EMPLOYMENT TRIBUNALS

Claimants: **Mrs. Melaine Whittick**

Respondent: **Initio Learning Trust (formally Wimbourne Academy Trust)**

Heard at: **Southampton Employment Tribunal**

On: **16,17,18,19, & 20 October 2023**

Before: **Employment Judge Hay sitting with lay members Ms. Kathy Simon and Ms. Christine Lloyd-Jennings**

Appearances

For the Claimant: Ms Nicholls, Counsel

For the Respondent: Mr Curtis, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The complaint of unfair (constructive) dismissal is not well-founded and is dismissed.
2. The complaint of harassment related to disability, being a failure to implement occupational health recommendations, is well founded and succeeds in part.
3. The remaining complaints of harassment are not well-founded and are dismissed.
4. The complaint of direct disability discrimination is not well-founded and is dismissed.
5. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

6. The following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:
    a. Failing to provide any timeframes for stages in a disciplinary process.
    b. Failing to provide and meet dates for suspension reviews.

REASONS

1. This is a claim for disability discrimination and constructive unfair dismissal brought by Mrs. Melanie Whittick against her former employer, Initio Learning Trust, previously known as Wimborne Academy Trust. It was heard over five days between the 16th and 20th of October 2023 by Employment Judge Hay and two panel members.
2. Mrs. Whittick had been employed as a part-time teacher from 2013 to 2021 in a small rural school of approximately 65 pupils spread over three classes. She was given the role of acting deputy head in 2014. At the start of autumn term in September 2015 she commenced a role as Head of School, offered as a 12-month development role, to be reviewed at the end of 12 months. This was a full-time role and her first as a head teacher. Within a few weeks she was struggling with what she felt was an unsustainable workload and she also had time off sick following emergency medical treatment.
3. Following Mrs. Whittick's return to work, the Respondent received complaints about her from several members of staff at the school and Mrs. Whittick was put on management leave and asked to leave the school premises. She never returned.
4. Over the next six years, the school undertook 2 disciplinary investigations into and considered a grievance raised by Mrs. Whittick. During that same time her mental health deteriorated dramatically and she made several attempts on her own life. In her ET/1 claim form she described her conditions as adjustment disorder, depression and anxiety.
5. It was agreed that Mrs. Whittick’s mental health met the definition of disability in section 6 of the Equality Act 2010.
6. Her complaints were that the school took too long to investigate the allegations against her and that those investigations were flawed in various ways which caused or contributed to her illness. She said during the course of those investigations she had been harassed because of her disability. She said that the incident which resulted in the later of the two investigations and associated disciplinary procedures, arose as a consequence of her disability and she was treated less favourably as a result. Mrs. Whittaker says that when she was ready

to come back to work, the school failed to make reasonable adjustments for her, which made it impossible for her to return, and so she resigned. She says the way the school treated her demonstrated that they wanted to get rid of her and this amounted to a constructive, unfair dismissal.

7. By claim form issued on the 11th of January 2022, she brought claims of constructive unfair dismissal and disability discrimination. These were clarified and then amended at a series of case management hearings between the 14th of September 2022 and the 5th of September 2023. By the time of the final hearing, they included the following:

   7.1 Constructive, unfair dismissal under s98 of the Employment Rights Act 1996

   7.2 Direct disability discrimination under section 13 of the Equality Act 2010

   7.3 Discrimination arising from disability under section 15.

   7.4 A failure to make reasonable adjustments under sections 20 and 21

   7.5 Harassment related to her disability under section 26.

The Evidence

8. We were referred to a hearing bundle of 502 pages, and a supplementary bundle of 329 pages. As explained at the hearing, it was simply not possible for us to read and digest every page of that evidence and so the parties were directed to refer to any specific page or passage they wanted us to read. We also heard from 3 live witnesses over the course of 3 days during which we heard their evidence and observed their demeanour in the witness box.

9. There was a degree of conflict on the evidence. We heard from the Claimant, Mrs. Whittick, and we considered a written statement from her ex-husband Carl Whittick, on her behalf. We found Mrs. Whittick to be an honest witness, doing her best under what she obviously found to be extremely difficult circumstances. She was carefully and sensitively cross-examined by Mr. Curtis on behalf of the Respondent and we found she provided truthful and candid answers. She made sensible concessions of certain points, at times saying to Mr. Curtis "*you know, I'm going to agree with that* (proposition)" or, "*you know I have to say yes* (to some other assertion)". She was right to do that.

10. But there were other times when she stuck resolutely to her memory of events, even where documentary evidence suggested or demonstrated that her memory was incorrect. For example, her recollection about a meeting on the 9th of February

2016 was challenged, including by reference to her own notes about it, in which she had described it as "*a bit of a blur*" in a diary entry we saw. But in evidence, she remained adamant that she could now remember that meeting as if it was yesterday. She went on to insist she had been told she would be dismissed if she spoke to anyone about that meeting, explaining that was why she left the school "terrified" because she was not permitted to speak to anyone. She also told us that she had tried to contact a trade union representative about her situation, but they hadn't called her back until after that 9th of February meeting. Those things cannot both be right. We cite that as an example of how even doing her best Mrs. Whittick's evidence, although genuinely, and even bravely, given to us at times was nevertheless sometimes confusing and contradictory.

11. We also heard from Mrs. Elizabeth ("Liz") West and Ross Bowel, the CEO and Director of Resources respectively of the Respondent Trust. At times we found their evidence problematic. Even making allowances for the natural stress involved in giving evidence and the fact they were dealing with events from some time ago, there were times when we found both reluctant to answer and to give their agreement to things which were obvious.

12. For example. Mrs. West was asked about her meeting with the three members of staff, which she says was the catalyst for action being taken against or about Mrs. Whittick. She was asked, perfectly reasonably, whether she had asked why those teachers were approaching her so soon after she had been approached by the school administrator, Beth Middlebrook. This was in response to a suggestion that Mrs. West had been influenced by what Beth Middlebrook had said. The same question was asked in a number of ways and Mrs. West was extremely reluctant to answer it. Our note of it reads "D*id you explore why they came to you then?" "They requested a meeting with me off-site and because they had concerns.*" But she didn't or wouldn't answer the question she had actually been asked. Eventually she said yes telling us "*I did explore with them why then? And what they said is in the meeting notes. I didn't ask why they were coming to me with this now*". We found it hard to tell if Mrs. West was being deliberately evasive, genuinely didn't understand the questions even when they were straightforward questions requiring a yes or no answer, or whether Miss West was overwhelmed and struggling to think. In another example, we asked "was Mrs. Whittick ever actually reviewed? Did you explore why those teachers were coming to speak to you then?" and she could not simply tell us yes or no. When asked about events immediately prior to a meeting on the 5th of February 2016, we did not get a straight answer; she added further important details about when she spoke with HR; her answers changed; she kept repeating "HR advised me" with little or no recognition of her part in what happened at that meeting. We therefore found Mrs. West's oral evidence unreliable.

13. Similar criticisms can be made of Ross Bowel's evidence. We recognise that he was sometimes being asked about decisions not directly made by him and had a natural defensiveness on behalf of his employer. Nevertheless, he too sometimes struggled to provide an answer to a straightforward question or to accept perfectly reasonable propositions being put to him. For example, he was asked about a 2019 incident in a pub involving Mrs. Whittick and her sickness which by then had been long-term, and whether they might be connected. He was asked "do you accept that the Respondent has never considered whether those two things were connected? Did you ever consider that they were?" and he simply could not answer for several minutes before eventually, having been asked by both Miss Nichols and Judge Hay, he said "*I was aware of what had gone before, so to that extent, yes*". But the delivery of his answer made it clear that his actual answer was "no".

14. Given the apparent limitations and unreliability of the oral evidence, we placed greater weight on the contemporaneous documents.

Findings of fact

2015

15. The Claimant was originally employed as a class teacher at Witchampton school. She was subsequently seconded to the role of Deputy Head Teacher in 2014. In September of 2015, she started in a new role of Head of School. This was described as a "development role" to be reviewed after 12 months. It was not a permanent full-time appointment because it was subject to the review. By November Mrs. Whittick feeling overwhelmed but the number and range of tasks which she felt were her responsibility, and was asking for help from Mrs. Elizabeth West, who was the CEO of the Trust and Mrs. Whittick's line manager. Some help was arranged including additional time for the caretaker, and another Head Teacher to mentor her and help her adjust to the new role. She had a period of absence towards the end of the Autumn term in 2015 which was caused by emergency medical treatment.

2016

16. In January 2016 Mrs. Whittick had a performance review with Mrs. West. This was on 27 Jan. Although we don't have a record of it, it was agreed that the feedback Mrs. West gave Mrs. Whittick in that meeting was positive. Also on that same day, Mrs. West spoke with Beth Middlebrook, the school administrator, who raised concerns about Mrs. Whittick.

17. There was a dispute about when this conversation with Ms. Middlebrook took place and whether it was before or after Mrs. Whittick's performance review. Mrs. Whittick asserted through questions asked by her Counsel, that her performance review took place at 5pm, in which case the review was after Mrs. West had spoken to Ms. Middlebrook. Conversely Mrs. West, although she couldn't remember when she spoke with Ms. Middlebrook, said she did not recall speaking with Mrs. Whittick after she had heard from Beth Middlebrook. This is an important point to Mrs. Whittick because she has said in various of the documents we have looked at that she cannot believe her life was ruined "*on the word of the school administrator*."

18. Mrs. West said that this conversation did not change her opinion of Mrs. Whittick, and although she informed HR about it their advice was simply to "monitor" the situation. In giving this evidence Mrs. West gave the appearance that Beth Middlebrook's comments were not particularly significant, and Mrs. West said the catalyst to taking action was the fact that 3 other teachers came to see her about Mrs. Whittick. But this evidence was undermined by the emails between Mrs. West and Sean Bennett of Dorset County Council HR, including one she caused her PA to send on the day she received Beth Middlebrook's comments. In that email Mrs. West was asking Mr. Bennett for an urgent response. We therefore don't accept Mrs. West's assertion that Beth Middlebrook's comments made no difference, because the contemporaneous emails show they clearly did.

19. We spent some time trying to decide which happened first (the review or the conversation with Beth Middlebrook) but we could not and we concluded that ultimately it doesn't take our decision making any further.

