



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Georgia Rogers

**Respondent:** Diocese of Southwell and Nottingham Multi Academy Trust

**Heard at:** Nottingham

**Heard on:** 6 – 9 November 2023  
27 November 2023 in Chambers

**Before:** Employment Judge Victoria Butler

**Members:** Ms L Scott  
Mr R Jones

**Representation**

**Claimant:** Mr A Adamou, Counsel

**Respondent:** Mr J Heard, Counsel

## RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

- (1) The Claimant's claim of unfair dismissal fails and is dismissed.
- (2) The Claimant's claim of discrimination arising from disability fails and is dismissed.

## REASONS

### BACKGROUND

1. The Claimant presented her claim to the Employment Tribunal on 26 June 2022 following a period of Early Conciliation between 18 March 2022 and 4 April 2022.
2. She was employed by the Respondent as a teacher from 6 September 2019 until her summary dismissal on 7 March 2022. She claims unfair dismissal and discrimination arising from disability.
3. In brief at this stage, the Claimant was a teacher teaching year 5 pupils (9–10 year olds). She was summarily dismissed primarily for breaching the Teachers' Standards and safeguarding provisions and claims that her dismissal was i) unfair and ii) unfavourable treatment because of something arising in consequence of her post-traumatic stress syndrome ("PTSD"), namely hyper-vigilance/hyperarousal.
4. On 1 November 2022, the parties attended a preliminary hearing for case management purposes at which a preliminary hearing to determine whether the Claimant was disabled at the material time was listed, as was this final hearing in relation to liability only.
5. At a preliminary hearing on 26 April 2023, Employment Judge Hutchinson found that the Claimant was suffering from a disability because of PTSD at all material times.

### **THE ISSUES**

6. The parties agreed the following issues for determination.

#### ***Discrimination Arising from Disability: Equality Act 2010 Section 15***

7. Has the Claimant been treated unfavourably because of something arising in consequence of her disability contrary to section 15 Equality Act 2010 ("EQA")? The Claimant relies upon hyper-vigilance/hyperarousal as alleged 'somethings arising' in consequence of her disability.
8. Did the 'somethings' listed above arise in consequence of the Claimant's disability?
9. Did the Respondent know or could reasonably have been expected to know of the Claimant's disability?
10. The alleged unfavourable treatment complained of is her dismissal.
11. Was the treatment a proportionate means of achieving a legitimate aim pursuant to section 15(1)(b) EQA? The Respondent relies on the legitimate aim of the upholding of Teachers' Standards and the safeguarding of children.

#### ***Unfair Dismissal***

12. Was the reason (or the principal reason) for the dismissal one of the five potentially fair reasons under section 98 Employment Rights Act 1996 ("ERA 1996")? The Respondent relies on misconduct.

13. Did the Respondent act reasonably in the circumstances in treating that as a sufficient reason to dismiss the Claimant?
14. Did the Respondent genuinely believe that the Claimant had committed misconduct?
15. Were there reasonable grounds for that belief?
16. At the time the belief was formed, had the Respondent carried out a reasonable investigation?
17. Was the dismissal within the band of reasonable responses?

### **THE HEARING**

18. The hearing was listed for four days, and the first two hours were allocated as reading time for the Tribunal. Due to mandatory Judges' training, the hearing had to be concluded by 1pm on the fourth day. The evidence was completed comfortably by this time and we asked the parties to provide written submissions to assist us in our deliberations which took place on 27 November 2023.
19. No preliminary matters arose save an application for one of the Respondent's witnesses, Mr Reichelt, to attend via video link because he had covid. The application was granted without opposition.

### **THE EVIDENCE**

20. We heard evidence from the Claimant.
21. For the Respondent we heard evidence from:
  - Mr Martin O'Connell, Governor
  - Ms Anna Martin, Executive Principal
  - Mr Jeremy Reichelt, Governor
22. The Respondent gave evidence first and we were satisfied that its witnesses were credible, and their accounts accorded with the contemporaneous documents.
23. We found the Claimant's evidence to be inconsistent, at times with her own evidence, and the contemporaneous documents. By way of example, in her witness statement she gives two separate accounts of when she says she began to have panic attacks daily (circa March 2021 and circa June 2021). However, she attended an occupational health appointment on 12 July 2021 and no mention of panic attacks is made. Furthermore, the minutes of an investigation meeting on 24 September 2021 (which the Claimant had opportunity to correct) record that the Claimant told Ms Smyth that she only had one panic attack over the summer holidays. She subsequently said in cross examination that she experienced three

or four panic attacks a week, some of which were ‘*horrific*’.

24. Accordingly, where there was any conflict on the evidence before us, we preferred that of the Respondent’s witnesses.

### **THE FACTS**

25. We made our findings of facts based on the material before us, taking into account the contemporaneous documents where they existed and the conduct of those concerned at the time. We resolved any conflicts of evidence on the balance of probabilities.

### **The Respondent**

26. The Respondent is a Multi-Academy trust which runs 17 academies in and around Nottinghamshire and Lincolnshire, including West Grantham Church of England Primary Academy (“the school”). The school has approximately 277 students on its roll and, overall, employees approximately 44 staff. The Claimant was initially employed to work at Bluecoat Meres Primary Academy (the school's predecessor) and her employment transferred to the school on 1 January 20 21.

### **Relevant policies**

#### ***Keeping Children Safe in Education***

27. Keeping Children Safe in Education is statutory guidance for schools and colleges issued by the Department for Education. Schools and colleges in England **must** have regard to it when carrying out their duties to safeguard and promote the welfare of children. It explains “*it is essential that everybody working in a school or college understands their safeguarding responsibilities*”.
28. In part one, it provides:

*“2. Safeguarding and promoting the welfare of children is **everyone's** responsibility. **Everyone** who comes into contact with children and their families has a role to play. In order to fulfil this responsibility effectively, all practitioners should make sure their approach is child-centred. This means that they should consider, at all times, what is in the best interests of the child.*

*3. No single practitioner can have a full picture of a child's needs and circumstances. If children and families are to receive the right help at the right time, **everyone** who comes into contact with them has a role to play in identifying concerns, sharing information and taking prompt action.*

*9. **Any staff member** who has **any** concerns about a child's welfare should follow the processes set out in paragraphs 55-70. Staff should expect to support social workers and other agencies following any referral.*

*Every school and college should have a designated safeguarding lead who will provide support to staff to carry out their safeguarding duties and will liaise closely with other services such as children's social care.*

.....

***What school and college staff should do if they have concerns about a child***

*55. Staff working with children are advised to maintain an attitude of “**it could happen here**” where safeguarding is concerned. When concerned about the welfare of a child, staff should always act in the best interests of the child.*

*56. If staff have **any concerns** about a child's welfare, they should act on them immediately.....*

*57. If staff have a concern, they should follow their own organisations child protection policy and speak to the designated safeguarding lead (or deputy).....(unnumbered as supplement to the bundle).*

***Teachers' Standards***

29. The relevant sections of the Teachers' Standards provide:

*A teacher must:*

- 1. Set high expectations which inspire, motivate and challenge pupils*
  - establish a safe and stimulating environment for pupils, rooted in mutual respect*
- 7. Behave effectively to ensure a good and safe learning environment*
  - maintain good relationships with pupils, exercise appropriate authority, and act decisively where necessary*

*Part 2: personal and professional conduct*

*A teacher is expected to demonstrate consistently high standards of personal and professional conduct. The following statements define the behaviour and attitudes which sets the required standard for conduct throughout a teacher's career.*

- Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school, by:*

- *treating pupils with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a teacher's professional position*
- *having regard for the need to safeguard pupils' well-being, in accordance with statutory provisions*
- .....
- *Teachers must have proper and professional regard for the ethos, policies and practices of the school in which they teach, and maintain high standards in their own attendance and punctuality.*
- *Teachers must have an understanding of, and always act within, the statutory frameworks which set out their professional duties and responsibilities” (page 53).*

**Staff Code of Conduct**

30. The Staff Code of Conduct provides:

*“In accordance with the DfE “keeping children safe in education” guidance April 2018 this code has been adopted by this academy in order for all academy staff to be fully aware of the standards of personal and professional conduct in relation to various aspects of their work. This code gives a clear framework for staff to know their responsibilities and will be discussed during the course of their employment, for example in team meetings as queries arise to ensure the code is mutually monitored, positively promoted in the academy and understood by everyone.*

