not see that more could reasonably have been done.

(d) The Claimant was absent on the day of her first disciplinary hearing, Friday 11 March 2022, but had returned to work on Monday 14 March 2022. We saw evidence from the First Respondent that cover had been arranged, although it appeared that that had not been communicated to the Claimant and therefore the cover, that would have been provided by the Claimant's fellow PE teacher, was not implemented.

We considered that the First Respondent could certainly have been more proactive in its communication to the Claimant about the availability of cover. However, regardless of that, we did not consider that the provision of cover would have made any material difference to the Claimant, and therefore making the fact of the availability of cover more clear would not have amounted to a reasonable adjustment.

As we have noted, it would have taken the Claimant a matter of a few minutes to read the particular statements, and they did not contain anything which would have been particularly surprising for her. She was asked at the commencement of the reconvened disciplinary hearing if she had read the statements and confirmed that she had. Implicit within that question in our view was that if the Claimant had indicated that she had not had sufficient opportunity to read them then she would have been afforded more time at that stage.

(e) We noted that the Claimant's Line Manager, Ms Price, had been earmarked to provide her with pastoral support, although it did not appear that that support was forthcoming until later in the disciplinary process. We were

satisfied that Ms Price, as she was not involved in the disciplinary process, would have been able to have provided that pastoral support had the Claimant sought it. We also noted that Mr Norton, in his letter inviting the Claimant to the investigatory meeting, reminded her of the First Respondent's Employee Assistance Programme. We considered therefore that the First Respondent had made a reasonable adjustment in this regard in any event.

(f) The First Respondent had gone to the step of obtaining formal occupational health advice in relation to the Claimant on two previous occasions, in 2018 and in 2021. Again, in light of the First Respondent's initial invitation to the Claimant to let them know if any disability the Claimant had might require adjustments, we considered that there was no requirement on it to take further action with regard to medical input unless and until the Claimant had indicated that there was any medical difficulty in her participating in the disciplinary process. She did not, and we did not therefore consider that any reasonable adjustment could have arisen.

(g) Whilst the imposition of a lesser disciplinary sanction could have been an obvious adjustment, we did not consider that it would have been a reasonable step for the First Respondent to take, bearing in mind its managerial prerogative.

(h) Mr Gatenby did attempt to reconvene the hearing, and it was the Claimant who said clearly that she did not wish to meet him again. In our view, had Mr Gatenby suggested that the meeting be reconvened then that again would have been a "damned if you do, damned if you don't" scenario, in that Mr Gatenby could then have been open to criticism for unduly pressurising the Claimant.

(i) We again would not have been satisfied that making an adjustment to the appeal outcome letter would necessarily have involved the application of any of the particular PCPs. Regardless of that, Mr Gatenby was simply outlining the perception he had gathered from what he understood to be the evidence about when the Staff Handbook and the Offsite Registration Procedures documents had been changed. The fact that the Claimant, during the course of this Hearing, following a rather lengthy discussion, had ultimately clarified that that had not been the case, did not detract from the reasonableness of Mr Gatenby's conclusions. The adjustment requested would not therefore in our view have been reasonable.

198. Overall therefore, even if we had concluded that the Claimant had been put at a substantial disadvantage by any of the PCPs, we would either have considered that reasonable adjustments had been put in place, or have considered that the adjustments suggested would not have been reasonable. The Claimant's claim of failure to make reasonable adjustments

would therefore have been dismissed in any event.

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Employment Judge S Jenkins
Dated: 13 July 2023

JUDGMENT SENT TO THE PARTIES ON 14 July 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche