Claimant: And **Respondent:**

Ms C Rautureau Lycee Francais Charles De Gaulle

Heard in person **On**: 16-20 October 2023 and deliberations in Chambers on 1 February 2024.

Before: Employment Judge Nicolle

Nonlegal members: Mr D Scofield
Mr S McLaughlin

Representation:

Claimant: Mr C Canning, of Counsel
Respondent: Mr A Line, of Counsel

JUDGMENT

1. The claims for direct disability discrimination, harassment on account of disability and indirect disability discrimination are dismissed on withdrawal.

2. The claims for discrimination arising from a disability and a failure to make reasonable adjustments on account of disability fail and are dismissed.

3. The claims for direct sex discrimination and harassment based on sex fail and are dismissed.

4. The claim for wrongful dismissal succeeds and the claimant is awarded an additional 11 days' pay.

5. The claim for unfair dismissal succeeds and the compensatory award is increased by 25% as a result of the Respondent's failure to comply with the ACAS Code, but is reduced by 65% under Polkey and a further 50% reduction for the Claimant's contributory conduct, as set out below.

6. The Claimant is entitled to a full basic award.

REASONS

The Hearing

7. The hearing took place in person between 16-20 October 2023. The Tribunal deliberated in Chambers on 1 February 2024.

8. There was an agreed bundle comprising of 1113 pages. A small number of additional documents were added during the hearing.

9. Timothee Leridon, Deputy Head Teacher (Mr Leridon), Stephane Foin, Deputy Cultural Counsellor at the Cultural Department of the Embassy of France (Mr Foin), Didier Devilard, Head Teacher from 1 September 2018 to 31 August 2023, (Mr Devilard) gave evidence on the Respondent's behalf. The Claimant gave evidence and Isabelle Feurtet, a CPE (equivalent of Head of Year/Pastoral Care), pupils in years 7, 11, 12 and 13 (Mrs Feurtet), Jerome Riviere, Physical Education Teacher, (Mr Riviere), Oliver Poggi, German Teacher (Mr Poggi) and Christophe Adol, Economics Teacher (Mr Adol) gave evidence on her behalf.

10. Ms O Lolonga acted as a French/English interpreter in respect of several witnesses. The Tribunal is satisfied that she performed this duty competently and no issues arose.

Agreed List of Issues

11. Prior to the final day of the hearing Mr Canning advised the Tribunal that the claims for direct disability discrimination, harassment on account of disability and indirect disability discrimination had been withdrawn. These claims are therefore dismissed on withdrawal. The Tribunal was provided with an updated agreed List of Issues which will be referred to in the conclusions.

Findings of Fact

The Claimant

12. The Claimant was employed as a Physical Education Teacher by the Respondent from 2 September 2002 until 16 September 2022.

The Respondent

13. The Respondent is a French co-educational primary and secondary independent day school situated in South Kensington. Its curriculum is accredited by the French National Ministry of Education, and it is overseen and owned by the French Ministry of Foreign Affairs. It has approximately 3500 students.

Relevant Documents

14. The Respondent has a detailed staff handbook. This includes the grievance and disciplinary procedures.

15. Section 174 contains a definition of gross misconduct which includes, but is not limited to:

- wilful disobedience of management instructions;
- conduct of any kind which endangers the health and safety of others;
- gross negligence in the performance of duties;
- conduct of any kind which offends or otherwise jeopardises the Lycee's relationship with a third party including parents and students;
- committing a repeated or continued (after receipt of a warning) breach of your obligations under your contract of employment; and
- serious violation of the measures outlined in the School Policies including Safeguarding & Child Protection Policy.

16. Section 174.2 deals with suspension and states:

> In instances where you are suspended from work temporarily during the course of investigations, such a suspension will be reviewed as soon as possible and will not normally exceed ten working days, unless the circumstances justify otherwise.

17. Section 175 concerns appeals against disciplinary sanctions and at s.175.2 states that the appeal will be heard by the Head Teacher for a decision short of dismissal and by the Deputy Cultural Attaché for a decision of dismissal.

The School Rules

18. The School Rules as approved on 5 July 2022 include details of the daily timetable. This provides that pupils who have chosen at the beginning of the school year not to have school lunches are allowed to leave the Lycee during the whole lunch hour. Only a small number of pupils leave in accordance with such preferences.

Local Joint Advisory Committees (CCPL)

19. The Lycee has a local joint advisory committee. The CCPL comprises both management and union representatives and is consulted on matters to include the rules and procedures of recruitment and dismissal.

Plan of the Lycee

20. The main entrance to the Lycee is on the Cromwell Road. This is where buses returning pupils to the Lycee drop them off. There is, however, an alternative exit route used by pupils to a quiet roundabout to the rear of the building.

The Claimant's alleged disabilities

21. The Claimant contends that she has disabilities on account of insomnia, distress and ADHD. She submitted a 15 page disability impact statement dated 1 June 2023. We summarise the Claimant's position in relation to the individual disabilities below.

Insomnia

22. The Claimant says that she has suffered from insomnia since her teenage years. She says that she wanted to avoid medication if possible but adopts daily strategies to assist her sleep to include managing stress, listening to calming music before going to bed and breathing exercises. She will on occasion use CBT, a cannabis derivative, as a relaxant and to help her to sleep.

23. On 22 May 2023 the Claimant met with Dr Yves Macombe, an Emergency Physician who prescribed her with 7.5mg of Imovane (marketed under the brand name, Zoplicone in the UK). Dr Macombe also prescribed the Claimant 6mg of Lexomil to treat her distress and anxiety.

24. The Respondent says that there is no medical diagnosis of the Claimant's insomnia. Further, it contends that from her evidence her sleeping patterns would appear sporadic rather than continuously characterised by insomnia. For example, the Claimant says that sometimes she will only sleep for four hours per night but then sleeps for ten hours per night for the next two nights to make up for it. Further, the Respondent says that the Claimant's evidence is that she adopted coping strategies to assist her to sleep such as taking exercise. They say that the Claimant had not made the Respondent aware that she suffered from insomnia, and that it was impacting on her ability to perform her job, and more specifically adversely impacting her during the disciplinary proceedings.

Distress

25. The Claimant says that she has suffered from what she calls distress (but which might also be called trauma, grief or anxiety) for this a long time.

26. Following a consultation with Dr Helene Nguyen (Dr Nguyen) on 16 June 2022 Dr Nguyen in a letter of 16 June 2022 stated, "Mrs Rautureau was clearly in distress during the consultation". The Respondent referred to an email from the Claimant to Dr Nguyen of 21 June 2022 in which she said: "would it be possible for you to give me some sort of certificate of good mental health?" The Respondent says that this is inconsistent with the Claimant having a mental health condition.

27. The Tribunal was referred to an email exchange between the Claimant and Dr Nguyen on 21 June 2022 in which Dr Nguyen stated, "I could say that you came to the consultation in a state of distress". She went on to say that the Claimant was in good health and had no current medication. She stated that she was not able to comment on the Claimant's mental wellbeing or otherwise as she had only seen her once. The Respondent says that this email exchange means that Dr Nguyen referring to the Claimant being in distress during the consultation needs to be treated with caution. Further, the Respondent says that it would be entirely normal for the Claimant to suffer a degree of distress with adverse life events such as a sequence of bereavements in 2021 and the strain of the disciplinary process.

28. The Claimant's medical evidence included reference to a single session with a psychotherapist on 27 July 2023.

ADHD

29. The Claimant says she has suffered from hyperactivity since being a child. She says that she was seen by a psychologist aged 6 who diagnosed her as hyperactive. However, there is no documentary evidence of this and further the Respondent does not accept that hyperactivity is the same as ADHD.

30. The Claimant's medical evidence included a short letter from Dr Macombe dated 22 May 2023 saying that she had presented with hyperactivity necessitating a long term anxyolytic treatment.

31. The Claimant provided a report dated 1 September 2023 from Gabriel Rafi, Neuro psychologist (Dr Rafi) in support of a diagnosis of ADHD. Relevant extracts from the report are as follows:

- working memory – average for her age
- processing speed – good abilities
- questionnaire – ACEPLUS – this stated that the Claimant had at least six criteria present to support an ADHD diagnosis

32. In his conclusions Dr Rafi stated that the Claimant shows very good performance in verbal comprehension, analogical reasoning and processing speed. The Claimant does present the clinical signs that confirm the diagnosis of ADHD. It seems that the Claimant presents an ADHD profile.

33. The Respondent says that considerable caution should be taken in respect of Dr Rafi's report. First, it was only commissioned after the Claimant had already commenced tribunal proceedings and therefore her motivation in responding to the questions comprising the diagnostic criteria should be questioned. Further, the Respondent contends that the conclusions of Dr Rafi are equivocal in his language i.e. "it seems".

Chronology of relevant events

34. There were no performance or disciplinary issues pertaining to the Claimant prior to 2022. Indeed, the Claimant's performance review conducted by Mr Devilard on 8 November 2021 was wholly positive.

Relationship between the Claimant and Aline Deve, PE Teacher, (Mrs Deve)

Claimant's email of 3 March 2020

35. In an email of 3 March 2020 from the Claimant to Mrs Deve she stated that she had a problem with Mrs Deve's speech to her 3rd year class. She concluded by saying that she would like Mrs Deve to wait until there are no students around when you address me as you did. She says that she had to calm down her students after Mrs Deve spoke.

36. The Claimant accepts that at no point did she raise a grievance pertaining to Mrs Deve.

Mrs Deve's grievance dated 27 November 2021 concerning the Claimant

37. In an email of 27 November 2021 from Mrs Deve to Vanessa Abbey in HR, (Mrs Abbey) she referred to an incident that had occurred on 26 November 2021 with the Claimant. She stated that the Claimant's behaviour towards her is intolerable and unacceptable. She says that the Claimant constantly tries to attack her and seems to take pleasure in shouting at her at the slightest opportunity. She said that she could no longer accept working in these conditions of stress and permanent aggression. She said that this was not new but has been getting worse day by day since June 2019 without counting on the Claimant's many professional shortcomings which for some have already been reported to the administration.

38. The Tribunal heard that Mrs Deve had already had a discussion with HR and was advised to submit a formal grievance in writing. She told HR that she wanted to raise a grievance. Therefore, her email to Mrs Abbey of 27 November 2021 was treated as a grievance.

39. In an email on 27 November 2021 to Mr Devilard the Claimant said that she would like to have seen him with Mrs Deve following a new disagreement.

40. In a letter from Mrs Abbey dated 10 January 2022 the Claimant was invited to an investigation meeting pertaining to Mrs Deve's grievance. This was a very short invitation letter and the Claimant criticises it on the basis that it did not specify the particulars of Mrs Deve's grievance, did not advise her of the right of accompaniment, did not attach a copy of the grievance procedure, did not refer to the possibility that the grievance could give rise to disciplinary proceedings and did not include any reference to support for her during the process. The Respondent says that the Claimant and her trade union representatives had access to the grievance and disciplinary procedures on the intranet.

41. In an email from the Claimant to Mr Devilard of 11 January 2022 she referred to having an "animated" discussion with Mrs Deve when they went to the SNEP Congress. She concluded her detailed email by saying: "I am now wondering if I should also initiate a grievance against Mrs Deve for the above noted facts? I didn't even know it was possible". The Claimant accepted in evidence that she had not raised a grievance against Mrs Deve.

Investigation interview with Mrs Deve on 12 January 2022

42. Mrs Deve attended an investigation meeting with Mrs Abbey and Elise Tossou, HR Advisor (Mrs Tossou) on 12 January 2022. Mrs Deve referred to verbal aggression and humiliation and said that she literally felt verbally abused by the Claimant. She also referred to concerns regarding the Claimant's conduct to include her leaving her students unaccompanied at Raynes Park and using illicit substances.

Investigation interview with Mr Riviere on 12 January 2022

43. Mr Riviere told Mrs Abbey and Mrs Tossou that the Claimant and Mrs Deve did not get along and were always looking for the little beast in each other (nit-picking). He referred to more virulent exchanges on certain points between the Claimant and Mr Middleton and Mr Sallet. He said that the Claimant is a "loudmouth". In evidence he said that the Claimant spoke her mind and this did suit everyone.

Investigation interview with Lucile Humbert, PE Teacher (Mrs Humbert) on 13 January 2022

44. She referred to the Claimant leaving pupils unsupervised at Raynes Park.

Investigation interview with Kevin Moran, PE Teacher, (Mr Moran) on 17 January 2022

45. He referred to the Claimant having a conflict with Mr Middleton a while ago. He said that she does not fit into a group.

Investigation interview with Marc Sallet, PE Teacher, (Mr Sallet) on 17 January 2022

46. Mr Sallet referred to feeling "literally verbally abused" by the Claimant. He stated that the Claimant is quite virulent orally. He made reference to having heard that she leaves her pupils unsupervised. He went on to say: "She's not well, she's a little all over the place. For a year or two and even more since September she has been lonely".

Investigation interview with the Claimant on 17 January 2022

47. The Claimant said that she got on well with Mr Tritz and Mr Riviere but not with Mrs Deve.

Investigation interview with Frederique Betsen on 19 January 2022

48. Mr Betsen referred to incidents between the Claimant and Mr Sallet, Mr Middleton, Mr Moran and Mr Doohan.

Investigation interview with Mr Bello on 20 January 2022

49. Mr Bello referred to the Claimant having an unfriendly and passive-aggressive attitude to Mr Middleton, Mrs Humbert and Mr Moran. He referred to the Claimant leaving groups unsupervised.

Investigation report

50. Following their investigation Mrs Abbey and Mrs Tossou produced an undated investigation report which was sent to Mr Leridon. It contained the following conclusions:

a) The people interviewed confirmed that the tone used by the Claimant was inappropriate.

b) The combination of two strong personalities and an authoritarian and aggressive attitude of the Claimant towards Mrs Deve led to an inability on the part of her two colleagues to work or interact normally.

c) The multiplicity of testimonies linked to periods of repeated absences of the Claimant during lessons, leaving students unsupervised, constitutes a breach of duty and vigilance vis a vis students, implying that their safety must be ensured at all times. It is therefore appropriate to carryout an investigation which could lead to disciplinary proceedings.

51. The Claimant says that this report was not objectively balanced as it focussed on the negative comments made by witnesses relating to her and excluded the positive. Further, the report focussed solely on the Claimant's culpability and on the breakdown of her working relationship with Mrs Deve and not at all on the Claimant's complaints regarding Mrs Deve's conduct towards her. Further, the Claimant says that she was only aware that Mrs Deve's grievance was being investigated, in terms of their working relationship, rather than more general consideration being given to her alleged professional shortcomings. The Claimant says that she did not receive a copy of the investigation report until it was included in the disclosure process.

Grievance Outcome meeting dated 3 February 2022

52. The Claimant attended a meeting with Mr Leridon on 3 February 2022. Mrs Abbey was in attendance as the note taker. The Claimant was advised that her tone and words towards Mrs Deve were inappropriate and aggressive. She was advised that Mrs Deve's allegations were corroborated by all those interviewed and present on the day of the incident.