*Every member of academy staff will be asked to read this code of conduct and date and sign that they have read and understood the document as part of their induction. This code will be reviewed annually and updated by the directors as and when necessary, and staff will be informed of any amendments. If staff have any questions about the requirements of this code, then advice should be sought from their line manager or the principal/headteacher. There is an expectation that all employees in this Trust will conduct themselves in a manner commensurate with the highest standard in order to maintain public trust and confidence and be beyond reproach in the performance of their duties. Each member of academy staff has a duty to ensure that the appropriate standards of conduct are upheld both by themselves and by colleagues.*

*Underlying principles*

*.....*

*Teachers must have an understanding of, and always act within, the*

*statutory frameworks which set out their professional duties and responsibilities. .... The conduct of all teachers must always be in line with the Teachers' Standards and where appropriate the Headteacher standards.*

*Staff are expected to provide the highest possible standard of service. Where staff are aware of any contravention of this Code, illegality, misconduct or breach of procedure they should notify their principal/headteacher at the earliest opportunity. This Code does not seek to address every possible circumstance, and simply because a particular action may not be addressed within the code, this does not condone that action by omission.*

### **1.Safeguarding**

*Staff must safeguard children's well-being, in accordance with statutory provisions, the local Safeguarding Children Board procedures and their Academy's child protection policy. Staff must report any safeguarding concerns immediately to the designated safeguarding lead in academy and ensure the principle/ head teacher is also informed. All staff have a responsibility to take appropriate action and work with of its services as needed.*

*All staff must be fully aware of the academy policies and procedures relating to safeguarding and, given their position of trust, must ensure that they do not put themselves in any situation where their conduct or behaviour with any pupil could be misconstrued. Any allegations of inappropriate contact with pupils will be investigated according to the Trust's Disciplinary Procedure.*

### **4. Relationships and contact between academy staff - the public, parents and Pupils**

*Academy staff should always act in a courteous, efficient and impartial manner towards all individual pupils, groups of pupils, staff and individuals. Staff must always treat pupils with dignity, building relationships rooted in mutual respect, observing proper boundaries appropriate to their position.*

*It is the policy of the academy that there will be no personal contact other than in certain exempted circumstances between staff and current/former pupils of academy age outside the normal academy work environment. Any proposed work-related contact, outside of the normal working environment, must be agreed in advance by the principal/headteacher and be recorded and monitored. Unexpected contact with pupils should be kept to a minimum e.g. brief greeting" (pages 103 – 115).*

**ICT policy**

31. The information and communication technologies policy provides:

*Staff/Volunteer Acceptable Use Agreement*

*I understand that I must use Academy systems in a responsible way, to ensure that there is no risk to my safety or to the safety and security of the systems and other users.....*

*For my professional and personal safety:*

- I understand that the academy will monitor my use of the school digital technology and communication systems.*
- I understand that the rules set out in this agreement also apply to use of these technologies (e.g laptops, e-mail, VLE etc.) out of school, and to the transfer of personal data (digital or paper based) out of school (as per the BYOD policy and in line with GDPR best practises).....*

*I will be professional in my communications and actions when using school/academy ICT systems:*

- I will not access, copy, remove or otherwise alter any other users files, without their express permission.*
- I will communicate with others in a professional manner, I will not use aggressive or inappropriate language and I appreciate that others may have different opinions.*
- I will ensure that when I take and/or publish images of others I will do so with their permission and in accordance with the academy's policy on the use of digital/video images.*
- I will not use my personal equipment to record these images, unless I have permission to do so.*
- I will only use social networking sites in in school in accordance with the academies social media and other policies.*
- I will only communicate with students/ pupils and parents/ carers using official school systems. Any such communication will be professional in tone and manner. I will not engage in any online activity that may compromise my professional responsibilities.*

*I understand that I am responsible for my actions in and out of school/ Academy:*



- *I understand that this Acceptable Use Agreement applies not only to my work and use of academy digital technology equipment in school, but also applies to my use of academy systems and equipment off the premises and my use of personal equipment on the premises or in situations related to my employment by the Academy.*
- *I understand that if I fail to comply with this acceptable use agreement, I could be subject to disciplinary action. This could include a warning, a suspension, referral to governors/ directors and in the event of illegal activities the involvement of the police” (pages 82 – 95).*

### **Social Media Policy**

32. The Social Media Policy provides:

*“Responsible Personal Use of Social Media*

*Terms used:*

*Appropriate: activities listed are acceptable in terms of ICT use.*

*Inappropriate: activities listed as inappropriate may potentially lead to misconduct and disciplinary proceedings. In some cases, this could lead to dismissal and legal action.*

*Appropriate - blocking unwanted communication from pupils*

*Inappropriate - inviting, accepting or engaging in communications with pupils over social network sites” (pages 96 – 102).*

### *Disciplinary policy*

33. The Respondent has a comprehensive disciplinary policy which provides guidance on all stages of the disciplinary policy.

### **The Claimant’s employment**

34. The Claimant commenced employment with the Bluecoat Meres Primary Academy on 1 September 2019 when it was part of the West Grantham Academy Trust. Her employment transferred to the school in January 2021 when Bluecoat Meres Primary Academy transferred into the Respondent. On joining Bluecoat Meres, she was provided with a contract of employment which stated *“All employees of the Academy are bound by the Code of Conduct. A copy can be found on the Academy network”* (page 121).
35. The Claimant was undoubtedly a committed teacher who enjoyed her job. Prior to the incidents in 2021, the Claimant had an unblemished disciplinary record.

36. In October/November 2020, the Claimant became aware of a serious safeguarding incident involving pupil XX and social media conversations including pornographic and sexualised language. She took prompt action which led to the involvement of the police and social services. Pupil XX and her mum were considered to be vulnerable by the school more generally and pupil XX formed an attachment to the Claimant.
37. In March 2020, the first covid lockdown was announced and schools were unable to teach in person save for those children of key workers. During the pandemic, the Respondent introduced an online platform called Dojo which was used alongside remote learning to communicate with parents and as a rewards system.
38. On 26 November 2020, the Claimant suffered an ectopic pregnancy and as a result was off sick from work until March 2021. In consequence of her experiences of the pregnancy, emergency surgery and circumstances whilst in hospital under covid restrictions, she was subsequently diagnosed with PTSD.
39. On 17 March 2021, the Claimant attended a return-to-work meeting with Ms N Smyth, Head of Primary. It was agreed that she would commence a phased return to work and the minutes recorded:

*“Georgia reported that she was fit and ready to return to work; her new medication was working and she has had no pain since the end of February. In addition, Georgia explained that all her ‘readings’ were back to normal and her PTSD was minimal and she was more anxious than anything and could still experience panic attacks at night which, thankfully, only lasted around 2 minutes. Mrs. Smith stated that it was good that Georgia was able to recognise when a panic attack was imminent and it would be beneficial if Georgia could develop some sort of signal to let staff in her classroom and the wider team know if she needed to remove herself from the class/ a particular situation” (page 168).*

40. A second return to work meeting was held on 30 March 2021, at which the Claimant confirmed that she was ready to return to her full-time hours and felt very supported by her colleagues. Ms Smyth advised the Claimant that if she received an e-mail or a build-up of work that caused her concern or anxiety then to say something as soon as possible so any issues could be resolved, and her anxiety would not escalate. The Respondent also provided a teaching assistant for her.
41. The Claimant was on sick leave when Bluecoat Meres was transferred into the Respondent and on her return encountered unfamiliar faces along with classroom observations which she found difficult and stressful.
42. In or around April/May 2021, the Claimant delivered a lesson on loss to her class which covered the loss of a pet, death and family difficulties. The resource used was prepared by a teacher who is trained to run support programmes for pupils experiencing loss and change. The theme is very simplistic with ‘gentle’ power point slides designed for the class age group (pages 157 – 161). The lesson formed

part of the PHSE curriculum and not relationship and sexual education (“RSE”). RSE content is shared with parents in advance, so they are aware of any relationship or sex education teaching and have the option to remove their child. The pupils are taught about pregnancy within this element of the curriculum which is typically delivered by an external company.

43. The Claimant had the lesson plan on loss a few days in advance and read the teacher’s note which said:

**“3.1 Before delivering this lesson**

***Reflect on self***

*As a teacher facilitating these sessions, it is really important that time is taken to reflect on the potential impact this may have on you as an individual and how this in turn could impact on the pupils and students in class. If you have suffered a recent and/or really difficult bereavement you may not be able to feel to deliver these lessons at this time. Seek support from Senior Leaders or colleagues to either opt out or team teach.*

*Children and young people look to the adults around them to help them develop their responses and feelings in difficult situations. It is important that teachers feel comfortable in normalising emotional responses to loss. If the teacher identifies and models that some of the discussion makes them feel sad or upset too, this will help the children see that it is OK to express these feelings and explore ways to manage them appropriately. It would not, however, be appropriate for an adult to share personal or detailed experiences of loss with the class or become very upset”*

44. The Claimant did not seek advice or support before the lesson. Whilst teaching the lesson, she became upset and explained to the class that she had a baby growing in the wrong part of her body and it was not there anymore or words to that effect. The Respondent was not aware of this incident until later on.
45. On 25 May 2021, the Claimant was put on a Performance Improvement Support Plan. On 27 May 2021, she emailed Ms N Wollerton, Deputy Head, saying *“I will formally write to you stating my concerns over the appraisal process that I don't agree with after consulting with my union. Therefore, there will be no point in us meeting tomorrow while I don't agree with this process and have not agreed to the informal appraisal paperwork”* (page 176).
46. On 31 June 2021, the Claimant requested a meeting with Ms Martin, Executive Principal. She explained that she was concerned about her current mental health and that her PTSD had been triggered by the Respondent’s CEO observing her lessons. As a result, Ms Martin postponed the performance support plan process until an occupational health referral was undertaken as a means to help the

Claimant with her teaching, performance and to understand any reasonable adjustments that could support her (page 177).

47. The Claimant attended an occupational health consultation on 14 July 2021. The subsequent report said:

**Background information**

*Miss Rogers had an ectopic pregnancy which required termination in November 2020.*

*She suffered from Post-Traumatic Stress (PTSD) as a result of this and this appears to be a complex issue, with a background of longer term anxiety problems.*

*However, Miss Rogers is on appropriate long-term treatment and has completed a course of psychotherapy to treat the PTSD/ anxiety.....*

*Miss Rogers was recovering from the PTSD and her anxiety levels were improving, but these appear to have been exacerbated by stressors at work in the past few weeks (please see below).*

**Occupational Aspects**

*I believe that Miss Rogers is on a support plan with a review that has been postponed pending this advice.*

*Miss Rogers has found the observations very stressful and I understand you have also made an adjustment of appointing an alternative observer/ assessor.*

*I believe that Miss Rogers is fit for her normal job, which she apparently enjoys and as long as the support plan review process is carefully managed, then this can proceed...*

**Answers to Specific Questions Raised in the Management Referral**

*Miss Rogers does have an underlying medical condition (anxiety/PTSD). Her medication is not likely to interfere with her workability. However, she does have reduced emotional resilience which may take some time to rebuild.*

*Miss Rogers does not appear to have a functional impairment likely to affect workability but, as mentioned above, has reduced emotional resilience and will be more vulnerable to stress. It is likely to be a matter of months before this improves.*

*The adjustments recommended are largely in the form of personal support, but Miss Rogers has found it helpful to have some temporary increased*

*administrative assistance from her teaching assistant, although I understand her teaching assistant is now unavailable.*

*It is highly likely that Miss Rogers will be regarded as having a disability under the Equality Act, although this is ultimately a decision made in a court of law or tribunal..... (pages 178- 179).*

48. The report was not received by the school until 27 July 2021 during the summer holidays so there was no opportunity to discuss it with the Claimant before the break.
49. On the last day of term, pupils in the Claimant's class wanted to show her a TikTok dance. The Claimant agreed and said would teach them the dance version as she used to be a dance teacher. They asked the Claimant if she would record it and she agreed to do so on the School's iPad. The video was not uploaded onto any social media site. It was evident that the children had been viewing Tik Tok but the Claimant made no further inquiries of them, nor did she report it as a safeguarding concern because they were underage (13 being the legal age).
50. At the end of the last day, pupil XX did not want to leave the Claimant and became very upset. The Claimant had to walk her to her mum's car in tears and extricate her from a hug.
51. Over the summer holidays, pupil XX contacted the Claimant via Dojo saying she missed her "so much". The Claimant replied and said that she missed pupil XX too. Over the summer the Claimant maintained contact with pupil XX and her mum. The Claimant sent pupil XX a picture of her nails and pupil XX sent pictures of her after having her hair and make-up done and from a day trip to Skegness with her granddad. Within the exchange, the Claimant told pupil XX's mum that "Bless her, I just love her" and "send her my love". She referred to pupil XX as "sweetheart" and did nothing do discourage the communication which she knew came directly from the pupil as well as her mum.
52. During the exchange pupil XX said that her grandad had died but the Claimant did not report it as a safeguarding/welfare concern.

### ***The decision to suspend***

53. The message exchange came to light on 6 September 2021 which was an inset day at the start of the new term. Ms Martin completed a 'decision to suspend' checklist which recorded the allegation as "Teacher has engaged in communication with the primary age student via our online reward system (class Dojo) during the summer. This includes unprofessional non-school related messages from the member of staff including sending photos of themselves and receiving photos of the student" (page 197).
54. Ms Martin took the decision to suspend the Claimant in accordance with the disciplinary policy as she felt the Claimant would "have opportunity to destroy

*evidence and also talk to child in school. As the child regularly spends lunch and break time with GR it would be difficult to isolate GR from child until the investigation is completed. Will need to disable all school IT accounts. May also talk to staff witnesses” (page 197).*

55. On 13 September 2021, the Claimant was notified of a disciplinary investigation and advised that the allegation against her was: *“during the school closure period from 22 July 2021 to 2 September 2021 you have communicated via class Dojo inappropriately and unprofessionally with a year 5 pupil” (page 200).*

### **The investigation**

56. Ms Smyth, the Respondent’s designated safeguarding lead, was appointed to investigate the allegation. On 20 September 2021, she interviewed three members of staff, two of whom had no concerns about the Claimant’s relationship with pupil XX (pages 202 – 204). One mentioned that the Claimant was closer to pupil XX than others but another felt that *“Miss Rogers was quite close with child XX; A little too close and borderline unprofessional” (page 204).*
57. Another member of staff provided a further statement under the Respondent’s whistle blowing procedure. They confirmed that they were aware of the exchanges over the summer with pupil XX which gave them sufficient cause for concern to report the matter as a potential safeguarding breach (page 206).

### **A further allegation**

58. At around the same time, a parent of a child (ZY) raised concerns with Ms Martin. Those concerns were that the Claimant was overly familiar with the students, had shared detailed and distressing information with her daughter about her ectopic pregnancy and that she had asked the children to keep secrets. Ms Martin asked Ms Smyth to investigate these concerns as part of the ongoing investigation.
59. Ms Smyth met with child ZY’s parent who wanted to discuss a number of small things which *“put together make a bigger concerning picture”*. During the summer holidays, the child relayed that the Claimant told pupils that she knew who her teacher was going to be the following year but to keep it a secret which the parent found alarming.
60. Furthermore, child ZY had been moved from her friendship group into another class which had upset her. The Claimant met the parent and pupil in an alleyway and expressed her view that she did not support the decision and had fought it. The parent was unhappy that the Claimant said this in front of her child.
61. The parent also told Ms Martin that she was aware of the Claimant’s sickness absence from school and that she had shared with pupils that when she was off, she had a baby in her tummy but had an operation and did not have a baby anymore. The parent felt that this was not appropriate information to be sharing. Her child had also understood that the Claimant was OK and now had a new

partner.

62. The parent's main concern was the Claimant's over sharing of information. They were also concerned about the Claimant's management of her child's diabetes and suggested that the Claimant had told her that she had administered insulin to the child late and at a different time to that recorded in the electronic records (pages 207 - 208).
63. On 24 September 2021, Ms Smyth interviewed another staff member who had no concerns about the Claimant (page 209).

### **The investigatory interview with the Claimant (pages 210 – 215)**

64. On 24 September 2021, the Claimant attended an investigatory meeting with Ms Smyth. She was accompanied by her union representative, Mr Swettenham, and asked to give her account of the messages with pupil XX over the summer. The Claimant felt that she had done nothing wrong because all communication was through the mum's account. However, the Claimant acknowledged that the messages were not professional but that was just how she usually texts using terms such as 'lovely' and 'sweetheart'.
65. In relation to the message which said: "*I do love her*", the Claimant explained that she had said it to parents before but acknowledged it was "*possibly not appropriate but at the time she said it from a caring perspective*". She also explained that pupil XX was reliant on her which she now saw as over reliance. The Claimant also acknowledged that she could see how the messages could be twisted.
66. Mr Swettenham wanted it noting that the Claimant had PTSD and the symptoms can last for a long time. However, his comments related to her experiences on return to work from sickness absence and the performance improvement plan. He did not advance it as a reason for her maintaining contact with pupil XX over the summer.
67. Following the meeting, the Claimant asked for the following statements to be added to the minutes:

*"it needs to be made clear this support plan did not note any support towards my PTSD. Also, regardless of whether I supported this support plan, this would still go ahead whether I liked it or not".*

*"it needs to be noted that I still believe there was not efficient training on class Dojo communications. After speaking to a staff member who was employed last year who left at the end of the year, agreed this training was not efficient in regards to communication and in fact related to the positive praise system on class Dojo"*

### **Further investigation**

68. On 24 September 2021, Ms Smyth met with pupil XX's mum who felt that the Claimant supported her child who was very nervous when the school finished for the summer break. She confirmed that she was aware of all the messages which were only sent through class Dojo on her phone, and she was not concerned about them. She did not want the Claimant to get into trouble because she was a nice teacher (page 216).