20. We do find that Beth Middlebrook held significant influence at the school. She was described as "*very opinionated*" and "*not easy to work with on occasions*". Mrs. Whittick had described her as running the place. Beth Middlebrook's influence was evidenced by the fact that when asked by the Chair of Governors for information about Mrs. West's visits to the school Beth Middlebrook "refused" to give it to him, because she thought it was inappropriate. Although Mrs. West said in evidence she would not have had a problem with the Govenor being given the information he asked for, she did not overrule Beth Middlebrook's unilateral

refusal of a perfectly reasonable request made by someone with a legal and moral responsibility to ensure the school was being run properly.

21. The next thing that happened was Mrs. West had a meeting with three other teachers from the school. Each of them made allegations against Mrs. Whittick ranging from her child asking staff to brush her hair in the mornings to potential safeguarding failures (the most serious). All of the teachers spoken to by Mrs. West expressed doubts about Mrs. Whittick's ability to fulfil the Head Teacher role. In the hearing Mrs. Whittick was asked her view of some of the allegations raised by the teachers in that 1st February meeting, and she rightly conceded that several of them were sufficiently serious to justify the school investigating.

22. Following that meeting Mrs. West again contacted HR and the emails show she was becoming increasingly concerned to do something about Mrs. Whittick and to do it quickly.

23. On 5 Feb 2016 Mrs. West and Mrs. Whittick had a meeting at which Mrs. Whittick was placed on Management Leave with immediate effect. This was in breach of disciplinary policy which says that the initial meeting should involve telling the employee nature of the alleged misconduct and then making a decision about suspension or Management leave.

24. Mrs. Whittick was expecting to see Mrs. West on 5 Feb but had no idea that there was a plan or intention to place her on Management Leave. We find that the decision to do that had been made in advance because we accept Mrs. Whittick's evidence of Mrs. West as "*reading from a script*". Further Ross Bowel who was in attendance told us that **"***I was asked to come along with Mrs. Whittick when Mrs. West was going to put her on Management Leave***".** That indicates to us that Mrs. West had already decided that is what would happen. That was a breach of the Respondent's policy.

25. Mrs. West said that was done on the advice of HR but it was clear from later emails that she was pushing for action from HR even though they were warning her of need to get these early stages right. She did not do so. HR provided Mrs. West with a letter to be given to Mrs. Whittick, and while this may have been sent

to Mrs. West after she had held the meeting that does not demonstrate that the decision had not been made beforehand.

26. Mrs. Whittick says she was told “not to speak to anyone”. We don’t accept that is what happened because of the content of the letter which followed, and it being inherently unlikely. We do accept that might be how she interpreted it but we are not satisfied that is what was said. The evidence from Mrs. Whittick was that she couldn’t talk “to anyone” but the letter made it clear she should not discuss the investigation with members of staff or pupils at the school but the letter itself said nothing about discussing it with anyone else. It also said that she could have social contact with people from the school provided she didn’t discuss the issues relating to her management leave. Further she was specifically referred to her Trade Union for advice, which can only mean advice in relation to these issues, and a counselling service for support if she felt she needed it.

27. 9 Feb 2016 was described by the Respondent as the initial meeting, although that means the status of the meeting on 5 Feb is unclear. Mrs. West cannot have it both ways: either 5 Feb was the initial meeting or 9 Feb was. In either event Mrs. Whittick was not given any details of any allegations against her but was given “headings”. Mrs. West says she told Mrs. Whittick the issues were with conduct AND capability. Mrs. West seemed to fail to understand the difference between these two concepts; one relates to something an employee has done “wrong” and the other to an employee’s inability to do their job. The letter itself gives 3 headings all of which are then described as “*serious allegations which if proven could amount to a breach of trust and confidence and could constitute gross misconduct*”. It made no mention of Mrs. Whittick’s capability.

28. None of the details of any alleged misconduct were given to Mrs. Whittick but she was told she would be interviewed about them even though she didn’t know what the specifics were she was supposed to answer to or account for. Mrs. Whittick asked for specific details of the allegations in that meeting and was told by Mrs. West that they would be provided at the investigation meeting scheduled for 25 Feb. That means Mrs. Whittick could not properly prepare for that investigation meeting in advance, which she was entitled to do.

29. The applicable policy states that following an initial meeting an employee would be sent a letter setting out the information discussed and “the details of the

investigation". We interpret that as meaning sufficient details to enable the employee to respond to the allegations in that investigative meeting, which in this case was the meeting scheduled for 25 Feb, and not just the logistics for it. These details regarding the allegations the meeting were to investigate were not provided to Mrs. Whittick in advance. This too amounts to a breach of R's policy.

30. The same policy says that an employee will be provided with a point of contact while absent from work. The letter sent to Mrs. Whittick did tell her that she could contact Mrs. West with any questions but did not make it sufficiently clear that Mrs. West was her "point of contact". This was a breach of the policy and of the employment contract but it could have been corrected at the meeting on 25 February so at that stage was not particularly significant. It was to become more significant in the weeks, months, and years that followed.

31. That letter did however, refer to counselling services and support that was available to Mrs. Whittick through her employment, so it is wrong to say she was not offered any support.

32. The decision to place Mrs. Whittick on Management Leave with no substantive explanation and a relatively lengthy wait of 2 weeks for a further meeting had a significant impact on Mrs. Whittick. Within days she had attempted suicide. Thankfully, she was unsuccessful.

33. The meeting scheduled for 25 Feb didn't take place because Mrs. Whittick was off sick with "stress" (according to the agreed chronology) from 19 February 2016. We don't have the sick note but it was apparently received on 24 Feb, the day before the investigation meeting was scheduled.

34. Next day Mrs. Whittick received a request for keys and asking about the location of safeguarding records via an email from Mrs. West. This was a reasonable request from Mrs. West but it was insensitively communicated given that by then Mrs. West had placed Mrs. Whittick on Management Leave, told her she was facing an investigation and potentially disciplinary proceedings, and knew Mrs. Whittick had been signed off sick with stress. The content of Mrs. West's letter was brutal because it lacked any empathy. Even recognising this was a professional relationship and not a personal friendship, we would still have

expected some acknowledgment of Mrs. Whittick's illness at that time. The tone of this correspondence would indicate to Mrs. Whittick that she was not a valued employee and this was how she interpreted it.

35. It's agreed that also on 25 Feb, the school sent a letter to parents and carers informing them of Mrs. Whittick's absence. Two issues arose about this: the content of the letter and the fact it was given to Mrs. Whittick's son.

36. The content of that letter was factual and open-ended, reflecting the reality that the school did not then know how long Mrs. Whittick might be absent, but reassuring parents that there was still leadership in place. We cannot see offence in the phrase "for the foreseeable future" which was used and which accurately reflects the fact that the school did not know how long Mrs. Whittick would be absent for. We asked Mrs. Whittick what she might have suggested as an acceptable alternative form of words and she could not articulate any. We find was nothing wrong with the wording of that letter.

37. It wasn't challenged by Mrs. Whittick that the practice of sending letters home via the pupils was standard practice for communicating with parents of children from the school. At the time it would have been difficult to single Mrs. Whittick's son out by giving the letter to everyone but him and it might have been detrimental to him to be treated differently. With hindsight we can see how that could have been managed better, perhaps with a warning to Mrs. Whittick that the letter was coming, but that doesn't mean that sending this letter home was inappropriate.

38. Next day, 26 Feb, Mrs. Whittick's brother, Mr. Moore, attended the school and informed them that Mrs. Whittick had been admitted to a psychiatric unit. There is no evidence that Mr. Moore specifically said Mrs. Whittick had tried to take her own life, and that was the reason for her hospital admission. Given the sensitivity of that information we do not feel we can assume that he would have mentioned suicide specifically. We do note that the Respondent accepts that from this date it knew that Mrs. Whittick was "seriously unwell" (as per chronology).

39. On 8 March 2016 the school received letter from Mrs. Whittick's treating clinician, psychiatrist Dr Jefferey who had diagnosed Mrs. Whittick with adjustment disorder. This letter did not state Mrs. Whittick had attempted suicide

in the period since being placed on Management Leave. He acknowledged Mrs. Whittick's awareness of the employment process which had started and that Mrs. Whittick found thinking about or engagement in it "d*emanding activating and overwhelming"*. He recommended "*less psychologically impactful means by which the process could be undertaken*" and suggested conducting the process by email or correspondence. This illustrates that Mrs. Whittick was at that time willing and potentially able to participate in the investigation and possible disciplinary process.

40. However that's not what the Respondent chose to do. Instead it elected to seek an Occupational Health (OH) assessment before continuing. Although the Trust wrote to Dr Jeffery to explain that referral was to get their views on Mrs. Whittick fitness to attend any interview, that was not what they communicated to her. She was told that the Occupational Health referral was in relation to her "current absence from work". Further the Trust's response to Dr Jeffery disregarded the suggestions contained in his letter.

41. On 31 March 2016 Mrs. Whittick tried to move things forward by writing to Ed Bell, Chair of Trustees, and indicating that she would co-operate with Occupational Health. In that letter she also mentioned receiving an invite from Mrs. West to a 1-2-1 meeting and asking "respectfully" that contact from Mrs. West be stopped. The Trust responded by saying it would suspend access to Mrs. Whittick's work email accounts. This is a good example of the Trust doing something they thought might be helpful but which failed to consider how it could be perceived and have a punitive effect on Mrs. Whittick. This clash of perspectives is a feature of much of the correspondence between the parties in this case.

42. By 28 April 2016 Mrs. Whittick had instructed solicitors, Gales, who wrote to Respondent on that date. This was a significant moment because of the content of that letter which explained that since the meeting on 5 Feb 2016, Mrs. Whittick had tried to end her life. It stated that Mrs. Whittick was still unaware of the detail of the allegations and asked for them. It also stated that at that time Mrs. Whittick was unfit to attend work or to attend any meetings but did not say that Mrs. Whittick could not participate in the investigation proceedings at all. Her solicitor told the Trust that Mrs. Whittick "f*eels unable to recover until such time as she understands the nature of the allegations made against her*". This was the first

time that the impact of the non-disclosure of the detail of the allegations against her had been cited as having a direct impact on Mrs. Whittick's recovery.

43. Those details were provided to Gales on 19 May 2016, some 3 weeks later, in a letter from the Trust's solicitor. That means the period between Mrs. Whittick knowing allegations had been made, and the specifics of those allegations being provided to her was Feb – May; a period of 3 or 3.5 months. This was an unreasonable delay. Mrs. West was aware of the details at the beginning of February and they should have been provided at the meeting on 9 February. The failure to do so was a breach of the Trust's own policy.