53. Mr Leridon advised the Claimant that various matters drawn to the Respondent's attention during the investigation process involved potential malfunctions which could not be ignored and which required a new investigation. He referred to the following:

- A breach of your duty of vigilance involving endangerment of students;
- Inappropriate behaviour towards your colleagues; and
- Non-compliance with regulations and national standards.

54. The Claimant was advised that the investigation may lead, if necessary, to a disciplinary procedure.

55. The Claimant says that the allegations were so general that it was not possible for her to ascertain what case was being made against her.

56. The above allegations were repeated in a letter to the Claimant of 3 February 2022.

Disciplinary Investigation

57. Mrs Abbey and Mrs Tossou carried out a series of investigation meetings with witnesses from 10 February 2022. The seven witnesses identified have been anonymised and are referred to by number only.

Interview with witness 1 on 10 February 2023

58. The Tribunal was told that witness 1 is Mrs Humbert. She referred to the Claimant having left her class unattended on several occasions.

Interview with witness 7 on 10 February 2022

59. They referred to the Claimant leaving her pupils unattended at Raynes Park for approximately eight minutes to go to the food truck. She was asked whether the Claimant's "erratic and strange behaviour" could be explained by substance abuse. She answered in the affirmative. The Claimant understandably criticises what she considers to have been highly leading questions.

Interview with witness 6 on 28 February 2022

60. They referred to it being fundamental in PE not to leave pupils unsupervised. They referred to the Claimant's behaviour being erratic and that she was very up and down.

Interview with witness 3 on 3 March 2022

61. They referred to the Claimant's behaviour having become more erratic and argumentative over the years. They referred to the Claimant adopting a very laissez-faire attitude. They referred to children coming back from a school trip in tears because of the Claimant's behaviour. The witness answered in the affirmative to a question asking whether the Claimant's behaviour had significantly worsened since the previous September.

Interview with witness 8 on 8 March 2022

62. They rejected the assertion that the Claimant sometimes put pupils in danger. They referred to the Claimant being a "loudmouth". The witness did not accept that the Claimant's behaviour was erratic but perhaps a little strange for some people who do not know her very well.

Investigation interview with Mr Riviere on 8 March 2022

63. He referred to the Claimant being a "loudmouth". He said that whilst he did not feel attacked he could understand that other colleagues might feel so even if not intended by the Claimant. He said that he had to juggle not putting the Claimant, Mr Humbert and Mrs Deve together which is not always easy.

Investigation interview with witness 4 on 9 March 2022

64. They referred to the Claimant having a professional attitude and being dynamic.

Investigation interview with witness 5 on 9 March 2022

65. They perceived that the Claimant was a bit depressed and had withdrawn a lot.

Investigation interview with witness 9 on 9 March 2022

66. They described the Claimant's behaviour towards colleagues as being professional and had not seen any particular tensions. The witness referred to the Claimant as being exuberant, having energy and that her behaviour is normal and enthusiastic.

Investigation interview with the Claimant on 10 March 2022

67. The Claimant said that for the last 20 years she had done the same and did not feel like she was not well. She said that she was thinking of leaving the school in June 2023 and that the whole procedure was unnecessary.

Investigation report said to have been produced by the Respondent on 22 March 2022

68. This undated and unaccredited report was only disclosed to the Claimant shortly prior to the Tribunal hearing. It is assumed that it was produced by Mrs Abbey and Mrs Tossou and was dated on or about 22 March 2022. It was sent to Mr Leridon and listed those interviewed and summarised what they had said. This included the following comments.

- The majority of teachers in the PE department have witnessed the fact that the Claimant sometimes leaves her classes unattended.
- It made reference to the Claimant's use of cannabis to help her sleep. It included the comment that many days of her absence could be the consequence of excessive cannabis consumption.
- It referred to colleagues noting a lack of professionalism and seriousness on the Claimant's behalf.
- It mentioned that at Raynes Park she teaches with a sandwich or a hot drink in her hand.

69. The Claimant says that this report is selective in that it focusses on negative comments made regarding her.

Disciplinary Hearing of 29 March 2022

70. The Claimant attended a disciplinary hearing with Mr Leridon. Nathalie Horan, HR Advisor (Mrs Horan) was in attendance as a note taker and the Claimant was represented by Mr Adol. The Claimant denied leaving her classes unsupervised. She referred to an occasion at Raynes Park where she had gone to a snack bar to get a hot chocolate for a pupil who was feeling unwell. She says that she could see her class at all times and, in any event, there were other teachers in attendance.

71. The Claimant said that she did not have time to read the interview notes. They had been provided to her 4½ days in advance of the hearing. The Claimant variously referred to being too busy with school work or feeling tired because of the effects of insomnia. We find it surprising that the Claimant did not take the time to read relatively

short statements, or alternatively that neither her nor Mr Adol, requested additional time so that she could read them prior to the disciplinary hearing commencing.

72. The Claimant said that she had the same lifestyle for 20 years and that whilst she used CBT to assist sleep it was not a problem and she had never come "stoned" to the Lycee. The Claimant made no reference to ADHD or distress and made no request for reasonable adjustments on account of potential disabilities.

73. Mr Leridon raised the possibility of an appointment being made for the Claimant with an occupational physician. He referred to her cannabis consumption, hyperactivity and support for life following recent bereavements. The Claimant declined this suggestion and she said she would rather obtain such support when she returned to France.

74. The Lycee was closed for the Easter holidays between 2-18 April 2022. The Respondent rejects the contention that there was any unreasonable delay . It was not until 20 April 2022 that the Claimant returned the minutes of the disciplinary hearing and only made minor amendments.

Email of Mr Riviere of 25 April 2022

75. Mr Riviere referred to alleged comments made by Mr Devilard pertaining to the Claimant and her mental health. He recollected that Mr Devilard had said: "what does she do during the weekends? Does she lock herself in her bedroom and smoke all weekend?"

Remark of Mr Devilard

76. Mr Devilard made a remark that the Claimant was "alone in life". He explained that loneliness in life can be an issue. The Respondent contended that this was a reference to her not having a support network. However, we find that the obvious interpretation of the comment was that it meant that the Claimant lived alone without a partner in life.

Notice of Final Written Warning dated 3 May 2022

77. Following the disciplinary hearing she attended on 29 March 2022 the Claimant was notified in a letter from Mr Leridon of 3 May 2022 that she had received a final written warning which would remain active for 12 months. She was informed that this had arisen as a result of:

- Breach of duty of care towards pupils – class left unsupervised;
- Inappropriate behaviour towards your colleagues; and
- Non-compliance with exam standards.

78. The Claimant was advised that the performance improvement required involved making sure that she stayed with her class at all times during lessons, including during transport. She was told that this improvement needed to take place immediately and that the likely consequence of further misconduct was dismissal.

Incident of 10 May 2022

79. There was a dispute as to whether the school premises were closed on the afternoon of 10 May 2022. Whilst the majority of lessons were not taking place that afternoon as preparations were being undertaken for the baccalaureate exams the Respondent says that school was open and that some GCSE and A level lessons were taking place. Further, the junior school was open albeit the Claimant says that this is separate and accessed via a separate entrance from the senior school.

80. The PE classes off-site continued as normal. This included the Claimant accompanying a class of 12 and 13 year olds to Raynes Park. The Claimant with her own class of approximately 30 pupils, together with half of another class so about 45 pupils, returned via bus to the Cromwell Road entrance to the school at approximately 15:47.