#### **Further allegation about TikTok**

69. On 15 October 2021, another teacher reported that pupil XX and another pupil were repeatedly asking them to film TikTok videos of them. The teacher told the pupils that they were not allowed to, and they responded: "*well Miss Rogers did*".
70. One of the pupils also alleged that the Claimant took pictures of them on Snapchat. They went on to say "*we know all about Miss Roger's love life too. She fell pregnant with a rich man but the baby grew in the wrong part of her tummy in died*". The pupils carried on telling the teacher stories about the Claimant's boyfriends and the staff member reported the conversation to Ms Smyth. Ms Smyth asked the teacher to gain further information from the pupils and the following was provided:
- that the Claimant took pictures on her iPad, she used her own personal phone for the sounds.
  - the above happened when the pupil was in Year 5 when Ms Rogers was her teacher.
  - Miss Rogers told a child that her account was private and that no videos would be posted.
  - Miss Rogers used Snapchat to take photos and then send them to her laptop although the child pupil did not think they were saved.
  - Most of the girls in the class did Tik Toks because Ms Rogers had promised that they could do them at the end of the school year (page 245).

#### **The Claimant's return to work and further sickness absence**

71. On 24 September 2021, the Claimant's suspension was lifted. She was advised that she could return to work but would not be expected to teach on the first day and could use it for familiarisation and planning instead. The Claimant replied saying that she was happy to return to work "*provided support is put in place regarding my PTSD and reasonable adjustments are made to ensure I can carry out my teaching*" (pages 217 – 218).
72. Ms Martin met with the Claimant on her return and asked her if she wanted to go through the occupational health report or take time to settle in first. The Claimant's preference was to settle in first. However, later that morning she went to see Ms Martin and explained that she was not ready to return to work (page 217). She



attended her GP who signed her as unfit for work because of stress at work (page 220). Given the Claimant's brief attendance, there was no opportunity for Ms Martin to discuss the occupational health report with her.

73. On Saturday 2 October 2021, Mr Swettenham e-mailed the school and requested an updated occupational health report "*to specify that she has a phased return to work*" as a reasonable adjustment. He also asked for a stress risk assessment to be undertaken. Ms Sharpe replied and said that the school would submit another referral to occupational health once they knew how long the Claimant was going to be absent. She also attached a Wellness Action Plan template for the Claimant to complete (page 221).
74. The Claimant remained absent from work until 17 January 2022 and the reason for her absence was stated as "*work related stress*" (pages 220, 251, 262, 271 & 280). No reference was made to her PTSD.
75. On 20 October 2021, the Claimant attended a further occupational health appointment. Within the assessment, the following matters were reported:

***"Current health status***

*She [the Claimant] stated that as a result of this experience [the ectopic pregnancy], she has been diagnosed with PTSD and has been having symptoms such as hyperarousal/hypervigilance, reduced concentration, and panic attacks. This has been on the background of anxiety which she has had since 2018. ....She also informed me that due to an incident, she was suspended from work for one month, and following an interview she was told she could return to work but when she tried to return on 27 September 2021, she stated that she continued to feel unsupported and felt unable to carry on at work and went to see her GP who advised she stay off work signing her off with "stress at work". Miss Rogers informed me that since being off work, she has been feeling relatively fine in herself but when she starts to think of work or returning to work, she starts having various adverse symptoms including panic attacks.*

***Does the worker have an underlying medical condition or having medical treatment/medication that may impact upon ability to work?***

*.....She experiences ongoing symptoms from her PTSD that may impact on her work. In my opinion, she is currently unfit to return to work in any capacity and the current barrier to her return to work is stress at work.*

***How will any residual functional impairment/incapacity effect work ability and for how long is this likely?***

*She informed me that she suffers from panic attacks which could disrupt her teaching her classes. She also experiences problems with concentration and has a lower threshold of being overwhelmed which can*

*affect the time it takes her to complete tasks. These symptoms are likely long-standing although could improve or deteriorate over the course of time.*

***If absent from work, what is the likely date for return to work and are there any specific recommendations to consider?***

*..... As the barrier to her return to work currently appears to be work related stress, she is able (sic) to secure a successful and sustained return to work before her sources of stress at work are addressed in a mutually acceptable manner to support her return to work. In my opinion, once this is satisfactorily addressed, she should be able to return to work thereafter” (pages 246 – 247).*

76. During the Claimant's absence, Ms Martin carried out regular welfare and return to work meetings with her (pages 259-261, 272, 277, 278, 279 and 289). The occupational health report was discussed, and adjustments put in place to support her return, including a phased return.
77. On 15 December 2021, a stress risk assessment and action plan were implemented (pages 264 – 266). The Claimant was able to return to working full time hours with adjustments in place.

### **The ongoing investigation**

78. Whilst the Claimant was absent, Ms Smyth sent her further investigation questions to answer. The questions related to the parent of ZY's concerns and the allegations about Tik Tok. On advice of her union representative, the Claimant answered the questions *“I don't recall it happening this way”* or *“no”* (page 276).
79. Ms Smyth did not interview any of the children involved in the allegations.
80. On 31 January 2022, Ms Smyth produced her investigation report. The report covered the original allegation relating to the messages with pupil XX and the following further allegations that had emerged:
  - *That, during the summer term 2021, you communicated inappropriately and unprofessionally with a year 5 pupil (pupil ZY);*
  - *That on 7/7/2021 you did not correctly administer insulin to a year 5 pupil (pupil ZY) with medical needs:*
  - *That, during the summer term 2021, you took photos and videos of pupils using social media;*
  - *That, during the summer term 2021, you used the school iPad and your personal phone to take photos and videos of pupils”*

81. The report was detailed and described Ms Smyth's investigations to date. In relation to the Claimant's PTSD, she said: "*at this stage of the interview with GR's issues around her PTSD and work expectations that are currently in place were mentioned however I do not deem these relevant to the allegation that has been brought to my attention to investigate*".
82. Ms Smyth concluded that, following her investigation, there was a case to answer and recommended that the matter be referred to a disciplinary hearing for full consideration and determination (pages 281 – 288)

### **The disciplinary hearing**

83. On 9 February 2022, the Claimant was invited to attend a disciplinary hearing on 25 February 2022 to answer the allegations against her (pages 290 – 291).
84. The hearing was re-arranged to permit the Claimant's union representative to attend to 7 March 2022.
85. Prior to the hearing, the Claimant provided two statements from former staff members. The first said that there was no formal training on Dojo. The second was primarily in relation to the incident regarding the administration of insulin and knowledge that the Claimant suffered from PTSD and panic attacks (pages 292 – 293).
86. The hearing was chaired by Mr O'Connell and the second panel member was Ms Martin. Ms Smyth attended to present the management case and the Claimant was accompanied by Mr Swettenham.
87. In relation to the Claimant's PTSD more generally, Mr Swettenham questioned Ms Smyth on part of the minutes which referenced it. Ms Smyth responded by explaining that the issue of PTSD was raised by Mr Swettenham but was not in response to a question she had asked, and it was not what she was charged with investigating. This was the only mention of the Claimant's PTSD during the hearing. At no point was it raised as a reason or contributory factor in the Claimant's behaviour despite the Claimant being given full opportunity to address the allegations.
88. In relation to allegation 1, the Claimant provided the following pre-prepared statement:

*"Upon reflection, in reference to allegation 1, my standpoint came from ensuring the well-being of one of my pupils. My input came from a nurturing and caring perspective and my overall goal was to ensure my pupils well-being was looked after. However, after serious reflection I understand and recognise the teaching standards. There were mitigating factors that led to this communication and I need to stress that the parent not only knew of this communication, encouraged it and was thankful for it as the pupil's well-being worried both of us. I want to*

*reassure you that in future, this line of communication will not occur and the teaching standards will be upheld. I apologise for the stress this may have caused everyone". .*