44. In Mrs. Whittick's absence it was necessary to appoint temporary Heads of School. The first of these, Ms. Smithson, was appointed in June 2016 and her appointment was described to parents as a "secondment". She handed over to Ms. Bolton who was to fufill the role "for as long as required". We find there is no other realistic way to describe those appointments and there is nothing in that use of language to indicate to Mrs. Whittick or to anyone else that the appointments were permanent or that Mrs. Whittick would not be returning to her post.

45. The school also covered Mrs. Whittick's name with gaffer tape on the board outside the school premises. We acknowledge this caused considerable distress to Mrs. Whittick, although we are bound to say that legally it had no real significance.

46. On 30 June 2016 there was a parents evening at the school. It was alleged by Mrs. Whittick that one of the other employees, Ms. Lemon, "announced" to attending parents that Mrs. Whittick would not be returning. There was no direct evidence of this although there was an email from some attendees reporting they had heard it which was included in the bundle. Mrs. West explained that she had been present to "open" that meeting and in doing so had introduced Mrs. Bolton as the "Acting Head Teacher". Coming from Mrs. West at the early part of the evening this would have had more weight than any passing comment from another employee who was not in a leadership role. Whilst we accept that hearing about this would have upset Mrs. Whittick when she became aware of it we do not find that this amounts to the Respondent informing parents that Mrs. Whittick was no longer employed.

47. In Sept 2016 Mrs. Whittick contacted the Chair of Trustees, Ed Bell, via his private email address and asked to meet. His response was sympathetic but did not accede to her request.

48. There was then an 8-month gap with apparently no communications between the parties. Mrs. Whittick was asked whose fault that was and she explained she had experienced a number of personal difficulties. She said she didn't blame the Respondent for that period of inaction and so neither do we.

2017

49. Next significant contact was in May 2017 when Mrs. Whittick again emailed Ed Bell describing to him her "*roller coaster of emotions*". He forwarded that to Ross Bowel who appears to have sent it to the Trust's solicitors who emailed Mrs. Whittick's solicitors. We know this because those solicitors, Gales, replied to the Respondent's solicitors saying "many thanks for your email". Mrs. Whittick's solicitors said that there would be an update, but there wasn't.

50. The next communication was an email from Mrs. Whittick's solicitors in Sept 2017. On 28 Sept 2017 they finally requested the disciplinary be reconvened. That email made no reference to Mrs. Whittick's health but made it clear that she wanted an opportunity to respond to the allegations that had been made against her. The Respondent's lawyers responded immediately by email dated 29 Sept. Shortly after, Mrs. Whittick was again signed off sick for a further 3 months. Understanding that Mrs. Whittick was now capable of participating in the investigation and was anticipating a return to work the Respondent then arranged for an Occupational Health assessment to be completed with a referral on 17 October 2017. During the period between Feb 2016 when Mrs. Whittick went on Management Leave and Sept 2017 when her lawyers wrote asking for the disciplinary process to restart, the Respondent had sought her consent to an Occupational Health assessment 5 times. She finally underwent the assessment in Oct 2017, with the report being provided to the Respondent in November 2017.

51. That report documents that by then Mrs. Whittick was "*keen to attend a meeting to discuss the alleged misconduct issues, and keen to return to work*." It also acknowledges that "i*t will be difficult to facilitate this*". The report suggested a series of adjustments.

52. In relation to the disciplinary it suggested it be convened as soon as possible; on neutral ground; with questions provided in advance to allow her time to formulate her answers.

53. In relation to her return to work it suggested meeting to explore bullying allegations made by Mrs. Whittick about Mrs. West; stress risk assessment; possible redeployment to another school; possibly a less demanding position.

54. Within 2 weeks, by 28 Nov 2017 the Respondent had appointed an independent investigator and 3 weeks after that he met with Mrs. Whittick. The investigator chose to meet with Mrs. Whittick first, and thereafter to interview other staff.

55. During part of that period from Dec 2017 to Jan 2018, without prejudice discussions were held to see if the situation could be resolved. They were unsuccessful and so the investigation process continued with other staff members being spoken to in Feb and March 2018.

2018

56. In March 2018, sadly, Mrs. Whittick made another attempt on her life which she communicated to John Dickson the new chair of Trustees. Emails provided to us indicate that in March Mrs. Whittick had indicated she wanted to raise a grievance against Mrs. West, and Mr. Dickson was replying to her. In responding to him she informed him of her latest suicide attempt. At that time the investigation report was being considered and prepared, but Mrs. Whittick did not know that, and had not been told what was happening or when she might expect an outcome. In the period between her interview regarding the allegations in Dec 2017 and receiving the outcome in June 2018, she made three further suicide attempts.

57. The investigation report was completed in May 2018, a period of 8 months since Mrs. Whittick had requested it be re-started. The outcome of it was sent to Mrs. Whittick on 20 June 2018 as was agreed by the advocates at the start of the hearing.

58. The total time taken from the first allegation being raised to the conclusion of the first investigation and disciplinary process was 27 months. It concluded with findings that Mrs. Whittick had not committed any disciplinary offence, although it raised the possibility of capability matters which it proposed dealing with as part

of her on-going development. Considering she was appointed Head of School specifically IN a development role and had raised with her Line Manager Mrs. West that she was struggling, the fact she may have needed capability support and development is not surprising.

59. During the period Mrs. Whittick was away from the school various others had been appointed as temporary or acting Head of School. All of these appointments were communicated to the parents and carers of children of the school via letters and newsletters. Some of these made clear that the appointments were temporary, using the words “for as long required” in a letter in June 2016 and “Acting Head of School” in July newsletter.

60. At the same time the school had the exterior board repainted with the names of the interim leaders described as “Head of School”. Again, although we acknowledge the pain this may have caused Mrs. Whittick that action did not signify that her exclusion was or would become permanent.

61. When the outcome of investigation was sent to Mrs. Whittick on 20 June 2018 the Respondent made what we consider reasonable enquiries about Mrs. Whittick’s return to work and a further Occupational Health referral to facilitate that. Their letter refers to an email from Mrs. Whittick in which she had indicated she might feel able to return in Sept 2018. The Respondent said the purpose of the Occupational Health report was to determine what support the Trust could provide to enable Mrs. Whittick to return.

62. That letter made no reference to Mrs. Whittick returning in any capacity other than as Head of School. It did raise the developmental needs which were identified in the investigation and said these would be managed by her Line Manager. That was problematic because her Line Manager was Mrs. West, about whom in the same letter, the Respondent acknowledges Mrs. Whittick had made a complaint. On the face of it this is unreasonable, however the letter also says the will be a further Occupational Health referral and we can see from the subsequent assessments that part of that referral was considering how to manage the relationship between Mrs. Whittick and Mrs. West.

63. The letter also told Mrs. Whittick that the Trust would carry out their own review of the issues about Mrs. West that Mrs. Whittick had raised, whether or not Mrs. Whittick raised a formal grievance, and invited Mrs. Whittick to document all her complaints. Mrs. Whittick did so, and according to the chronology she did raise a grievance on 29 June 2018.

64. 2 weeks later on 9 July 2018 the Respondent appointed external HR consultant Mrs. Duckett to investigate the grievance. Mrs. West was interviewed about it on 12 July 2018. Mrs. Whittick asked for a face-to-face meeting with Natasha Duckett but that request was refused. Ms. Duckett did have a detailed 15-page account from Mrs. Whittick to consider. That document was a narrative document from Mrs. Whittick in which she was able to raise and describe any and all complaints she had against the Trust or any individual within it. It was comprehensive.

65. Ms. Duckett completed her grievance report in October 2018. She upheld some of Mrs. Whittick's complaints in full and some in part but most she found were "unsubstantiated". Ms. Duckett did make a number of recommendations.

66. She placed a clear emphasis on obtaining further advice from Occupational Health to assist in managing both Mrs. Whittick's return to work and her on-going working relationship with Mrs. West. She also highlighted that the Oct 2017 Occupational Health assessment had raised the possibility of Mrs. Whittick returning to work in a less demanding role, and Ms. Duckett recommended again that this should be explored with or by Occupational Health.

67. Ms. Duckett concluded there had been a failure or breach of the Trust's policy because no "nominated link" had been provided for Mrs. Whittick until 2017, some 18 months after she had been placed on Management Leave. We agree with this assessment. Although in the original letters which placed her on Management Leave Mrs. Whittick was told she should contact Mrs. West with any questions, thereafter there was no single point of contact. The policy document says that "*the role of the link member of staff is to advise the employee of developments at their school*". There had been a number of significant developments at Witchampton during the period of Mrs. Whitticks' absence, including the necessary appointment of interim leadership, but none of this was communicated to her, save in the letters sent home with her children in Summer term 2016.

68. On 20 December 2018 Mrs. Whittick acknowledged the grievance report in an email sent via her solicitors. By now she was no longer represented by Gales but had recently instructed Ellis Jones. Mrs. Whittick made various recommendations to enable her return to work and stated she was happy to attend a further Occupational Health assessment. This email was significant because it

demonstrated that Mrs. Whittick was actively seeking a return to work at this time. Mrs. Whittick was not willing to attend mediation with Mrs. West.

2019

69. That position had changed by the new year because on 9th Jan Mrs. Whittick wrote via her solicitors that she was now ready to return to work and was "*open to and indeed fit to engage in mediation*". The Trust responded saying that Mrs. Whittick could not return until after the Occupational Health assessment which they describe as "paramount". They said that the assessment would consider any potential adjustments to Mrs. West acting as Line Manager for Mrs. Whittick.

70. The assessment took place on 12 February 2019. Mrs. Whittick had been sent vacancies within the Trust in the interim. This was in line with a request she had made in the email of 9 Jan.

71. By 21 March the Respondent had and was considering the third Occupational Health report. The recommendations it made were: phased return to work; an alternative role within the Trust; and different line management. The report also mentioned that Mrs. Whittick had her own suggestions and so the Respondent enquired what these were. By this time there was no medical reason why Mrs. Whittick could not come back to work and the Trust had a set of proposals it could have started to implement. By then she had done everything they asked her to, had complied with their requests, and had indicated her desire and fitness to return. Asking Mrs. Whittick for her suggestions at that moment operated as a barrier to her successful return to work, but there is no real explanation for it.

72. Mrs. Whittick provided these suggestions, again via her solicitors, on 10 May 2019.

73. In the meantime that process was disrupted by an incident on 13 April 2019. On that evening Mrs. Whittick visited a pub with her family. Present in the pub was another member of staff from the Trust. Attempts at conversation descended into a verbal altercation in which Mrs. Whittick became agitated and overwrought. The police were called and Mrs. Whittick was arrested.