81. The Tribunal saw video evidence, together with photographic stills, showing the events between 15:47 and 15:55. It is agreed that the majority of the pupils on exiting the bus then walked along the Cromwell Road and did not enter the school premises. The Claimant together with six pupils who wish to collect their scooters entered through the front entrance and then exited via the rear entrance to the roundabout at 15:55.

16 May 2022

82. Following a meeting between the Claimant and Mr Leridon he sent her a letter dated 16 May 2022 notifying her that she was suspended with immediate effect, on full pay, pending an investigation as a result of concerns regarding her having let her class leave the Lycee several minutes before the ringing of the bell signalling the end of the class at 15:55. The Claimant was advised that the allegation may amount to gross misconduct and lead to her dismissal.

Investigation interviews

83. The investigation meetings were again undertaken by Mr Abbey and Mrs Tossou.

Investigation interview with witness 5 on 18 May 2022

84. They said that they told the Claimant that it was not allowed to let the pupils leave early but did not confront her and the Claimant said it is ok for them to go.

Letter from Mrs Abbey to the Claimant dated 19 May 2022

85. In a letter from Mrs Abbey dated 19 May 2022 the Claimant was invited to a disciplinary interview on 26 May 2022. The Claimant complains that she was not advised about the possibility of calling witnesses and that no documents pertaining to the disciplinary investigation were provided.

Investigation interview with witness Mrs Humbert on 26 May 2022

86. Mrs Humbert said that she had never seen pupils being allowed to leave early but that it was rare that they returned from Raynes Park before the end of lesson bell. It was suggested on behalf of the Claimant that if Mrs Humbert had a genuine concern

regarding the wellbeing of the pupils it would have been open for her to have intervened rather than standing close to the school entrance and then reporting the Claimant's actions.

Investigation interview with the Claimant on 26 May 2022

87. The Claimant says that she explained to pupils on the bus that they could not enter the school because it is an exam centre, and that she intended to leave with them to go to the roundabout, but some had told her that they had to get their scooters so she walked in with them and told the others to go to the roundabout. There is no evidence that the majority of the students actually went to the roundabout.

Investigation report following the incident on 10 May 2023

88. Once again this report is not dated and unaccredited but again assumed to be in late May/early June 2022 and produced by Mrs Abbey and Mrs Tossou. Again, it was not given to the Claimant until shortly prior to the Tribunal hearing. It conclusions were as follows:

- New student safety incident one month after final written warning;
- Inadequate decision making;
- Breach of responsibility involving endangerment of students; and
- Non compliance with school exit rules.

Letter from Mr Devilard to the Claimant dated 30 May 2022

89. In a letter dated 30 May 2022 from Mr Devilard the Claimant was requested to attend a disciplinary hearing on 7 June 2022. She was advised that having a live final written warning for breaching her duty of care towards her pupils it was possible that a dismissal for misconduct may result.

Claimant's disciplinary hearing of 7 June 2022

90. The hearing was conducted by Mr Devilard. Mrs Horan attended in a note taking capacity. The Claimant was represented by Mr Poggi. The Claimant said that colleagues had told her that her file was very heavy and that she was going to be dismissed. The Respondent denies that any predetermined decision had been made.

91. The Claimant reiterated her understanding that the school was closed. Mr Devilard referred to the Claimant's misinterpretation of instructions. He drew a distinction between letting students out of a classroom before the bell rings, whilst they remain in the school grounds, and allowing them to leave the Lycee unsupervised eight minutes before the end of the course.

92. In an email from Mrs Horan to the Claimant of 15 June 2022 she advised that Mr Devilard was directed towards a dismissal for misconduct. She was advised that a CCPL will be convened as soon as possible for an opinion.

Emails supportive of the Claimant

93. Subsequent to 21 June 2022 a number of the Claimant's colleagues and former colleagues sent supportive emails regarding her position. There is no need to refer to these in detail.

Meeting of the CCPL 27 June 2022

94. The CCPL comprised five members of the school management and five union representatives. This included Mr Foin and Mr Devilard on behalf of the school management and Mr Poggi and Mr Adol as union members. The meeting was chaired by Mr Foin.

95. The union representatives expressed concern about the referral of the Claimant to psychological counselling. They did not make any reference to the proposed dismissal of the Claimant being discriminatory on account of her sex or any alleged disability.

96. At the end of the meeting the members of the CCPL were invited to vote on the proposed dismissal of the Claimant and the management representatives voted unanimously in favour of dismissal and the trade union members unanimously against. This meant that Mr Foin was amongst those voting in favour of her dismissal.

The Claimant's letter of dismissal dated 27 June 2022

97. In a letter dated 27 June 2022 Mr Devilard advised the Claimant that she was dismissed on the grounds of misconduct for a breach of her duty of care towards pupils which equates to gross negligence in the performance of her duties. He stated that he had found:

(a) "That you did allow a large group of children, aged 12 to 13, to leave the school entirely unsupervised, eight minutes before the end of class, albeit on a day where most lessons were cancelled;
(b) That you did make a conscious decision to walk inside the school with a small group of pupils at a time where, according to your own explanations, you thought the school was closed to children.

I find this behaviour to be absolutely unacceptable". He referred to the Claimant already having a final written warning.

98. He stated that the Claimant would nevertheless receive 12 weeks' notice with her employment running until 16 September 2022. As a matter of fact the Claimant had a contractual entitlement to three months' notice which would not have expired until 27 September 2022.

99. The Claimant was advised that she could appeal the decision in writing within five days and that the appeal would be conducted by Mr Foin.

Email from Mrs Adol dated 28 June 2022

100. Mrs Adol is the wife of Mr Adol. She referred to a conversation with Mrs Humbert. This included her stating that Mrs Humbert had said that she would never find

accommodation at such an attractive place and that she hoped the Claimant would leave so that she could stay in the flat.

The Claimant's appeal dated 4 July 2022

101. In a WhatsApp exchange with Mrs Feurtet on 28 June 2022 the Claimant stated that she was going to appeal just to annoy them a little bit more.

102. In her appeal of 4 July 2022 the Claimant said that she wished to appeal Mr Devilard's decision. She did not provide any particulars as to the grounds of appeal. The Claimant did not question the appropriateness of Mr Foin conducting the appeal notwithstanding his participation and vote in favour of her dismissal at the CCPL.

Appeal hearing on 13 July 2022

103. The appeal hearing was conducted by Mr Foin. Mr Adol attended as the Claimant's union representative. Mr Adol pointed out that Mr Foin had already had the opportunity to participate in discussions at the CCPL. However, he did not unequivocally object to his conducting the appeal hearing or make any allegation of bias or the appearance of bias. Mr Foin stated that the CCPL has no legal recognition in British law and must, therefore, be considered as a separate procedure.

104. Four grounds of appeal were articulated by Mr Adol during the hearing and were as follows:

- The final warning given to the Claimant on 3 May 2022 was not preceded by any prior warning;
- None of the reasons justifying the final warning can be related to serious misconduct;
- Comments on the incident of 10 May 2022: exceptional circumstances, motivation of one of the witnesses and duration of the suspension; and
- A mix of personal and educational/professional elements throughout the disciplinary procedure.

105. The Respondent says that three of the four grounds of appeal were in effect an attempt to reopen the final written warning in respect of which no appeal had been pursued.

106. In a letter dated 20 July 2022 Mr Foin informed the Claimant that her appeal had been unsuccessful.

Position of Mr Moran as a comparator

107. There was an incident involving Mr Moran during a school trip to Barcelona in October 2016. As a result he was suspended and received a warning. The Claimant seeks to compare her situation with his.