89. In relation to allegation 2, the Claimant did not feel that she had communicated inappropriately or unprofessionally but accepted that she had no observed proper boundaries. She also denied sharing information about boyfriends.
90. The Claimant admitted that she had told pupils she was not their class teacher next year but had not revealed who their new teacher was. She had wanted them to get used to the idea that it would not be her and some of the children were crying after she told them.
91. In relation to allegation 3, she gave her version of events and said she was not dishonest in relation to the administration of insulin to pupil ZY.
92. In relation to allegations 4 and 5, the Claimant denied taking photos or videos of the pupils and posting them on social media. She said that whilst she was aware the children were viewing Tik Tok, Facebook and Instagram she explained to them that it was not appropriate to make a Tik Tok video in school. However, she showed them how to do the dance they had seen on Tik Tok properly using her dance teacher background and videoed them using the school's iPad. She did not log the pupils' use of Tik Tok as a safeguarding concern despite her knowledge that the legal age for using it was 13.
93. The Claimant did not advance any mitigating circumstances for her actions and did not link them to her PTSD.
94. She was given opportunity to comment on the minutes after the hearing and she made corrections/notes (pages 308 – 317).
95. After a period of deliberation, the panel took the decision to summarily dismiss the Claimant. They delivered their findings orally and recorded them in a letter dated 10 March 2022 as follows:

*"In relation to the first allegation, the panel considered all the evidence in respect of the matter and believed that there was significant evidence to support this allegation. By your own admission, you believed your actions were inappropriate and that you should not have communicated with this student over the summer break. Furthermore, you were advised the panel felt this student was a vulnerable student who had become attached to you, however you had not raised these concerns to senior leaders in order to safeguard the student or yourself, but instead you had chosen to encourage the student to communicate and share pictures with you, which was accessed on your personal mobile phone. The panel therefore find this allegation is proven.*

*In relation to the second allegation, the panel again carefully*

*considered all the evidence presented to them and, again, by your own admission confirmed that you did share with your class the fact that you had experienced an ectopic pregnancy and that your baby had grown in the wrong part of your body. While the panel acknowledged that you had shared this information with your class while teaching them about loss, the panel did not feel this was appropriate given the age of your class. Furthermore, the panel felt that on the balance of probability it was more likely than not, that you also shared personal details with your class or a student about your relationships with boyfriends. The panel therefore found this allegation to be proven.*

*In relation to the third allegation, the panel felt that based on the evidence presented to them, there was not enough evidence to substantiate that you did or did not correctly administer insulin to a year 5 student. The panel have not upheld this allegation.*

*Lastly, the panel considered allegations four and five together as they believed the two allegations were tied together and related to the same incident. The panel could find no evidence that you shared any videos or photos of pupils on social media, however, you advised the panel that you understood the age grading of TikTok to be aged 13, you were aware that the students were active users of the site and you did teach pupils how to dance a recognised Tik Tok dance and filmed this for them on the pupils' iPad. The panel therefore felt that this could be seen as condoning pupils to use a social media site that was not appropriate for 10-year olds. Furthermore, despite knowing that the students were using TikTok you did not raise this as a safeguarding concern, which you acknowledged you should have done. The panel therefore found both allegations to be proven.*

*The panel felt that by upholding four out of the five allegations that this demonstrated a serious and repeated pattern of unprofessional and inappropriate behaviour towards pupils in your care and that you have failed on a number of occasions to raise safeguarding concerns in order to safeguard your students from harm or yourself from such allegations. This unprofessional behaviour was in breach of the Teachers Standards (Part Two: personal and professional conduct) in that you have not demonstrated consistently high standards of personal and professional contacts and you have not observed proper boundaries appropriate to a teacher. Furthermore, your actions have also breached the Trust's Code of Conduct policy and Keeping Children Safe in Education....." (pages 319 – 321).*

### **The Claimant's appeal**

96. The Claimant appealed the decision to dismiss her by way of letter dated 21 March 2022. The ground of appeal were as follows:

*“1. The procedure: the procedure was not followed relating in a failure to conduct a fair and reasonable investigation.*

*2. The decision: the conclusions of the Executive Principal/Disciplinary Committee were unreasonable*

*3. The penalty: the penalty is considered to be too harsh - the sanction is disproportionately severe*

*4. There is relevant new evidence*

97. Within the letter, she alleged that the Respondent had failed to make reasonable adjustments in relation to her PTSD. She said *“there needs to be a huge consideration of my frame of mind at the time these allegations relate to and this was not explored by the hearing panel. The Investigating Officer and Hearing Officer were both aware of my diagnosis and struggle with PTSD. Nothing was implemented, no support, no reasonable adjustments. Throughout the Summer terms, the West Grantham Primary Academy failed in their duty of care towards me and this led to my PTSD having more of a significant impact on my day-to-day life .....”* (pages 326 – 357).
98. Attached to her appeal letter were numerous documents which, in her view, demonstrated that the school promoted the use of Tik Tok including encouraging pupils to watch Newsround which regularly featured articles relating to Tik Tok.
99. The letter was drafted with support of her union, but no causative link was made between the Claimant’s PTSD and the allegations against her.
100. On 1 April 2022, the Claimant was invited to attend an appeal hearing on 25 May 2022 (pages 358 – 359).
101. On 25 April 2022, the Claimant provided further evidence to support her appeal and confirmed that she had submitted a subject access request (page 360).
102. On 10 May 2022, Mr Smith, Regional Union Official, e-mailed the Respondent as follows:
- “Georgia informs me her request is for any questions they know they are going to ask to be presented so her PTSD side effects are managed to a degree. If they have any questions they wish to ask following statements this is fine to ask. Georgia feels like having the majority of questions written down would ensure side effects of memory, hesitation and panic attacks could be managed if they are written in front of me”* (page 361).
103. This request was agreed by the Respondent.
104. On 16 May 2022, the Claimant’s new union representative, Mr Lloyd, e-mailed the

Respondent saying that having reviewed her grounds of appeal a fifth ground of appeal needed adding, namely that:

*“....my dismissal amounted to disability discrimination, contrary to the Equality Act 2010, including section 15 of the Act. Georgia’s letter made mention of disability discrimination but without an explicit ground based on the concerns. That is now corrected”* (page 365).

105. On 17 May 2002, Mr Lloyd asked the Respondent to include the Claimant’s occupational health reports in the appeal pack (page 366).

106. Prior to the appeal, the Claimant provided a report from her GP dated 19 May 2022, detailing her current state of health including suicidal thoughts. Within the report it said:

*“Georgia came to see me in the surgery on the 12th of July 2021 as she was having flashbacks to her surgery and panic attacks after an occupational health assessment revisited her surgery. We discussed further therapy and other sources of support.....”*

107. However, there was no mention of hypervigilance/hyperarousal or the effects of PTSD in relation to the allegations against her (page 369).

108. She also provided a letter from steps2change dated 30 May 2022 which set out her treatment since referral and reported that:

*“..... At the time of discharge on 05/05/2021 your PTSD symptoms were in remission and you felt able to go back to work on a phased return, although you had identified that you felt overwhelmed in some team meetings and had had panic attacks. We discussed how to maintain your therapy progress and asked for you to consolidate your learning from therapy over a 3 month period before we would accept a re-referral from you”* (pages 370 – 371).

109. On 30 May 2022, Mr Lloyd e-mailed Ms Sharpe attaching the GP report and noting:

*“I note the allegations which led to the dismissal, largely coincide with the dates in the GP letter where Georgia was experiencing flashbacks and, I believe, symptoms of PTSD.*

*I also draw your attention to the duration of symptoms, from at least January 2021. At the time of dismissal, the symptoms had persisted, perhaps intermittently, for more than 12 months. We have already discussed how OH previously considered that Georgia may be protected by the disability provisions of the Equality Act 2010.*

*My request is that a further referral is made to an OH physician to provide a report on whether there is a link between the PTSD and the*

*allegations. I think this is essential to ensure that the appeal hearing has all relevant evidence before it" (page 372).*

110. The appeal hearing took place on 8 and 10 June 2022 to accommodate Mr Lloyd's availability and he was present to accompany the Claimant. The panel was chaired by Mr Reichelt and comprised Mr R Wilkinson (SEN and Health and Safety Governor at Magnus CofE Academy) and Ms S Dennis (Deputy Diocesan Director of Education at Diocese Southwell and Nottingham Safeguarding Consultant for Diocese Southwell and Nottingham MAT).
111. Mr Lloyd prepared a presentation for use at the hearing. He criticised the reasonableness of the investigation more generally and that the Claimant's PTSD was not considered by the disciplinary panel.
112. The presentation set out the Claimant's view on the relevance of disability in relation to each allegation and included an explanation of S.15 EQA. She explained that it was hyperarousal or hypervigilance that led to allegation one:

*"Prior to my return to work, one of my symptoms was 'hypervigilance' – this means that I was constantly over analysing people and myself and it shows as paranoia. The moment I woke up from my emergency surgery, my main concern was my class and how I felt guilty for just leaving them without an explanation or an apology. This never went away. The guilt was overbearing at times and lead to constantly asking my TA, colleagues about my class and extremely intrusive thoughts. My PTSD made me believe that my class was vulnerable as I wasn't there to protect them. It was like an itch I couldn't scratch but it was my fault and I hated myself for it.*

*Prior to my surgery there was a major safeguarding involving members of my class (including pupil XX). I was the one who looked out for them and made them feel safe. ....*

*The last day of term was hard for me. Pupil XX was my last pupil to leave and clung to me crying as she didn't want to leave me or Y5, I had to take her to her mum when both mum and I were nearly in tears. This made my PTSD symptoms worse and my guilt returned stronger than it was. Having communication with pupil XX and her mum during the summer term helped my hypervigilance, it allowed me to know she was ok" (page 376 – 379).*

113. The Claimant also said that she had assumed that the SLT had sight of the messages over the summer period.
114. In relation to allegation 2, the Claimant acknowledged that she had discussed the loss of her baby in a lesson but said the school, in essence, should not have asked her to teach it. Further, the lesson triggered a re-experiencing of her trauma which led to her oversharing in the lesson. She did not, however, link this allegation to



hyperarousal/hypervigilance.

115. In respect of allegations 4 and 5, Mr Lloyd submitted that

*“there is no evidence for the allegation that Georgia ‘took photos and videos of pupils using social media’. The dismissal letter confirmed the same. By improperly joining allegations 4 and 5 together, the Panel tried to blur the absence of evidence for allegation 4. The wording of the allegation is clear. The finding of the Panel should be clear – there is no evidence to support the claim. Any finding against Georgia is unreasonable and excessive”.*

116. Within the hearing itself, the Claimant agreed that she was familiar with the Teachers’ Standards and, in relation to allegation 1, that she had ‘*probably not*’ acted in accordance with them but that she ‘*didn’t do it willingly*’. (pages 375 – 408).

117. After the close of the hearing, the panel took time to deliberate and considered the impact of PTSD on the Claimant’s behaviour but concluded that the decision to dismiss should stand. They set out their conclusions in a letter dated 20 June 2022 (pages 409 – 411). The findings were:

*“..... In relation to the Dojo communication, the appeals panel reviewed in detail the messages that were exchanged between you and the Year 5 pupil. Amongst those messages the committee considered that there were a number of very concerning items including but not limited to: pupil signing off messages to you with kisses; you telling the pupil you miss the pupil and making arrangements for her to maintain contact with you next year; you signing off messages to the pupil with kisses; the pupil telling you that she loves you; you sending photographs of yourself, and your activities, to the pupil and encouraging the pupil to send photographs of herself to you; you commenting on the pupils appearance and telling her she looks ‘beautiful’.*

*Whilst the message exchanges do not appear to be sexually motivated, the committee were clear that they raise serious concerns regarding compliance with the teachers standards.....*

*The committee also considered the following:*

- the messages were sent on the platform which is not intended for the personal communication between staff and pupils. We discussed with you the training you had received on Dojo and you indicated that you had received very little. However, given your understanding of safeguarding the committee did not believe a lack of training on Dojo would be a credible explanation for entering into the mode of messaging you did with their pupil.*
- We note from the transcript of the messages that the pupil*

*messaged you first and, therefore, appears to have initiated the conversation. However, the panel considered it irrelevant that the pupil initiated the personal messaging. The pupil is a child and as the teacher you are the adult professional who should understand your responsibilities on receipt of such messaging from a child. This does not include striking up a channel for exchanging personal messages with the pupil outside of school on matters not properly sanctioned by the school.*

- *The messaging is extensive extending over six weeks with multiple messages and several photographs.*
- *You failed to report your contact with the pupil to the school as you should have done.*
- *The messages were sent outside school term time , during the summer holidays and are almost entirely of a personal/social nature in which you share details of your personal life with the pupil.*
- *The language used by you in the messages is over friendly and unprofessional.*
- *The committee noted your assertion that you were effectively supplying pastoral support to the pupil which should not stop for school holidays. However, communicating via Dojo in the way you did is not a recognised pastoral support method and not within the Trust’s safeguarding policies and procedures.*
- *You failed to report pastoral and/or safeguarding matters arising from the messages to the Trust, including the pupil’s attachment to you and the death of the pupil’s grandfather, both of which should have alerted you to the pupil being vulnerable.*
- *When asked directly at the appeal hearing, you admitted that the messaging with the pupil was in breach of the Teachers’ Standards”*

118. In respect of allegation 2, the panel held that sharing details of her ectopic pregnancy, given the age of the pupils, was inappropriate and could have caused the pupils to be upset and therefore harmed. It was also a breach of the Teachers’ Standards and safeguarding responsibilities.

119. Turning to the Claimant’s PTSD the panel said:

*“we acknowledge your assertion that your professional judgement was impaired by your PTSD to the extent that it prevented you complying with teachers standards and your statutory safeguarding*

*responsibilities. You stated in the appeal hearing that you would not have entered into the messaging with the pupil over the summer holiday if you had not had PTSD. The committee considered that this raised serious concerns about your ability to teach and that the Trust cannot have sufficient confidence that such serious and unacceptable lapses of judgment would not occur again in similar circumstances.*

*The committee reviewed the OH reports, and whilst they report your PTSD and that it is highly likely that you have a disability, they do not suggest a compromised safeguarding or child protection risk. Indeed, the report dated 14 July 2021, immediately prior to your message exchanges with the pupil over the summer states that you appeal not to have a ‘functional impairment likely to affect workability’.*

*.....”*

120. Finally, addressing allegations 4 and 5 the panel said:

*“The committee noted and considered your arguments regarding the allegations relating to the Tik Tok dancing and filming. However, for the substantial reasons set out above these matters are not considered capable of fundamentally changing our view that your dismissal was the correct and reasonable action for the Trust to take”.*

121. Thereafter, the school reported its concerns to the Teachers’ Regulatory Authority, but no action was taken by it.

## **THE LAW**

122. Section 98 Employment Rights Act 1996 (“ERA”) provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) .....

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

.....”

123. Section 15 of the EqA provides:

“(1) A person (A) discriminates against a disabled person (B) if—

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

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

(2) Subsection (1) 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.”

124. Section 136(2) EQA provides:

**“Burden of Proof**

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

125. We were referred to the following cases:

*Abernethy v Mott, Hay & Anderson [1974] ICR 323; Polkey v AE Dayton Services Limited [1987] UKHL 8.; Chubb Fire Security Ltd v Harper [1983] IRLR 311; W Devis and Ltd v Atkins [1977] IRLR 314; Orr V Milton Keynes [2011] EWCA Civ 62; Uddin v London Borough of Ealing UKEAT/0165/19; City of York Council v Grosset [2018] EWCA Civ 1105; Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65; Madarassy v Nomura International plc [2007] IRLR 246 (CA); Din v Carrington Viyella Ltd [1982] ICR 256; Glasgow City Council v Zafar [1998] IRLR 36 (HL); Chief Constable of Gwent v Parsons and Roberts UKEAT/0143/18; Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305; Pnaiser v NHS England [206] IRLR 170; Hall v Chief Constable of West Yorkshire Police (2015) UKEAT/0057/15; Stott v Ralli Ltd [2022] IRLR 148; Homer v Chief Constable of West Yorkshire Police Authority [2012] IRLR} 601; Lockward v DWP [2013] IRLR 941; McCulloch v ICI [2008] IRLR 846; West Midland Co-Operative Society Limited v Tipton [1986] IRLR 112; Iceland Frozen Foods Limited v Jones [1983] ICR 17, EAT; Foley v Post Office; HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] ICR 1238, CA; Tayeh v Barchester Healthcare Ltd [2013] IRLR 387; and Taylor v OCS Group Limited [2006] ICR 1602, CA.*

## **SUBMISSIONS**

126. Both parties provided comprehensive written submissions which are not set out in any detail but referred to as necessary below. We have considered all the points made and the authorities relied on even when no specific reference is made to them.

## **CONCLUSIONS**

### ***Discrimination arising from disability***

127. We deal with the s.15 claim first given that some of our findings in this regard are relevant to our findings in the unfair dismissal claim.
128. The Claimant says that the unfavourable treatment suffered was her dismissal and there is no dispute by the Respondent that this constitutes unfavourable treatment.
129. The ‘*something arising*’ is hypervigilance/hyperarousal and she says it was this symptom of her PTSD which caused her to engage in the messaging with pupil XX.
130. The Claimant does not plead that hypervigilance/hyperarousal in any way influenced allegations 2, 4 and 5. Rather, in respect of allegation 2, she says it was re-experiencing that caused her to share details of her pregnancy. She does not argue any causative link between disability and allegations 4 and 5.
131. The Claimant submits that she provided significant evidence about how her PTSD affects her and also provided a detailed account of her concerns about pupil XX. As such, she has established that hypervigilance/hyperarousal arose in

consequence of her disability, and it was this which caused her to engage with pupil XX.

132. The Respondent submits that the Claimant has not established that hypervigilance/hyperarousal was something arising in consequence of her PTSD or that it caused her to engage with pupil XX.
133. The Respondent further submits that the Claimant failed to plead the second link in the agreed list of issues and should not be permitted to rely on it. However, given that it was the crux of the case before us, and the Respondent has only raised this point in submissions, we have allowed the Claimant to rely on it.
134. In our deliberations, we had regard to the occupational health reports, GP letter and the letter from step2change.
135. The exchange of messages with pupil XX occurred primarily between July and August 2021 over a period of six weeks. The relevant medical evidence at this stage is the occupational health report dated 14 July 2021 which was produced a matter of days before the messaging took place. There is nothing within that report to indicate that the Claimant was suffering with hypervigilance/hyperarousal. On the contrary, it says that whilst the Claimant had reduced emotional resilience, she did not have a functional impairment likely to affect her workability and was fit for her normal job.
136. The GP report dated 19 May 2022 makes no reference to hypervigilance/hyperarousal.
137. The steps2 change letter dated 30 May 2022 referred to the Claimant's symptoms on initial referral which included her reporting that she had become more '*hypervigilant to threat, jumpy and easily startled*'. However, by the time of discharge on 5 May 2021, her PTSD symptoms were in remission.
138. The Claimant attended a second occupational health appointment on 20 October 2021 and the physician's report recorded that: "*she [the Claimant] stated that as a result of this experience [the ectopic pregnancy], she has been diagnosed with PTSD and has been having symptoms such as hyperarousal/hypervigilance, reduced concentration, and panic attacks.*" However, that is the extent of it. The focus of the report is on work-related stress following the Claimant's initial return to work and return after her suspension. Nothing further is said about hypervigilance/hyperarousal or its impact on the Claimant's behaviour.
139. It is striking that the Claimant failed to rely on her PTSD at all during the investigation or disciplinary hearing save only in respect of her view that the school failed to support her on her return to work. Nothing was said to indicate that her PTSD was in any way linked to allegation 1 nor did she challenge Ms Smyth's investigation report which concluded that it was not relevant to the allegations she was tasked with investigating.

140. Before us, the Claimant argued that she did not realise the effect her PTSD was having on her until much later. However, we do not accept her account given the contemporaneous medical reports do not support it.
141. The Claimant raised PTSD as a mitigating factor in her original appeal letter but did not identify hypervigilance/hyperarousal as a factor in her behaviour – her appeal was on the basis that the Respondent failed to make reasonable adjustments or consider her frame of mind. The first time it was raised was when Mr Lloyd became involved in the appeal some eleven months after the messaging occurred.
142. The Claimant gave extensive oral evidence on the effects of hypervigilance/hyperarousal, but again, this evidence does not accord with the steps2change summary of her symptoms, the GP report or the occupational health report which was prepared a matter of days before the messaging ensued.
143. The Respondent highlights that the Claimant failed to state in her witness statement that hypervigilance/hyperarousal were symptoms of her PTSD prior to the allegations, and we agree with this assessment.
144. For these reasons, we are not satisfied that Claimant has established that hypervigilance/hyperarousal was a symptom of PTSD at the material time and her claim fails at this stage.
145. Even if she had established it was a symptom, we agree with the Respondent that she has failed to establish a causal link between hypervigilance/hyperarousal and the messaging with pupil XX. We find this primarily because the Claimant's oral evidence was inconsistent with the contemporaneous medical evidence and documents in the bundle.
146. Further, the Claimant gave repeated evidence that she had concerns about pupil XX. She said that hypervigilance/hyperarousal compelled her to engage in the communication to make sure she was ok, yet failed to identify with any clarity what those ongoing concerns were thereby undermining her evidence in this regard.
147. The contents of the messages do not indicate that the Claimant was concerned about the pupil's welfare. Furthermore, when pupil XX said that her grandfather had died, the Claimant took no steps to seek further support or log it as a welfare/safeguarding concern. She could not explain why, if she was experiencing hypervigilance/hyperarousal in the way she advances, it i) did not prompt her to escalate any concerns she had within the Respondent's established safeguarding procedures before the summer holidays and ii) log the grandfather's death as a concern. Her position is inconsistent.
148. For these reasons, we are not satisfied that the Claimant established that her PTSD either wholly or partially or directly or indirectly caused her conduct and it follows that the Respondent cannot have dismissed her because of this, either consciously or unconsciously.

149. For completeness, even if the Claimant had established a prima facie case that she was dismissed because of the hypervigilance/hyperarousal, we are satisfied that the Respondent's action in dismissing her was a proportionate means of achieving a legitimate aim. The legitimate aim relied on is the upholding of the Teachers' Standards and the safeguarding of children.
150. The Respondent submits that the safeguarding of children is of paramount importance and the Claimant does not seek to argue otherwise.
151. It was not put to the Respondent's witnesses that a sanction short of dismissal was more appropriate. However, we agree with the Respondent that a sanction short of dismissal would not have been appropriate given that the Claimant said in evidence that she could not control her behaviour because of PTSD.
152. The appeal panel was not presented with any evidence that her hypervigilance/hyperarousal was going to dissipate or that her conduct was a one-off incident. Accordingly, there was an ongoing risk of such behaviour re-occurring and, if that was the reason for her engaging in the messaging, she failed to report the real safeguarding issues that arose – namely the pupil's overreliance on her, the grandfather's death and the ongoing concerns she says prompted her to engage in the first place.
153. In light of the Claimant's own position that she could not control her behaviour, we are satisfied that dismissing her was a proportionate means of achieving a legitimate aim.

### **Unfair dismissal**

154. The Respondent submits that the Claimant was dismissed for the potentially fair reason of conduct and the Claimant does not seek to argue otherwise. She was dismissed for four allegations following a comprehensive disciplinary process and we are satisfied, therefore, that this was the reason for her dismissal.
155. However, the Claimant submits that her dismissal was unfair for the following reasons:
- The innocuous nature of the messages
  - The lack of training on Dojo
  - Her hypervigilance/hyperarousal
  - The fact that there were no videos posted by the Claimant on social media
  - The majority of colleagues interviewed saw no issue with the Claimant's relationship with pupil XX
  - There is no evidence to suggest the Claimant had any videos on her



personal phone

- She was suspended shortly after the first allegation was made without assessing the evidence
- Relevant documents had not been presented to the appeal panel
- No further investigation was undertaken
- A lack of investigation into why the Claimant was teaching a class on loss given her circumstances
- Conversations and deliberations relating to the Claimant's PTSD did not make it into the final decision rationale
- Points of appeal raised by the Claimant were not dealt with in the decision letter dismissing her appeal

156. We have had regard to the principles set out in *Burchell* in respect of each allegation.

*Allegation 1*

157. The Respondent had a transcript of the messages so there was no dispute about their content or the fact that they were exchanged.

158. Immediately prior to the summer holidays, the Claimant had not raised any concerns about pupil XX or her welfare more generally if there were any as she says, nor that she had become overly attached to her.

159. When pupil XX and her mum messaged the Claimant on Dojo during the holidays, the Claimant did nothing to discourage it. On the contrary, she encouraged it. She also sent photos of her own nails and encouraged pupil XX to send photos after having her hair and make-up done.

160. The tone of the messages was very personal with the Claimant calling pupil XX 'sweetheart' and saying to her mum "bless her, I love her" and "send her my love". The messages continued over a period of six weeks.

161. We observe that there is nothing within those messages to indicate that the Claimant had ongoing concerns about pupil XX's welfare as she subsequently argued. Furthermore, when pupil XX told the Claimant that her grandad died, the Claimant did not report it to the Respondent as a safeguarding/welfare concern.

162. The Respondent took the view that there was nothing sexual about the messages. However, it considered that several matters arose in consequence of the messages which breached the Teachers' Standards, Keeping Children Safe in Education, the Staff Code of Conduct and IT policies.

163. The Staff Code of Conduct provides:

*“It is the policy of the academy that there will be no personal contact other than in certain exempted circumstances between staff and current/former pupils of academy age outside the normal academy work environment. Any proposed work-related contact, outside of the normal working environment, must be agreed in advance by the principal/headteacher and be recorded and monitored”.*

164. The Respondent reasonably believed that the Claimant’s conduct breached the Code in maintaining personal contact which was not agreed, recorded or monitored. Furthermore, the Claimant did not maintain proper boundaries as per the Code and the Teachers’ Standards nor did she report safeguarding concerns as per Keeping Children Safe in education.

165. The Respondent also took the view that the Claimant was in breach of the ICT policy which provides that *‘any such communication will be professional in tone and manner’* and the Social Media policy which provides that it is inappropriate to *“invite, accept or engage in communication with pupils over social network sites”*.

166. During the investigation, the Claimant acknowledged that the messaging was *“possibly not appropriate”* and during the disciplinary hearing admitted that it was not appropriate. In her pre-prepared statement delivered at the hearing, she explained that after serious reflection she understood and recognised the Teachers’ Standards and committed to not engaging in such messaging again, along with an apology. Under cross examination she also conceded *“I can see the problem for the school”*.

167. At the appeal stage, the Claimant advanced that her PTSD caused her to engage in the messaging. As above, we do not consider any link between the two, nor did the Respondent.

168. We also note that during the appeal, the Claimant said that *“having communication with pupil XX and her mum during the summer term helped my hypervigilance, it allowed me to know she was ok”* thereby indicating that she was staying touch for her own benefit as opposed to that of pupil XX contrary to Keeping Children Safe in Education which provides that *‘staff should always act in the best interests of the child’*.

169. The Claimant gave evidence of her belief that the Respondent was monitoring all messages over the summer period and, therefore, if there was a problem it should have raised it over the summer period. The Respondent gave evidence that Dojo was not routinely monitored daily, and we are not persuaded that the ICT policy provides for continual monitoring in that way. Regardless, the Claimant still engaged in the messaging and failed to report safeguarding issues about pupil XX, despite her knowledge of the requirement to do so. The Claimant also argued that she had inadequate training on Dojo. However, the Respondent concluded that this was not a credible explanation given her understanding of safeguarding.

170. Given the nature of the messages, the statutory framework for safeguarding, the Teachers' Standards and the Respondent's own policies, we are satisfied that the Respondent genuinely believed that the Claimant was guilty of gross misconduct and there were reasonable grounds for that belief.
171. We are also satisfied that the Respondent carried out a reasonable investigation into this allegation. It had the undisputed evidence and the Claimant's own admission that the messaging was inappropriate.

*Allegation 2*

172. The Claimant does not dispute the fact that she shared her ectopic pregnancy with her class (albeit not in those terms). At the disciplinary hearing she denied that doing so was inappropriate.
173. The Respondent took the view that this information was not appropriate for 9–10-year-olds and matters relating to pregnancy should be properly discussed in age-appropriate PSE where parents are given the option to remove their children and such teaching is typically provided by an external company. The sharing of this information also formed part of pupil ZY's parent's concerns about the Claimant.
174. Furthermore, the Claimant failed to seek advice before delivering the lesson despite the knowledge that she could ask to opt out or team teach. She gave oral evidence that she had the slides a few days in advance of the lesson and had read the "*reflect of self*" section so was aware that this was an option available to her.
175. The Claimant did not link her behaviour to her PTSD until the appeal stage at which she said she was re-experiencing her trauma whilst delivering the lesson. It is puzzling that she did not advance this explanation during the investigation or the disciplinary hearing. However, even if she was re-experiencing, this does not explain her decision to proceed to share personal information with her year 5 class contrary to the Teacher's note on the slides and the Teachers' Standards which provide teachers must at all times observe proper boundaries.
176. Given the Claimant's own admission that she shared this information, the gentle nature of the slides which did not touch on pregnancy or loss of that nature, and the fact that matters relating to pregnancy should be delivered in PSE, we are satisfied that the Respondent genuinely believed the Claimant to be guilty of gross misconduct and had reasonable grounds for doing so. We are also satisfied that the investigation into this allegation was reasonable given the Claimant's own admissions.
177. In relation to the allegation that the Claimant shared information about her boyfriends the Respondent concluded that she had "*on the balance of probability*". This view was formed based on comments from pupil/s to another teacher. Those pupil/s were not interviewed, understandably, yet the Respondent formed a belief of the Claimant's guilt based on hearsay. There was no additional investigation into whether there was another source for the pupil/s forming their understanding and,

as such, we are not satisfied that a reasonable investigation was undertaken in relation to this element of allegation 2 or that the Respondent had reasonable grounds for forming the belief in her guilt.

*Allegations 4 and 5*

178. The Respondent grouped these allegations together because they related to the same incident. The allegations faced by the Claimant were specifically:
- *That, during the summer term 2021, you took photos and videos of pupils using social media;*
  - *That, during the summer term 2021, you used the school iPad and your personal phone to take photos and videos of pupils"*
179. The Respondent found no evidence that the Claimant shared photos or videos of pupils using social media, nor did it look at the Respondent's iPad to view the dance that she taught them.
180. Despite the lack of evidence to support the specific allegations, the Respondent upheld them upheld for different reasons, namely that the Claimant had in effect condoned the pupils' use of Tik Tok and not reported it as a safeguarding concern. These were not the allegations she was required to answer.
181. Rather, the Respondent relied on the allegations to show a pattern of behaviour but did not investigate, or produce evidence, of other teachers recording the use of Tik Tok or other such social media sites as a safeguarding concern. Accordingly, we are not satisfied that the Respondent had reasonable grounds to believe that the Claimant was guilty of gross misconduct in relation to allegations 4 and 5 because on its own case it had no evidence to support them.

*The procedure*

182. We are satisfied that, overall, a fair procedure was followed. The Claimant was suspended in accordance with policy to prevent the destruction of potential evidence but, after examination of the Claimant's IT equipment, the suspension was lifted.
183. We are satisfied that Ms Smyth conducted a reasonable investigation into allegations 1 and 2 (the lesson on loss). She interviewed the Claimant, her colleagues and two parents. The Claimant disengaged from the investigation when she was asked further questions and did not help herself by doing so. However, she was given full opportunity to present her case at the disciplinary hearing and at the appeal stage. She was also given the opportunity to view and correct any inaccuracies in the minutes.
184. Ms Smyth concluded at the investigation stage that the Claimant's PTSD was not relevant to the allegations she was investigating. Occupational health reports were

not, therefore, included in the disciplinary pack. Arguably, the Respondent could have included them at this stage, but we are satisfied that Ms Smyth was not unreasonable in failing to include them given her view that they were not relevant, and the absence of the Claimant raising PTSD as a factor.

- 185. When the Claimant raised it as a causative factor at the appeal stage, the Respondent reviewed all the medial evidence submitted by her albeit concluded that it did not suggest a compromised safeguarding or child protection risk.
- 186. Whilst the investigation in relation to the second element of allegation 2 and allegations 4 and 5 was flawed, we are satisfied that it does not undermine the procedure in its entirety given that the Claimant was given full opportunity to address the reasons for her dismissal at the appeal hearing and provide extensive evidence in her defence. As such, any defects in these elements of the investigation were remedied on appeal.

*Overall conclusion*

- 187. We are satisfied that the decision to dismiss for allegations 1 and 2 (in respect of the lesson on loss) either singularly or collectively was within the range of reasonable responses and we are satisfied that the Respondent undertook a reasonable investigation into those two matters. Whilst we do not doubt that the Claimant’s actions were well-intentioned, the Respondent reasonably took the view that they were in breach of the statutory and school frameworks in place relating to safeguarding and the maintaining of proper boundaries between pupils and teachers and amounted to gross misconduct.
- 188. The panel considered the Claimant’s representations about allegations 4 and 5 but ultimately concluded that the Claimant’s submissions on these points did not fundamentally change its view that the dismissal should be upheld because of the seriousness of allegations 1 and 2. We are satisfied that this was a reasonable response. The failings in respect of allegations 2 (in part), 4 and 5 do not undermine the overall substantive fairness of the decision to dismiss.
- 189. Accordingly, we are satisfied that in all the circumstances the Respondent acted reasonably in treating the Claimant’s conduct as a sufficient reason for dismissing her and her claim of unfair dismissal fails.

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Employment Judge Victoria Butler

Date: 19 December 2023

JUDGMENT SENT TO THE PARTIES ON

....20 January 2024.....

.....  
FOR THE TRIBUNAL OFFICE

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