74. The Trust had a specific policy addressing criminal offences and cautions outside of work and Mrs. Whitticks employment contract at clause 20.2 states that "*any relevant past, present, or future court convictions, bindovers, cautions and any judgements or investigations pending, your employment may be terminated*". The

Dept for Education also has a set of “Teachers Standards” which reflected the same approach.

75. Mrs. Whittick did not report this incident to the Trust, but another employee of the Trust did. Almost immediately the Trust asked via Mrs. Whittick’s solicitors for details of that incident. They were not forthcoming from Mrs. Whittick. She did send the email on 10 May setting out her suggestions for a return to work, which show that Mrs. Whittick was actively engaging in issues relating to her employment and her relationship with the Respondent in the time shortly after her arrest.

76. The Respondent replied to that 10 May email addressing some of the issues about a return to work but reiterating a concern that there had been no reply to the correspondence asking about the pub incident. They say that while those questions are unanswered they could not progress steps to return Mrs. Whittick to work. This letter indicates there were two processes going on in parallel: steps to return Mrs. Whittick to work, and also an enquiry (at that stage) about the incident in the pub.

77. At the end of May 2019, Mrs. Whittick’s solicitors finally provided some detail of the criminal allegations against Mrs. Whittick and said Mrs. Whittick would deny them. At the beginning of June, the Respondent completed a “decision to suspend” checklist, but Mrs. Whittick was not formally suspended until 17 June AFTER a representative of the Respondent had attended the Magistrates Court and heard details of the criminal allegations.

78. In that suspension letter dated 17 June 2019, Ross Bowel informs Mrs. Whittick that Mark Legge had been appointed to investigate in line with the Trust’s disciplinary policy. Mr. Bowel specifically says “*your suspension does not constitute disciplinary action and does not imply any assumption that you are guilty of any misconduct”*. The letter also told her “*you must not communicate with any of our pupils, employees, parents, governors, contractors or customers, save for your usual social contacts and a named contact*”. This reference to a “named contact” relates to the policy of providing a link member of staff, as per Clause 6.5 which had not been provided previously and was not provided now. Although Ross Bowel says in that letter that Mrs. Whittick can nominate a member of staff the policy says one should be provided for her. This was a further breach of that policy.

79. Mrs. Whittick’s suspension was sporadically reviewed over the next few months but remained in place.

80. On 23 August 2019 Mrs. Whittick's trial took place. A representative of Respondent again attended and provided a full note of the hearing to the Trust. At that hearing part way through the evidence, Mrs. Whittick changed her plea to one of Guilty to a Public Order offence (using threatening abusive or insulting words or behaviour or disorderly behaviour with intent to cause harassment alarm or distress contrary to section 4A of the Public Order Act 1986). Other allegations of assault and criminal damage were dropped. Mrs. Whittick received a 12-month conditional discharge and two restraining orders were imposed.

81. On 9 September the investigating officer Mark Legge wrote to Poole Magistrates Court seeking an official certificate of conviction. Mrs. Whittick's solicitors wrote to Respondent on 16 Sept 2019 saying Mrs. Whittick was distressed by the delay and asserting that the outcome of the criminal proceedings would not show on a Disclosure and Barring Service (DBS) check.

82. Mr. Legge wrote to Mrs. Whittick (not via her sols) asking a series of questions relevant to his investigation on 19 September 2019. On 16 October 2019 Mrs. Whittick's suspension was reviewed again. The Respondent also indicated that it was willing to consider reasonable adjustments to enable Mrs. Whittick's participation in the investigation process including the provision of written responses to pre-prepared questions which had already been sent.

83. Those questions were sent to Mrs. Whittick again on 17 October 2019. In this letter, Mr. Legge specifically noted that without Mrs. Whittick's input he would proceed and base his findings on the information available to him. He clearly did not consider himself prohibited from concluding an investigative process by a lack of input or account from Mrs. Whittick. He also says he would require an up-to-date DBS check.

84. Mrs. Whittick provided a detailed written account on 5 November 2019, via her solicitor. She continued on suspension for the rest of that year, and into Spring of 2020.

2020

85. In spring 2020 the UK experienced the Covid pandemic. No real progress was made with the investigation in this period. In July 2020, Mark Legge was replaced with Jo Blair, an independent HR professional brought in to conclude the investigation and disciplinary process. In August Mrs. Whittick provided an up-to-

date DBS certificate. In the same month Jo Blair concluded her investigation report and determined that Mrs. Whittick had a disciplinary case to answer.

86. It was agreed that Jo Blair went beyond her remit as an investigating officer and made determinations and even recommendations including the Trust considering whether Mrs. Whittick is suitable to remain in her current role as Head of School. In compiling her report Jo Blair made only a passing reference to Mrs. Whittick's history of mental health issues and long-term absence from work. She did not refer to it as a disability.

87. Following that report a disciplinary hearing was convened. Disruptions and difficulties caused by the pandemic made this difficult and the disciplinary hearing did not take place until Nov 2020. The pandemic also meant hearing arrangements had to be changed, and this included the individuals on the panel, but not the constitution of it. Mrs. Whittick had no compliant regarding people on the panel telling us "*I was concerned that one was a Policeman and another was HR but actually they were lovely people*".

2021

88. Following that disciplinary hearing Mrs. Whittick was issued with a "first and final written warning" for gross misconduct. A full and detailed letter explaining the decision was sent on 14 Jan 2021. In that letter the Trust explained that they had considered mitigating circumstances and evidence put forward on Mrs. Whittick's behalf, including her history of mental health, her history with the Trust, and with the other person involved in the pub incident.

89. Mrs. Whittick was advised of her right to appeal. She did not do so.

90. In February 2021 discussions began again between Mrs. Whittick and the Respondent about a return to work. Despite it now being nearly 2 years since her last Occupational Health assessment, there was no suggestion of an updated one being required. Nor was any enquiry made of her to check that despite the mental health issues which the disciplinary panel had taken into account, she was fit to return. We find this surprising given the importance the Respondent had previously placed on having up to date Occupational Health reports before a return to work.

91. These discussions included the Respondent informing Mrs. Whittick of various roles and posts to which she could apply if she wished to. During this period she remained on paid leave.

92. She was told on 3 March 2021 that her role as Head of School was available to be returned to, although the Trust had some concerns about an IMMEDIATE return to that position. They suggested a return to the role of class teacher, which was in line with an Occupational Health recommendation which they said they had considered. The return in a teacher role was to be supplemented by other adjustments, including in relation to her salary.

93. Mrs. Whittick replied to that via her solicitors indicating that the suggestion had again impacted her mental health. Mrs. Whittick's solicitors sent a detailed list of questions addressing the content of the 3 March email. These were replied to in detail in May 21.

94. One of the specific questions was whether the option of returning as Acting Head of School at Witchampton was being offered to Mrs. Whittick. In fact her role had not been "acting" head, it was a developmental role, akin to a probationary headship (as confirmed with the parties in the hearing). The answer to that query was that developments within the Trust had superseded that question. By then the Trust had grown and there was some restructuring going on, including the insertion of an additional layer of management (according to Mrs. West's oral evidence). Mrs. Whittick was advised that there were now permanent appointments (to Head of School) becoming available and she was invited to apply, and with the possibility of reasonable adjustments to assist her in that recruitment process.

95. The chronology notes, and so we accept, that on 10 June 2021 the Respondent wrote to Mrs. Whittick specifically asking if she had any queries in relation to applications for any vacancies. There is no evidence of any response from her and so we infer that there was none.

96. On 24 June the Respondent wrote to Mrs. Whittick confirming that her previous role as Head of School was ending because a permanent Headteacher had been appointed in the recruitment exercise she had previously been advised about. As a result, Mrs. Whittick would return to her substantive post as Teacher at Witchampton from 31 July 2021, on the same terms as preceded her secondment to the Deputy Head role in 2014, and the developmental Head of School role in 2015.

97. She resigned the next day.

98. Her last day of employment was 31 August 2021. Her final months salary payment was commensurate with the salary payable for teacher role to which she had reverted.

The Law

99. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the Equality Act"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the Equality Act. The Claimant alleges direct disability discrimination, discrimination arising from a disability, failure by the Respondent to comply with its duty to make adjustments, and harassment.

100. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the Equality Act. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.

101. One of the acts of discrimination alleged is "constructive dismissal". Section 95 of the Employment Rights Act 1996 addresses the circumstances in which an employee is dismissed. The relevant for this case is section 95.(1) (c) which states: "*For the purposes of this part, an employee is dismissed by their employer if the employee terminates the contract under which they are employed with or without notice, in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct*. This is known as constructive dismissal.

102. A dismissal may amount to a constructive dismissal if the employer acts in direct breach of a fundamental term of the employment contract. The law writes a term into every employment contract which requires "mutual trust and confidence" between the employer and the employee. If either party breaks this implied term of mutual trust and confidence then the other party is, or maybe, entitled to treat the employment contract as at an end. An employee must show, on the balance of probabilities, that the employer's conduct towards them was so bad that it fundamentally breached or repudiated that implied term of mutual trust and confidence, and that the employee was entitled to resign in response.

103. As for the claim for direct disability discrimination, under section 13(1) of the Equality Act 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.

104. As for the claim for discrimination arising from disability, under section 15 (1) of the Equality Act a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

105. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the Equality Act. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

106. The definition of harassment is found in section 26 of the Equality Act. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

107. Some of the allegations raised by the claimant are presented as both harassment and/or direct discrimination. In the first place these allegations have been considered as allegations of harassment. If any specific factual allegation is not proven, then it is dismissed as an allegation of both harassment and direct discrimination. If the factual allegation is proven, then the tribunal has applied the statutory test for harassment under section 26 Equality Act. If that allegation of harassment is made out, then it is dismissed as an allegation of direct discrimination because under section 212(1) Equality Act the definition of detriment does not include conduct which amounts to harassment. If any act which is complained is dismissed as an allegation of harassment, we have then considered whether it may amount to an act of direct discrimination.

108. Section 123 of the Equality Act states that discrimination complaints must be brought within 3 months of the act complained of. This time limit is automatically extended by the early conciliation provisions. It may be further extended if the Tribunal decides there was conduct extending over a period and that the claim was brought within 3 months of the end of that period.

109. Even if it was not, the Tribunal can extend the time limit if it concludes it is "just and equitable" to do so. In deciding whether it is just and equitable to extend the time limits the Tribunal will consider all the circumstances of the case. These will include the length of any delay and the reason for it, and whether any delay has put the employer at a disadvantage in responding to allegations made in the claim.

Conclusions and decision

110. The parties had helpfully prepared a list of issues which had been considered and revised prior to the hearing. We have somewhat restructured this list in reaching and delivering our decisions below.