The Claimant's other comparators

108. The Claimant also contends that she was treated less favourably than Mr Poggi and Mr Tupoin-Bron the grounds of her sex. The Respondent says that there was a material difference in that the allegation that they had allowed pupils to leave early involved pupils within the school rather than leaving the premises.

Appointment of a new PE teacher

109. A new PE teacher was appointed on or about 20 May 2022. The Claimant says that this is evidence that a decision had already been made to terminate her employment. The Respondent says that the appointment had already been decided on and was made without reference to the Claimant's position. The new teacher started on 7 November 2022 with a weekly schedule of 19 hours.

Ofsted report

110. Following an inspection of the Lycee between 15 and 17 November 2022 a report was produced which whilst stating that generally the school is good, said that the overall effectiveness was inadequate with leadership and management being inadequate and the school not meeting independent school standards. It referred to leaders not understanding the standards, not managing policies well and that arrangements for safeguarding are not effective. It went on to state that leaders do not ensure that staff have regular updates and reminders and nor do they give sufficient considerations to risk when making decisions, for example, in allowing older pupils to go off site during the school day. Overall, the weakness in the school's approach to safeguarding combined to mean that pupils are not kept safe.

Media article concerning Mr Devilard from June 2023

111. The Tribunal was referred to an online article concerning the school and Mr Devilard in particular. This included a reference to his having made comments to someone called Carla to the effect of: "ok, I can give you a kiss, but it won't change much". It went on to refer to him allegedly making inappropriate comments, particularly about women, to include calling them "little girls" and making remarks about the way they dress when arriving at meetings. He was alleged to have referred to a female colleague as a "sweet dessert that melts under the tongue".

112. Mr Devilard was questioned regarding this article and the Claimant's contention is that he did not unequivocally deny making such remarks but rather referred to his employer providing him with another role. No report was produced in respect of these allegations by the Respondent.

The Law

Unfair dismissal

113. Under section 98(1)(b) of the Employment Rights Act 1996 (the ERA) the employer must show that the reason falls within subsection (2) or is some other substantial reason

of a kind such as to justify the dismissal of an employee holding the position which the employee held. This is the set of facts known or beliefs in the mind of the year decision-maker at the time of the dismissal which causes him or her to dismiss the employee Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

114. Under s98(4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

115. In considering whether the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303, and the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09.

116. In considering the fairness of the dismissal, a tribunal must have regard to Iceland Frozen Foods v Jones [1982] IRLR 439 and the approach summarised in that case. The starting point should be the wording of section 98(4) of the ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

117. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.

118. A tribunal is entitled to find that the investigation was outside the band of reasonable responses without being accused of placing itself in the position of the employer: Newbound v Thames Water Utilities [2015] IRLR 735, CA, per Bean LJ at paragraph 61. It is not necessary, according to Court of Appeal in Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94 extensively to investigate each line of defence advanced by an employee. That would be too narrow an approach and would

add an "unwanted gloss" to the Burchill test. What is important is the reasonableness of the investigation as a whole. Further, when considering the extent of the investigation required, it is important to have regard to the extent to which underlying matters are not in dispute.

119. The Court of Appeal held in London Ambulance Service NHS Trust v Small [2009] IRLR 563 that a tribunal's focus in a complaint of unfair dismissal is not on the employee's guilt or innocence. Instead, the tribunal should confine itself to reviewing the reasonableness of the respondent's decision. In Small the tribunal had, according to the Court of Appeal, seriously strayed from its path of reviewing the fairness of the employer's handling of the dismissal. Instead, the tribunal had retried certain factual issues, substituted its own view of the facts relating to Mr Small's conduct and ultimately concluded that there were not reasonable grounds for believing that Mr Small was guilty of misconduct.

120. It is also important for the tribunal to keep in mind when considering the reasonableness of the disciplinary and dismissal process that procedural issues do not sit in a vacuum, but they must be considered together with the reason for dismissal: Taylor v OCS Group Ltd [2006] IRLR 613 (CA) and Sharkey v Lloyds Bank Plc [2015 UKEAT/0005/15]. The tribunal must consider the context and gravity of any procedural flaw identified and it is only those faults which have a meaningful impact on the decision to dismiss that are likely to affect the reasonableness of the procedure.

Consistency with comparable cases

121. If it bears in mind that authorities suggesting that disparity arguments should be scrutinised with particular care, a tribunal is entitled to rely on disparity of treatment to support a finding of unfair dismissal: Newbound at paragraphs 62- 65.

122. The circumstances must be truly comparable: Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 (EAT); Paul v East Surrey District Health Authority [1995] IRLR 305 (CA) and MBNA Ltd v Jones (UKEAT/120/15). In Paul, the Court of Appeal indicated that it would be rare for a dismissal to be unfair based on inconsistent treatment alone. A tribunal must be satisfied that the situations are truly similar and that material differences do not exist between the position of a claimant and the named comparator.

123. When allegations of inconsistent treatment are made, it will be necessary to look at whether there really has been a disparity of treatment. The question for a tribunal to ask is whether the alleged differential treatment was so irrational that no reasonable employer could have taken that decision: Securicor Ltd v Smith [1989] IRLR 356, confirmed in Epstein v Royal Borough of Windsor and Maidenhead UKEAT/0250/07.

Relevance of final written warning

124. If a warning was imposed in good faith and there were prima facie grounds for its imposition, then it must be regarded by the tribunal as having validly imposed. In such circumstances it will thus be reasonable for the employer to take account of it if subsequent misconduct arises as per Stein v Associated Driers [1982] IRLR 447, at paragraph 6.

125. In accordance with Davis v Sandwell BC [2013] IRLR 374 and the judgment of Mummery LJ challenging a warning in tribunal proceedings imposes a very high bar on a claimant. To go behind the final warning, the tribunal must be satisfied that its imposition was manifestly inappropriate. From the judgment of Mummery LJ at paragraphs 22-23:

> "It is not the function of the ET to reopen the final warning and rule on an issue raised by the Claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a nullity.

126. In Wincanton Group Plc v Stone [2013] IRLR 178 it was held that a warning needs to be treated by the tribunal as valid unless it is satisfied that its imposition was manifestly inappropriate.

ACAS Code on Disciplinary and Grievance Procedures (the Code).

127. In reaching their decision, tribunals must also consider the Code. By virtue of s.207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence, and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be considered in determining that question.

128. The Code's provisions include:

Establish the facts of each case

a) It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

b) In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

c) If there is an investigatory meeting this should not by itself result in any disciplinary action.

d) In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

Inform the employee of the problem

e) If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would

normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

Hold a meeting with the employee to discuss the problem

f) The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

g) At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses.

Polkey reduction

129. In Software 2000 v Andrews [2007] ICR 825, EAT, Elias P summarised (at paragraph 54) the authorities on "Polkey" reductions and made the following observations:

(a) in assessing compensation for unfair dismissal, the tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

(b) if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

(c) there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

(d) however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence; and

(e) a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e., that employment might have been terminated earlier) is so scant that it can effectively be ignored.

Contributory conduct and the compensatory award

130. When considering a reduction to the compensatory award, under S.123(6) ERA, the tribunal should: identify the impugned conduct, consider whether it was blameworthy, and decide, if so, whether it caused or contributed to the dismissal.

131. The conduct must have been known at the time of the dismissal: Optikinetics Ltd v Whooley [1999] ICR 984, EAT, per HHJ Peter Clark at 989A-C. It is for the tribunal alone to determine, as a matter of fact, whether the employee committed the impugned conduct and, if so, how wrongful it was: Steen v ASP Packaging [2014] ICR 56, EAT, per Langstaff P at paragraph 12.

132. There are four questions for the tribunal to consider: Steen v ASP Packaging Ltd:

(a) what was the conduct which is said to give rise to possible contributory fault?

(b) was that conduct blameworthy, irrespective of the employer's view of the matter?

(c) did the blameworthy conduct cause or contribute to the dismissal?

(d) if so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

Contributory conduct and the basic award

133. Under s.122 (2) of the ERA where a tribunal considers that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce, or further reduce, the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Definition of Disability under s.6(2) of the EQA

134. A person has a disability if he or she has "a physical or mental impairment" which has a "substantial and long-term adverse effect on his or her ability to carry out normal day to day activities". The burden of proof is on the claimant to show that she satisfies this definition.

135. Schedule one provides in relation to long term effects:

> 2(1) the effect of an impairment is long-term if – (a) it has lasted for at least 12 months; (b) it is likely to last for at least 12 months; or (c) it is likely to last for the rest of the life of the person affected.

136. Paragraph 5 Schedule 1 provides:

a. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if (a) measures are being taken to treat or correct it; and (b) but for that, it would be likely to have that effect.

b. The test as to whether the effect is "substantial" is objective, as opposed to being determined solely by reference to what the individual believes. The effect will be "substantial" if it is more than minor or trivial; s.212(1).

137. The question of whether the affective impairment has lasted for 12 months, or is likely to last at least 12 months, must be assessed as at the time of the alleged discriminatory act(s) in accordance with all answers VW [2021] IRLR 612, paragraph 26.

138. The burden of proof in relation to disability status rests on the claimant.

139. The law imposes the responsibility on a respondent, subject to a standard of reasonableness, to find out if its employees have disabilities.

140. Did a respondent do all that it can reasonably to find out if a worker has a disability?

Sex and disability discrimination and the burden of proof

141. Under s13 (1) of the Equality Act 2010 (the EQA) read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of sex than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

142. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of sex. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

143. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

144. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA). The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

145. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

146. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870. "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

147. An act may be rendered discriminatory by the mental processes, conscious or nonconscious, of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877, HL. In such cases, the tribunal must ask itself what the reason was for the alleged discriminator's actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that answers the question of whether the claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, per Lord Nicholls at paragraph 10.

148. It is permissible for the tribunal to answer the hypothetical comparator question by having regard to how unidentical but not wholly dissimilar cases have been treated: Chief Constable of West Yorkshire v Vento (No.1) [2001] IRLR 124, EAT, per Lindsay J at paragraph 7; approved in Shamoon, per Lord Hutton at paragraph 81.

149. A benign motive is irrelevant when considering direct discrimination: Nagarajan at 884G-885D, per Lord Nicholls. It is irrelevant whether the alleged discriminator thought the reason for the treatment was the protected characteristic, as there may be subconscious motivation: Nagarajan at 885E-H:

> "I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds."

150. It is not sufficient for to draw an inference of discrimination based on an "intuitive hunch" without findings of primary fact to back it: Chapman and Anor v Simon [1994] IRLR 124.

151. In determining whether a claimant has established a prima facie case, the tribunal must reach findings as to the primary facts and any circumstantial matters that it considers relevant: Anya v University of Oxford and Anor [2001] IRLR 377 (CA). Having established those facts, the tribunal must decide whether those facts are sufficient to justify an inference that discrimination has taken place.

152. The tribunal may cast its net widely to look for facts that are consistent with discrimination and may therefore give rise to a prima facie case. The tribunal may take account of circumstantial evidence, including matters occurring before the alleged discrimination (even those outside the limitation period) and matters occurring afterwards if they are relevant. However, there must be "some nexus between the facts relied on and the discrimination complained of": Wheeler & Anor v Durham County Council [2001] EWCA Civ 844.

153. Finally, the less favourable treatment must be because of a protected characteristic and that requires the tribunal to consider the reason why the claimant was treated less favourably: Nagarajan. The tribunal needs to consider the conscious or subconscious mental processes which led the respondent to take a particular course of action in respect of the claimant and to consider whether her gender played a significant part in the treatment: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Harassment on the grounds of sex under S 26 of the EQA

154. Under s26, EQA, a person harasses the claimant if he or she engages in unwanted conduct related to age, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

155. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, where Mr Justice Underhill (as he then was) gave this guidance:

> "An employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

156. General Municipal and Boilermakers Union v Henderson [2015] IRLR 451 provides that a single incident is unlikely to be sufficient to create an environment sufficient to give rise to an offence of harassment.

Harassment and detriment claims

157. Under S 212 of the EQA "detriment" does not…… include conduct which amounts to harassment".

158. The effect of S 212 (1) is that harassment and direct discrimination claims are mutually exclusive, meaning that a claimant cannot claim that both definitions are satisfied simultaneously by the same course of conduct. A claimant must choose one or run alternative claims.

159. In cases such as the present, where harassment and direct discrimination are relied on as alternative causes of action based on the same facts, Tribunals will often consider the complaint of harassment first. The reason for this is that under that cause of action, the acts complained of need only be "related to" the protected characteristic, as opposed to being "because of" the protected characteristic as required for direct discrimination.

Submissions

Claimant

160. Mr Canning provided the Tribunal with a 40 page closing submission. It is not necessary to refer to this in detail. He emphasised that the Tribunal should take account of remarks allegedly made by Mr Devilard to draw an inference that the Claimant's sex played a part in what was a draconian decision to dismiss her.

161. In relation to unfair dismissal he contends that the Respondent's processes throughout were non-compliant with the principle of fairness. He says that the questioning of witnesses was objectional because it was leading, invited assumptions of guilt, sought to elicit evidence on irrelevant/highly personal matters, that witness statements were unnecessarily anonymised, that the Claimant was subject to a cocktail of diverse criticisms and that the meeting between the Claimant and Mr Leridon on 29 March 2022 was chaotically structured.

162. He argues that the Tribunal should therefore disregard the final written warning.

163. He says said that it was reasonable for the Claimant to believe that the school was closed on 10 May 2022.

164. Mr Canning conceded that Mr Poggi, Mr Tupoin-Bron and Mr Moran are not direct comparators because the conditions in s.23(1) of the EQA are not met in their case. They each serve instead as evidential comparators as the House of Lords suggested in Watt.

Respondent

165. Mr Line says it was not manifestly unreasonable for a final written warning to be imposed and the Tribunal should not go behind it. Further, the Claimant did not appeal the decision.

166. He says that whilst the Respondent concedes that there were some breaches of procedure that these were not material, for example, the suspension not being reviewed after ten days.

167. He says that the CCPL is a consultative body and did not include the Head Teacher.

168. He says that the Claimant did not at any stage request reasonable adjustments on account of any alleged disability.

Conclusions and discussion

What was the reason or principal reason for dismissal?

169. We find that the reason for the Claimant's dismissal was conduct and therefore a fair reason within the meaning of s.98(2)(b) of the Employment Rights Act 1996 (the ERA).

Was the Claimant's dismissal within the range of reasonable responses?

170. We find that the Claimant's dismissal was within the range of reasonable responses open to the Respondent. We find that the Respondent had genuine grounds for a concern that the Claimant's conduct had potentially endangered the safety of pupils in her care and therefore its decision to dismiss her for gross misconduct was within the range of reasonable responses open to it as an employer.

Did the Respondent act in a procedurally fair manner?