Disability

111. It was agreed that the Claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, being a period from the 5th of February 2016 to the 31st of August 2021. The mental impairments were an adjustment disorder, anxiety and depression. The Respondent accepts knowledge that the Claimant had these disabilities for the full period to which the claim relates, although we note that the diagnosis of adjustment disorder was not communicated to the Respondent until the letter from Mrs. Whittaker's psychiatrist, dated the 8th of March 2016.

Time Limits

112. The claim form was presented on 11 January 2022. The Claimant commenced ACAS Early Conciliation on 15 September 2021 and the ACAS Early Conciliation certificate was issued on 27 October 2021. The applicable 3-month time limit therefore allows for a 42-day extension under the Early Conciliation provisions, which means that any act or omission which took place before 31 August 2021 is potentially out of time.

113. The final “act” of the Respondent was the letter dated 24 June 2021 which confirmed that Mrs. Whittick’s Head of School role would formally end on 31 July 2021 and that she would then revert to her previous teacher role. This was not a specific act about which a complaint was made but we have considered this to be the final act in what the Claimant submits was a course of conduct extending over a period. On her case that period extends over 5 plus years, from February 2016 when Mrs. Whittick was first placed on Management Leave, to June 2021 when she reverted to her teacher role. The Claimant says this was all part of a “course of conduct” because the matters complained of were predominantly committed by Mrs. West and Mr. Bowel. The Claimant says it would be just and equitable to extend time for bringing her complaints because the cogency of the evidence was not affected by any delay. She cited the fact that the Respondent was able to produce contemporaneous documents part way through the hearing as evidence of this, and she says that some of Mrs. West’s inability to answer questions was because “no matter how much time she had to answer, she wouldn’t be able to”. The Claimant did not specifically address why her claims had not been brought sooner.

114. In written submissions the Respondent argued that all except two of the specific claims were significantly out of time, some by years and many by months. They say the Claimant has provided no reason for the delay in presenting the claim and remind the Tribunal that the Claimant has been represented by specialist employment solicitors for large parts of the chronology. They say these are factors which mitigate strongly against extending the time limit.

115. The Respondent also says that the cogency of the evidence from the witnesses has been significantly impacted by the delay and that witnesses had obvious difficulties recalling events from months or even years ago.

116. The Tribunal concluded that there were three periods of time which represent distinct courses of conduct by the Respondent which could have given rise to three sets of complaints, each of which would have attracted separate time limits. These were the period covering the first disciplinary process, from February 2016 to 20 June 2018; the period during which Mrs. Whittick raised her grievance on 29 June 2018 to it being successfully concluded at the end of 2018;

and then the period following the incident in the pub in April 2019 up until Mrs. Whittick's effective date of termination on 31 August 2021.

117. We considered that these were three discrete periods rather than one course of conduct for the following reasons;

113.1 Each represented a distinct and self-contained process which might have been the subject of a complaint.

113.2 They were not each attributable to a single decision maker that could make them a single act of discrimination which extended over a period.

113.3 Independent and different decision makers were involved in making the findings of fact in each process.

113.4 They were separated in time and in purpose; the first to investigate potential wrongdoing, the second to consider Mrs. Whittick's grievance, and the third to apply a disciplinary procedure in the circumstances of an apparently clear disciplinary offence by the Claimant.

118. In considering whether it is just and equitable to extend a time limit for discrimination claims, the Tribunal has a wide discretion: *Abertawe Bro Mogannwg University Local Health Board v Morgan* 2018 ICR 1194 CA. We have considered the matters in *British Coal Coporation v Keeble and ors* 1997 IRLR 336 EAT. Because Mrs. Whittick had provided no direct evidence addressing the time limit point we also considered the more recent case of *Concentrix CVG Intelligent Contact Ltd v Obi* 2022 EAT 149 and noted that a lack of specific explanation for why a claim had not been presented earlier would not necessarily lead to the conclusion that time could not be extended.

119. There was no explanation from the Claimant for the reasons why any claims arising during the first and second periods were not presented either in time or in any event sooner than January 2022. There was no evidence or information about which we could make an assessment in applying and weighting the various factors necessary to decide whether to extend the time limit for these claims, as opposed to the later claim. We therefore do not consider it just and equitable to extend time for those claims.

120. In relation to the final period, from April 2019 to June 2021 we consider the various complaints to be about a single course of conduct extending over that period all of which are connected to the Respondent's investigation of that incident and their response to it as an employer. The final act was the letter dated 24 June 2021. The claim form making Mrs. Whittick's complaint was presented outside the time limit relating to those claims.

121. We concluded that it would be just and equitable to extend the time limit for bringing claims relating to that third period for the following reasons:

121.1 the period of the delay was assessed as a period of approximately two months from mid-November 2021 (which would have been the applicable date allowing for ACAS conciliation if Mrs. Whittick had commenced the claim on the basis of the June letter) to January 2022.

121.2 This was a relatively short period of time in the context of the whole of Mrs. Whittick's complaints and her employment relationship with the Respondent, all of which she was thinking about when formulating her complaints. In this regard it was materially different to what should have been her earlier claims, which were years out of time.

121.3 The evidence suggested there had been without prejudice discussions during this period, which was one of the reasons for the delay, although for understandable reasons we did not hear detailed evidence about this. We concluded it was reasonable for the Claimant to attempt to resolve her complaints by settlement without bringing Tribunal proceedings although this was only a factor in our consideration and not the reason for extending the time limit.

121.4 Mrs. Whittick continued to experience mental ill health throughout the period leading up to her resignation, as evidenced in her communications with the Respondent which referred to her upset at some of the suggestions being made about her return to work. We note the Respondent offered her adjustments to the recruitment process if she needed them which indicated that the Respondent still considered Mrs. Whittick to be disabled at this time. It is therefore a reasonable inference to conclude that this continued in the period immediately after she left the Respondent's employment and was having to make important decisions about whether to bring a claim, and if so, what for.

121.5 We considered that the "forensic prejudice" to both sides in identifying, producing, and presenting cogent evidence about factual events affected both the Claimant and the Respondent broadly equally. The Respondent's ability to produce emails during the hearing showed that in fact it had greater access to

contemporary records than the Claimant did. This somewhat mitigated the disadvantage they faced from any delay that the Claimant had caused by presenting her claim late.

121.6 We considered that the balance of prejudice favoured allowing the extension because the impact of the alleged discrimination upon Mrs. Whittick had been significant and to deprive her of the opportunity to have her claim litigated would have been devastating. In contrast, although we acknowledge the potential for reputational damage to the Respondent, there was no individual who would be as directly affected by an adverse finding as Mrs. Whittick would be by being denied the opportunity to be heard. That is not to say that the Employment Tribunal exists to provide some form of performative catharsis for a Claimant, but the importance of the claim to an individual seeking to enforce their rights is a relevant consideration, and in the circumstances of this case it was an important one.

Constructive dismissal under s98 of the Employment Rights Act 1996

122. In the agreed revised list of issues the Claimant included over 40 separate complaints, each of which she said amounted to a breach of the implied term of mutual trust and confidence between herself and the Respondent such that they entitled her to treat the employment contract between them as being at an end.

123. It has not been possible, in the time available to us, to definitively determine factually each of Mrs. Whittick's specific complaints. This is because the List of Issues did not present them chronologically, it proved impossible to work out if some of the allegations were repetitious, some lacked factual specificity[1], and some contained multiple allegations under a single paragraph. This is a feature of discrimination complaints, particularly where they extend back over a period and can be hard to articulate.

[1] For example 2.1.4.9 (31) despite being aware that the Respondent's conduct was causing the Claimant symptoms, the Respondent failed to take any action to speed up the process or offer any support to the Claimant. Despite her sending her suicide note and funeral arrangements to John Dickson the chair of the trustee board on 11 November 2018

124. We did not consider it consistent with the overriding objective in rule 2 of schedule 1 to the Employment Tribunal Rules of Procedure to spend the time which would have been necessary to untangle that List of Issues as opposed to hearing the evidence. Had we done so we are confident the hearing could not have been completed and this would have caused further delay. This would have been contrary to the requirement that the Tribunal to deal with cases in ways which are proportionate to the complexity and importance of the issues; avoiding delay; and saving expense, which includes being mindful of the constraints on Tribunal resources. Given the disability experienced by the Claimant and the fact that delays which she considered unconscionable were a feature of her complaint, we considered that further delay would have placed further strain on her. It only became apparent during the hearing, and the subsequent deliberations, how challenging determining the list of issues was. That means we may not have determined every single factual allegation. We have determined sufficient to enable us to decide her claim of constructive dismissal but may not provide an answer to each specific complaint Mrs. Whittick makes.

125. As explained we concluded there were three relevant periods of time, each of which were distinct. The first was the period between February 2016 and the conclusion of the first disciplinary process in May 2018. The second was a period during which Mrs. Whittick raised her grievance about that process. This grievance was investigated between June and December 2018. And the third was the period during which the second disciplinary process resulting from the incident in the pub in April 2019 was undertaken up until the time Mrs. Whittick resigned.

126. In relation to that first period, we found the following things to be a breach of the implied term of trust and confidence between the Claimant and her employer. Firstly the failure to provide details to her of the allegations of potentially gross misconduct at either the meeting on the 5th of February or on the 9th of February of 2016. This was a breach of the Respondent's own policy.

127. Second was the Respondent's failure thereafter to provide to Mrs. Whittick a single point of contact and make it clear to her not only that she could contact somebody if she had any questions, but that there would be a point of contact keeping her up to date with developments at her school. This too was a breach of the Respondent's own policy.

128. Thirdly, we find the failure of Mrs. West to follow the human resources advice she was being given to slow down before instigating the disciplinary process and placing Mrs. Whitwick on immediate management leave was capable of undermining the term of mutual trust and confidence necessary to the employment contract. We concluded this showed some form of desire on behalf of Mrs. West to remove Mrs. Whittick from the school, at least temporarily. We could find no other explanation why it was that Mrs. West was so insistent that the HR advisor send her a letter which would enable her to place Mrs. Whittick on immediate management leave.

129. Lastly, we found that the Respondent put hurdles in the way of Mrs. Whittick participating in that disciplinary process by their repeated insistence on referring her to Occupational Health instead of following the advice given by her own clinician. We find they also delayed completion of the first disciplinary process by not interviewing the people who had made complaints about her until after Mrs. Whittick had provided an account. The Respondent's insistence on interviewing Mrs. Whittick at the start of that process was inexplicable to us. In relation to the second disciplinary process, she was informed, quite reasonably, that if she chose to or was unable to participate in that process by attending an interview or providing an account, the process would continue without her. There was no reason why the Respondent could not, in relation to the first set of complaints, have taken this same approach and investigate them fully, falling short of interviewing Mrs. Whittick, and then determining whether or not there was a case for her to answer at that stage, and if there was, then asking her to provide an account. It would have been a sensible, pragmatic and reasonable thing to do to interview those people who complained about her and establish that there was a case to answer before requiring Mrs. Whittick to provide an account in response. The Respondent took the opposite approach in relation to that first disciplinary procedure and the result was it took over two years before the Respondent could reach the assessment that in fact there was no real case to answer. That approach would and did seriously undermine the trust and confidence necessary to maintain an employment relationship between Mrs. Whittick and the Respondent.

130. We therefore conclude that at that stage, Mrs. Whittick would have been entitled to treat her employment contract with the Respondent as being at an end. We note that during this period she had retained and used the services of

solicitors to help her in her dealings with the Respondent. Their correspondence and actions taken on her behalf in this period illustrate that at key moments Mrs. Whittick could give instructions and act on advice, and this would have included consideration of what complaints, if any, she might have at an Employment Tribunal. But she chose not to resign or act in any way which indicated she thought the Respondent had treated her so poorly that she was entitled to treat their employment contract as at an end. Instead, she raised a grievance procedure which she was perfectly entitled to do.

131. Turning then to that grievance procedure, we note that the only complaint about it is that the investigating officer did not speak directly to Mrs. Whittick before reaching her conclusion. Whilst we acknowledge that Mrs. Whittick wanted to speak with the officer in person, we also note that Mrs. Whittick had provided a detailed 15-page narrative account, which was considered as part of the grievance process. We are therefore satisfied that she was given a fair opportunity to present her complaint and that the investigating officer had sufficient detail to question others about it. We do not consider that by not speaking with Mrs. Whittick in person the grievance process was unfair. We therefore conclude that the grievance procedure and the way it was conducted is not capable of undermining the implied term of mutual trust and confidence between Mrs. Whittick and the Respondent.

132. Mrs. Whittick was provided with the grievance report in autumn of 2018 – the chronology says in October. She made no complaint about its conclusions, she remained employed by the Respondent and over the next 5 months, and from October to March she corresponded with them about her return to work. That process was interrupted by the incident in the pub in April 2019 which led to the second disciplinary process.

133. We are satisfied that there were some difficulties with that second disciplinary procedure. Joe Blair, the investigating officer, overreached her task and authority, and failed to properly consider or give due weight to Mrs. Whittick’s disability and the contributing effect it had had on Mrs. Whittick’s behaviour. However, that failure or breach was corrected by the approach taken and the decision made by the disciplinary panel, who did afford significant mitigation for Mrs. Whittick’s then disability.

134. Mrs. Whittick asked for permission to attend the school with a view to reengaging and returning to work. The Respondent did not allow her to do that. The Respondent didn't in fact seek to put her back into a post for quite an extended period of time. During her absence from school the Respondent had failed to keep Mrs. Whitwick informed about developments at the school.

135. Notwithstanding those breaches or failures on the part of the Respondent, the chronology shows that over the majority of that period from April 2019, when the Respondent learnt of the incident in the pub through 2020 and 2021 up until the date on which Mrs. Whittick resigned, it was clear that the Respondent was engaged with Mrs. Whittick in looking at ways that she could return to work. Some of the correspondence about this return to work was undertaken even whilst the Respondent was investigating the allegations.

136. For example, in May 2019, the Respondent wrote to the Claimant making it clear that they were reviewing the leadership structure at Witchampton School and attaching for her reference details of other vacancies within the Trust. This was in correspondence in which they also were chasing a substantive reply from Mrs. Whittick about the incident in the pub. It seems that the two processes (the investigation into the pub incident and communication about how and in what role Mrs. Whittick might return to work) were being conducted side by side and sometimes in the same pieces of correspondence. This was unfortunate because it meant that at times the two things became blurred.

137. However, the fact that the Respondent complete continued to communicate with Mrs. Whittick about developments at the school and potential employment opportunities available to her show that they considered she was an employee and they continued to treat her as such.

138. Conversely, in July of 2019, Mrs. Whittick wrote to the Respondent saying that it was her belief that the Respondent no longer wished to be bound by their employment contract. Again, if that was the stage at which Mrs. Whittick wanted to consider herself to have been dismissed, she could have acted on that belief, but she did not do so. The result is that she remained employed. Throughout this time the Respondent continued sending her suspension review letters clearing indicating to her that they still considered her their employee. We also note that she was kept on “paid leave” during this period, something about which she

complains but which further demonstrates that the Respondent was treating her as an employee, and not as someone with whom they wanted to end their contractual relationship.

139. The Respondent also required Mrs. Whittick to provide an up-to-date DBS check. This was initiated by the Respondent's investigating officer and was linked to an e-mail sent by Mrs. Whittick's then solicitors asserting that the outcome of the Criminal Court case against Mrs. Whittick would not appear on a DBS check and therefore by inference would not be relevant to her employment status as a teacher. This was a bold, and legally incorrect, statement for Mrs. Whittick's lawyers to make, and the Respondent was entitled to clarify that and establish if it was accurate. Therefore, we do not conclude that the request for a DBS was a barrier to her return which was put in place by the Respondent.

140. We further note that the considerable time it took to get that certificate, between October 2019 and July 2020 was not something for which either the Claimant or the Respondent are directly responsible because they were both reliant on the Disclosure and Barring Service to provide it.

141. It was said on behalf of Mrs. Whittick that the Respondent should have already had an up-to-date DBS check for her, and the fact that they did not was itself a breach. Although questions were asked of Mr. Bowel about it, there was no evidence that it would routinely be the Respondent employer's role to obtain this or to require employees to have it in place so its absence has not been shown to be a breach.

142. Mrs. Whittick complains that the second disciplinary process took too long and that while it was going on the Respondent failed to implement a plan to get her back to work and instead used other people to fulfill her role. The Respondent explained that this was necessary to ensure there was suitable leadership in place at the school, and that involved seconding or appointing staff who could not simply be removed from their posts to accommodate Mrs. Whittick's return.

143. Mrs. Whittick complained that the vacancies the Respondent notified her of were at Trust locations she could not work at because of previous problems

either she or her children had encountered at the schools which were being suggested. In relation to the more senior roles that she was informed about Mrs. Whittick said she felt she wouldn't be successful and so didn't apply. It seemed to us that at this point in her employment Mrs. Whittick was placing barriers to her return to the workplace by having an unrealistic expectation of what the Respondent might offer. Looking objectively at what the Respondent did during this period, sending her information about positions, prompting her for questions about them, considering alternative lesser roles as suggested by Occupational Health incorporating a salary adjustment to lessen the financial impact, it is hard to see what more they could have done.

144. When she was asked what the Respondent could have done, Mrs. Whittick suggested they could have put her on a training programme for leadership at a smaller school (Camphill) or given her the now permanent the Head of School role at Witchampton but with a complement of additional staff to reduce her responsibilities. However she accepted that she had never made a counter suggestion like that to the Respondent. She also agreed that it was reasonable for the Respondent to have concerns about her ability to go straight into a permanent Head of School role after such an extended period of absence from teaching and her ill health.

145. Given that Mrs. Whittick did not appear to be engaging constructively with the Respondent's efforts to identify an appropriate role for her, and the fact that they could only offer her employment at their schools (as opposed to other local schools which were not part of the Trust, if any) we struggled to see what more the Respondent could have done to reintegrate Mrs. Whittick at this specific point in time.

146. We also concluded that given the development role she had held at Witchampton no longer existed and was replaced with a permanent Head of School role for which she did not apply, and the fact that Mrs. Whittick chose not to apply for any leadership or other roles the Respondent told her about, they had no option but to revert to her original contract as a part time Teacher. Mrs. Whittick was warned that this would happen, but even this did not prompt her to actively pursue other opportunities with the Respondent.

147. We therefore conclude that the conduct of the Respondent in the period between 2019 when the pub incident occurred and 2021 when the Claimant eventually resigned, was not calculated to destroy or seriously damage the trust and confidence between them.

148. Of those alleged breaches we did accept we considered whether that conduct was likely to have the effect of destroying or seriously damaging the trust and confidence between the Claimant and the Respondent. We reminded ourselves that this is an objective test about which the Claimant's feelings or opinion is not determinative. We also considered whether, in relation to those breaches, the Respondent could show they had reasonable and proper cause for them.

149. We concluded that some of the breaches, not allowing Mrs. Whittick to visit the school, and failing to keep her informed of developments there, were breaches for which the Respondent had no explanation, and therefore no reasonable and proper cause. Although we accept that these contributed to Mrs Whittick's perception that the Trust wanted her "out" these actions must be considered as part of the Respondent's overall conduct towards Mrs. Whittick at the time. They are only part of the picture, not the whole. We do not consider that these failures are enough, in the wider context of the communications between the Claimant and the Respondent about her return to work, to sufficiently undermine the mutual trust and confidence between them that they would have entitled Mrs. Whittick to resign.

150. We considered the delay in actually getting Mrs. Whittick back to work, which we have to acknowledge was extensive. However, much of that period was spent dealing with the disciplinary proceedings following the incident in the pub, and the delay in obtaining the DBS certificate, for which neither the Claimant nor the Respondent are directly responsible. We therefore conclude that although on the face of it that delay seems surprising, when the reasons for it are viewed and analysed objectively the delay itself would not have the effect of destroying or damaging the mutual trust and confidence between them.

151. Two further specific actions Mrs. Whittick complains of as having that effect are the fact she was kept on paid leave following the conclusion of the

second disciplinary process, and the Respondent offering her what she described as “a lower ranking role”.

152. We do not find that the Respondent continuing to honour its financial commitments to the Claimant while trying to agree a return to work with her would have the effect of undermining the necessary trust and confidence between them; quite the opposite.

153. We do not agree that the Respondent offered the Claimant “a lower ranking role”. The Respondent attempted to engage with the Claimant to find a suitable role for her return to work but when none was found, because she did not suggest or apply for any, the Respondent returned her to the original employment contract she was hired on. Again, while we acknowledge that Mrs. Whittick was upset by this, objectively viewed it is hard to see what alternative the Respondent had by that stage. This means we do not accept that this was likely to have the effect of destroying or damaging the necessary trust and confidence between them, and if in fact it did, then the Respondent had reasonable and proper cause for doing so, in that it was trying to manage their workforce and responsibilities to their various school communities.

154. This means our conclusions on the claim of discriminatory constructive dismissal are as follows:

154.1 The conduct of the first disciplinary procedure could have amounted to an unfair constructive dismissal but the Claimant remained employed and in doing so affirmed the contract.

154.2 The grievance procedure did not amount to a constructive unfair dismissal, and in any event the Claimant remained employed and in doing so again affirmed the contract.

154.3 The second disciplinary procedure did not amount to a constructive unfair dismissal, and so the reason for the Claimant’s employment ending was her own resignation.

<u>Harassment related to disability under s26 of the Equality Act 2010</u>

155. Mrs. Whittick complained of four specific acts of harassment which she says related to her disability. These were: sending the email requesting the keys

be returned in February 2016; providing her with a final written warning (re the incident in the pub) in January 2021; failing to implement a plan to return her to work; and proposing she returned to work in a lesser role.

156. We concluded that each of those were “unwanted conduct”. In relation to the second of those we found that the failure to implement the suggestions made by occupational health amounted to making a specific decision not to do so, and therefore was a positive act.

157. We find that the sending of the e-mail asking for the keys was not related to Mrs. Whittick's disability. This is because it was sent at an early stage in her absence from work and related to the need on behalf of the Respondent to be able to run the school premises efficiently.

158. In relation to the other things complained of, we are satisfied they did relate to the Claimant's disability because without her disability none of those would have arisen or been relevant.

159. We then considered whether any of those three things had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We are not satisfied in all the circumstances that that was the Respondent's purpose in doing those things. We note that this is a relatively unusual claim of harassment because it doesn't involve specific comments or acts targeting Mrs. Whittick with explicit reference to her disability, although they do relate to her disability.

160. We then considered whether, even though that was not their purpose, did those acts have that effect? In doing so, we considered Mrs. Whittick’s perception, the other circumstances of the case and whether on an objective view it was reasonable for the conduct to have that effect.

161. In relation to the written warning, it clearly did have the effect upon her of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Given the history between her and the Respondent at the time she received that in January of 2021, this was perhaps understandable from Mrs.

Whittick's perspective. But this was not objectively reasonable in circumstances where the Respondent was compelled, by its own disciplinary policy, to take some action in relation to the incident in the pub. The Respondent would have been entitled to dismiss Mrs. Whitwick because of this single incident alone, but they chose not to do that. Instead, they took into account her disability as significant mitigation and gave her a final written warning. In our assessment in approaching the second disciplinary outcome in that way the Respondent did not act in a way which, objectively viewed, either violated Mrs. Whittaker dignity or created an intimidating, intimidating, hostile, degrading, humiliating or offensive environment for her.

162. Turning to the Respondent's failure to implement the recommendations made by an Occupational Health assessment which they had insisted upon. We conclude that this did have the necessary effect. This is because the things which were suggested by Occupational Health, including, for example, visits to the school while it was closed in the holidays so Mrs. Whittick could be reacquainted with it's environment and could see how things had changed, were relatively simple things that the Respondent could have done or facilitated. The fact that they refused to do so did create a hostile environment for Mrs. Whittick because it suggested to her that they did not really want to assist her to return. On balance, we concluded that it was reasonable for the conduct to have that effect, particularly bearing in mind for how long it was that Mrs. Whittick had been trying to return to the school and how relatively minor some of these requests or adjustments being suggested were and how easily they could have been implemented.

163. Turning to the offer or suggestion of a job as a teacher rather than as a Head of School, we accept that she took this as violating her dignity and effectively as a demotion. However, we note the recommendations of Occupational Health which included that the parties look at identifying a role which would be less stressful for her than the previous Head of School role and the fact that despite being invited to, she had not applied for any other jobs, including jobs for which the Respondent had sent her details. We do not think it was reasonable for the Respondent's conduct in reverting to her previous employment contract to have affected her in this way.

164. We note that between January and May of 2021, the school had restructured and the development role which she had been employed had come

to an end and was being replaced with a permanent Head of School. We know that the Respondent on several occasions wrote to Mrs. Whittick identifying potential positions for her and making it clear that she could apply for those positions. They also made it clear that they would be willing to consider adapting the application process to accommodate her disability. In relation to each of those invitations, she gave no real response, simply asking on a number of occasions whether her previous job was available to her. She did not engage with them in any discussion about what might be an alternative to which she was amenable. She simply complained when in the absence of applying for any alternative job she was automatically reverted to the job she had originally been employed for, which was as an English teacher. We concluded that the invitations extended by the Respondent to her to make alternative suggestions demonstrated a willingness to work with Mrs. Whittick to find a position which was suitable for her and for the Respondent, rather than to enforce a position upon her. And we conclude that these invitations from the Respondent would mitigate any harassing effects.

165. The reason that Mrs. Wittick ended up being reemployed or reverted to her original teacher's contract was because she didn't apply for or take up any alternative employment with the Respondent. She complains that none of the other jobs which were offered to her or suggested for her were suitable. But this has less weight in circumstances where she made no alternative suggestions herself. We therefore conclude that reverting her to her original teacher's contract was not an act of harassment.

166. We concluded that the Claimant has proved a single act of harassment by the Respondent's failure to implement some parts of its own Occupational Health advice about taking steps which would facilitate Mrs. Whittick's return to work, specifically not allowing her to visit the school in the holidays.

167. We recognise that in many situations a proven allegation of harassment may be sufficient to undermine the implied term of mutual trust and confidence which exists in every employment contract. Where that is so, an employee is entitled to treat the contract as an end. This is referred to as constructive dismissal, as discussed in the paragraphs above.

168. In this case, we do not think that this single act of harassment by the Respondent is sufficient to so undermine that term of mutual trust and confidence. This was an unusual act of harassment. It was not somebody making comments, targeting, bullying or physically abusing someone at work. It was the Respondent's failure to act which created the environment which amounted to harassment. However, this must be seen in the wider context of the actions the Respondent was taking to try and return the Claimant to the workplace. Considering all the circumstances, and the other efforts the Respondent was making to return Mrs. Whittick to work this single act of harassment was not sufficient to undermine all those other efforts, and to justify the claimant treating the contract as at an end.

Direct Disability Discrimination under s13 Equality Act 2010

169. Turning to direct disability discrimination under section 13 of the Equality Act 2010, this requires us to ask whether the Respondent did or failed to do a list of things identified by the Claimant. It must be established that the Claimant was treated less favourably than someone without a disability. We have compared the way the Claimant was treated with somebody had been accused of potentially serious misconduct, was then absent from work for an extended period, and then trying to return to work, for a reason unconnected with their health. Mrs. Whittick's specific complaints of less favourable treatment are addressed below.

170. The Claimant complained that on the 5th of February 2016 she was placed on immediate management leave for gross misconduct and the Respondent instigated the first disciplinary investigation. We have concluded that the Respondent was entitled to put Mrs. Whittick on management leave and the decision itself could have been applied to anyone about whom the sort of serious concerns which had been raised about Mrs. Whittick had been raised. This means that putting her on management leave and instigating a disciplinary process was not less favourable treatment.

171. Mrs. Whittick complained that in June 2019, following the incident in the pub, Ross Bowell instigated the second disciplinary investigation. We are satisfied that the school's disciplinary policy required a response to an allegation that a member of teaching staff had been arrested. This was a serious incident. The school was also entitled to respond to a member of staff failing to report that they had been arrested. We are satisfied this would have applied to anyone. Although

the school had a degree of flexibility built into the policy, given that the arrest and or the failure to notify are cited as examples of gross misconduct, we conclude that any teacher who was arrested, like Mrs. Whittick was, would also be subject to an investigation. This was not less favourable treatment.

172. Mrs. Whittick complained that as part of the disciplinary process between 2019 and 2021, the investigating officer and disciplinary chair failed to consider the impact of her medical conditions on her actions in the pub in April 2019. The investigating officer did fail to do this, but the panel who made the ultimate decision did not. Mr. Bowel's evidence made it clear that the school themselves made no connection between Mrs. Whittick's illness and absences and her sudden and apparently out of character behaviour in April 2019. But it is not true to say that the Respondent failed to consider her medical condition as part of that second disciplinary process. It was taken as considerable mitigation when determining what sanction she should face and resulted in her receiving only a written warning when others, we are satisfied, would have been dismissed. This was not less favorable treatment.

173. Mrs. Whittick complained that as part of the second disciplinary process between 2019 and 2021, the investigating officer and then the disciplinary officer assumed that she was guilty when she was suspended on the 14th of June 2019, which was prior to her criminal trial. She also complains that she was told not to attend the school premises and was prevented from communicating with pupils, employees, parents and governors without first seeking permission from the Respondent.

174. Although it's true that she was suspended and she was told not to communicate with those people, it was not assumed that she was guilty. The suspension letter itself made clear that that assumption was not being made. She was told not to attend the school, not because it was assumed she was guilty, but because it was thought her attendance might impede the ability to carry out a fair investigation because it involved people who did or who had worked at the school. There was also a suggestion of a history of inappropriate communications between Mrs. Whittick and current or former employees. We do not conclude, therefore, given that she was suspended while an investigation took place, that telling her not to have communications and not to attend the school was less favourable treatment than someone without her disabilities would have received.

175. Mrs. Whittick complained that at a new parents meeting on the 30th of June 2016 Sarah Lemon, another employee of the school, had publicly informed parents and others that the Claimant would not be returning to the school and that Kathy Bolton was now Head of school. As acknowledged, this may well have upset Mrs. Whittick when she heard about it, but we conclude that if Sarah Lemon said this, she did not do so on the instruction of or with the authority of the Respondent. In any event, even if that was less favourable treatment, there's no evidence that it was because of Mrs. Whittaker's disability as opposed to a consequence of a natural gossip. We do not consider that this act amounts to an act of direct disability discrimination.

176. Mrs. Whittick also complained that the school changed the sign outside the school covering up her name and displaying Miss Bolton's name as the head teacher. This too, we do not consider to be less favourable treatment than would have been experienced by somebody who was absent from the school for an extended period for a reason other than disability.

177. Lastly, Mrs. Whittick complained that she was constructively dismissed and that constructive dismissal amounts to an act of direct disability discrimination. We did not conclude that Mrs. Whittick was constructively dismissed, and so it follows that we do not find her dismissal, by her resignation, was direct disability discrimination.

Discrimination arising from disability under s15 Equality Act 2010

178. We turn then to consider discrimination arising from disability, a claim brought under section 15 of the Equality Act 2010. In considering this claim, we reminded ourselves that unfavourable treatment under section 15 is not the same as less favourable treatment under section 13, because there is no need for a comparator.

179. The Claimant brings four complaints, although effectively they are split into three categories. The first is the suspension and instigation of a disciplinary investigation following the incident in the pub in 2019. The second is including

Mrs. Whittick's failure to inform the Respondent of the police investigation following that incident as part of the disciplinary against her, and the third is what she claims is constructive dismissal.

180. Mrs. Whittick says that the first of those things, her involvement in an incident at a pub in April 2019 arose from her extremely distressed and emotional state, having a panic attack and losing control, all of which was a consequence of her disability. We agree with that and we accept her evidence on that point. This clearly was out of character for her and an incident which occurred towards end of an extended period of ill health. Mrs. Whittick, the professional woman who was appointed to Head of School in a development role in late 2015, would not have behaved in the way that Mrs. Whittick did in April 2019. The difference between the two periods was the extensive and complex mental health deterioration she had experienced and so was a consequence arising from her disability.

181. Since that behaviour is what gave rise to the suspension and the disciplinary investigation into what happened in the pub, it follows that they too arise in consequence of her disability. We accept that being placed on suspension and subject to a disciplinary was unfavourable treatment because it was something the Claimant would not have wanted.

182. The Respondent says it's "legitimate aim" was to ensure that the Claimant was (and remained) a fit and proper person to remain in post as a teacher, and that she was or would comply with her contractual obligations. This included the contractual obligation under clause 20.2 to inform her employer of "*any relevant past, present, or future court convictions, bindovers, cautions and any judgements or investigations pending"*.

183. We accept that this was the Respondent's aim, and that the Respondent is entitled to ensure that the people it employs, particularly in a teacher role and even more particularly in a Head of School role, are fit and proper people to remain in post. Allegations of assault and public disorder are serious allegations and potentially in breach of the code for teachers. In these circumstances, the Respondent was entitled to investigate, and doing so in the way they did in 2019 and 2020 was appropriate and therefore a proportionate means of achieving a legitimate aim.

184. As we are required to, we considered whether the treatment was an appropriate and reasonably necessary way to achieve those aims and whether something less discriminatory could have been done instead. We concluded that it was theoretically possible for the Respondent not to have suspended Mrs. Whittick, but the disciplinary policy governing the employment contract required them to take disciplinary action because criminal offences outside of work are categorized as acts of gross misconduct within that policy.

185. Given that the incident involved somebody formally connected with the school and currently employed by the Respondent we find that the suspension and investigation was an appropriate and reasonably necessary way to achieve the Respondent's aims, because failing to act in that way would have sent the wrong signal to other employees and the wider community. It was really serious for a Head Teacher to get involved in an alleged assault and public disorder in the way Mrs. Whitwick did.

186. We considered how the needs of the Claimant and the Respondent should be balanced. We are satisfied that by considering Mrs. Whittick's disability as mitigation, the Respondent has acknowledged both her needs as an employee and their needs to maintain their reputation both as an employer and as a member of the community, being an organisation which runs schools. We conclude that the balance falls in favour of the Respondent being permitted to address Mrs. Whittick's alleged conduct in the way that they did.

187. Mrs. Whittick also complained that including her failure to inform the Respondent of her arrest as part of that disciplinary was discrimination arising from her disability. We do not accept this. At the time of this incident she was in regular contact with the Respondent, albeit through her lawyers, and so was well capable of communicating with her employers. She was communicating with them in connection with her employment and so we do not accept that she was unable to communicate with the Respondent about matters relating to her employment, which the incident in the pub clearly was. We therefore conclude it was right of the Respondent to include this as a specific disciplinary allegation, because the disciplinary policy under which Mrs. Whittock was employed made it clear that there was a requirement on employees to report an incident such as

this, and she did not. This was not unfavourable treatment arising from her disability.

188. For the reasons given above, we do not find that Mrs. Whittick was constructively dismissed and so this was not an act of discrimination arising from her disability.

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

189. The Claimant raised four PCP's that is provision, criterion or practice. They were not all accepted by the Respondent. In respect of each of those four, we considered whether the Respondent had that PCP and if so, whether they put the Claimant at a substantial disadvantage compared to somebody without her disability. We considered what adjustments could have been taken to avoid that disadvantage.

190. The first PCP identified by the Claimant was initiating and continuing disciplinary processes despite employees not being fit to work. The Respondent accepted it did have that PCP because its disciplinary processes applied to all employees, including in appropriate circumstances, those who were off sick. This claim wasn't really pursued by Mrs. Whittick because she was also complaining that the failure to conclude a disciplinary process whilst she was unwell was a fundamental breach of her contract and rightly it was conceded that she could not have it both ways. She could not, on the one hand, complain that the Respondent was pursuing a disciplinary against her and on the other hand complain that they had failed to complete it, so that part of her claim falls away.

191. Even if we took the alternative view we concluded the Respondent had a legal and contractual obligation to other employees to investigate concerns they might raise (such as those raised against Mrs. Whittick in February 2016). The Respondent also has to maintain an equitable application of their disciplinary policy which would be undermined if they allowed someone who was unwell to avoid those processes all together.

192. Mrs. Whittick complained that the Respondent had PCP of putting employees on management leave without providing details of the allegations they were facing. We do not find that the Respondent had that PCP. In fact, we have found elsewhere that by putting Mrs. Whittaker on management leave without providing the details of the allegations the Respondent was in fact, in breach of their own policy.

193. The next complaint was that the school failed to provide any support to manage the Respondent's relationship with the Claimant "as a parent". Any responsibility the school may have to Mrs. Whittick "as a parent" does not arise from her employment relationship with them, and so is not justiciable by the Employment Tribunal.

194. Mrs. Whittick also complained about the PCP of sending school updates home with students. It was accepted that the Respondent routinely did that. We concluded that did place Mrs. Whittick as a disadvantage because the school knew she was a parent of the school as well as an employee of the Respondent, and so she would receive that communication in both capacities. Mrs. Whittick suggested that the adjustment that could have been made was to communicate updates regarding her role directly to her and not via her children. We find that the Respondent, in its capacity as her employer, could have communicated with her in advance of those letters going home, knowing that in her separate capacity as a parent she was going to receive letters which directly concerned her and her status at the school. They could have reasonably expected this would cause her some distress and they could have forewarned her that the communication was coming. This would have been a reasonable adjustment to make because they could easily have emailed her in advance.

195. However, this was a specific and time-limited PCP and for the reasons given above the Tribunal has found that complaints about the period to which it relates are out of time.

196. The next complaint Mrs. Whittick brought was that the school had conducted investigations or disciplinary processes without adhering to the time frames insofar as they had been provided to her. This was not a PCP that we could consider because no time frames were provided by the Claimant which she says the Respondent failed to adhere to. We have interpreted this as meaning

that Mrs. Whittick's actual complaint is that the Respondent had a PCP of not providing timeframes and that placed her at a disadvantage. The Respondent agreed this was a PCP in place in appropriate circumstances. We accept this did place her at a disadvantage because of her conditions, including adjustment disorder and anxiety, both of which would have been made worse by being subjected to an open-ended process. On her behalf it was suggested that the Respondent should have speeded up their HR processes, provided clear time frames and stuck to them. The Claimant suggests this was conduct extending over a period from the 5th of February 2016, right up until the 31st of August.

197. In March 2016 the Respondent was informed by Mrs. Whittick's psychiatrist that she had adjustment disorder and that she found the disciplinary process difficult. This meant that an open-ended process with no defined stages would place her at a substantial disadvantage compared to someone without her disability.

198. We conclude that the Respondent could have provided staged processes with clearly identified stages, such as the interviewing of other people who've made complaints or were potential witnesses and set time frames for those parts of the process over which they had some control. In the circumstances of this case this might not have included when it was Mrs. Whittick would be able to provide an account to the Respondent or to be interviewed by them. But providing some time frames would have given her some certainty both that progress was being made and that she had not been forgotten or abandoned. It would have been reasonable to do that, especially after the Respondent was made aware in spring of 2016 of the impact upon her of there being no resolutions to the complaints.

199. Regarding the suspension reviews, although these weren't specified in the Trust's policy, the suspension letters made clear when next review dates were or were intended to be. It would have been a reasonable adjustment to meet those dates, although the evidence shows that the reviews of Mrs. Whittick's suspension were relatively regular. They were not always made or sent on the dates that the Respondent had indicated. However, we conclude that the impact of this particular failing was relatively low.

200. It follows therefore that the Respondent could have taken reasonable steps to make adjustments which would have accommodated Mrs. Whittick's disability and they failed to do so.

CASE MANAGEMENT ORDER: REMEDY

201. Below is a proposed list of issues to be considered at a remedy hearing. The parties are invited to agree this list of issues, but if either side disagrees with this list or believes that there is some other matter which should be included, they are to write to the Tribunal and the other side with their proposed additions or alternatives in an editable word document (not pdf) at the same time as they provide their witness statements.

202. Mrs. Whittick is to provide a statement addressing remedy and answering the questions below, to be sent to the Respondent and the Tribunal by 4pm on Wednesday 4 January 2024. Her witness statement must be limited to 2000 words. Any supporting documents she intends to refer to or rely on must be provided at the same time as her statement and must be limited to 100 pages.

203. The Respondent is permitted to serve a witness statement addressing the issues below. This must be sent to the Claimant and the Tribunal by 4pm on Wednesday 4 January 2024. The Respondent’s evidence is limited to 2000 words in total. Any supporting documents they intend to refer to or rely on must be provided at the same time as the statement and must be limited to 100 pages.

204. The Tribunal will notify the parties of the date for remedy hearing once it has been possible to confirm availability of the panel members.

LIST OF ISSUES: REMEDY

205. The Tribunal will consider:

205.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend? Since the Claimant has left the Respondent's employment the Tribunal shall assume this does not apply, but if the Claimant seeks any recommendation it should be addressed in her witness statement.

205.2 What financial losses has the discrimination caused the claimant?

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

205.4 If not, for what period of loss should the claimant be compensated?

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

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

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

205.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

205.9 Did the respondent or the claimant unreasonably fail to comply with it by? If either side alleges an unreasonable failure to comply with any applicable ACAS code they must identify and cite the relevant code, assert the alleged breach, and address that in any statement served for the remedy hearing.

205.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

205.11 By what proportion, up to 25%?

205.12 Should interest be awarded? How much?

206. The parties are reminded it remains open to them to reach a settlement, and they are encouraged to do so once they have had an opportunity to read and digest the Tribunal's findings on liability.

Employment Judge Hay
Date: 24 November 2023

Judgment sent to the Parties: 14 December 2023

For the Tribunal Office