171. We find that the totality of the procedure applied by the Respondent was unfair. We reach this decision for the following reasons. First, we do not consider that the dismissal process can be considered in isolation from the process which culminated in the Claimant's final written warning dated 3 May 2022.

172. We have carefully considered whether it would be appropriate to go behind the circumstances, together with the process followed, pertaining to the imposition of the warning. We find that it would.

173. Whilst we accept that the warning was issued in good faith we nevertheless consider that its imposition was manifestly inappropriate. We reach this finding for the following reasons:

174. Whilst not the primary factor we consider it to be significant that the warning was only imposed seven days in advance of the incident of 10 May 2022 which culminated in the Claimant's dismissal. As such we consider that the circumstances giving rise to the warning cannot be regarded as entirely discrete and severable from the incident of 10 May 2022 and the resultant disciplinary procedure.

175. We find that the circumstances in which the investigation of Mrs Deve's grievance dated 27 November 2021 segued into a disciplinary investigation and procedure pertaining to the Claimant was unfair. In particular, we find that the potential disciplinary

concerns highlighted to the Claimant at the grievance outcome meeting with Mr Leridon on 3 February 2022 were very vague and did not properly enable her to understand, consider and answer the case against her.

176. Whilst Mr Leridon referred to the following:

- a breach of your duty of vigilance involving endangerment of students;
- inappropriate behaviour towards your colleagues; and
- non-compliance with regulations and national standards

he did not provide specificity as to what elements of the Claimant's alleged conduct had given rise to these concerns. In particular, the concept of inappropriate behaviour towards her colleagues is vague and subjective and without more specific allegations it would have been impossible for the Claimant to properly assess and respond to the concerns.

177. We find that the questioning of witnesses during the grievance investigation was flawed. The interviews provided the Claimant's colleagues with the opportunity to make generalised criticisms of her conduct and performance. Many of the comments raised were not directly relevant to the content of Mrs Deve's grievance.

178. We find that the undated investigation report produced by Mrs Abbey and Mrs Tossou lacked objectivity. We find that it had a disproportionate focus on pejorative comments regarding the Claimant and placed less emphasis on positive comments. Further, the Claimant was not provided with a copy of the investigation report until it was included in the disclosure process, and therefore did not have the opportunity to respond to the individual criticisms made which compromised her ability to properly put forward arguments as part of the grievance process.

179. The investigation report said to have been produced by the Respondent on 22 March 2022 was again not disclosed to the Claimant until shortly prior to the Tribunal hearing. It made general, and not necessarily relevant, references to the Claimant's conduct to include her using cannabis to help her sleep, her alleged lack of seriousness and her teaching with a sandwich or hot drink in her hand at Raynes Park.

180. We find that the notice of final written warning letter dated 3 May 2022 was inadequate in so far as it repeated the unparticularised allegations of unsatisfactory conduct and performance without additional particularity. Further, the letter did not attempt to summarise the explanations provided by and on behalf of the Claimant during the disciplinary hearing meeting on 29 March 2022. As such it creates an impression of a largely preordained and perfunctory process with inadequate critical objectivity applied to the circumstances of the grievance investigation which had then evolved to the disciplinary process against the Claimant.

181. We therefore find that the fact of the Claimant's final written warning should be disregarded in assessing whether her dismissal was fair.

<u>The dismissal procedure</u>

182. Whilst we find that the disciplinary hearing was procedurally fair we nevertheless find that the Respondent failed to carry out a reasonable investigation. We reach this finding for the following reasons:

a) There was a failure to investigate and provide clarity as to what arrangements existed at the school on 10 May 2022 and in particular what steps a teacher should take in the event that they returned to the school from an external activity prior to the end of day bell, to include whether pupils should have been kept on the bus, marshalled in the street outside the school, brought back into the school or taken through the school to the rear entrance.

b) There was a failure to question Mrs Humbert as to why, if she was concerned regarding the Claimant's conduct, she did not intervene and take responsibility for the pupils, rather than focussing on highlighting her concern regarding the Claimant's conduct.

183. We find that the procedure was unfair in that the undated investigation report produced by Mrs Abbey and Mrs Tossou, following the incident on 10 May 2022, was not given to the Claimant when clearly it would have been a material document for her to consider to properly know the case against her.

184. We find that Mr Devilard's letter dated 30 May 2022 inviting the Claimant to the disciplinary hearing was inadequate in that it contained no particularity regarding the allegation against her beyond "breach of duty of care towards pupils". Whilst we take account of the fact that the letter of 30 May 2022 was subsequent to that from Mr Leridon dated 16 May 2022 in which he advised the Claimant of her suspension on the grounds that she had allowed children in her class to leave the school several minutes before the ring of the bell signalling the end of the class, we nevertheless consider that looked at in totality the letters to the Claimant did not provide adequate particularity of the disciplinary allegations against her.

<u>Appeal Hearing</u>

185. We find that the appeal hearing was unfair in that it was not dealt with impartially by a manager who had not previously been involved in the case. In circumstances where Mr Foin had been one of the five members of the school management team to vote in favour of the Claimant's dismissal at the CCPL on 27 June 2022 we consider that it was unfair for him to then conduct the appeal hearing on 13 July 2022. We consider that Mr Foin should have recused himself from conducting the appeal as at the very least his involvement created the appearance of a potential bias or a predetermined procedure.

186. We therefore find that the Claimant's dismissal was unfair. We have decided that it would be appropriate for us to consider and give our findings on any Polkey reduction and contributory conduct, given that these issues were included in our discussion regarding liability, and it would therefore be artificial to defer them to a remedy hearing.

<u>Consistency</u>

187. We do not consider that the Claimant's dismissal was unfair on the grounds of inconsistency with comparable cases. The majority of the incidences of other teachers allowing pupils to leave before the bell were distinguishable in so far as they were in the school premises and/or not at the end of the school day. For example, we do not consider that leaving pupils unsupervised within the gym at PE is in any way comparable to leaving pupils in the street, with the potential danger from traffic, prior to the end of the official school day.

Suspension

188. Whilst the Claimant's suspension was longer than the ten days stipulated, and a review did not happen, we do not consider that this constituted a significant procedural deficiency.

ACSA Code of Conduct

189. We consider that the Respondent's conduct of the grievance and disciplinary procedures did not comply with the ACAS Code. In particular, we find: that the Claimant was not properly and fully informed of the disciplinary allegations against her both in respect of the process leading to the final written warning and the dismissal procedure. Further, the Claimant was not provided with the respective investigation reports, to include the notes of the interviews with the witnesses, which, in any event, were anonymised.

190. We find, as stated above, that it was unfair, that given his earlier involvement in the CCPL, that Mr Foin conducted the appeal.

191. We consider it appropriate that given these shortcomings that there should be an uplift in the compensatory award of 25% under the ACAS Code.

Polkey

192. We need to assess whether the Claimant was likely to have been dismissed absent the final written warning. We find that there is a 50% chance that she would have been and therefore apply a 50% reduction under Polkey on the basis that had she not been subject to a final written warning, which we consider to have been manifestly unfair, that she would not have been dismissed.

193. We then need to consider what difference a reasonable investigation would have made. We consider that there was a 30% chance that a reasonable investigation would have created a situation where the Claimant's employment was not terminated.

194. Combining the above we find that had the manifestly unfair final written warning not existed and a fair investigation had been undertaken there would have been a 35% probability of the Claimant remaining in employment We therefore apply a Polkey reduction of 65% to the compensatory award.

Contributory conduct

195. We consider it would be appropriate to reduce the compensatory award under s.123(6) of the ERA on the basis of the Claimant's blameworthy conduct. We find that it should have been obvious to the Claimant that whatever the ambiguity regarding the school's open/closed status on the afternoon of 10 May 2022, and the approach which should have been taken in the event that pupils returned prior to the end of the school day from an external event, that her action of leaving pupils unattended, and to their own devices, prior to the end of school bell was contrary to established, safe and best practice. We accept the Respondent's evidence that a distinction existed between pupils being let out of class early during the school day, and whilst on the school premises, from pupils being left unattended outside the school when there would have been a potential issue regarding the legal liability of the school in the event of a pupil being involved in an accident and a question as to whether the school's insurance policy would thereby be compromised. We consider that a 50% reduction in the compensatory award would be appropriate.

196. We do not, however, consider it just and equitable to reduce the basic award under s.122(2) of the ERA.

Wrongful dismissal

197. We find that the Claimant was not provided with her full contractual notice. Under clause 18.3 of her contract of employment the Claimant had an entitlement to three months' notice. In the dismissal letter dated 27 June 2022 she was given 12 weeks' notice from 27 June 2022 running until 16 September 2022. We therefore find that the Claimant is entitled to an additional 11 days' gross pay to reflect her full contractual notice period. The Claimant will be responsible for any tax and employee national insurance contributions on this payment.

Direct sex discrimination

198. The Claimant has conceded that Mr Poggi, Mr Tupin-Bron and Mr Moran are not direct comparators because the conditions in s.23(1) of the EQA are not met in their case. She does, however, rely on them as evidential comparators.

199. Whilst we accept that the press article pertaining to Mr Devilard from June 2022, creates an inference of him adopting a misogynistic and sexually discriminatory approach towards female colleagues, we do not find that this in itself is sufficient to create an inference that his conduct of the disciplinary hearing pertaining to the Claimant gave rise to less favourable treatment on account of her sex. In our assessment of Dr Devilard's evidence in respect of that press article we accept the Claimant's contention that his denials were equivocal and did not directly address the specific contentions made. However, the fact that he may have rightly been criticised for previous misogynistic conduct in his role at the Respondent does not mean that all of his subsequent actions, to include the Claimant's disciplinary process, were tainted with sexism.

200. Further, whilst we find that on the balance of probabilities Mr Devilard made the comment as reported by Mrs Fuertet at paragraph 23 of her witness statement, that he had described the Claimant as a "seule dans le vie", this does not in our view mean that

his conduct of the disciplinary process and its outcome were tainted by sexism and less favourable treatment of the Claimant.

201. We therefore do not consider that the burden of proof has switched to the Respondent given that that the only grounds relied upon by the Claimant to infer less favourable treatment on account of her sex of the above matters pertaining to Mr Devilard and what is contended to be the "harshness" of her treatment.

202. We do not find that any of the matters referred to in paragaraph 4(ii) e-k constituted less favourable treatment of the Claimant on account of her sex. We consider that the Claimant would have been treated in exactly the same way had she been a male employee charged with a similar offence.

Harassment based on sex

203. We do not consider, as set out above, that the matters referred to at 5(i) c-i were on account of the Claimant's sex and as such are not mattes capable of constituting harassment based on sex.

Disability

204. We have considered whether the conditions of ADHD/hyperactivity, insomnia and distress, whether individually or cumulatively, constitute disabilities under s.6 of the EQA. We find they do not. We reach this decision for the following reasons:

Insomnia

205. Whilst there may be some circumstances where insomnia has a sufficient substantial and long-term adverse effect on an employee's ability to carry out normal day-to-day activities to constitute a disability under S6 of the EQA we consider that this would only be the case in the most severe circumstances and most normally where insomnia was a symptom of an underlying physical or mental impairment.

206. We find that there is inadequate evidence that the Claimant's insomnia had a substantial and long term adverse effect on her ability to carry out normal day-to-day activities. The Claimant's evidence was that she had coping strategies and that she had experienced sleep difficulties for most of her adult life. We need to consider the evidence available during the Claimant's employment. As such the fact that she was prescribed zopiclone on 22 May 2023 is not relevant given that her employment had terminated on 16 September 2022. Whilst the Claimant was prescribed magnesium tablets in 2022 we do not consider this sufficient to demonstrate the existence of insomnia of a sufficient magnitude to constitute a disability.

207. There is no evidence that the Claimant's professional duties were significantly compromised by her insomnia. Her evidence was that she would sometimes have a poor night's sleep and would need to make up for that. She gave evidence regarding coping strategies such as taking plenty of exercise, evening meditation and using cannabidiol (CBD).

208. Further, people have variable sleep patterns, and the fact that different individuals have a different sleep needs, and propensity to sleeplessness, does not in itself cross the threshold of giving rise to a disability particularly when there is no direct link given between arguable insomnia and any other underlying medical condition.

ADHD

209. We have considered ADHD in conjunction with Hyperactivity. Whilst we accept that ADHD is capable of constituting a disability we find that in the Claimant's case it did not. In reaching this decision we have taken account of Dr Ravi's report dated 1 September 2023. Whilst the report was produced significantly after the termination of the Claimant's employment we nevertheless consider that with a condition such as ADHD, the effects are likely to be broadly consistent over a period of time, and therefore the post-employment report is in all probability applicable to her condition during her employment.

210. We consider that with a condition such as ADHD it is a question of degree, and there will be some instances where an employee with an ADHD diagnosis has a disability, and others where they do not. Whilst Dr Ravi concluded that "it seems that the Claimant presents an ADHD profile" we consider that is a non-precise diagnosis and many aspects of her report indicate that the Claimant's normal day-to-day activities were functioning at a reasonably high level. For example:

- Her overall understanding of the instructions was very good
- Her working memory was within the average for her age
- Her processing speed was good
- She shows very good performance in verbal comprehension, analogical reasoning and processing speed.

Distress

211. We do not consider that distress as referred to is capable of constituting a disability. We consider that the distress experienced by the Claimant in respect of bereavements, she suffered in late 2021, and the disciplinary process in May/June 2022, constituted a normal reaction to ordinary adverse life events rather than a condition potentially amounting to a disability.

Overall conclusion on disability

212. Therefore, we conclude that looked at individually and cumulatively the Claimant did not have a disability during the relevant period. Further, we would have decided that the Respondent did not have actual or constructive knowledge of any such conditions amounting to a disability.

213. It is not therefore necessary for us to consider whether the matters referred to in paragraph 8 constituted discrimination arising from disability or in paragraph 9 whether the Respondent failed to make reasonable adjustments.

Overall conclusions

214. The claims for direct disability discrimination, harassment on account of disability and indirect disability discrimination are dismissed on withdrawal.

215. The claims for discrimination arising from a disability and a failure to make reasonable adjustments on account of disability fail and are dismissed.

216. The claims for direct sex discrimination and harassment based on sex fail and are dismissed.

217. The claim for wrongful dismissal succeeds and the claimant is awarded an additional 11 days' pay.

218. The claim for unfair dismissal succeeds and compensatory award is subject to a 25% uplift as a result of the Respondent's breach of the ACAS Code, but is subject to a 65% reduction under Polkey and a further 50% reduction for contributory conduct, as set out above.

219. The Claimant is entitled to a full basic award.

220. The Tribunal has provisionally listed a one day in-person remedy hearing on 14 March 2024, but the parties are invited to consider whether they are able to achieve a settlement without a further hearing, and to notify the Tribunal as soon as possible as to whether this date is required.

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Employment Judge Nicolle

7 February 2024

Sent to the parties on:

13 February 2024

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For the Tribunal: