EMPLOYMENT TRIBUNALS

Claimant: **Mr T Paddy**

Respondents: **(1) Haggerston School**
(2) London Borough of Hackney

Heard at: **East London Hearing Centre**

On: **16, 17, 18 & 23 May 2023**
& 11, 12, 13, 14 & 17 July 2023
(13, 14 & 17 (AM only) In Chambers)

Before: **Employment Judge B Beyzade**
Members: **Mrs G McLaughlin**
Mr M L Wood

Representation
For the Claimant: **In Person**
For the Respondents: **Mr M Salter (Counsel)**
(Ms A George-Elliott, Legal Executive – 17 July 2023)

JUDGMENT having been sent to the parties on 09 June 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

Background

1. The claimant presented a claim to the Employment Tribunal on 19 April 2021 of constructive unfair dismissal, direct sex discrimination, and unauthorised deductions from wages.

2. The respondents entered a Response on 27 May 2021 denying the claimant's claim in its entirety.

3. The Final Hearing took place in person at the East London Hearing Centre on 16,

17, 18 & 23 May and it continued on 11, 12, 13, 14 and 17 July 2023 (on 13, 14 July 2023 and on the morning of 17 July 2023, the Tribunal carried out their deliberations in private).

4. At the start of the Hearing, we discussed the List of Issues with the claimant and the respondents' representative.

5. The claimant made application to amend paragraph 4.1 sub paragraph 4 of the List of Issues (direct sex discrimination) that were recorded by Employment Judge Gardiner at the Preliminary Hearing on 18 November 2021.

6. The claimant requested that the Tribunal amends the List of Issues to read as follows: "Placing the Claimant under a disciplinary investigation in July 2020 for an incident on 28 January 2020 when the Claimant collected his daughter from nursery school. The allegation was that the Claimant failed to inform the Respondent that the police had investigated this incident, or the police had been called following a complaint from the Claimant's ex-partner".

7. The claimant maintained that he had never suggested that the police had conducted an investigation. The respondents' representative objected to the proposed amended to the List of Issues on the basis that this was not part of the claimant's pleaded claim.

8. We reviewed the pleadings together with an additional document provided by the claimant containing further information pursuant to the Orders of Employment Judge Gardiner. We also heard oral submissions from the respondents' representative and the claimant. We look into account that the claimant was a litigant in person (he was representing himself).

9. We were satisfied that it was appropriate to amend the second sentence of paragraph 4.1(4) of the List of Issues to read: "The allegation was that the Claimant had failed to inform the Respondent that the police had investigated this incident or the police had been called to this incident following a complaint from the Claimant's ex-partner." We considered the Tribunal's overriding objective set out in Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules").

10. We also determined that the respondents would have adequate opportunity to deal with this point (which they were on notice of since the further information was sent by the claimant albeit the details were provided under the label of constructive dismissal) and that they will be able to deal with this matter adequately in supplemental questions (which they may ask relevant witnesses of theirs), cross-examination and within their submissions. This would also enable the claimant to pursue his claim in accordance with the alleged factual basis that he outlines in his evidence.

11. We then considered the respondents' application for a Hybrid Hearing. We heard oral representations from the respondents' Counsel and the claimant. We refused the application and provided oral reasons, and on the respondents' counsel's request we have set out below a written record of our decision and reasons in respect thereof.

12. The respondents' Counsel submitted that the Tribunal should convert this hearing to a Hybrid Hearing, in order to enable the respondents' Counsel to attend the hearing remotely on grounds of his personal circumstances (arising from his childcare responsibilities and the respondents' representative's son being unwell and in hospital). The claimant did not object. We enquired about the parties' resources including the availability of IT equipment and a stable internet connection, and we also made enquiries in respect of the Tribunal's resources. The Tribunal, although it sympathised with the respondents' representative's position, was unable to grant the application. It was not just and equitable to convert the hearing to a Hybrid Hearing having considered the length of the hearing, the nature of the complaints and issues before the Tribunal, the parties' circumstances and resources, the Tribunal's resources (the Acting Regional Employment Judge had advised that there were issues with the availability of CVP rooms, and other issues in terms of resources), and the need for reliability and the consistency.

13. As we did not consider that the alternative option of sitting reduced hours would enable us to complete the hearing in the allocated time, we therefore advised the parties, that in the exceptional circumstances in this case, we considered that it may be appropriate to adjourn this hearing and to re-list it for six days to include remedy (if appropriate) on dates to be confirmed. We advised the parties that we would endeavour to re-list the Hearing as soon as possible before the same Tribunal, (and the Tribunal could use any time remaining from the first day of the hearing in order to read the documents). We invited representations from the parties in respect of this matter. Having heard representations from both the claimant and the respondents' representative, we decided not to postpone the hearing, on the basis that this would lead to substantial delay and costs, and it was not in accordance with the overriding objective. Parties indicated that their preferences were to complete the Final Hearing as soon as possible. By agreement, we directed that the start and finish times of the hearing be altered (each day, as appropriate) to assist the respondents' counsel to attend to their family matter. If the respondents' counsel required any further adjustments, we indicated that these may be requested from the Tribunal. We decided that we would continue with the Final Hearing subject to discussing a timetable with the parties and we will look to arrange any additional dates that may be required.

14. We were provided with a copy of the List of Issues that had been prepared in advance of the Final Hearing. Having discussed those issues with the respondents' representative and the claimant, at the outset of the hearing, having added the matter we addressed following the claimant's application (and having also agreed further changes to those issues that were discussed), the respondents' representative and the claimant were advised that the Tribunal would investigate and record the following issues as falling to be determined, the parties' being in agreement with these:

1. <u>Time limits</u>

    1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 December 2020 may not have been brought in time.

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

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the unauthorised deductions complaint made within the time limit in 23 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
1.3.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.34 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. <u>Constructive Unfair dismissal</u>

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

(1) Failing to offer the Claimant immediate support in December 2019 and January 2020 after telling the Headteacher, Ciara Emmerson that the Claimant was a victim of domestic violence.
(2) Giving a false reason to the Claimant in communications between 5 February and 14 December 2020 for refusing to meet with the Claimant's lawyers.
(3) Failing at any point after 24 March 2020 to request a letter or documentation asking if the Claimant was allowed to pick up his daughter, as advised by the LADO.
(4) Failing to allow the Claimant to work remotely from home from 13 July 2020 until the end of the summer term.
(5) Placing the Claimant under a disciplinary investigation in July 2020 for an incident on 28 January 2020 when the Claimant collected his daughter from nursery school. The allegation was that the Claimant had failed to inform the Respondent that the Police had investigated or the police had been called to this incident following a complaint from the Claimant's ex-partner
(6) Attempted to contact the Claimant's ex-partner for information on 9 September 2020 then denying she had done this.
(7) The Head Teacher's willingness to accept his ex-partner's allegations, without sufficient supporting factual evidence.
(8) Failing to follow Hackney Learning Trusts Policy on supporting employees who have been the victim of domestic abuse.

(9) Refusing the Claimant's request for off-site therapy on 30 September 2020.
(10) Acting contrary to the agreed risk assessment from February 2020 which had assured the Claimant that he would be entitled to take the necessary time to engage in counselling.
(11) Being reprimanded by the Head Teacher in the meeting on 8 October 2020.
(12) The Head Teacher alleging during the meeting on 13th November 2020 that the Claimant's grievances and allegations against her are malicious and false.
(13) The Respondent refusing to accept that the Claimant could be a victim of domestic violence despite having viewed the evidence contained in CRISP reports.
(14) The Head Teacher "ambushing" the meeting on 8 October 2020, which had been convened to discuss the Claimant's mental health, by discussing the Claimant's lack of professional standards. Telling the Claimant that it was inappropriate to request off site therapy.
(15) The interim disciplinary report prepared by Michael J Potts on 19 October 2020 did not have the full factual picture because Mr Potts had failed in the course of his investigation to speak to the Claimant's solicitor, despite being invited to do so by the Claimant. Mr Potts also misunderstand the legal significance of the requirement that the Claimant only have supervised access to his daughter, wrongly inferring that this implied that there was some finding of misconduct against the Claimant.
(16) Suspending the Claimant on 11 November 2020 in response to the Claimant's grievance lodged on 9 November 2020.
(17) Failing to follow Hackney Learning Trusts Policy on grievances relating to harassment and bullying in the workplace during disciplinary investigations.
(18) On 30 November 2020, encouraging the Claimant to resign in order to avoid potential disciplinary sanctions.
(19) Placing the Claimant under another disciplinary investigation on **07** December 2020 for attending a job interview whilst on sick leave.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.
2.1.4 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation. The respondent argues that the claimant had decided to resign in any event, having secured an equivalently paid role in circumstances where he was facing potential disciplinary sanctions including dismissal if he remained in his current employment.
2.1.5 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the claimant was dismissed, what was the reason for the breach of contract?
2.3 Was it a potentially fair reason?
2.4 Did the respondent act reasonably in all the circumstances in treating it as a

sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

3.1 The Claimant has confirmed he is not seeking re-employment or re-engagement
3.2 The Claimant confirmed there were no financial losses being claimed
3.3 What basic award is payable to the claimant, if any?
3.4 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Direct sex discrimination (Equality Act 2010 section 13)
4.1 Did the respondent do the following things:
(1) Failing to offer the Claimant immediate support in December 2019 and January 2020 after telling the Headteacher, Ciara Emmerson that the Claimant was a victim of domestic violence.
(2) Giving a false reason to the Claimant in communications between 5 February and 14 December 2020 for refusing to meet with the Claimant's lawyers
(3) Failing at any point after 24 March 2020 to request a letter or documentation asking if the Claimant was allowed to pick up his daughter, as advised by the LADO
(4) Placing the Claimant under a disciplinary investigation in July 2020 for an incident on 28 January 2020 when the Claimant collected his daughter from nursery school. The allegation was that the Claimant had failed to inform the Respondent that the Police had investigated this incident or the police had been called following a complaint from the Claimant's ex-partner
(5) Attempted to contact the Claimant's ex-partner for information on 9 September 2020 then denying she had done this.
(6) The Head Teacher's willingness to accept his ex-partner's allegations, without sufficient supporting factual evidence.
(7) Failing to follow Hackney Learning Trusts Policy on supporting employees who have been the victim of domestic abuse.
(8) Refusing the Claimant's request for off-site therapy on 30 September 2020.
(9) The Claimant alleges that his resignation amounts to a constructive dismissal, and that this dismissal was influenced by the Head Teacher's discriminatory acts as set out above. Accordingly, the constructive dismissal is said to be a further detriment caused by direct sex discrimination for which a remedy should be awarded.
4.2 Was that less favourable treatment?
The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
The claimant accepts that there is no actual comparator and the tribunal will need to consider whether the claimant was treated unfavourably in comparison to how a hypothetical female employee would have been treated in equivalent circumstances.
4.3 If so, was it because of his sex?

5. Remedy for Discrimination
5.1 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

5.2 The Claimant seeks aggravated damages. The Claimant contends the Respondent acted in a high-handed, malicious, insulting or oppressive manner in committing the discrimination or in the manner in which the matter was handled

6. Unauthorised deductions

6.1 Were the wages paid to the claimant for the period of the Easter holidays 2020 less than the wages he should have been paid? The claimant says that he worked for ten days during the holidays in circumstances where under his employment contract he was only required to work for five days.

6.2 In those circumstances he claims he should have been paid for a further five days' pay by way of overtime

6.3 How much is the Claimant owed?

7. Remedy (unauthorised deductions)

7.1 How much should the claimant be awarded?

15. By consent, the Tribunal decided to hear evidence and submissions relating to both liability and remedy at the same time.

16. We were also referred to an agreed file of documents consisting of 891 pages, and parties referred us to documents within this file during the Hearing.

17. We were also provided with a file containing parties' written witness statements.

18. We heard oral evidence from the claimant on the claimant's own behalf, who produced a written witness statement. Mr Peter Reynolds, Ms Nicola Anthony, Ms Rachel Ade Tutu Onawanwo, also provided short written witness statements. On 23 May 2023 we were advised that Mr Reynolds would not be able to give oral evidence as he engaged in a court hearing which commenced on the Monday, and he was away in the South of France in July 2023. We were advised that the claimant's remaining witnesses could not attend the Tribunal to give oral evidence. In the circumstances the Tribunal confirmed that it would read their statements and give them appropriate weight considering all the circumstances, the parties being in agreement with this. We advised that parties may make submissions on matters of weight during their submissions at the conclusion of the evidence.

19. We heard oral evidence on behalf of the respondents from Ms Donna Moran (the claimant's line manager), Ms Ciara Emmerson (the first respondent's headteacher), and Mr Michael Jarrett-Potts (who conducted the disciplinary investigations), all of whom had prepared written witness statements.

20. Parties provided to the Tribunal an agreed Chronology and Cast List at the start of the Hearing.

21. The parties agreed to work to a timetable at the outset of the Hearing to ensure the Hearing could be completed within the hearing dates allocated.

22. The respondents were represented by Mr M Salter, Counsel and the claimant appeared in person (represented himself) during the Final Hearing. We explained the process to the claimant at the start of the hearing, and we assisted the claimant where appropriate to formulate questions to the respondents' witnesses, in accordance with

the Tribunal's overriding objective and in order to ensure that parties were placed on an equal footing. We also provided regular breaks (as appropriate). Parties confirmed that no reasonable adjustments were required.

23. The respondents' representative and the claimant provided written representations and supplemented those with oral submissions, which the Tribunal found to be informative. We were referred to authorities by parties during their submissions.

24. We reminded parties of the need to work together in order to achieve the overriding objective set out in Rule 2 of the ET Rules. The parties co-operated, as appropriate, which ensured that the Hearing could be completed within the hearing dates.

Findings of Fact

25. We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that it is proportionate to the complexity and importance of the relevant issues before the Tribunal.

26. On the basis of the evidence heard from the claimant and the respondents' witnesses before us over the course of this Final Hearing and the various documents in the agreed file of documents provided to us, so far as spoken to in evidence and that we were referred to, the Tribunal has found the following essential facts established:

Background

27. The claimant was employed by the second respondent, the London Borough of Hackney, and he worked at Haggerston School as Assistant Head of School from 1 February 2016. His continuous employment date was 22 April 2014.

28. The first respondent, Haggerston School, is a secondary school and sixth form located at Weymouth Terrace in Haggerston, London Borough of Hackney. Haggerston School had approximately 1000 pupils at the relevant time.

29. With effect from 18 June 2018, the claimant was appointed Deputy Designated Safeguarding Lead. The claimant received written confirmation of his appointment to that role by letter dated 25 June 2018, which confirmed that his salary for the role would be £38,766 FTE (PO3 Scale Point 39), but his actual salary will amount to £34,305. All other terms and conditions of employment would remain unchanged (see page 285 of the Hearing Bundle).

30. The Job Description applicable to his role of Deputy Designated Safeguarding Lead is at pages 286 to 288 of the Hearing Bundle. This was a permanent role, and the claimant was employed on a termtime plus 5 days basis, working 36 hours per week.

31. The claimant's contract of employment relating to his job title Assistant Head to School is dated 01 February 2016 (see pages 275 to 284 of the Hearing Bundle). The contractual notice period in the event that the claimant's employer wanted to terminate his employment was 4 weeks minimum notice (for less than 5 years' continuous service) whereas the claimant was required to give one month's period of notice (up to scale PO3 monthly paid employees) if he wished to terminate his employment. Clause 10 of the contract provided the following in relation to paid weeks per year:

> "Staff who work all year round will be paid for 52.14 weeks per year and will receive the full time equivalent (FTE) salary.
> Start who work term time only will be paid on a pro rata basis. The number of weeks they are paid for will be based on:
> -38 working weeks
> -1 week of INSET days (where applicable)
> -annual leave, bank holidays and long service leave (where applicable) on a pro rata basis.
> This will equate to:
> - Staff with less than five years' service 44.99 paid weeks per year
> - Staff with five or more years' service 46.01 paid weeks per year
> If staff work term time plus additional weeks then the above figures will be increased in line with the Local Government term time pay model."
> (See page 279 of the Hearing Bundle)

32. Clause 13 of the claimant's contract of employment referred to collective agreements negotiated from time to time by the National Joint Council for Local Government Services which covered terms and conditions including Pay and Grading.

33. Clause 13 also stated that the rules, procedures, and provisions adopted by the governing body directly affecting employee's terms and conditions included:

- "the Disciplinary Procedure
- the Sickness Absence Management Procedure

…

- the Grievance Procedure"

34. At clause 14 of the claimant's contract of employment (at page 281 of the Hearing Bundle) a number of examples of gross misconduct are provided. The contract stated that the list of gross misconduct examples is neither exclusive nor exhaustive, and that "There may be other offences of similar gravity, which would also constitute gross misconduct."

35. Clause 16 the claimant's contract is headed "Grievance Procedure" and it states that "If you have a grievance relating to your employment please refer to the School's Grievance Policy."

<u>Relevant Policies</u>

36. A copy of the Grievance Policy with the issue date of August 2014 is at pages 669 to 683 of the Hearing Bundle. The Policy states that the employee's grievance must be sent to their line manager, who will normally investigate and decide the outcome of the grievance (a copy should also be given to the Headteacher and HR

representative). The Policy further states if the complaint involved the Headteacher, the grievance should be sent to the Chair of Governors in the first instance. Thereafter, the Chair of Governors may either hear the grievance themselves or appoint an appropriate person (usually a governor) who is not involved in the case to hear the grievance.

37. The Policy requires a meeting to be arranged with the aggrieved employee and provides as follows:

> "The person hearing the grievance will arrange a meeting with the aggrieved employee to listen to the complaint and explore possible resolution. The meeting should be arranged without unreasonable delay. Employees should be given at least five working days notice of the meeting and be informed of the right to be accompanied by a colleague or a trade union representative."

38. There are provisions in respect of a right of appeal at stage 2 of the process (see page 678 – 680 of the Hearing Bundle). Furthermore, there is also a procedure set out in terms of dealing with grievances during a disciplinary case (see page 681 of the Hearing Bundle). When the grievance and disciplinary cases are related, the Policy provides that it may be appropriate to deal with both issues concurrently and an example of this is provided. If it is found that the grievance should be considered separately, the grievance procedure should be followed, and it may be appropriate to suspend the disciplinary procedure for a short time. It further states "Advice should be sought from HR regarding the appropriate course of action in the specific circumstances."

39. A copy of the Disciplinary Policy is at pages 685-708 of the Hearing Bundle. At page 690 the Policy provides a procedure in respect of informal action. This states:

> "For cases of misconduct where the employee confirms the allegation is true and factual and shows remorse for their actions, the school will consider an agreed outcome, up to a written warning on the employees file, without the need for a disciplinary investigation or hearing. This will be decided at the discretion of the line manager and HR representative and will be dependent on the circumstances of the case."

40. The provisions relating to responsibility for disciplinary action and dismissal are at section 5.1.1 of the Disciplinary Policy (see page 691 of the Hearing Bundle). This provides that although the Headteacher will normally lead the process of making disciplinary and the initial decision, there are two circumstances set out in which it will not be appropriate for the Headteacher to perform those functions. In such cases, the Staff Discipline/Disciplinary committee of the Governing Body will be responsible.

41. Section 5.1.2 of the Disciplinary Policy states that "a member of staff has the right to be accompanied by a trade union representative or work colleague at the formal stages of this procedure." Furthermore, this also states:
"Legal representation
In specific cases, where disciplinary charges are of such gravity that someone might be unable to work in the future in that professional capacity if the charges are proved, employees may have a right to legal representation as disciplinary hearings. This will usually apply in a specific set of circumstances where employee in a regulated

profession, for example teaching, may potentially face a life-long ban from working in their profession.
HR will advise where this is applicable."

42. At section 5.2.2 (page 695 of the Hearing Bundle), the Disciplinary Policy refers to the handling of child protection allegations. The Policy states that where an allegation of an offence is received that may fall within the remit of legislation dealing with the protection of children, consideration should be given to the suspension of any member of staff under investigation in accordance with DFE Guidance and the Headteacher should consult with the Governing Body. In addition, according to the Police, advice from HR, and the Principal Officer for Vulnerable Pupils should be sought, and the Local Authority Designated Officer ("LADO") should be informed in the circumstances set out in the Policy. There are further provisions in respect of the role of the LADO.

43. The Policy also provides at section 6 (page 704), "During the disciplinary procedure a member of staff might raise a grievance. When the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently. For example, where a grievance is raised in direct response to the disciplinary procedure, the disciplinary procedure should be expanded to include the grievance issue, dealt with during the investigation and/or at the disciplinary hearing."
44. A copy of the Domestic Abuse Policy is at pages 709 – 715 of the Hearing Bundle. The Policy states that:

> "Managers should be aware that colleagues and employees of any gender can in their lifetimes experience domestic abuse. Managers should follow an approach known as the '4Rs'.
> - Recognise the problem (look for signs and ask)
> - Respond appropriately
> - Refer on to the appropriate help
> - Record the details.

45. The Policy states that "Managers should be as flexible as possible to assist employees who are leaving an abusive relationship-this includes allowing up to 5 days domestic abuse leave for direct employees to deal with practical issues such as going to court, meeting solicitors and attending counselling."

46. There are provisions relating to perpetrators of domestic abuse at page 714 of the Hearing Bundle, including the requirement to inform the relevant employee's Head of Service and/or Director if they are charged with or convicted of a crime or to inform their manager if it is alleged that they are perpetrating domestic abuse in their personal life. The Policy states "Failure to do so may constitute Gross Misconduct."

47. The Safeguarding and Child Protection Policy was issued on 14 December 2020 and a copy of the relevant parts of the policy we were provided with can be found at pages 720 to 724 of the Hearing Bundle. At page 723 of the Hearing Bundle, under the heading "Allegations regarding person(s) working in or on behalf of the school (including volunteers)", there are provisions in respect of dealing with allegations against any person working in or on behalf of the school (including initial action by the Headteacher).

Allegation – accepting gifts from 6th Form Student

48. On 17 January 2019 the claimant met Ms Ciara Emmerson, Headteacher, to discuss circumstances in which a 6th form student provided the claimant with a gift on two occasions. The claimant was given advice in terms of best practice by Ms Emmerson (see page 289 of the Hearing Bundle). Ms Emmerson stated:
"in the meeting, I explained that the initial fact finding that had taken place after this incident had led us to the conclusion that your intentions and actions towards this student did not constitute a safeguarding concern or warrant any disciplinary action. However, I did want to advise you on best practice to ensure that future situations of this nature might be avoided and prevented."

Claimant's family law matters

49. During October 2019, the claimant informed Ms Emmerson that he was involved in family law proceedings with his ex-partner. He requested flexible working hours to enable him to pick up and drop off his daughter to the nursery. His flexible working request was granted. Ms Emmerson also stated that any court dates relating to the matter would be approved as special dates and paid in full. The claimant had advised Ms Emmerson at the time that he was having issues with access to his daughter.

50. On 20 November 2019 an email was sent from a member of the first respondent's human resources team to the claimant stating his DBS check was 4 months overdue. There were a number of emails between the claimant and the first respondent's human resources team relating to this matter.

Non-Molestation Orders

51. On 11 December 2019 a meeting took place between the claimant and Ms Emmerson (which is referred to in the email at page 320 of the Hearing Bundle). The claimant informed Ms Emmerson about the family proceedings and his intention to apply for a Non-Molestation Order ("NMO") against his ex-partner. He advised Ms Emmerson that his ex-partner had been abusive and manipulative. He also highlighted that his solicitor advised him that his ex-partner is likely to be applying for a NMO against him (which she subsequently did). Ms Emmerson asked the claimant if he needed support and she suggested Aspace (the school's counselling service). The claimant said he did not need anything at the time, and he just wanted to let her know. She asked the claimant to keep her infirmed about any developments which would have a bearing on his role as the school's Safeguarding Lead.

52. The claimant made an application for an NMO on 12 December 2019.

53. The claimant's ex-partner made an application on 18 December 2019 for an NMO.

54. The claimant was served with an Interim NMO on 23 December 2019 obtained on an ex parte application (made by the claimant's former partner).

55. On 10 January 2020 the return date hearing was due to take place in relation to the claimant's former partner's NMO application. The claimant explained that this had

been “put over” until 20 January 2020. The claimant hoped that this matter would be resolved on 20 January 2020.

56. However, following the return date hearing, the NMO was continued, and a provision was made allowing the claimant to contact his former partner regarding arrangements concerning their children.

57. On 17 January 2020 a letter was sent from the first respondent’s HR Manager to the claimant inviting him to a meeting to discuss his personal circumstances following the communication that took place between the LADO and Ms Emmerson.

58. A meeting took place on 21 January 2020 between the claimant and Ms Emmerson, and the notes of that meeting are at pages 304-306 of the Hearing Bundle. During that meeting it was stated that:

> “CE began the meeting by reminding TP that they had a conversation after Christmas about his personal circumstances. TP stated that it may have been before Christmas.
> CE informed TP that she had received a call from the Hackney Local Authority Designated Officer (LADO) informing her that a Non-Molestation Order had been granted against him just before Christmas, relating to domestic abuse.”

59. Ms Emmerson advised that a risk assessment was needed in accordance with the LADO’s advice in view of the nature of his role and that this process will involve probing into his personal circumstances. Ms Emmerson explained the issue to the claimant in the following terms:

> “CE informed TP that it would have been helpful if he had been more transparent with her sooner, especially considering his role within school. If he had, this would have allowed CE to offer support.
> TP stated that in his defence, he was a bit blasé about it because he thought it would be resolved before Solicitors were involved. TP stated that they both thought that on the 20th January the Parenting Plan would be signed off by the Court.
> CE advised TP that the moment the Non-Molestation Order was issued, he should have come to her immediately making sure that he is on the front foot. Information should come from TP and not the LADO. There should never be a circumstance where the school is not aware. CE went on to state that given all that has happened in the last two months, it is really important to be honest.”

60. Thereafter the claimant asked what the worst-case scenario would be. The claimant was advised:

> “…the worst case scenario would be disciplinary action for the non-disclosure of information or dishonesty, which could include suspension but this is a neutral act. The school would then investigate fully and if it is determined that there is a case to answer, it could be deemed gross misconduct and dismissal without notice. There is however a whole strata before that.”

61. The notes of that meeting record that Ms Emmerson also stated “CE advised TP that if she was in his position, she would review the Disciplinary process. CE

reassured TP however that it is not that common to get to dismissal, some people may resign."

62. Ms Emmerson asked whether the claimant was member of professional union. The claimant confirmed that he was part of a union. Ms Emmerson also reminded him about external counselling services that are available, such as ASpace.

63. Shortly after the meeting started Ms Emmerson had provided the claimant with copies of the Hackney Learning Trust Domestic Abuse and the Workplace: Guidance for Senior Leaders and Managers document and referred him to the second from the last page which states that anyone who received an allegation of perpetrating domestic abuse in their personal life is under a duty to inform their line manager.

64. On 22 January 2020 the claimant informed Ms Emmerson that he had to attend an emergency Prohibited Steps Order hearing to prevent his daughter leaving the jurisdiction and that he would aim to come into school by lunchtime.
65. In an email sent to the claimant on 23 January 2020 the claimant was reminded about the need to complete a green form for his recent absence and green forms he had not provided for 7 and 8 January 2020 (as per the school's procedure).

66. Following the meeting on 21 January 2020, the school implemented a specific risk assessment for the claimant. This was dated 29 January 2020 (see pages 314 to 315 of the Hearing Bundle). They key points of the Risk Assessment were as follows:

- "Risk: Non disclosure of information related to the Non Molestation Order/ongoing case which has an impact of role as Deputy Designated Safeguarding Lead.
  Mitigation: Clear instruction given about the expectation of transparency, honesty and prompt sharing of relevant information regarding ongoing court case. Recorded verbal warning letter issued for previous non-disclosure of key details of the case and will remain on file for 6 months. Copy of HLT policy on domestic abuse provided to TPA.
  By Who: CEM to issue verbal instruction, policy and recorded verbal warning letter.
  TPA to ensure all relevant, future developments are disclosed in full to HR/CEM."

67. There were also mitigation measures in terms of decision making about safeguarding cases within the claimant's role, including weekly supervision meetings with the claimant's line manager, DMO to include review and discussion in the three listed instances. In addition, the assessment stated "TPA offered support through Aspace, including off site, confidential counselling if preferred" and "HR to arrange upon request by TPA".

68. There were also mitigation steps with respect to absences from work to attend court and related meetings and the outcome of court proceedings upholding allegations within the NMO making the claimant's role untenable (outcome of fact-finding process and relevant court decisions to be notified to HR/CEM with written evidence provided). A further meeting would thereafter be held with Ms Emmerson to discuss closure of the process or potential disciplinary process (depending on the outcome).

69. Ms Emmerson printed her name on the form which was dated by her on 30 January 2020 underneath the statement: "Following this Risk Assessment, I have determined that the above named individual is suitable to continue employment subject to approval, with the identified control measures. The HR Office will review this situation at intervals of no less than every two weeks."

Collection of claimant's daughter from nursery school on 28 January 2020

70. On 28 January 2020 the claimant collected his daughter from nursery school.

71. At the time, the claimant was permitted to collect his daughter from her nursery school. Since Christmas, he had not been collecting his daughter from her nursery school. On 28 January 2020, the claimant's solicitor was on standby on the telephone to clarify the position to the nursery school staff in the event that his right to collect his daughter was challenged.
72. At the time of picking up his child from his nursery, the claimant had no knowledge in terms of the police being called or being present at the nursery school.

Meeting and correspondences in February 2020

73. On 4 February 2020 a further meeting took place between Ms Emmerson and the claimant. The claimant's email dated 13 February 2020 stated the following in relation to that meeting:
"Additionally in the meeting on the 4th you raised some points which I had not previously mentioned. How a non molestation could only be granted with some evidence/ texts etc. A non molestation ex parte requires no evidence merely an allegation of violence or harassment. It is then required to go to a hearing within 2weeks. You also mentioned that there had been no violence from me except against my ex partners new boyfriend. When we met previously on the 21st January I informed you I was attacked by my ex partners boyfriend, so was surprised that you stated it was me who was the aggressor. I may have misunderstood your wording in our meeting on the 4th." (see page 320 of the Hearing Bundle)

74. Thus, in his email dated 13 February 2020 the claimant outlined what he said took place at the meetings on 11 December 2019 and on 04 February 2020. He also complained that the interim order (NMO obtained by his ex-partner) did not provide the above details he mentioned in his email, so he was a little surprised how Ms Emmerson/the LADO had managed to obtain this level of detail (when the court itself had not heard or filed the evidence). He queried the source of the LADO's information (whether the school/LADO fact checked his account solely using the court order, or his former partner's NMO application). He said this was a very stressful time for him. He asked for clarity in terms of Ms Emmerson's expectations on the information she required.

75. On 22 February 2020 an email was sent from Ms Emmerson to the claimant stating she asked the claimant following the meeting on 11 December 2019 to keep her informed in relation to the NMOs. She explained why this was important and referred to the nature of his role within the school. Ms Emmerson stated that the LADO's role was to assess risk, to inform Ms Emmerson of potential risks, and to ratify decisions taken by the school to mitigate those risks. She stated that the LADO

confirmed that no allegations of domestic violence were made against the claimant. She stated that it was not for her or the LADO to make a judgment about what did or did not take place and that it is for the court to make that determination (but they do have to make a responsible assessment of risk).

76. Ms Emmerson advised that she did not know where the LADO had obtained the information from and that they referenced their colleagues, information sharing between the local authority and relevant agencies. She also stated in that email that at no point had the LADO referred to an individual reporting directly to them (i.e., the claimant's former partner). Ms Emmerson reminded the claimant that he could accept the offer of offsite counselling through ASpace if he felt that this would help him.

77. On 25 February 2020 the claimant submitted police reports to Ms. Emmerson (see page 322 of the Hearing Bundle). The police reports indicate that the claimant made a complaint to police about an alleged attack by his former partner in October 2018 (and by the claimant former partner's new partner in December 2019).

Verbal warning

78. On 25 February 2020 the claimant was issued with a verbal warning in relation to his non-disclosure of an NMO issued against him and the circumstances relating to this. The claimant was advised that the warning will remain in effect for a period of six months.

79. The claimant sent an email to Donna Moran on 26 February 2020 advising that he had not been placed on cover, but he is in court all day that day, and he confirmed he would be at work the following day.

80. On 03 March 2020 the letter issuing a verbal warning to the claimant was re-issued (see page 332 of the Hearing Bundle). This letter confirmed that the claimant was given a verbal warning in relation to the non-disclosure of a NMO made against him and the circumstances relating to this. Although the claimant had advised Ms Emmerson in December 2019 that an NMO may be issued against him, he did not notify her or HR that it had actually been granted or the reasons why. The claimant was advised that the warning will remain in effect for a period of six months, and that he had a right to appeal against this decision.

81. In the email at page 333 of the Hearing Bundle dated 12 March 2020, the claimant was advised (following his request for clarification earlier that day) that the following sentence was removed from the original version of the letter "According to Hackney Learning Trust Domestic Abuse Guidance, previously issued to you, employees must inform their employer if an accusation of domestic abuse has been made."

Allegations relating to the claimant collecting his daughter from nursery school

82. An email was sent from Liezel Le Roux, LADO on 26 February 2020. The LADO stated that they had liaised with the Independent Domestic Violence Adviser ("IDVA"), and she advised that the claimant's former partner was in Australia. She said that it appeared that the nursery let the child go with the father (Mr Paddy) and that the mother was the person that called the police. The email stated: "the e-mail was a bit vague but she will double-check that these are indeed the facts as she will send her an

e-mail. In addition to this she will also check to see if the child was unwell. This would be a key factor of course. I will let you know as soon as I have those details. The IDVA also mentioned that the ex-partner obtained another order post nursery incident to prevent him from collecting the child from nursery. In the proposed email, she will seek clarification regarding the title of the order as this as this was not clear."

83. In that email, the LADO also advised that the risks identified in the risk assessment are accurate and the accompanying actions are suitable.

84. The LADO provided an update to Ms Emmerson by email dated 13 March 2020. She advised that she had received some feedback from the IDVA, and she copied that feedback within the email as follows:

> "in response to your queries the last time we spoke, my client stated the following:
> -They have had two hearings since 7th Feb (20th and 26th) regarding fact finding and obtaining a full prohibited steps order to stop Thomas from attending the nursery
> -the interim order my client obtained from court is a Specific Issue Order permitting my client to take their child (name redacted) abroad- this was granted on 7th Feb.
> -The police were called by my client and a member of nursery staff on the day Thomas took (name redacted) from nursery
> (name redacted) was not ill on the day Thomas took her from nursery."

Claimant's sick leave

85. On 03 March 2020 the claimant commenced sick leave which ended on 10 March 2020. The claimant experienced COVID-19 related symptoms on 13 March 2020 and thereafter, he took a period of sickness absence leave.

86. Ms Emmerson sent an email to the claimant on 13 March 2020 to advise that they will meet for a discussion when he returns to work. She asked the human resources team to set up a meeting on the claimant's return to work.

Request to speak to claimant's lawyer

87. The claimant advised that he will be returning to work after 7 days as advised by the NHS, in his email sent to Ms Emmerson on 17 March 2020. He asked if they could meet on 27 March 2020, and he also advised in his email that he had asked his legal team to attend the meeting to give some further clarity and support.

88. The claimant was advised by email dated 19 March 2020 that he cannot bring his legal team to the meeting, but he may bring a colleague or a trade union representative.

89. The claimant repeated his request to arrange a meeting with the claimant's legal team by email dated 19 March 2020. He said he would like them to meet with Ms Emmerson to give the school some clarity over the current NMO situation.

90. On 24 March 2020 the claimant provided medical evidence in an email

addressed to Ms Emmerson and Ms Moran and he advised that he is still experiencing symptoms and he needed to self-isolate until he received his results/breathing improves. The documents he attached to his email had file names that ended with the words “Fake Text Message.jpg.” Ms Emmerson replied that day thanking the claimant for letting them know and wished him to get well soon.

March 2020 Lockdown

91. Towards the end of March 2020, the UK entered into its first national lockdown as a result of the COVID-19 pandemic. School teachers at Haggerston School commenced online learning. Some staff attended the school (in person) to work with vulnerable children or key workers’ children (unless staff or their families were clinically vulnerable, in which case they were not permitted to do so).

92. The claimant returned to work on 01 April 2020, and he was working from home at that time. He had a short visit to the school on or around 3 April 2020.

Working arrangements during Easter 2020

93. On 6 April 2020 the claimant sent an email to Donna Moran advising that he is still not fully recovered but he was able to conduct meetings from home. He set out two meetings that he had scheduled to attend over the holiday break as video calls on Monday 6th and Wednesday 8th and that he was happy to attend both. Ms Moran had advised in her email sent on the same date that staff should only be attending those meetings that are considered to be urgent and all others should be scheduled after the Easter break.

Claimant’s attendance at school on 2 occasions in May and June 2020

94. The claimant came into Haggerston School on 2 occasions to work with vulnerable students on 06 May 2020 and 10 June 2020. He was not on the duty rota on those dates, but he was working from home at the time.

Staff roster June 2020

95. The claimant was rostered to come into Haggerston School on 15 June 2020 during a particularly busy week. He said he could not meet this roster request because of ongoing health concerns and due to his daughter’s mother stating she is considered at risk (so he could only see his daughter if he were social distancing). The claimant was removed from the rota. The claimant continued to work from home until the end of the summer term in July 2020.

Disciplinary investigation

96. Ms Emmerson sent an email to the claimant on 14 July 2020 advising him that he had a number of concerns that were outlined in that email (see page 383 of the Hearing Bundle). Ms Emmerson’s concerns were set out over three separate numbered headings:

1. “Non-attendance to work.

2. Suspicion of falsification of medical evidence.
3. Failure to uphold the agreed actions within your safeguarding risk assessment, regarding transparency."

97. In the same email the claimant was advised that Ms Emmerson had replaced the claimant on the staff rota for that school term, and that they will liaise with the claimant in writing regarding the progression and requirements of the disciplinary investigation. Although the claimant may be contacted by the investigator before September, in September (when the claimant returned to work), he may be notified about any meetings or potential hearings relating to this matter.

98. The claimant replied by email sent on the same day (see page 385 of the Hearing Bundle) and he also provided a form of consent enabling his employer to contact his GP to establish whether the medical evidence he supplied with file names containing the words "Fake text message.jpg" were genuine.

99. A disciplinary Investigation into the allegations against the claimant commenced on 15 July 2020 and this was conducted by Michael Jarrett-Potts, HR Advisor. The claimant requested details of the allegations on the same date.

100. By a letter sent by email dated 17 July 2020 at 11.58am the two allegations were confirmed by Ms Emmerson in the following terms:

"- You provided false medical evidence to the school regarding a period of sick leave
- You failed to comply with the agreed actions identified in your safeguarding risk assessment to 'disclose in full' all 'relevant, future developments' in the ongoing case regarding your ex-partner's allegation of domestic abuse against you. This specifically refers to information referred to the school, by the LADO, that the police were called to your child's nursery, on the day you took dependency leave to care for her, due to concern that you were not authorised to pick her up."

101. The claimant was advised that Mr Jarrett-Potts will be the investigating officer and he would be in touch regarding the investigation. He was also advised that at this stage they are seeking information only and the investigation has been arranged for fact-finding purposes. If after this there was a case to answer, the claimant would be invited to a formal disciplinary hearing. Ms Emmerson advised that the claimant could contact Shaveta Malik if he wished to make a request for counselling or other support.

102. The claimant requested further information regarding the allegations for the fact finding by email dated 17 July 2020 sent at 2.11pm. He advised that he would like this information to be provided before September. He stated that he will be away for the summer break from the following Monday until 01 September 2020.

103. The school term ended on or around 18 July 2020.

104. Ms Emmerson sent an email to the claimant on 20 July 2020 in response to the points raised by the claimant (see page 392 of the Hearing Bundle).

<u>September 2020/2021 school year</u>

105. In September 2020, the new academic School year commenced.

106. On 01 September 2020, Mr Jarrett-Potts invited the claimant to attend an investigation meeting on 09 September 2020.

107. Ms Emmerson sent an email to Mr Jarrett-Potts on 07 September 2020 summarising the position with regards to the information obtained from the LADO, the allegations relating to the nursery incident, providing details of the risk assessment and a meeting held with the claimant after Christmas (see page 396 of the Hearing Bundle). She stated that the LADO had asked her not to give details of the source of the information, but in some cases like this one it is fairly obvious that there has been a direct report from the staff member's former partner because of the details shared. Ms Emmerson sent a further email that day containing additional information.

108. The claimant sent an email to Donna Moran on 07 September 2020 advising that his doctor had instructed him to start work at 10am due to his ongoing recovery relating to a COVID-19 infection. He intended to work until 5.30pm and to take a 30-minute lunch break. He attached a copy of his fitness to work statement.

109. Ms Emmerson replied on 08 September 2020 asking him to resend the completed form with the GP's signature and NI number as they were unable to accept forms that were not signed. She also stated that she will need further information about why the specified adjustments are being requested and how they will support with the claimant's symptoms. The claimant sent a reply on the same day by email advising that his breathing is exceptionally painful, and that this is particularly difficult in the mornings. He advised that he had a CT scan scheduled on Thursday. He said that he was unable to come into work at 08.30am due to ill health, which is confirmed in his fit note.

110. Ms Emmerson replied by email dated 09 September 2020 sent at 6.47pm approving his request to start at 10am for the period outlined in his first GP fit note and she made a suggestion to reduce the physical demands of the claimant's role (see page 402 of the Hearing Bundle).

111. On 9 September 2020 Ms Emmerson asked a number of questions to the LADO by email which included:
"Is it possible for us to speak to Nursery and/or the mother?"

112. She stated in this email that she appreciated that she was asking a lot of questions but that she wanted to be clear on the details so that they can challenge the claimant's contradictory account appropriately.

Disciplinary investigation meeting

113. The claimant attended a disciplinary investigation meeting with Mr Jarrett-Potts on 09 September 2020, and a record of that meeting appears at pages 537-549 of the Hearing Bundle. During the meeting the claimant was represented by a trade union representative, Ms K Ford.

114. The terms of reference set out at that meeting were as follows:

"From the basis of the letter sent to you from Ms Emmerson in July 2020 regarding a need for an investigation. There are 2 allegations to address: 1. Provision of false medical evidence in relation to an absence and 2. Regarding the relevance absences and issues with respect to your daughter and partner and transparency of information provided at that time. We will deal with those two issues separately."

115. The claimant provided his explanation in respect of the alleged fake text messages (see page 538 of the Hearing Bundle). He explained that he received text messages from his GP Surgery on 23 March 2020 and he had also been in touch with the NHS 111 service. He received 4 or 5 messages, but he did not have them anymore. He stated that he took screenshots of the relevant messages and when he saved them, he labelled them as "fake text messages" to make it easier for him to identify them.

116. In relation to the allegation relating to the nursery (see pages 545-547 of the Hearing Bundle), it was alleged that the claimant had failed to explain the consequential events in terms of collecting his daughter from nursery, and that the claimant took his child from nursery without authorisation (and that the police were contacted as a result of those events). The events that day were reported to the local authority (and then to the LADO).

117. The claimant confirmed that he collected his daughter from nursery on 28 January 2020 as his daughter was with him having stayed overnight. He reported dependency absence on 29 January 2020 due to anxiety and stress (she was not well enough to go to nursery). He advised that on 11 November 2019 he met Ms Emmerson and advised that he will be taking out a NMO against his former partner due to difficulties in the relationship between them over the custody of his daughter and being a victim of domestic abuse. The claimant explained that he took out the non-molestation order on 12 December 2019 and his ex-partner had taken hers out on 16 December 2019. He said he had uninterrupted contact with his daughter throughout Christmas and up to 06 January 2020. He also advised that he obtained legal representation and his former partner had secured legal aid (she needed to show that there was a safeguarding issue for the child or domestic abuse in order to obtain legal aid). He explained that his former partner chose to allege domestic abuse in order to gain legal aid and had stopped contact. He confirmed that his former partner had prevented him from seeing his daughter since 06 January 2020 and that this was contrary to their parental agreement.

118. The claimant maintained that he was authorised to collect his daughter from the nursery pursuant to a parental agreement and the nursery manager contacted his lawyer who had clarified the legal position (that the claimant had full rights to pick up his daughter and could not be prevented without a court order).

119. The claimant advised that he was not contacted by the police, and he had no knowledge of them being contacted at that time. He found out from a nursery employee who he was friends with at a later time that police had been contacted. He stated that he had made a written complaint to the nursery about his former mother-in-law's behaviour. He was told that his former mother-in-law had been suspended.

120. He also queried whether Ms Emmerson could speak to his lawyer and what

further information was required. He sought clarity about how things can be disclosed and what threshold of information was required. Mr Jarrett-Potts stated that he understood why Ms Emmerson did not want to attend a meeting with the claimant's lawyer.

121. Mr Jarrett-Potts stated that he will go through all of the notes and documents, and that a report will be sent to Ms Emmerson who will make a decision on the next steps. The claimant queried whether his legal representative would receive the report, but he was advised that the report was intended for the claimant.

Request for counselling

122. On 22 September 2020, the claimant was assessed as not fit to attend work by his GP due to anxiety. He provided a fit note dated 09 October 2020 (please see page 430 of the Hearing Bundle).

123. There was correspondence between the claimant and the first respondent's human resources team in relation to his sickness absence. On 05 October 2020 the claimant advised Ms Coleman (part of the school's HR team) in relation to his therapy appointment as follows:
"Please see attached.
These sessions will run every Friday until December/end of the year hopefully. Is there anything additional you need from me. I will have to leave school at 12.30 on these days."

124. At page 417 of the Hearing Bundle, there is a copy of a letter dated 16 September 2020 providing details of a virtual clinic on 16 October 2020.

125. Ms Coleman sent an email dated 05 October 2020 to Ms Emmerson and Mr Jarrett-Potts advising that Ms Coleman had informed the claimant that a meeting room could be arranged at the school as the sessions would be virtual meetings, and she was awaiting a response.

126. The claimant sent an email on the same date advising that this would not be appropriate. He outlined the reasons why and the nature of the virtual sessions (see page 421 of the Hearing Bundle). He required the ability to conduct the sessions off site to increase the necessary confidentiality and to ensure that they can be truly beneficial.

127. The claimant sent an email on 06 October 2020 advising that he did not trust that what would be discussed in his counselling sessions would not be used as evidence against him in the school's ongoing investigation. He stated, "However if you insist for these sessions to take place in school, despite me making you aware how this will increase my anxiety, then I'll have to have these sessions on site."

128. A meeting took place between the claimant, Ms Emmerson, and Ashanti Coleman (HR Manager) on 09 October 2020.

129. The purpose of the meeting was to agree a consensus about the claimant's leave of absence and to discuss his request for a change in working hours.

130. Ms Emmerson stated that procedures for requesting sickness absence were outlined during the professional standards training at the start of term, but that it was noticeable that during the session the claimant was on his mobile telephone. The claimant stated that he did not recall this and that he was probably undertaking work. Ms Emmerson said another example of the claimant not following procedures was in relation to the requirement to fob in and out daily (which she stated he did not do consistently).

131. It was confirmed that Mr Jarrett-Potts would conclude two parts of the disciplinary process. Ms Emmerson stated "The outcome of those will be critical to any decision. Then we could have a hearing. Have you considered your options if you were unable to stay in role? Have you thought about it?" The claimant replied "Not really. I've given you everything. I'm confident I've done nothing wrong. The only thing was the nursery, but I didn't know the police were called until you told me." Ms Emmerson replied "Mike will present his findings and we will then have a meeting regarding the safeguarding risk assessment. Clearly there is a question of trust."

132. Ms Emmerson's position in relation to the claimant's request for time off to attend his counselling sessions was, "I am happy to agree to continue with a 10am start until 1st November. For the counselling sessions, you can use a classroom or other suitable room or you can contact them and inform them of your work situation and try to change the time. Or you can go off site for the session and return back to school afterwards. You don't need to let us know your decision now."

133. The claimant stated that he had a fit note from 22 September 2020 for one month that he received that day. Ms Emmerson said the claimant should follow his GP's recommendations. The claimant advised that he wanted to stay and finish off some work. Ms Emmerson replied that the claimant needed to carry out a handover with Donna Moran and that while he was at home he should focus on his health. The claimant confirmed he was happy for Mr Jarrett-Potts's investigation to continue during his sick leave.

134. The claimant was on sick leave from 12 October 2020. The claimant's fit note dated 09 October 2020 indicating that he was not fit for work for one month due to anxiety is at page 430 of the Hearing Bundle.

Investigation report

135. The Interim Investigation Report into the Nursery Allegation (Allegation 2) was dated 19 October 2020, a copy of which is at pages 437-443 of the Hearing Bundle. Mr Jarrett-Potts concluded that there was a case to answer in respect of the allegation and that there is justified concern as to the tenability of the claimant continuing to perform his safeguarding role. He stated that there is a case to consider in terms of suspending the claimant's safeguarding role on an interim basis pending completion of the investigation. Mr Jarrett-Potts also concluded that the claimant did not have permission to collect his daughter.

136. Mr Jarrett-Potts refers to the claimant's admission to him in the investigation meeting about the events that occurred at his child's nursery on 28 January 2020. He observes that all the evidence was provided by the claimant and as concluded there could be no doubt that as described it was a very significant event both at the time and

subsequently. Significant enough, he believed, given the meeting and warning in January 2020 about similar issues, for the claimant to have recognised and reported it to the school.

137. Ms Emmerson sent a letter to the claimant dated 5 November 2020 requesting further information about his family law proceedings. This included a list of past court dates, future court dates and their purpose, the matters which are still to be resolved (including an ongoing GBH case), and confirmation that there has never been any ruling that the claimant was only allowed to see his daughter under supervision. Ms Emmerson requested the information to be sent to her by 13 November 2020.

138. On the same date, Ms Emmerson sent an email to the LADO requesting an update in relation to any communications that they had had from the IDVA regarding the claimant's case.

139. On 09 November 2020, the claimant sent a further fit note dated 2 November 2020 to Ms Emmerson and Ashanti Coleman from the claimant's GP indicating that the claimant was unfit for work due to anxiety until 16 November 2020. The claimant also enclosed a copy of his grievance letter. He stated that he would like to return to work on 17 November 2020 but that this was dependent upon the school supporting him in terms of his return to work (he stated that his letter set out a number of action points that needed to be addressed before he was able to return to work). He requested a reply by the end of that week.

Claimant's Grievance

140. A copy of the claimant's grievance dated 9 November 2020 can be found at pages 448 to 462 of the Hearing Bundle. The claimant stated that he would like to raise a grievance of bullying and harassment within the workplace.

141. The claimant's grievance includes complaints about a number of matters including but not limited to the following:

141.1 The claimant complained that he was not offered any form of support when he applied for a NMO against his former partner. He states that the Hackney Learning Trust Domestic Abuse Policy (the 4 Rs) were not followed. The claimant says that after the 11 December 2019 meeting, he expected guidance and, "Unfortunately what followed was a lack of management and support in the proceeding weeks, failing to request any further details from me until you were contacted by the LADO where you then felt it appropriate to give me a verbal warning for "not informing HR or you that non molestation had been granted or the reasons why","

141.2 He clarified a number of points in respect of the family proceedings and the application for a NMO he made and that his ex-partner had made.

141.3 The claimant alleged that Ms Emmerson did not consider in detail his explanation provided during their 11 December 2019 meeting (or understand why/how one would file a NMO application) as to why his former partner may file an application for a NMO.

141.4 He was informed on 12 March 2020 that a meeting would take place to discuss the relevant points and he offered to invite his solicitors to attend the meeting in order to give Ms Emmerson the relevant facts (and Ms Emmerson decided that this was not appropriate). The claimant stated that legal representation is permitted if any allegations made may result in the loss of his employment. He also said it is the school's duty to obtain any evidence needed if the employee is seeking additional support or time off due to being a victim of domestic abuse. He stated he did not receive a response, a meeting did not take place, and he was left feeling increasingly unsupported and unfairly persecuted despite being a victim of domestic abuse.

141.5 He said that the first respondent's position in relation to fake text messages was a misapprehension of the truth. He pointed out that he gave consent for his GP to be contacted on numerous occasions.

141.6 The claimant was placed on the work rota in June 2020 (and he was expected to attend the school). He also stated that he had not received appropriate support due to his health issues.

141.7 He explained the position relating to the orange request for leave form for attending therapy sessions. He stated that he would have completed this if his request was granted, Ms Emmerson had used this to highlight the claimant's professionalism issues, and that Ms Emmerson's response was inconsistent (and she were now highlighting areas of concern that did not used to be issues).

141.8 He raised concerns regarding the arrangements for his therapy sessions and not granting him leave to attend these off site (equivalent to 3 whole days over 6 weeks). He said the Hackney Learning Trust's Domestic Abuse Policy allowed up to five days' domestic abuse leave (with discretion to grant up to 20 days special leave). He referred to the risk assessment in regard to his request to attend off-site confidential counselling. He explained why he was unable to use the school's internal counselling service or receive counselling in school. He questioned the supportive strategies of the school.

141.9 He referred to a number of issues listed in bullet points at pages 454 and 455 of the Hearing Bundle relating to completion of green forms, sickness absence certification and the claimant not turning up to a meeting between March 2019 and January 2020, which had never been raised until today. He asserted that if the first incident (which was 18 months ago) had been raised at the time, then perhaps a solution could have been found where instead of leaving the green forms in the HR tray, he could have scanned and sent these.

141.10 He alleges that the school did not focus on his stress and how they could support him as a victim of domestic abuse.

141.11 He suggested that in the same meeting it was brought up that the claimant was on his telephone during a presentation, and not concentrating. He was unable to recall the incident as it was 4 weeks

prior, and that he only used his telephone in school in respect of work (but he could not comment). He said he had searched his telephone since, and he could see that on 04 September 2019 at 10:36 he had made notes concerning the presentation.

141.12 He said that the meeting on 09 October 2020 felt like an ambush about his professionalism and he was professionally attacked. He questioned if any of the points raised or the way he carried out his daily tasks had yet compromised safeguarding at any point.

141.13 He complained that no weekly meetings had taken place since his risk assessment. His risk assessment had stated that there would be weekly line management meetings and he said this was due to his allegations of domestic abuse (and he would receive support with any cases of domestic violence).

141.14 The claimant stated that he had provided the CRISP reports where two of the reports detail attacks on the claimant by his ex-partner where visible injuries and observed and written down by the police. He stated that despite having this information, the school had not supported him as a victim of domestic abuse, but instead they treated him as a perpetrator. The claimant stated "I can only assume I've been treated in such an unsupportive manner due to your unconscious bias of gender roles when it comes to domestic abuse cases. Unfortunately, this unconscious bias of yours has led to such a lack of support and guidance in this matter. Where you have become bullish and aggressive towards me. Continually stating "have I thought about what will happen if I face a disciplinary over these matters" that my mental health has ultimately become compromised due to your actions."

141.15 At paragraph 35 of his grievance the claimant refers to Ms Emmerson stating that the "trust has been eroded" on both sides as she felt that the claimant had not fulfilled the requirements of the risk assessment. He queried why the risk assessment had not been followed through by the school, including in relation to not allowing him off site therapy and weekly line management meetings, and he enquired about the consequences of the risk assessment not being followed.

141.16 He stated, **"**Lastly, due to the above points in this grievance I feel you are permitting an increasingly hostile work environment to develop for me to work in, which in turn is aggravating the situation and fueling an emerging escalation towards more formal dispute mechanisms. I have no wish or desire to see this situation escalate, since I genuinely believe it is perfectly possible to amicably resolve and de-escalate the situation at this informal stage. However, I also that there are thresholds (a) where a manager's behaviour whether conscious or unconscious crosses the threshold from being reasonable and healthy to being unreasonable and unhealthy; (b) from being an isolated incident to becoming a course of conduct; and (c) from a lawful working to an unlawful working environment."

142. Towards the end of his grievance, the claimant alleged bullying, and harassment and he provided a list of remedies he is seeking at paragraph 38 [listed separately from a) to k)]. This included suspending (and discontinuing) the disciplinary process, a number of remedies including an apology from Ms Emmerson, and he sought a conflict resolution meeting (to be arranged with Ms Emmerson).

Claimant's suspension from safeguarding duties

143. On 11 November 2020 the LADO sent an email to Ms Emmerson providing further information received from the IDVA. She stated that:
"Below is a chronology of events. I am sharing this information as it would be relevant to your enquiries as ultimately, there are discrepancies in the information the employee has provided vs that received from the IDVA. This in turn has a bearing on his honesty and integrity as an employee and secondly, the question that needs to be satisfied is whether the employee could reliably fulfil his role as a safeguarding officer given honesty and transparency are key factors when a) assessing risk of harm and b) the reporting thereof/acting upon it."

144. In that email the LADO provided a chronology of events in relation to the claimant's family proceedings between 18 December 2019 and 20 February 2020. She stated "Claire, I think for the purposes of your procedures, see if the above dates match those given by Mr Paddy."

145. Ms Emmerson sent an email to the LADO on 11 November 2020 advising that "this is very helpful and contradictory to some of what he has told us." She explained that Mr Paddy had submitted a grievance on the basis of bullying and harassment, he claimed that he is the victim of domestic abuse, and that he had not been supported by the school as a victim. She asked a number of questions in that email.

146. A further email was received on the same day from the LADO. The LADO explained the reasons why the NMO was requested by the claimant's former partner. In response to the enquiry about whether the Judge saw evidence to support the NMO application, the LADO stated that the IDVA confirmed that "the statement is the evidence. In order to have an NMO granted, you have to provide a statement: that is the evidence." The LADO was unable to confirm if there were any further hearings and that this information would need to be sought from Mr Paddy. She also confirmed that the claimant had submitted a request for a NMO against his former partner, but that the NMO obtained by the claimant's former partner is the one that is in force (this was reviewed during the hearing on 10 January 2020).

147. On 11 November the claimant was suspended, with immediate effect, from his role as Deputy Designated Safeguarding Lead. The letter explained:
"In view of the critical relationship of the report to your safeguarding role, I am, with immediate effect, suspending you from your role as Deputy Designated Safeguarding Lead, pending the outcome of considerations. When you return to school following your current period of sick leave, your role will be adjusted to reflect this change of duties until the outcome is known. This decision will not affect your pay. Your suspension from safeguarding duties is precautionary, not punitive, and does not imply guilt or blame."

148. Ms Emmerson also explained in that letter that she had received the interim

disciplinary investigation report and set out an extract from that report together with the conclusion that at this juncture there was a case to answer. She stated that this would, if so decided, be heard at a future formal disciplinary hearing. As there was a further allegation and investigation report pending, they would wait to receive both reports before deciding what steps may be appropriate regarding the need for a hearing.

149. The claimant was further advised in that letter "In accordance with the policy, the grievance you have raised will be dealt with as part of the disciplinary process and you will have an opportunity to put forward your concerns during the formal hearing. I will write to you separately in response to this grievance."

150. The claimant sent an email dated 12 November 2020 to Ashanti Coleman with the subject "disciplinary investigation". He advised that Ms Emmerson had not mentioned any proposed meeting regarding his return-to-work next week. He stated that he would like to have a clear understanding of his new role. He also requested a copy of the interim investigation report prepared by Mr Jarrett-Potts and he asked at which point he may involve the School's Governors and Hackney Learning Trust (and whether this can only occur during the appeals process).

151. In that email the claimant stated:
"Unfortunately, I have evidence that CME appears to have corrupted the investigation, resulting in it being somewhat bias and farcical. As this is the case, who should I raise this irregularity with?"

Grievance response

152. On 12 November 2020 Ms Emmerson sent a letter to the claimant with the subject "Response to your letter raising a grievance". In summary, Ms Emmerson included the following points in her letter:

152.1 She stated in line with policy as his grievance related to the disciplinary process, the claimant's grievance will be heard as part of any disciplinary hearing and that the Chair of Governors had been informed.

152.2 She commented on the details of the NMO and the relationship between the claimant and his former partner and the circumstances which led to a NMO being granted. She set out new information obtained from the LADO, which will be reported to the investigator as required to widen the investigation.

152.3 When the claimant alleged that he was the victim of domestic abuse, he was offered counselling which he declined. She stated that a NMO had not been granted against his former partner. No request had been made by the claimant for domestic abuse leave for himself previously.

152.4 Legal representatives are not permitted to attend meetings relating to disciplinary matters.

152.5 The points made relating to counselling were addressed previously. The claimant was offered ASpace counselling on or offsite, which he declined. Following the pandemic, there was increased pressure on

staffing, and it made it more difficult to support half a day's leave per week in addition to an adjusted 10am start time. It was stated that the fact that these sessions were online made leaving the school site and the length of leave requested unreasonable. She stated that this was also addressed in the letter dated 14 October 2020. When the claimant returned to work, it was stated that the school would provide him with a private space to conduct the appointments online.

152.6 No request had been made for himself for 5 days domestic abuse leave previously, and the claimant was not advised that his request for counselling was unprofessional. He was simply reminded of the school's systems and expectations.

152.7 In relation to paragraphs 19-22 of the claimant's grievance, the reason why the incidents were raised is because the claimant asked for evidence of previous incidents where proper process had not been followed. There had been no action taken against the claimant in respect of those matters.

152.8 Ms Emmerson stated that she will look into why the claimant's weekly meetings with his line management had not been taking place. She would not comment on matters relating to breaches of the risk assessment as this was part of the disciplinary process. She strongly refuted that she was acting bullish and aggressively during the meeting.

152.9 She strongly refuted that the school created a hostile work environment and believed that support had been provided (and she also believed that the school was following due process and policy in addressing the information provided by the LADO). She said the information shared by the LADO during the course of the year and the unfolding events had raised serious concerns about trust and are subject to disciplinary investigation.

152.10 In relation to points 36-38 of the grievance she stated "we have not actively sought ways to not support you. I consider these allegations to be not only false, but malicious. The offer of offsite support in February was made at a time when staffing levels and circumstances were completely different from the challenges of managing the reopening of the school in the midst of a global pandemic in September/October. The school has not refused your access to counselling and has supported this by offering to provide a private space for these sessions to take place. At all stages of the process, we have followed HR policy, advice from the LADO and our external HR consultants in determining our actions."

152.11 Ms Emmerson strongly refuted the accusations made within the claimant's grievance. In addition, she stated that the ongoing disciplinary investigations are not only justifiable and appropriate, but necessary in order for the school to meet their responsibilities to investigate breaches of the Code of Conduct and to follow up concerns raised by the LADO in terms of his suitability for his role (in the light of

the allegations). The claimant's action points that he sought which were listed at paragraph 38 a) to k) of his grievance letter (see page 461 of the Hearing Bundle) were therefore not accepted.

153. Ms Emmerson requested in her letter that the claimant kept her updated regarding any intended return to work and that they will as per policy, arrange a return-to-work meeting with the claimant's line manager, during which the change of duties due to the claimant's suspension from his safeguarding role, will be outlined.

Correspondences with the claimant's solicitor from November 2020

154. The claimant sent an email to Ashanti Coleman and Wendy Mason dated 15 November 2020 advising that following receipt of Ms Emmerson's response to his grievance, he was attaching a letter altering the school of possible breaches of Court orders in the child family proceedings. He stated that given the nature of the proceedings, the Judge directed that all matters relating to this case remain confidential. He mentioned that there was a pending order (that he would have permission to share) and that his solicitor will be in contact shortly regarding the possible breach. The letter attached to that email appears at pages 475 – 477 of the Hearing Bundle.

155. On 16 November 2020 Ms. Emmerson was sent an email from the claimant's solicitor (see page 479 of the Hearing Bundle). He explained that he was surprised that he had not been contacted by the school and he advised that he had been given authority by the claimant to confirm to the school any details that were requested. He advised that as these were family proceedings, they are private and there are strict rules as to what details can be disclosed to third parties including the school. He stated that disclosure of certain details and documents is unlawful without the court's prior approval, and this was the reason why his correspondence was in general terms.

156. The claimant's solicitor (Mr Peter Reynolds) advised that there had been allegations made by his client and his former partner and to date there had been no findings of fact or orders made in which evidence from both parties had been considered. He advised that a fact-finding hearing is listed to be heard as an in-person hearing on 26 February 2021 (the hearing had been delayed due to the pandemic), and that evidence will be heard.

157. He explained that the NMO made against his client was granted without his client having had the opportunity to attend Court and that the facts alleged in that application and in the claimant's application for a NMO will be heard at the fact-finding hearing in February 2021. He stated that whilst the evidence filed is supportive of his client's account of events, the claimant's NMO application was not heard ex parte, and it was listed without notice to either party (the application was dismissed due to nonattendance and not based on the court's assessment that it was without merit).

158. Mr Reynolds also stated "I remain deeply concerned as to what information you have been provided with as I am aware that no applications have been made by the other side for permission to disclose details to third parties. Please therefore provide me with the contact details for Haggerston's named liaison LADO officer as I will need to make contact with them as to their source of information to ascertain whether a criminal offence has been committed."

159. On 17 November 2020 Ms Coleman sent a letter to the claimant in relation to his return to work, investigation reports, his allegation that the school has acted unlawfully and improperly in relation to child protection, request for contact with the claimant's legal team, and the claimant's Freedom of Information Act request. Among other matters, Ms Coleman confirmed that the investigation reports will be provided to the claimant when completed; that all information received in relation to the legal case had come from the LADO (and the school is duty bound to investigate those allegations); and that further information had been sought from the claimant's legal team on 05 November 2020.

160. Ms Emmerson sent an email to the claimant's solicitor on the same date in response to his email sent on 16 November 2020. She stated that the London Borough of Hackney and the school had a clear duty to act on issues connected to legal safeguarding duties, she referred to the Safeguarding Policy and advised that they cannot discharge their duties without requiring specific information. She further stated: "In this case, it was legitimate information that caused the school to address matters with Mr Paddy. Actions taken since then are wholly as a result of matters then shared by Mr Paddy and aspects of that which were then seen as contradictory and containing omission."

161. She stated that the concerns have since centered on court events (not the detail) and made reference to her letter of 05 November 2020 which she says was not answered. Ms Emmerson also stated:
"I am surprised that you would expect me not to have written directly to your client as he is an employee of the school and therefore all disciplinary matters relate to him directly. Also, until 16 November, I had no contact details for you or your firm, hence why questions have been directed via Mr Paddy."

162. Ms Emmerson stated that the LADO's contact details are publicly available on their website. Mr Paddy provided the contact details of the LADO to his solicitor on that day by email.

163. On the same date Mr Reynolds responded to Ms Emmerson's letter providing further information and an explanation in relation to the family proceedings (see page 494 of the Hearing Bundle).

164. On 20 November 2020 at 6.12pm Ms Emmerson sent a reply to Mr Reynolds thanking him for his response and his time in responding to the requests and clarifying that she wanted to make very clear what their legal duties were in relation to this matter (in light of the allegations made by the claimant).

165. The claimant sent an email on 20 November 2020 at 7.32pm to Ms Emmerson stating that he was writing in reply to her email to his solicitor, and that he had raised concerns about the way in which she had shared his information improperly (including unlawfully sharing his information with Mr Jarrett-Potts and that details of family proceedings can only be shared with those who hold safeguarding responsibilities). The claimant also questioned why Ms Emmerson did not contact Mr Reynolds in March 2020, and why his dispute with the school had been shared with Mr Reynolds.

166. Ms Emmerson sent an email to the claimant on 24 November 2020 advising

that as Mr Reynolds referred to the letter of 12 November 2020 and the school's safeguarding investigation, the school assumed that the claimant shared the current investigation with him. Ms Emmerson stated that the school responded to the claimant's allegations in detail including why it was not appropriate to speak to Mr Reynolds and when the school requested information from Mr Reynolds in early November 2020, they did not receive a reply. Ms Emmerson further stated "We will not continue to respond to the same repeated allegations which we view as malicious and vexatious. As previously stated, these will be dealt with as part of the disciplinary process, as per policy."

Claimant's communications with Chair of Governors

167. On 19 November 2020 the claimant sent an email to Wendy Mason, Chair of Governors and Ashanti Coleman attaching a letter setting out his concerns in response to the letter he received on 18 November 2020 (see pages 483 – 489 of the Hearing Bundle). He stated that he was writing to Wendy Mason as Chair of Governors and pointing out that there were concerning allegations of a lack of understanding regarding safeguarding and child protection matters from leadership (points 6-11). He stated that so far, the response from the school that there had been no wrongdoing during the disciplinary process, or the investigation had been unsatisfactory, and he would appreciate a frank and honest discussion about how all parties can move forward. He said the reason why previous decisions had been made by leadership may be due to lack of know-how and experience of family law procedures and disclosure.

168. The claimant stated that he had no desire to escalate matters further and he hoped that as a school they could reach an amicable solution internally.

169. On 19 November 2020 Ms Coleman forwarded the claimant's email and letter to Ms Emmerson and Mr Jarrett-Potts. She requested confirmation of whether to respond by email to the claimant.

170. Ms Wendy Mason replied to the claimant by email dated 19 November 2020 in the following terms:
"I confirm receipt of your e-mail below and attached letter.

I am advised that there is an ongoing disciplinary process and so it would be inappropriate at this stage for me to address the points which you raise. Any grievance raised will be dealt with as part of the disciplinary process as per policy.

Therefore any meeting at this point could be prejudicial to the ongoing investigation. I would ask you to desist in sharing information with me."

171. On the same day the claimant sent a further email to Ms Mason advising "Thank you for your swift response. I totally understand your position, and thank you again for clarifying. These ongoing issues can hopefully be resolved between the school and myself."

Parties' correspondences between 30 November 2020 – 04 December 2020

172. On 29 November 2020 the claimant sent an email to Ms Emmerson and Ms

Coleman stating that the school made an incorrect assumption, and it was not appropriate to discuss employment grievances with his solicitor as this was not within his remit. In relation to the email dated 05 November 2020, the claimant stated that he did not receive this until 18 November 2020, but he pointed out that Mr Reynolds sent correspondence on 14 November 2020 (and that he had always been open and willing for them to speak to Mr Reynolds). He further stated, "By conducting investigations on false allegations, which appear to have come from my abusive ex-partner, can put the school in a position where they've become complicit in the abuse I've had to suffer." He also stated that he had instructed Mr Reynolds to investigate where the LADO obtained their information from. He attached a copy of his fit note to that email.

173. The claimant further stated:

> "Additionally, as stated in my grievances I feel pressurised and forced out of Haggerston by leadership. Due to this, I have decided it's best I look for new roles away from Haggerston. I have been offered a new role which I will hopefully like to start in January 2021, although I am mindful to wait until after the Court case and the conclusion of my grievance, before deciding on what next steps I may take. However, I have given my potential new employer the school's details for a reference.
> Ashanti, regarding my grievances how would this continue if I was to leave Haggerston. Would this being resolved/heard before my last day of employment."

174. Mr Jarrett-Potts advised Ms Emmerson by email dated 30 November 2020 that the claimant's grievance is linked with the disciplinary process and cannot proceed separately, and that if the claimant resigned during the processes such that it was unlikely that they could be concluded prior to his last day (then those processes would also cease). He advised that the practice of ignoring and breaching sickness absence processes should be addressed formally, and that the claimant is due a formal sickness absence review given the extent of his absences.

175. Ms Emmerson sent an email to the claimant on the same date providing a copy of the email dated 05 November 2020, and advising that the ongoing disciplinary investigations are relating to two matters, and that the school was not complicit in any abuse. She advised that HR would write to him in regard to non-compliance with sick leave procedures. She further stated:

- "The grievance is linked with the disciplinary and cannot proceed separately.
- Were you to cease employment with school prior to the conclusion of these processes then they would cease as school processes.
- Were you to resign in such a way that it was unlikely that they would be concluded prior to your last day, then they would also cease."

176. Ms Emmerson also requested details of the claimant's new employer and role.

177. The claimant replied to that email requesting the first respondent's IT team to look into the issues surrounding the email dated 05 November 2020, denying that the alleged incident ever occurred, and stating that he did not accept that the school were not complicit in furthering abuse perpetrated by his former partner. He said that the

investigation process and the incorrect manner in which it was carried out made him feel prejudged and persecuted on the basis of false allegations before a fact-finding hearing had occurred. He advised that the school was previously informed that his former partner had been abusive to himself and his daughter. He further advised that the school did not ensure his wellbeing and safety in terms of further domestic abuse from his former partner. He stated that if the LADO's source of information was his former partner, this would be passed onto the police to fully investigate. Noting that if he were to leave, this would result in the grievance process ending, he requested an agreed reference and provided details of his new employer.

178. Ms Coleman advised by email dated 30 November 2020 that the claimant's medical certificate expired on 16 November 2020, he had not sent a new medical certificate until today (which was dated 11 November 2020), that on two occasions he failed to provide medical certificates, and any future failure to provide medical evidence in a timely manner will result in disciplinary action. Ms Coleman advised she will write to the claimant to invite him to a formal sickness review meeting.

179. The claimant sent an email to Ms Coleman on 01 December 2020 advising that due to the pandemic his GP surgery was taking longer than normal to process forms, that the GP's workload is outside his control, and he questioned whether the school would consider this to be reasonable grounds for a disciplinary.

180. Ms Coleman sent an email to Ms Emmerson and Mr Jarrett-Potts forwarding a copy of the claimant's email and his recent medical certificate. She stated that the certificate showed that he was assessed prior to his previous fit note expiring. The claimant' fit note was dated 11 November 2020, and it covered the period between 11 November 2020 and 03 December 2020.

181. Ms Coleman responded to the claimant by letter dated 03 December 2020 (sent by email that evening) requiring the claimant to acknowledge the conditions in the sickness absence policy and his need to abide by them in writing, advising that he had not contacted the school for 2 weeks after his fit note had expired, and she provided notice that further action would be taken if he did not comply.

182. The claimant sent an email that evening to Ms Coleman advising that he had been contacting his GP surgery several times to add further information to fit notes that Ms Emmerson had stated to him were a requirement. He stated that his GP surgery was overwhelmed and unable to process requests in a timely manner. He asked Ms Coleman to let him know how the school could support him with this. He requested an open discussion on this matter. Ms Coleman forwarded that email to Ms Emmerson and Mr Jarrett-Potts the following morning stating that the claimant had misinterpreted what Ms Emmerson said in relation to National Insurance numbers, his latest medical certificate expired yesterday, and he had not informed them whether or not he would be returning to work. Ms Emmerson replied to Ms Coleman advising her that the requirement that sick notes are signed is standard practice, the claimant was aware that the National Insurance number should be his number, and this was not a reason for the delay. She also stated that he had not informed them of his intention to work (or provided a new sick note), and he had not answered the questions sent to him in the previous letter.

183. Ms Coleman sent an email to the claimant later on 04 December 2020 advising

that it is his National Insurance number (not his GPs) that is required and in the letter of 12 November 2020 it stated, "I am not sure what your reference to the GP national insurance number refers to but believe this may relate to HR's request that GP certificates should always be signed." The claimant was requested to provide information relating to his consultations, and he was advised that he had not informed them of his current status and whether he will be returning to work. The claimant replied that day providing his national insurance number, confirming that he believed the date of the consultation is on the fit note, but that he had received the fit note unsigned on the day he had sent it to her by email. He advised that he is waiting for his GP to email him his fit note after speaking with them that day like a space.

Further correspondences with the claimant's solicitor

184. Mr Reynolds sent an email to Ms Emmerson on 04 December 2020 confirming the court hearing dates he had on his file, he confirmed that no evidence was considered at those hearings, and they were dealt with by submissions (either by lawyers or by the claimant on occasions when he represented himself). He said he represented the claimant at most hearings, and there may be a hearing date missing. He summarised what the hearings related to. The first prohibited steps order application made by the mother was refused. Within that summary he said "The mother made a subsequent application for a prohibited steps order in relation to the father attending the child's new school at collection and drop off times. The mother claimed that this was at the school's request but the school confirmed in writing that they have not requested or encouraged the mother to make this application." He advised that after the fact finding hearing next year, the court is likely to appoint a CAFCASS officer to report back, and a Final Hearing was likely in late summer 2021.

185. Ms Emmerson sent a number of questions to Mr Reynolds by email dated 07 December 2020 at 09.22am, including in relation to whether the claimant attended this is the problem all the listed hearings, details of the original prohibited steps order application, whether and when the claimant applied for a prohibited steps order, the justification for the mother withdrawing supervised contact and the status quo of shared care, and details of the allegations of violence.

186. Mr Reynolds replied to Ms Emmerson by email of the same date at 10.47am clarifying that the claimant attended all hearings remotely or in person and that the first application for a prohibited steps order was in relation to attending the nursery. The further application by the mother was made despite an agreement reached between the parties and it was dismissed. He said this is the alleged breach of agreement by the mother, and there has never been an allegation of breach of any order or agreement by his client. Mr Paddy had applied for a prohibited steps order to stop his child being taken to Australia by the mother, but an agreement was subsequently reached. In relation to the allegations of violence he said the mother alleges that the claimant hit her boyfriend and injured her jaw in an attempt to intervene on 01 December 2019. He says the police took no action, child contact continued until January 2020, and the allegations by the other party had been put forward after allegations were made by the claimant. The fact-finding hearing, he advised, will deal with both matters.

187. Upon Ms Emmerson's further request for clarification of the date of the original prohibited steps order relating to the nursery sent by email at 1.37pm that day, Mr Reynolds replied at 1.47pm advising "There was not a prohibited steps order relating

to the nursery." He clarified that this matter was dealt with by way of agreement between the parties, the mother subsequently made an application, which was dismissed by the Judge.

Claimant's sickness absence

188. The claimant was sent a letter from Ms Emmerson dated 07 December 2020 (sent by email from Ms Coleman on the same date) advising him that the school intended to investigate potential breaches of his employment contract conditions in relation to sickness absence under the Disciplinary Policy. The potential breaches were set out in the following terms:

> "1. Failure to provide medical sick notes in an timely manner, and not communicating the status of your illness or the reason for your continued absence or of your intended return date.
> 4. Attending a job interview during a period of sick leave.
> 5. Attending court for your family proceedings on dates which were taken as sick leave.
> 6. Taking dependency/leave of absence relating to your court case which do not match the court dates supplied by your solicitor."

189. The claimant was advised that an investigating officer will be appointed from the Senior Leadership Team.

190. On 08 December 2020 the claimant sent an email to Ms Coleman providing a copy of his new fit note and advising that having spoken to his GP and union, he would like the investigation relating to both employment matters to cease while he was off sick. He mentioned that Ms Emmerson previously advised that the investigations could be paused. The fit note confirmed that the claimant was unfit to work until 19 December 2020 due to anxiety.

Disciplinary report relating to allegations 1 and 2

191. On 09 December 2020 Mr Jarrett-Potts concluded that further investigation was not necessary and would not be able to take place within any reasonable period of time and submitted his reports on allegation 1 (see pages 528-563) and allegation 2 (pages 564-606).

192. In relation to allegation 1 regarding the fake medical text messages, he concluded that "Mr Paddy's explanations and self-contradictory versions of events simply do not scan" and there was a case to consider moving to a disciplinary hearing.

193. The second allegation related to the claimant allegedly failing to comply with the agreed actions in his risk assessment, the claimant's disclosure obligations, and an incident that allegedly occurred at his child's nursery on 28 January 2020. Mr Jarrett-Potts found that the claimant's omissions were obstructive and his judgments on reporting were fundamentally unsound, and it was concluded that there is a case to consider moving to a disciplinary hearing either in terms of "gross misconduct" or under trust and confidence as "some other substantial reason".

Reference request

194. In early December 2020, the first respondent received a reference request for the claimant. Ms Emmerson replied confirming the information that was requested. She also confirmed that there was a safeguarding concern in relation to the claimant. Ms Emmerson did not provide further details about this concern.

195. Ms Emmerson had a telephone conversation with the prospective employer during which she confirmed that there was a safeguarding concern in relation to the claimant. The prospective employer asked if the concern was in connection with a child in the school. Ms Emmerson confirmed that her concerns did not relate to a child within the school.

Claimant's resignation

196. By an email dated 13 December 2020 sent at 11.22pm, the claimant sent a copy of his letter of resignation to Ms Coleman (see pages 608 – 616 of the Hearing Bundle). The claimant advised Ms Emmerson that he was resigning from his role of Deputy Designated Safeguarding Lead at Haggerston School with immediate effect and without notice on grounds that they have breached the implied term of mutual trust and confidence between the employer and employee, in terms of his contract of employment.

197. After summarizing the matters that he considered in reaching his decision to resign, the claimant set out a chronology of events which led him to tender his resignation at pages 609 to 615 of the Hearing Bundle. His chronology of events included the letter sent to him dated 07 December 2020 and the school informing him on 10 December 2020 that they would not be passing the new investigation over to the Local Authority (they would be carrying out the new investigation internally).

198. At page 615 he stated as follows:

> "The bullish manner in which you, as the headteacher have conducted yourself in relation to my family matters has been highly alarming and distressing. Your obvious incompetence in dealing with these matters sensitively and confidentially despite my constant requests for you to do so has eroded all trust I have in the school being able to impartially and competently investigate these family proceedings. The school has openly shown a propensity throughout this process of gender bias, assuming guilt before proven facts. This open inconsistency and bias not only has created an undertone of hostility perpetrated by the yourself towards my person, despite me being a victim of domestic abuse, which the school are aware of."

199. He ended that letter by stating:

> "It is for the above reasons that I am no longer able to continue my employment at Haggerston and will now leave with immediate affect after an onslaught of harassment, mismanagement and bullying within the workplace, perpetuated solely by yourself.
>
> I cease employment with Haggerston as of the 13th December 2020."

200. Ms Coleman forwarded that email to Ms Emmerson and Mr Jarrett-Potts on the morning of 14 December 2020.

201. Ms Emmerson sent an email to the claimant on 14 December 2020 at 5.09pm advising:

> "Your resignation is accepted.
>
> All your allegations are refuted in full and we view them as false and malicious.
>
> We also consider your resignation without notice to be a breach of contract."

Events that occurred after the claimant's resignation

202. Ms Coleman sent the claimant a letter by email dated 17 December 2020 claiming an overpayment from the claimant in relation to his December 2020 salary. The claimant was also required to return all Haggerston School items including his staff ID card, fob, keys and Chromebook.

203. The claimant sent an email on the same day to Ms Coleman requesting payment he believed he was owed in respect of the Easter Holidays. He advised that they were requested to work through the Easter break. He asked for the time to be calculated and factored in. He advised that his additional working days were 5 days throughout the year. He stated that through the Easter holidays he worked an additional 5 extra days.

204. Ms Coleman advised by email on the same day that they had nothing on record to show that the claimant carried out work throughout the Easter break.

205. There was further correspondence about the claimant's claim for payment in relation to work carried out during the Easter break between 18 December 2020 and February 2021 (see pages 623 – 636 of the Hearing Bundle).

206. The claimant was paid his salary in full pay up until the end of December 2020.

207. The claimant secured a new job at ADA College, and he started his new role on 01 January 2021 with a salary of £41,116.00 (gross) per annum.

208. We were referred to a copy of an unsigned statement from Lois Kates (see page 625 of the Hearing Bundle) dated 15 February 2021.

209. We also had before us a copy of an email from the claimant's solicitor dated 27 February 2021 advising that following conclusion of the 3-day fact finding hearing,

> "I can confirm that having heard all the evidence and upon admissions by the mother no allegations of violence against my client were proven. The Judge set aside the injunction order and it was accepted that upon hearing evidence it should not have been made.
> It was ordered that contact should take place the next day unsupervised and move to overnight after two sessions.
> All the allegations put forward by my client were proven (save for one relating to

coercive and controlling behaviour by the mother)."

210. We were also provided with a copy of a letter of demand dated 24 February 2021. At page 636 of the Hearing Bundle, the claimant's letter stated, "The limitation for claims in the Employment Tribunal are three months less one day."

Employment Tribunal procedure

211. The claimant commenced ACAS Early Conciliation on 04 March 2021.

212. The claimant's ACAS Early Conciliation Certificate was issued on 15 April 2021.

213. The claimant presented his Claim Form on 19 April 2021.

214. On 27 May 2021, the respondents sent their Response to the Tribunal.

215. Case Management Orders were issued on 18 November 2021.

216. The respondents' Amended Grounds of Resistance was filed on 21 January 2022.

Remedy

217. The claimant's evidence at paragraph 181 of his witness statement is that he obtained a 10-month maternity cover role to escape bullying from Ms Emmerson.

218. The claimant provided a copy of his employment contract with ADA National College for Digital Skills Further Education College, stating that his employment in the role of Assistant Principal – Personal Development Behaviour and Attitudes (Maternity Cover) will commence on 01 January 2021 and will end on 05 November 2021. His salary was £41,116.00 per annum (see pages 641-653 of the Hearing Bundle).

219. The claimant received a conditional offer of employment for the role of Wellbeing and Safeguarding Officer with Catch22 by letter dated 23 November 2021. This was a full time – permanent role and the claimant's salary in that post was confirmed to be £34,000.00 per annum (see pages 654-655 of the Hearing Bundle).

Observations

220. On the documents and oral evidence presented, the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the List of Issues:

221. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of the event was more likely than not, then the Tribunal is satisfied that the event did occur.

222. This was a case where it was possible to distil a significant amount of facts from the documents in relation to the material issues that required to be determined.

223. Where there was a dispute of fact, we made our decision on the balance of

probabilities based on the evidence of the witness which set out the position both clearly and consistently, and we also considered any relevant contemporaneous documents and emails.

224. In relation to the email dated 17 January 2019, Ms Emmerson stated that the LADO were notified, and that the student had said the claimant, and the student had a conversation in which the claimant stated that he was lonely, and he missed having someone at home. This was not reflected or even hinted at in the letter dated 17 January 2019. There was no evidence that the claimant was notified by Ms Emmerson about these matters. She said in her oral evidence that a verbal warning had been provided, but the email we were referred to did not make reference to a verbal warning. She said that because the verbal warning had lapsed, she could not mention it to the claimant's new employer. Although we used the content of the letter to assist to ascertain what had taken place, we did not find that the additional details provided by Ms Emmerson in her oral evidence were reliable or consistent with the documents.

225. We noted that there was no mention at the meeting on 21 January 2020 that the LADO's information was inaccurate nor did the claimant provide any update about his own NMO application. However, we accepted the claimant's evidence in relation to what happened on 28 January 2020 when he collected his daughter from nursery. This is because the evidence was clear, logical, and consistent.

226. We found the claimant's explanation at the meeting on 09 September 2020 in relation to what had happened when he collected his daughter from the nursery on 28 January 2020 which we set out above (in our findings of fact) to be credible. He did not advise the school about any incident. There is no evidence that he knew anything about police involvement until later on. It was not clear to the Tribunal what the first respondent's rationale was for believing that the claimant's conduct on 28 January 2020 and his alleged failure to report what happened on that date was a safeguarding concern (from the first respondent's perspective).

227. The 19 March 2020 email related to a meeting in relation to discussing the claimant's family law proceedings (particularly in relation to the NMO). The claimant was advised that he could not bring a lawyer to the meeting, but he may bring a colleague or a trade union representative. We were not surprised by that decision. Although the disciplinary policy made reference to the involvement of legal representatives, this may become relevant at a later stage of the process.

228. It is not clear why at that stage, the claimant did not provide a written summary from his solicitor in relation to the family proceedings, particularly, to clarify the facts in relation to the NMOs. This was put to him during the Tribunal's questions at the end of his evidence. He replied as follows: "I totally agree that in hindsight would have been so much easier. I wish I had done that in March. I wish I had got Mr Reynolds to email the school in March." It was also difficult to decipher why Ms Emmerson had not contacted the claimant's solicitor to obtain their comments and any relevant facts on the allegations made through the LADO at an earlier stage in the process.

229. In relation to the details of 10 days' work in respect of which the claimant claimed a payment in lieu, the Tribunal were given very little information. The claimant told Ms Moran that two meetings took place in his email dated 06 April 2020. No other evidence was provided in relation to the days that he carried out work during the

Easter holidays. We do not know how long those two meetings were or the time spent in relation to any preparation work carried out in relation to those meetings. There was no evidence to support any claim in respect of payment due for any additional days worked by the claimant. He could work 5 extra days under the terms of his contract of employment. He did not raise this matter in writing or ask for payment or a credit in lieu until 17 December 2020.

230. In relation to the allegations relating to fake text messages, the explanation given at the meeting on 09 September 2020 was that the claimant labelled them as fake as he thought they might not be genuine. In the email dated 01 July 2020 he said he thought there might have been a data breach. The claimant did not provide any clarity or evidence to support his position, and it was not clear why he sent text messages to his employer that he suspected were not genuine. We noted that the claimant remained on full pay during the relevant period and there was no question of withholding his pay at the time in question. We heard from Ms Emmerson that during the COVID crisis with so many staff off sick and self-isolating, the school were not being as rigorous with respect to medical certificates as they would normally. Notwithstanding this, the Tribunal could see no reason why the claimant would submit fake messages. At page 350 of the Bundle there was a letter dated 24 April 2020 in which he provided redacted medical records consisting of 8 pages including a letter from his GP confirming his medical condition. We found it difficult to follow their evidence (in terms that based on the evidence before Ms Emmerson or Mr Jarrett-Potts at the material time), that they genuinely or reasonably believed that the claimant had in fact submitted fake text messages or that he had any reason to do so.

231. As part of the risk assessment in early 2020, the first respondent agreed that the claimant should receive some counselling support. The claimant secured a series of counselling sessions via a local hospital which were about an hour in terms of duration via Zoom (online). Due to reasons of privacy the claimant preferred to have them off the school site (which was entirely understandable in the circumstances). The first respondent preferred the claimant to undertake those sessions in a private meeting room on the school premises. After some exchange of emails, the claimant said that if the school insisted, despite the impact on his anxiety, he would have the counselling sessions on site. After 12 October 2020, the claimant went on sickness absence leave.

232. The investigation report in relation to allegation two was sent to the first respondent on 19 October 2020. The claimant requested a copy on 16 November 2020, but this was not provided to him. That report was described as an interim report. The reports relating to allegations one and two were sent to the first respondent by Mr Jarrett-Potts on 09 December 2020. There was no evidence in the agreed file of documents that the claimant was sent a copy of those reports. It is not clear why the reports were not shared with the claimant at the material time. The Tribunal noted that there were a number of inaccuracies in the investigation report in relation to both the facts and the conclusions of the reports.

233. We noted that Ms Emmerson did not provide any satisfactory explanation in terms of why she sent a detailed letter of response to the claimant's grievance shortly after the presentation of the claimant's grievance, without having appointed an independent investigator or grievance chair.

234. On 19 November 2020 the Chair of Governors responded to the claimant's correspondence (raising serious complaints and concerns). However, the Chair of Governor's email response provided no timeline and the next steps in terms of the process were not addressed. We took into account the context at that time and the stage of the first respondent's processes. She stated that the claimant's grievance will be dealt with during the disciplinary process. This simply appeared to mirror Ms Emmerson's approach. The rationale for this decision was not clearly set out or explained (and this remained unclear).

235. In relation to the four additional disciplinary allegations made against the claimant in December 2020, it was difficult to follow the alleged basis for these allegations and it was not clear what evidence these allegations were based on. The claimant's points in relation to delays caused by the COVID-19 pandemic in terms of GP services were not addressed or considered.

236. We noted that the claimant's request dated 08 December 2020 that the disciplinary process be paused during the claimant's sickness absence was not given due consideration at the material time. It is unclear why the decision was made at that time not to grant the claimant's request. Mr Jarrett-Potts appears to provide a reason in his witness evidence. However, he does not consider either the claimant's prognosis and how long any delays are likely to be before an investigation meeting with the claimant could take place, and furthermore, he does not appear to look at any alternative options such as putting any points to the claimant in writing and requesting written answers. The first respondent had ample time between the date of the claimant's request and the date of his resignation to reply or to engage with the claimant meaningfully. The claimant tendered his resignation, which was accepted by Ms Emmerson shortly thereafter.

237. In terms of the time bar issue and the claimant's complaints under the Equality Act 2010, we noted that the evidence before the Tribunal showed that the claimant received support and advice from his trade union representative in 2020. He also referred to the Tribunal time limits in his correspondence to the first respondent sent in the early part of 2021. The claimant did not proffer any reason for the late presentation of his discrimination complaints in his witness evidence.

238. In relation to remedy, we accepted the evidence provided by the claimant (at paragraph 118 of his witness statement), both in terms of the steps he had taken to find alternative employment and also with regards to the effects of the treatment he received.

The Law

239. To those facts, the Tribunal applied the law –

<u>Unfair dismissal (constructive)</u>

240. The Tribunal had regard to the terms of section 95(1)(c) of the Employment Rights Act 1996 ("the ERA 1996") which provides that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if the employee terminates the contract under which he is employed (with or without notice) in

circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is known as constructive dismissal.

241. The Tribunal also had regard to the case of Western Excavating Ltd v Sharp 1978 ICR 221 where it was stated that:- "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

242. An employee pursuing a claim of constructive dismissal must establish that:

242.1 there was a fundamental breach of contract on the part of the employer;

242.2 the employer's breach caused the employee to resign and

242.3 the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

243. The claimant asserted that the employer had, by their actions, breached the implied duty of trust and confidence. This term is implied into all contracts of employment, and means that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84).

244. In W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516 the EAT held that the Tribunal had not made an error of law in holding that the employers' failure to provide and implement a procedure to deal with the respondent employees' grievances relating to a reduction in take home pay, amounted to conduct entitling employees to resign and be treated as constructively dismissed. It was, according to the EAT, an implied term in a contract of employment that employers will reasonably and promptly afford employees a reasonable opportunity to obtain redress of any grievance they may have.

245. In Blackburn v Aldi Stores [2013] IRLR 846 EAT it was held that a failure to adhere to a grievance procedure is capable of amounting to or contributing to a breach of the implied term of trust and confidence, but whether it does is a matter for the Tribunal to assess on the facts. For example, the fact that an indicative timetable is not met will not necessarily contribute to or amount to a breach of the term of trust and confidence. On the other hand, a wholesale failure to respond to a grievance may amount to or contribute to such a breach, when assessed against the relevant test.

246. In the case of Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 it was stated that "to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

247. This was developed further in the case of Malik v BCCI [1997] IRLR 462 where

it was stated that “in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer’s behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.”

248. In Hilton v Shiner Limited [2001] IRLR 727, it was held that the implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which a complaint is made must be engaged in without reasonable and proper cause. Thus, in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts.

249. In London Borough of Waltham Forest v Omilaju [2005] IRLR 35, the Court of Appeal held that a final straw, if it is to be relied upon by the employee as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. However, the final straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and confidence in the employer.

250. In Wright v North Ayrshire Council [2014] IRLR 4, the EAT found that the Tribunal had been wrong to rely on the principle that, where there was more than one cause, it was only the main (i.e. effective) cause of the resignation which should be considered to decide whether there had been a constructive dismissal.

251. In Charles Gordon v J & D Pierce (Contracts) Ltd UKEATS/0010/20/SS, the Tribunal held that even if there was a fundamental breach of contract that entitled the claimant to resign, the claimant could not succeed because he had affirmed the contract of employment by engaging in the respondents’ grievance procedure. The EAT decided that this was an error of law. In the EAT’s view in that case where an employee intimates that he considers the contract has come to an end, he is not to be taken to affirm that the contract has come to an end for all purposes. The EAT stated at paragraph 23 “In particular I do not consider that the parties can be presumed to intend that a clause designed to procure the resolution of differences should be regarded as being evacuated because one party asserts that the implied obligation of trust and confidence has been breached.” At paragraph 24, the EAT stated, “Although pragmatic considerations are not always a sure guide, it would be unsatisfactory if an employee was unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure.”

252. If the dismissal is established, then the Tribunal must also consider the fairness of the dismissal under Section 98 of the ERA 1996. This requires the employer to show the reason for the dismissal (i.e. the reason why the employer breached the contract of employment) and that it is a potentially fair reason under Sections 98 (1) and (2) of the ERA 1996; and where the employer has established a potentially fair reason, then the Tribunal will consider the fairness of the dismissal under Section 98

(4), that is: (a) did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and (b) was it fair bearing in mind equity and the merits of the case. A constructive dismissal is not necessarily an unfair dismissal: Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166.

253. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, relying on an argument that there was no dismissal, then a Tribunal is under no obligation to investigate the reason for the dismissal itself. The dismissal will be unfair because the employer has failed to show a potentially fair reason for it: Derby City Council v Marshall [1979] ICR 731.

Direct sex discrimination

254. Section 13 of the Equality Act 2010 ("EqA") sets out as follows:

> **"**13 Direct discrimination
>
> (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5)If the protected characteristic is race, less favourable treatment includes segregating B from others.
>
> (6)If the protected characteristic is sex—
>
> (a)less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
>
> (b)in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
>
> (7)Subsection (6)(a) does not apply for the purposes of Part 5 (work).
>
> (8)This section is subject to sections 17(6) and 18(7)."

255. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In Amnesty International v Ahmed [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in James v Eastleigh Borough Council [1990] IRLR 288 and (ii) in Nagaragan v London Regional Transport [1999] IRLR 572. In some cases, such as James, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as Nagaragan, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That

approach was endorsed in R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.

256. Further guidance was given in Amnesty, in which the then President of the EAT explained the test in the following way: "… The basic question in direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of. ……. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself…… In other cases—of which Nagarajan is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling James v Eastleigh and Nagarajan. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

257. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of Anya v University of Oxford [2001] IRLR 377.

Less favourable treatment

258. In Glasgow City Council v Zafar [1998] IRLR 36, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

259. Section 23 of the EqA states:

> "23 Comparison by reference to circumstances
>
> (1)On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
>
> (2)The circumstances relating to a case include a person's abilities if—
>
> (a)on a comparison for the purposes of section 13, the protected characteristic is disability;

(b)on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.

…"

260. In Shamoon v Chief Constable of the RUC [2003] IRLR 285, also a House of Lords authority, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as he was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

261. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in Balamoody v Nursing and Midwifery Council [2002] ICR 646, in the Court of Appeal.

262. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

"Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

263. In Owen and Briggs v Jones [1981] ICR 618 it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In O'Neill v Governors of Thomas More School [1997] ICR 33 it was held that the protected characteristic needed to be a cause of the decision but did not need to be the only or a main cause. In Igen v Wong [2005] IRLR 258 the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from Nagarajan "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.

264. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows: "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial."

265. The law was summarised in JP Morgan Europe Limited v Chweidan [2011] IRLR 673, heard in the Court of Appeal. Lord Justice Elias said the following (in a case

which concerned the protected characteristic of disability): “Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case. In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason.”

Burden of proof

266. Section 136 of the EqA provides the burden of proof provisions:

> **“**136 Burden of proof
>
> (1)This section applies to any proceedings relating to a contravention of this Act.
>
> (2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) 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.
>
> (4)The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
>
> (5)This section does not apply to proceedings for an offence under this Act.
>
> (6)A reference to the court includes a reference to—
>
> (a)an employment tribunal;”

267. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or victimisation, as explained in the authorities of Igen v Wong [2005] IRLR 258, and Madarassy v

Nomura International Plc [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two-stage process as explained in Laing v Manchester City Council [2006] IRLR 748.

268. Discrimination may be inferred if there is no explanation for unreasonable behaviour (The Law Society v Bahl [2003] IRLR 640 (EAT), upheld by the Court of Appeal at [2004] IRLR 799.)

269. In Ayodele v Citylink Ltd [2018] ICR 748, the Court of Appeal rejected an argument that the Igen and Madarassy authorities could no longer apply as a matter of European law and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in Royal Mail Group Ltd v Efobi [2019] IRLR 352 at the Court of Appeal, and upheld at the Supreme Court, reported at [2021] IRLR 811. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

270. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

271. In Igen Ltd v Wong [2005] ICR 931 the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of

proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

272. The Tribunal must also consider the possibility of unconscious bias, as addressed in Geller v Yeshurun Hebrew Congregation [2016] ICR 1028. It was an issue addressed in Nagarajan.

Time limits

273. Section 123 of the EqA provides as follows:

> "123 Time limits
>
> (1)**[** Subject to section**]** 140B**]]** proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a)the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b)such other period as the employment tribunal thinks just and equitable.
>
> (2)Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a)the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b)such other period as the employment tribunal thinks just and equitable.
>
> (3)For the purposes of this section—
>
> (a)conduct extending over a period is to be treated as done at the end of the period;
>
> (b)failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a)when P does an act inconsistent with doing it, or
>
> (b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

274. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule,

practice or principle which has had a clear and adverse effect on the complainant - Barclays Bank plc v Kapur [1989] IRLR 387. The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (Hendricks v Metropolitan Police Commissioner, [2003] IRLR 96).

275. Even if the Tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278, following Pathan v South London Islamic Centre UKEAT/0312/13 and Szmidt v AC Produce Imports Ltd UKEAT/0291/14. A different division of the EAT decided that issue differently in Habinteg Housing Association Ltd v Holleran UKEAT/0274/14 holding that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed In Edomobi v La Retraite RC Girls School UKEAT/0180/16 in which the Judge added that she did not “understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the Tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay.”

276. In Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801 the EAT did not directly address those authorities but stated that, in relation to the issue of delay, “it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason”.

277. In Rathakrishnan there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of London Borough of Southwark v Afolabi [2003] IRLR 220, in which it was held that a Tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to Dale v British Coal Corporation [1992] 1 WLR 964, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded “What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see Hutchison v Westward Television Ltd [1977] IRLR 69) involves a multi-factorial approach. No single factor is determinative.”

278. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 the Court of Appeal held similarly: “First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion.”

279. That was emphasised more recently in Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, which discouraged use of what has become known as the Keeble factors, in relation to the Limitation Act referred to, as form of template for the exercise of discretion.

280. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (Robertson v Bexley Community Centre [2003] IRLR 434). At paragraphs 23, 24 and 25 Lord Justice Auld states:

> "23 I turn now to the second issue. The decision by the employment tribunal not to exercise its discretion to consider the claim on just and equitable grounds. There are a number of basic propositions of law to which Miss Outhwaite has referred us which govern the way in which this exercise has to be undertaken. If the claim is out of time, there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine, as it did here, having reconvened for the purpose of hearing argument on it.
>
> 24 The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in Daniel v Homerton Hospital Trust (unreported, 9 July 1999, CA) in the judgment of Gibson LJ at p.3, where he said:
>
> 'The discretion of the tribunal under s.68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong.'
>
> 25 It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect."

281. Exceptional circumstances are not required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (Pathan v South London Islamic Centre UKEAT/0312/13).

Unauthorised deductions from wages

282. Section 13 of the ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA 1996.

283. A worker means an individual who has entered into or works under a contract of

employment, or any other contract whereby the individual undertakes to personally perform any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 of the ERA 1996).

284. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

285. Under Section 27(1) of the ERA 1996 “wages” means any sums payable to the worker in connection with their employment including salary and holiday pay. S 27(2)(c) of the ERA 1996 excludes pension contributions from the scope of unlawful deduction from wages claims: Somerset Council v Chambers [2017] IRLR 1087 and therefore a claim for pension contributions would need to be brought as a breach of contract claim.

286. The words 'properly payable' refer to a legal entitlement on the part of the employee to the payment (New Century Cleaning Co Ltd v Church [2000] IRLR 27). The claimant’s case is that his legal entitlement to payment derives from his contract of employment with the respondent.

287. It does not automatically follow that an employee is not entitled to be paid if they do not work. There are, however, some cases in which the express or implied terms of the contract, properly construed, do not give rise to any obligation to pay when work has not actually been performed, even if the employee is ready, willing, and able to work.

288. In determining whether an employee is entitled to be paid for a period during which they have not worked, the terms of the contract are the starting point. As Lord Justice Coulson said in the case of North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387, [2019] IRLR 570: "the starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself… Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract?”

289. In the case of Gregg, Coulson LJ went on to say this: “If the contract did not permit deduction then… the related question is whether the decision to deduct pay for the period… was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the “ready, willing and able” analysis… falls to be considered."

290. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 of the ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.

Submissions

291. The respondents’ representative and the claimant prepared written submissions and they supplemented those by making oral submissions after the conclusion of the evidence which the Tribunal found to be informative. We considered those submissions fully. References are made to those submissions in this Judgment where necessary.

292. The Tribunal also referred to any authorities in parties' written submissions and those referred to in oral submissions which included the following:

Constructive unfair dismissal

292.1 Malik v Bank of Credit and Commerce International SA [1997] IRLR 462: "It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

292.2 Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 841 at [55]: In a 'last straw' case the Tribunal will consider the most recent act complained of which is said to trigger the resignation; whether the contract has been affirmed; whether that act by itself or with other acts relied on constitutes a repudiatory breach; whether the employee resigned in response to that breach. The 'final straw' itself, must contribute something to the breach, it cannot be entirely innocuous.

292.3 Gaelic Oil Co. Ltd v Hamilton [1977] IRLR 27: Conduct that occurs after the resignation of an employee cannot be directly relevant to the reason for the claimant's resignation. The same principle must apply to that which is unknown to the employee at the time of their resignation.

Direct sex discrimination

292.4 Barton v Investec Henderson Crostwaite Securities Ltd [2003] ICR 1205, EAT;

292.5 Igen Ltd (former Leeds Careers Guidance) and ors v Wong and other [2005] ICR 931, CA;

292.6 Hewage v Grampian Health Board [2012] ICR 1054, SC;

292.7 Madarassy, paragraph 56;

292.8 Glasgow City Council v Zafar [1998] ICR 120, HL; and

292.9 CILFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439: the Court of Appeal emphasized the importance of separating out the involvement of people in any decision and focusing on the mind of the person who makes the relevant decision.

293. The claimant, in his submissions, provides a factual narrative and analysis (referring to several supporting page references within the Hearing Bundle).

294. At paragraph 23 of his submissions, he sets out a number of errors and misunderstandings relating to Mr Jarrett-Potts which he says were admitted during cross examination.

295. He also provides a list of incidents (at paragraph 48) which he submits show a discernible pattern of bullying exhibited by the headteacher whenever the claimant raised concerns.

296. In addition, the claimant states that the headteacher's behaviour coupled with the factors listed at paragraph 51 of his submissions, contributed to an untenable situation.

297. The claimant avers that the facts he sets out in his evidence and submissions culminated in his constructive dismissal on 14 December 2020.

298. The respondents' position on the claimant's constructive unfair dismissal claim is that none of the conduct complained of by the claimant was unreasonable or inappropriate (and was in some instances, clearly to the claimant's advantage). The respondents' representative submits that there was no fundamental breach of contract and in the alternative, he contends that if there was, the dismissal was fair (with the claimant being dismissed for a reason that related to his conduct or for some other substantial reason). It is further submitted that there was a clear breakdown in the relationship that could not be resolved (although the first respondent did nothing that could be considered unreasonable).

299. The respondents' representative says there is no merit to the claimant's direct discrimination complaints, and that there is nothing from which any reasonable inference can be drawn that any treatment complained of was 'because' of sex.

300. In relation to the three written statements of witnesses who did not give oral evidence on behalf of the claimant, the respondents' representative invited us to give no weight to those statements or alternatively, where they were contradicted by the respondents' evidence, to give such weight as we consider appropriate to the evidence. In the event of a conflict, we are invited to prefer the evidence of the respondents' witnesses who attended the hearing and gave oral evidence.

301. The respondents' representative also says that when considering the reliability of evidence entirely unsupported by documentation the principles set out in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) [16] to [18] (restated in Marlow v AIG (UKEAT/0267/17/BA) at [21]) ought to be borne in mind. The principles that our attention is drawn to (and which we considered) are set out at paragraphs 17(a) to (d) of the respondents' submissions.

302. It is submitted on behalf of the respondents that the claimant is an unreliable witness, and the Tribunal should take account of the fact that the claimant's evidence purports to create an impression which sits uncomfortably with the objective facts of the matter (and relies upon the Tribunal putting aside the contemporaneous documented and expressed views of the respondents' witnesses, and considering facts that were not relevant at the time). Where it is necessary to resolve a conflict of fact, we are invited to prefer the evidence of the respondents' witnesses for the reasons set out at paragraphs 19 and 20 of the respondents' submissions.

303. In terms of the constructive unfair dismissal claim, the respondents accept that the claimant was an employee and that he had sufficient qualifying service to present

his claim.

304. The respondents' representative contends that the claimant has not discharged the burden of proof in terms that he was subject to any conduct or treatment that (a) entitled him to resign and (b) could be described as discriminatory. There follows a number of paragraphs (paragraphs 24 to 35 in which the respondents' representative sets out applicable principles). It is suggested at paragraph 34 that it was only after the claimant resigned that the disciplinary investigation into the fake text messages was completed and provided, and the conclusion was that there was a case to answer. It is submitted that that was the "highpoint" of the first respondent's procedure i.e., it was concluded that there was a case to answer, and that the claimant did not avail himself of the opportunity to produce material before a Board of Governors at a Disciplinary Hearing.

Discussion and conclusion

305. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Constructive dismissal

Was the claimant dismissed?

306. We have considered all of the facts in the round and have assessed the aggregate effect on the relationship of trust and confidence between the claimant and the first respondent. We have carefully applied the definition of the implied term of trust and confidence set out in the Malik and Courtaulds cases (referred to above). Our approach has been to consider the facts objectively and not from the subjective perspective of either side, since that is how breaches of contract must be assessed. The important words used to describe the implied term in the above cases must be applied, and it is certainly not a question of simply seeking to identify objectively unreasonable behaviour.

307. Thus, the first issue for this Tribunal to determine is the complaint of constructive dismissal. The claimant asserted the employer had, by their actions, breached the implied duty of trust and confidence. The claimant argued that the first respondent had breached the implied duty of trust and confidence by reason of the acts and/or omissions of the first respondent that are set out in paragraphs 2.1.1 (1) to 2.1.1 (19) of the agreed List of Issues set out above. We considered each of those matters in turn.

Issue 2.1.1 Did the respondent do the following things:

(1) Failing to offer the claimant immediate support in December 2019 and January 2020 after telling the Headteacher, Ciara Emmerson that the claimant was a victim of domestic violence.

308. In his submissions, the claimant provides a summary of events at paragraphs 1 to 10 which relate to December 2019 and January 2020. Broadly speaking it is the claimant's position that he believed that the first respondent's HR team were not

providing sufficient support for his health and his family and child arrangements.

309. The respondents' representative says Ms Emmerson did offer the claimant immediate support when appropriate in accordance with the first respondent's Domestic Abuse Policy.

310. On the evidence before us, we concluded that the claimant was given some support after advising Ms Emmerson in December 2019 and January 2020 that he had been a victim of domestic violence. He was provided with leave in order to attend court hearings in relation to his family law proceedings. The first respondent also identified supportive measures in the risk assessment completed in January 2020 including the availability of counselling. We have considered the correspondence relating to counselling, and that ultimately the claimant conceded that he would attend his Friday counselling appointments online on the school premises (albeit he said this may impact upon his health). We reviewed the correspondences dated on or around 19 March 2020 that were before us. We considered that the claimant did not request or specify any further immediate support that he needed, and he declined in-house counselling.

(2) Giving a false reason to the claimant in communications between 5 February and 14 December 2020 for refusing to meet with the Claimant's lawyers.

311. It is not clear from the claimant's witness statement or written submissions on what basis he contends that he was provided with a false reason for (the first respondent) refusing to meet with his lawyers.

312. The respondents' representative submits that Ms Emmerson did not give a false reason for not contacting the claimant's solicitors, and that in terms of solicitors' attendance at meetings, this was not permitted under the relevant policies.

313. We did not accept that a false reason was provided to the claimant for refusing to meet with his lawyers having reviewed the communications between 05 February 2020 and 14 December 2020. We considered that it was reasonable in the circumstances not to allow the claimant's lawyers to attend the relevant meetings given that they were internal meetings and considering the nature of the meetings. That decision was within the bands of reasonable responses open to a reasonable employer. The first respondent's Disciplinary Policy to which we were referred did not require that the claimant's lawyers should be permitted to attend such meetings.

314. We noted that written correspondence between the claimant's solicitor and Ms Emmerson took place from November 2020.

(3) Failing at any point after 24 March 2020 to request a letter or documentation asking if the claimant was allowed to pick up his daughter, as advised by the LADO.

315. There was no evidence before us to suggest that Ms Emmerson (or the school's HR team) requested a letter or documentation from the claimant's solicitor asking if the claimant was allowed to pick up his daughter as advised by the LADO (no documentation or information was requested from the claimant's solicitor by Ms Emmerson until November 2020). The claimant had tried to assist Ms Emmerson with

the enquiries she made. There was information that the claimant felt he could disclose and information he felt he could not disclose (considering the confidential nature of family court proceedings).

316. The respondents' representative states it is for the respondents to determine how they deal with their employees and that this allegation shows that the claimant had a lack of understanding in terms of what the respondents were concerned about. It is submitted that whether the claimant had a right to attend the nursery and collect his daughter did not in any way impact in terms of whether an incident occurred that required police attendance, and if the claimant notified the first respondent about it. The claimant's position was that he was not aware of the police being called on the day in question (at the relevant time).

317. It was suggested that the claimant's former partner was providing information via the IDVA/LADO. On the evidence we considered, we determined that Ms Emmerson could have contacted the claimant's lawyers earlier or alternatively, she could have said to the claimant that if he wanted to tell her his version of events, he could ask his lawyers what they could (and could not) tell the school and indicate whether she was happy to accept that in the form of brief written correspondence.

318. Whilst this was not a breach of any policies or procedures on Ms Emmerson's part, we consider that the approach we have outlined may well have assisted the claimant and the first respondent, particularly in view of the ongoing employment relationship.

319. We noted that the claimant's solicitor was asked to provide information in November 2020, and they confirmed that the claimant was authorised to collect his daughter from nursery at the end of January 2020. If this information were requested by Ms Emmerson (from the claimant's solicitor) and obtained earlier in the process, this may have avoided the protracted correspondences relating to this matter between the parties. In the circumstances, we did not find that Ms Emmerson's approach fell within the range of reasonable responses open to a reasonable employer and it led to substantial unnecessary correspondences over a period of time.

320. This matter contributed to the claimant's perception of the headteacher's view of the claimant (and his actions) with regard to his family matters. The delay in seeking input from the claimant's solicitor was, in our judgment, contributory conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. There was no satisfactory explanation from Ms Emmerson in terms of why she did not take the appropriate steps or approach the claimant's solicitor prior to November 2020 to seek information.

321. However, we did not consider the circumstances relating to this matter alone. We proceeded to look at the first respondent's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the claimant could not be expected to put up with it.

<u>(4) Failing to allow the claimant to work remotely from home from 13 July 2020 until the end of the summer term.</u>

322. On the facts before us, we did not find that Ms Emmerson or the first respondent's HR team failed to allow the claimant to work remotely from home from 13 July 2020 until the end of the summer term. We do not find that this allegation has been established or proven based on the documents we were referred to or the evidence that we heard.

(5) Placing the Claimant under a disciplinary investigation in July 2020 for an incident on 28 January 2020 when the Claimant collected his daughter from nursery school. The allegation was that the Claimant had failed to inform the Respondent that the Police had investigated, or the police had been called to this incident following a complaint from the Claimant's ex-partner

323. The respondents' representative acknowledges that the claimant was placed under disciplinary investigation, and he states that it appears to be an agreed fact that an allegation was made that the police had been called to the claimant's daughter's nursery school.

324. The claimant states that while Ms Emmerson accepts that she was informed about the nursery collection incident by the LADO on 26 February 2020, no discussion took place with the claimant at that time. He complains that he was placed under investigation for the nursery collection incident based on information from his former partner, relayed through her IDVA, claiming that the police had been called to the nursery. The claimant states that he was not aware of the police being called on the day when he collected his daughter from the nursery school (and we accepted the claimant's evidence in relation to this matter). At some stage afterwards, he had been informed about this.

325. We consider that given Ms Emmerson was informed about the nursery school incident on 26 February 2020, a reasonable employer would have explored the issue with the claimant (and his solicitor) much earlier. There was a lengthy delay in terms of this.

326. We understand that the claimant was off sick on 26 February 2020, and he was also on sickness absence leave after 04 March 2020 for a few days. It was thought that the claimant might have been suffering from long COVID at the time. The claimant points out that he continued to be present in school for a number of days before he went on sick leave on 04 March 2020. We considered that the school had delayed taking appropriate steps in terms of investigating this matter. We took into account the impact of the COVID-19 pandemic in relation to any delay. However, even taking that into account, we do not find that Ms Emmerson's or the school's investigation and the lengthy delay fell within the range of reasonable responses open to a reasonable employer.

327. Ultimately, Ms Emmerson believed that based on the information she received from the LADO, the claimant was hiding information that the police were called to his daughter's nursery school when he had attended to collect her, which appears to have caused her some upset and she did not take any reasonable steps within a reasonable time to obtain the relevant facts from the claimant's perspective.

328. The matters (relating to this allegation) contributed to the claimant's perception of the headteacher's view of the claimant (and the claimant's actions) with regard to his family matters. The first respondent's conduct was, in our judgment, contributory

conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

329. However, we did not consider the circumstances relating to this matter alone. We proceeded to look at the first respondent's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the claimant could not be expected to put up with it. Horse next one

(6) Attempted to contact the Claimant's ex-partner for information on 9 September 2020 then denying she had done this.

330. The claimant draws our attention to the facts relating to this allegation at paragraph 22 of his submissions. The respondents' representative states that Ms Emmerson explained the questions put in the relevant email she sent in her witness evidence.

331. The fact that, in her mind, Ms Emmerson expressed a strong interest to the LADO in terms of her and Mr Jarrett-Potts being able to contact the claimant's former partner is evidenced by the email we saw that was sent by Ms Emmerson to the LADO at page 403 of the Hearing Bundle.

332. There was no evidence before us to suggest that Ms Emmerson attempted to make contact with the claimant's former partner directly on 09 September 2020.

333. Ms Emmerson said at paragraph 26 of her witness statement that she did not attempt to contact the claimant's former partner directly on 09 September 2020. She also advised that she was attempting to verify the claimant's account by asking questions to the claimant's former partner. We consider that the use of the words "to verify" must mean to seek to form some kind of judgement or opinion in terms of what happened. It is difficult to understand on what basis Ms Emmerson was seeking to obtain verification from the claimant's former partner (who the claimant alleged had subjected him to domestic abuse).

334. However, we did not give further consideration to this allegation on the basis that the claimant was not aware of the email dated 09 September 2020 prior to the termination of his employment, and therefore the content of that email could not have caused or contributed to any breach of the implied duty of trust and confidence, or to the termination of the claimant's employment.

(7) The Head Teacher's willingness to accept his ex-partner's allegations, without sufficient supporting factual evidence.

335. The LADO obtained their information from the IDVA. According to the evidence, the IDVA, in turn, obtained information from the claimant's former partner.

336. We took into account that a number of questions were put to the LADO and answers were sought in relation to the questions asked. In addition, Ms Emmerson asked the LADO if she could contact the claimant's former partner.

337. There was, therefore, some attempt by Ms Emmerson to obtain further information. Some of the responses provided by the LADO contained a limited amount of information. By way of example, the LADO was able to confirm that the claimant

had applied for a NMO, but they did not confirm the directions that were made by the court in respect of the claimant's application.

338. We referred earlier in this Judgment to the claimant's position that the first respondent did not contact the claimant's solicitor prior to November 2020 to obtain any information or documentation. We consider that a reasonable employer acting within the range of reasonable responses open to a reasonable employer would have approached the matter with an open mind from the outset and contacted the claimant's solicitor prior to November 2020 and investigated the relevant events by obtaining information and documents, both to fill in significant gaps in terms of any information provided by the LADO and also to test the veracity of the allegations and factual contentions made by the claimant's former partner.

339. This matter contributed to the claimant's perception of the headteacher's view of the claimant (and the claimant's actions) with regard to his family matters. The first respondent's conduct was, in our judgment, contributory conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

340. However, we did not consider the circumstances relating to this matter alone. We proceeded to look at the first respondent's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the claimant could not be expected to put up with it.

(8) Failing to follow Hackney Learning Trusts Policy on supporting employees who have been the victim of domestic abuse.

341. We considered the allegation that there was a failure to follow Hackney Learning Trust's Policy on supporting employees who have been the victim of domestic abuse. We did not accept that there was such a failure by the first respondent.

342. We considered the claimant's witness evidence and the documents to which we were referred.

343. We also reviewed and took into account Ms Emmerson's evidence in relation to the applicability of this policy (and in terms of her position that how and when it became relevant it was complied with).

344. We determined that whilst the first respondent's level of support provided to the claimant was not perfect, we considered that the steps taken by the first respondent could appropriately be described as adequate when considered against the relevant policy. By way of example, the claimant was provided with leave to attend court hearings and support in terms of counselling was offered. We considered this in the context of the COVID-19 pandemic and the challenges created by this for the first respondent.

(9) Refusing the claimant's request for off-site therapy on 30 September 2020.

345. We did not accept that the first respondent refused the claimant's request for off-site therapy on 30 September 2020.

346. Ms Emmerson's position was that the claimant could leave the school to attend his counselling session, but he needed to come back to work afterwards. He was given three alternative options (as indicated in our findings of fact above). During the period of the COVID-19 pandemic, the school was short staffed, and it was a particularly busy period for the school in terms of safeguarding matters.

347. Ultimately, the claimant conceded that he would attend the online counselling sessions from within the school, albeit he indicated that this would have an adverse impact on him.

(10) Acting contrary to the agreed risk assessment from February 2020 which had assured the claimant that he would be entitled to take the necessary time to engage in counselling.

348. The claimant points out that the first respondent assured the claimant that he would be entitled to take the necessary time off to engage in counselling. This was in order to provide support to the claimant.

349. As stated earlier, in our judgment, the claimant was provided with a number of options including the option of leaving the school to attend his counselling sessions and returning to the school afterwards. Viewed objectively, we do not consider that the first respondent's conduct in relation to allowing the claimant the necessary time off to undertake counselling sessions was outside the range of reasonable responses that were open to a reasonable employer in the circumstances.

(11) Being reprimanded by the Head Teacher in the meeting on 8 October 2020.

350. There was no reference to a meeting that took place on 08 October 2020 within the documents we were referred to in the Hearing Bundle or in the claimant's witness evidence. We assume that this allegation relates to the meeting of 09 October 2020, the record of which appears at pages 426 to 428 of the Hearing Bundle.

351. Whilst we did not consider that the claimant was reprimanded at the meeting on 09 October 2020, Ms Emmerson pointed out a number of matters to the claimant in what we consider to be rather strong terms.

352. The matters addressed with the claimant included using his mobile telephone during the professional standards training session at the start of the school term and the fact that the claimant was not fobbing in and out daily on a consistent basis. The claimant was not given any prior notice that these matters would be discussed during the meeting.

353. We are satisfied that Ms Emmerson's approach in terms of raising those matters with the claimant contributed to the claimant feeling that he was being subjected to bullying and harassment by her. Ms Emmerson's explanation that these areas were mentioned in reply to the claimant's request for examples of breaches on his part is difficult to decipher.

354. This matter contributed to the claimant's perception of the headteacher's negative view of the claimant (and his actions). The timing and manner in which the

additional matters were raised in the meeting on 09 October 2020 were, in our judgment, contributory conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. We were not provided with any satisfactory explanation in terms of why the allegations referred to were raised at this meeting and why the claimant was not informed about any purported concerns prior to the meeting.

355. However, we did not consider the circumstances relating to this matter alone. We proceeded to look at the first respondent's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the claimant could not be expected to put up with it.

(12) The Head Teacher alleging during the meeting on 13th November 2020 that the Claimant's grievances and allegations against her are malicious and false.

356. There was no reference to a meeting that took place on 13 November 2020 within the claimant's witness statement or in any of the documents to which we were referred.

357. We noted that Ms Emmerson sent the claimant a letter dated 12 November 2020 headed "response to your letter raising a grievance." At page 472 of the Hearing Bundle when addressing paragraphs 36-38, Ms Emmerson refers to the ongoing disciplinary investigation and that the school had not assumed guilt or behaved in a hostile way. Ms Emmerson further states "I consider these allegations to be not only false, but malicious." We have assumed that the reference to Ms Emmerson characterising the claimant's grievances and allegations against her as malicious and false, is a reference to that paragraph within Ms Emmerson's letter of response.

358. We have considered the issue of compliance with the first respondent's Grievance Policy and Ms Emmerson's letter of response in further detail at allegation (17) below.

(13) The Respondent refusing to accept that the Claimant could be a victim of domestic violence despite having viewed the evidence contained in CRISP reports.

359. We did not accept that on the witness evidence we heard and the documents to which we were referred that the first respondent refused to accept that the claimant could be a victim of domestic violence.

360. Ms Emmerson acknowledged the claimant's alleged treatment by his former partner in the early part of 2020. The claimant was offered some support, including by way of counselling. In certain instances, Ms Emmerson did not provide the claimant with as much sympathy as she could have in the circumstances.

(14) The Head Teacher "ambushing" the meeting on 8 October 2020, which had been convened to discuss the Claimant's mental health, by discussing the Claimant's lack of professional standards. Telling the Claimant that it was inappropriate to request off-site therapy.

361. We repeat our findings in respect of allegation (11) above. Although we did not find that any meeting took place on 08 October 2020, we assume that this allegation is

intended to refer to the meeting on 09 October 2020.

362. Whilst we did not accept that the claimant was ambushed during that meeting, we considered firstly that the purpose of the meeting was to resolve the issue of the claimant's leave of absence request. There was discussion in relation to the claimant's taking time off and treatment recommended by his GP. At the end of the meeting the claimant was asked to clarify the date he will be signed off until with the first respondent's HR team.

363. However, Ms Emmerson raised additional matters during that meeting including the claimant using his mobile telephone during a training session and not consistently fobbing in and out daily. The claimant was advised that the LADO had informed Ms Emmerson that the police were contacted by his child's nursery in January 2020, that they did not hear this from the claimant, and they had a duty to investigate it, and also that they would need to investigate the issues relating to the fake text messages. Ms Emmerson stated that there were questions about trust, that trust had been undermined, and they wanted to make sure that there were no further breaches of trust.

364. As we found in relation to allegation (11) above, this matter contributed to the claimant's perception of the headteacher's negative view of the claimant (and his actions). The timing and manner in which those additional matters were raised in the meeting on 09 October 2020 were, in our judgment, contributory conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

365. However, we did not consider the circumstances relating to this matter alone. We proceeded to look at the first respondent's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the claimant could not be expected to put up with it.

(15) The interim disciplinary report prepared by Michael J Potts on 19 October 2020 did not have the full factual picture because Mr Potts had failed in the course of his investigation to speak to the Claimant's solicitor, despite being invited to do so by the Claimant. Mr Potts also misunderstand the legal significance of the requirement that the Claimant only have supervised access to his daughter, wrongly inferring that this implied that there was some finding of misconduct against the Claimant.

366. The claimant was sent a short summary of the findings of the interim report within the letter sent to him relating to the disciplinary investigation dated 11 November 2020.

367. The claimant requested a copy of the full interim report by email dated 12 November 2020.

368. We considered the discrepancies highlighted in terms of Mr Jarrett-Potts's interim report. However, the interim report was not sent to the claimant before his employment had terminated.

369. We did not give further consideration to this allegation on the basis that the claimant was not aware of the content of the full interim report prior to the termination

of his employment, and therefore the content of that report could not have caused or contributed to any breach of the implied duty of trust and confidence, or any termination of the claimant's employment. The short summary of the report findings provided in the letter of 11 November 2020 was insufficient to enable the claimant to effectively challenge the investigation or any of the specific findings made.

(16) Suspending the Claimant on 11 November 2020 in response to the Claimant's grievance lodged on 9 November 2020.

370. The claimant's grievance was sent to Ms Emmerson on 09 November 2020. The claimant was suspended from his role as Deputy Designated Safeguarding Lead by letter dated 11 November 2020 with immediate effect.

371. We considered the reasons for the claimant's suspension, which according to Ms Emmerson's letter were based on the interim report dated 19 October 2020. Information relating to that allegation was contained in Ms Emmerson's email dated 17 July 2020 and it was also referred to by Ms Emmerson during the meeting on 09 October 2020.

372. It is not clear on what basis Ms Emmerson decided to suspend the claimant from his role on 11 November 2020 despite the fact that the claimant continued to be employed in his Deputy Designated Safeguarding Lead role for several months after the allegation came to light. We considered the timing and manner of the claimant's suspension from his Deputy Designated Safeguarding Lead role, which took place just two days after the claimant sent his letter of grievance to Ms Emmerson. Moreover, in the circumstances and in light of our findings of fact and observations (above), we did not consider that Ms Emmerson had a reasonable basis for suspending the claimant from his role on the relevant date. We also noted that Ms Emmerson had not made clear what new responsibilities the claimant would be assigned on his return to work.

373. Notwithstanding the above and the content of Ms Emmerson's letter, we noted that the letter of grievance dated 09 November 2020 and the claimant's suspension from his role as Deputy Designated Safeguarding Lead took place in close proximity to each other (after his grievance had been raised). Ms Emmerson did not provide any satisfactory explanation in her evidence in terms of why she took the decision to suspend the claimant on 11 November 2020 from his role as Deputy Designated Safeguarding Lead. If there were genuine concerns in relation to the claimant's ability to carry out his safeguarding role, a reasonable employer would have taken steps to suspend the claimant several months prior to that date.

374. This matter contributed to the claimant's perception of the headteacher's view of the claimant (and the claimant's actions). The first respondent's conduct was, in our judgment, contributory conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

375. However, we did not consider the circumstances relating to this matter alone. We proceeded to look at the first respondent's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the claimant could not be expected to put up with it.

(17) Failing to follow Hackney Learning Trusts Policy on grievances relating to harassment and bullying in the workplace during disciplinary investigations.

376. We noted that the claimant sent his letter of grievance to Ms Emmerson complaining about bullying and harassment, detailing a number of complaints on 09 November 2020.

377. Ms Emmerson sent the claimant a letter dated 12 November 2020 headed "response to your letter raising a grievance." Although the letter indicated that as the claimant was raising a grievance relating to a disciplinary process, his grievance would be heard as part of any disciplinary hearing or meeting, Ms Emmerson then proceeded to provide a detailed response to the content of the claimant's grievance.

378. At page 472 of the Hearing Bundle when addressing paragraphs 36-38 of the claimant's grievance, Ms Emmerson refers to the ongoing disciplinary investigation and that the school had not assumed guilt or behaved in a hostile way. Ms Emmerson further states "I consider these allegations to be not only false, but malicious."

379. We find that the fact that Ms Emmerson responded to the claimant's grievance (which raised allegations against her), was not only in flagrant disregard of the first respondent's grievance policy, but also it was clearly outside the range of reasonable responses open to a reasonable employer. Moreover, Ms Emmerson's response characterising the claimant's grievances and allegations against her as malicious and false in her letter, were also outside the range of reasonable responses open to a reasonable employer.

380. According to the first respondent's grievance policy the person hearing the grievance must acknowledge receipt within five working days. The policy emphasises that the grievance should be dealt with by someone who has not previously been involved in the case. We have also taken account of the ACAS Code of Practice in this regard (in particular paragraph 32).

381. Given the nature of the allegations raised in the claimant's grievance, it was not clear on what basis Ms Emmerson concluded that all the matters therein were overlapping with the disciplinary process, taking account of both the content of the first respondent's grievance policy and the ACAS Code of Practice (per paragraph 46). This was not adequately explained or addressed in her witness evidence.

382. Not only did Ms Emmerson send a detailed response to the claimant's grievance, but she also stated that she strongly refuted the claimant's allegations, the ongoing disciplinary investigations were justifiable, appropriate and necessary, and further stated "Your actions listed as a-k are therefore not accepted". In doing so, Ms Emmerson expressly rejected the remedies sought by the claimant at paragraph 38 a – k of his letter of grievance.

383. The claimant escalated his concerns to the Chair of Governors by email dated 19 November 2020, who replied on the same date advising that any grievance raised will be dealt with as part of the disciplinary process as per the first respondent's grievance policy. The first respondent's grievance policy provides that the person hearing the grievance must acknowledge receipt within five working days and will also set out the proposed timetable for hearing the grievance. In addition, there is a requirement that a meeting be arranged without unreasonable delay to listen to the

complaint and explore possible resolutions. We note with concern that the Chair of Governors failed to indicate the proposed timetable for considering the claimant's grievance and course of action. No meeting had been scheduled to hear the claimant's grievance prior to the termination of the claimant's employment.

384. We consider that the steps that the first respondent took in response to the claimant's grievance did not fall within the band or range of reasonable responses open to a reasonable employer. The first respondent's conduct was, in our judgment, conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. We did not find that there was any reasonable or proper cause in respect of the manner in which the first respondent conducted themselves.

385. We also considered the first respondent's conduct as a whole in order to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the claimant could not be expected to put up with it.

(18) On 30 November 2020, encouraging the Claimant to resign in order to avoid potential disciplinary sanctions.

386. In his email dated 29 November 2020 the claimant requested clarification in terms of whether his grievances would continue if he were to leave Haggerston School. He also advised that he felt pressurised and forced out of the school by leadership and he had decided it was best to start a new role (which he hoped to start on 1 January 2021).

387. In response to the claimant's email, Ms Emmerson replied on 30 November 2020 by email stating that the grievance is linked to the disciplinary and cannot proceed separately, and that if the claimant were to cease employment with the school prior to the conclusion of the processes then they would cease as school processes.

388. We decided that in terms of this allegation, Ms Emmerson was not encouraging the claimant to resign in order to avoid potential disciplinary sanctions. Ms Emmerson was responding to the claimant's enquiry in his email dated 29 November 2020. In any event, the claimant communicated his intention to leave his employment and start a new role in his email dated 29 November 2020. However, his employment had not terminated at that stage.

(19) Placing the Claimant under another disciplinary investigation on 07 December 2020 for attending a job interview whilst on sick leave.

389. We note that the claimant was sent a letter dated 07 December 2020 from Ms Emmerson advising him that the school intended to investigate potential breaches of his employment contract in relation to sickness absence under the disciplinary policy, including the claimant attending a job interview whilst on sick leave. It was difficult to understand or decipher the basis upon which Ms Emmerson proposed to take disciplinary action against the claimant in respect of this matter.

390. The claimant had expressed his intention to leave his employment and start a new role in his email dated 29 November 2020. However, his employment had not terminated at that stage. The claimant's letter of resignation was sent on 13 December

2020. We noted the claimant's concerns raised therein in respect of the disciplinary allegations contained in the letter of 07 December 2020. He also refers to the school informing him on 10 December 2020 that they would not be passing the new investigation to the Local Authority (and they will carry this out themselves). He expressed concerns with the first respondent's conduct in relation to their previous investigations. He was also concerned that his colleagues would be dealing with the investigation of the new allegations which related to sensitive family matters.

391. The first respondent's conduct was, in our judgment, conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

Issue 2.1.2 Did that breach the implied term of trust and confidence?
Issue 2.1.3 Was the breach a fundamental one?

392. We considered the information that Ms Emmerson had obtained from the LADO, which was provided by the claimant's former partner. We noted Ms Emmerson's willingness to accept the claimant's former partner's allegations, without any sufficient supporting factual evidence. We also considered the circumstances in which the claimant was subjected to disciplinary investigations in respect of an alleged incident on 28 January 2020 at the claimant's daughter's nursery school.

393. There was no attempt to contact the claimant's solicitor or to obtain documentary evidence or information to confirm the claimant's former partner's allegations prior to November 2020.

394. We also took account of the additional matters and allegations raised during the meeting on 09 October 2020, a meeting which was arranged while the claimant was on sickness absence leave in order to discuss his request for leave.

395. We considered that the claimant's suspension on 11 November 2020 was not appropriate nor within the range of reasonable responses open to a reasonable employer. The suspension appeared to be based on allegations that had been made several months ago. There was no suggestion that there was any new evidence. The basis of the claimant's suspension was difficult to decipher or understand.

396. We considered that the headteacher's detailed letter of response to the claimant's grievance was inappropriate and it was rather aggressive in terms of its content and tone. We found the fact that Ms Emmerson responded to the grievance in considerable detail (and the content of her response) to be a significant matter of concern coupled with the fact the claimant was not given a proposed timetable and course of action for the grievance process (notwithstanding the fact it was to be considered along with the disciplinary process and the ongoing COVID-19 pandemic). Neither Ms Emmerson nor the Chair of Governors confirmed any proposed timetable or course of action in respect of dealing with the claimant's grievance in a fair and reasonable manner in the circumstances.

397. Ms Emmerson's response to the claimant's grievance did not display an even-handed approach that would have given the claimant confidence in terms of the timetable and that the process for hearing the grievance and any future disciplinary investigation would be fair and impartial. No information was provided in relation to the

timetable for the process for investigating his grievance. We noted that, normally according to the first respondent's grievance policy the grievance should have been acknowledged by the person hearing the grievance within five working days and a meeting should be arranged with that person without unreasonable delay. There was no reason proffered in terms of the first respondent not following their grievance policy or providing any timeframes. Ms Emmerson indicated to the claimant in her letter of response to the claimant's grievance that the claimant would not be provided with any of the remedies requested in his grievance letter. In respect of the first respondent's response to the claimant's grievance, we found that this did not fall within the range of reasonable responses open to a reasonable employer. Shortly after this, by an email dated 29 November 2020, the claimant advised Ms Emmerson that he had been offered a new role which he hoped to start in January 2021.

398. Thereafter, on 07 December 2020 the first respondent advised the claimant that there were further disciplinary allegations that would be investigated by a member of their Senior Management Team. We considered the timing and manner of the new allegations, and the nature of the allegations (which we concluded on the facts before us, that the first respondent's conduct was outside the range of reasonable responses open to a reasonable employer).

399. On the analysis above, assessed objectively, we find that the incidents set out at paragraph 2.1.1 (3), (5), (7), (11), (16), and (17) of the agreed List of Issues [as set out in our above findings] were likely to, and did, undermine trust and confidence without reasonable and proper cause. The last incident within the series of events we consider that led to a breakdown in trust and confidence was the first respondent's conduct in respect of the claimant's grievance (which led to the claimant's decision to seek alternative employment that he hoped to start in January 2021, and he had communicated to Ms Emmerson on 29 November 2020). In our mind these matters amounted to a breach of the implied term because they reached the level of destruction of, or causing serious damage to, the relationship of trust and confidence, such that the claimant could not remain in employment. We have taken into account of the nature and extent of the breaches in question. The claimant's intention, after it became clear that his grievance would not be addressed fairly or reasonably, was to secure a new role (confirm his start date), and then to conclude his employment at Haggerston School in order to enable him to start his new role in January 2021.

400. However, the first respondent's conduct in relation to the new disciplinary allegations that the claimant was notified about on 07 December 2020 led to the claimant sending his resignation letter on 13 December 2020. We find that the allegation set out at paragraph 2.1.1 (19) of the agreed List of Issues caused the claimant to send his resignation letter on 13 December 2020 (and, in turn, to end his employment with the first respondent prior to starting his new employment). The first respondent's conduct in respect of the new disciplinary allegations communicated to the claimant on 07 December 2020 (considered together with the other incidents at paragraph 399 above) had meant that the claimant was placed in a position in which he could not reasonably be expected to remain in employment (from 13 December 2020).

401. On the evidence we heard and considered, we do not consider that there was any reasonable or proper cause in respect of the first respondent's conduct which was likely to, and did, undermine the claimant's trust and confidence in the first respondent.

402. It is clear to us that in light of those events, that the relationship between the claimant and the first respondent was certainly seriously damaged or destroyed and that the breach of contract by the first respondent was so serious that the claimant could not be reasonably expected from that point (13 December 2020) to remain in employment.

403. We decided the breach of contract we have identified by the first respondent was fundamental (or serious) because the employer had, by their actions, destroyed the claimant's trust in them. They had an opportunity to resolve matters, but they did not take it, and instead compounded the situation by threatening further disciplinary action. We were satisfied the breach was fundamental.

404. Our function is to look at the first respondent's conduct as a whole and decide whether it was such that its effect judged reasonably and sensibly, was such that the employee cannot be expected to put up with it. We decided, judging the first respondent's conduct reasonably and sensibly, that the claimant could not reasonably be expected to put up with it: the first respondent had seriously damaged the employment relationship; they had done nothing to try to resolve that despite the claimant raising a detailed grievance setting out serious and significant concerns.

Did the claimant resign in response to the breach?

405. We accept that the claimant resigned in response to the matters that amounted to breach of contract which we have identified at paragraphs 399-402 above. The claimant resigned with immediate effect by letter dated 13 December 2020. The claimant complained repeatedly about his concerns. He sought to obtain redress by raising a grievance with Ms Emmerson and the Chair of Governors, but the first respondent's Grievance Policy was not followed and there were no fair or reasonable process implemented or any timetable set out (or course of action). He referred to his treatment by the first respondent in considerable detail in his resignation letter (broadly speaking including in terms of the matters that we found amounted to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee). Taking account of these, the subsequent correspondences between the parties, and the witness evidence and oral evidence in relation to this matter, we are satisfied that the breaches of the implied duty of trust and confidence we have identified at paragraphs 399-402 above caused or materially contributed to the claimant's resignation on 13 December 2020.

406. The Tribunal accepted the claimant's evidence regarding the reasons for his resignation which centered around the events leading up to his grievance which we refer to at paragraphs 399-402 above, and the first respondent's conduct in response to the claimant's grievance. The claimant advised Ms Emmerson on 29 November 2020 that he had secured new employment. It was the claimant's intention to resign after he had confirmed the start date in terms of his new role. The first respondent's unreasonable conduct of the subsequent disciplinary process thereafter led to the claimant's decision to send his resignation letter on 13 December 2020.

Did the claimant affirm the contract before resigning?

407. The Tribunal considered the chronology of events carefully, including but not limited to the timing and manner of the claimant's grievance.

408. We find that the claimant did not affirm the contract before resigning. He did not send his letter of resignation until 13 December 2020 as he was hoping that his grievance sent in early November 2020 would be resolved fairly and equitably (and he obtained new employment in November/December 2020). He had addressed his grievance to Ms Emmerson and therefore he also contacted the Chair of Governors to seek redress. Despite the claimant's endeavours, he was not invited to a meeting to discuss his grievance or provided with any timetable in respect thereof prior to termination of his employment. Thus, the claimant had taken steps to obtain redress (albeit unsuccessfully) in respect of his grievance within Haggerston School. However, the claimant intimated to the first respondent by email dated 29 November 2020 that he felt pressurised and forced out by the Haggerston School leadership and that he hoped to be starting new employment in January 2021.

409. He had been seeking alternative employment which he may have required in order to support his family and his ongoing family legal proceedings. He took time to attend an interview with his prospective new employer and to obtain an employment reference which was important (to complete the necessary pre-employment checks).

410. Following receipt of the notice of the new disciplinary allegations received on 07 December 2020, the school confirmed on 10 December 2020 that they will be undertaking the new investigation internally (despite the claimant's objections). He resigned within three days from that date, having prepared a detailed letter of resignation.

411. Considering the time the claimant took prior to tendering his resignation in order to attend to the above matters, on the facts before us, taking account of all the circumstances, we were satisfied that the claimant did not affirm (or indicate an intention to continue with) the contract before resigning. Accordingly, the claimant's words or actions did not show that he chose to keep the contract alive even after any of the incidents we identified as a breach of contract (above).

Issue 2.2 If the claimant was dismissed, what was the reason for the breach of contract?

412. The claimant was accordingly dismissed following fundamental breach of contract by the first respondent based on the implied duty of trust and confidence.

413. We proceeded to consider whether there was a potentially fair reason for the claimant's dismissal in terms of section 98(2) of the ERA 1996.

Issue 2.3 Was it a potentially fair reason?

414. The respondents' representative submits that the claimant could reasonably have been dismissed in the circumstances for reasons relating to his conduct, or because of a breakdown in trust and confidence in the claimant occupying his role with the first respondent. He invites the Tribunal to bear in mind the band of reasonable responses in respect of this matter.

415. We considered the respondents' witness evidence including the witness statement of Ms Emmerson. Ms Emmerson sets out a number of concerns including at

paragraphs 43-46 of her witness statement. We do not find that Ms Emmerson held a genuine belief that the claimant had committed misconduct or that she genuinely or reasonably believed that there was a breakdown in trust and confidence between the first respondent and the claimant.

416. Accordingly, we do not find that the first respondent has shown that there was a potentially fair reason for dismissal in terms of section 98(2) of the ERA 1996.

Issue 2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

417. Even if we found that there was a potentially fair reason for dismissal (namely misconduct or some other substantial reason in terms of a breakdown in trust and confidence), we would not have found that in all the circumstances (including the size and administrative resources of the first respondent) that the first respondent acted reasonably in treating either (or both) of those purported reasons for dismissal as a sufficient reason for dismissing the claimant in terms of s 98(4) of the ERA 1996.
418. We did not accept that there were reasonable grounds to support any belief that was formed by Ms Emmerson in terms that the claimant committed misconduct, nor that the first respondent conducted a reasonable investigation in respect thereof in all the circumstances.

419. We did not find that in terms of any dismissal based on some other substantial reason namely the alleged breach of trust and confidence on the claimant's part was made out on the basis of the evidence we heard and considered, nor did we find that the first respondent carried out any reasonable investigation in respect of this matter.

420. We noted the claimant's criticisms in relation to the first respondent's investigation, and the claimant had expressed a number of concerns in his resignation letter. We also noted substantial shortcomings in respect of these matters in terms of our findings above. No reasonable employer would have conducted their investigation in this manner.

421. Accordingly, we would have found that any decision to dismiss the claimant in the circumstances either purportedly by reason of misconduct or some other substantial reason (breach of trust and confidence) would not have fallen within the band or range of reasonable responses open to a reasonable employer.

Constructive unfair dismissal – conclusion

422. We therefore decided that the claimant was constructively dismissed, and that the claimant's dismissal was unfair.

Direct sex discrimination – section 13 Equality Act 2010

423. In relation to the claimant's complaints of direct sex discrimination, we considered the alleged acts of less favourable treatment listed at paragraph 4.1 of the agreed List of Issues.

Allegation 4.1 (9) in the agreed List of Issues

227. We first considered the allegation at paragraph 4.1(9) of the agreed List of Issues which is set out in the following terms:

> "(9) The claimant alleges that his resignation amounts to a constructive dismissal, and that this dismissal was influenced by the Head Teacher's discriminatory acts as set out above. Accordingly, the constructive dismissal is said to be a further detriment caused by direct sex discrimination for which a remedy should be awarded."

228. Earlier in our Judgment, we set out our conclusion in terms that the claimant was constructively dismissed and our reasons in respect thereof. We considered the facts and circumstances which led to the claimant's constructive dismissal. This was due to the matters we identified above, the last acts being the first respondent's conduct in respect of the claimant's grievance dated 09 November 2020, and first respondent's conduct after the claimant's grievance was sent (including Ms Emmerson's and the Chair of Governor's responses to the claimant's grievance). The claimant had been suspended from his safeguarding role after he raised his grievance. The claimant stated in his email dated 29 November 2020 that he felt forced out of his role by the Haggerston School leadership and he had secured alternative employment. After the disciplinary allegations sent to the claimant on 07 December 2020 and following confirmation that the school would be investigating those matters internally, the claimant tendered his resignation on 13 December 2020.

229. We took account of all the facts and circumstances including the written and the oral evidence that was before the Tribunal.

230. We also looked carefully at the claimant's concerns at the time of his resignation, including the claimant's allegation of bias on the ground of sex.

231. On the evidence before us, we were not satisfied that the reason why the claimant was constructively dismissed by the first respondent was because of sex. Furthermore, we were not satisfied that any of the events relating to the first respondent's conduct leading up to the claimant's resignation had any connection with sex.

232. Moreover, it was clear that, looking at the facts and circumstances objectively, that the first respondent's conduct towards the claimant was outside the range of reasonable responses open to a reasonable employer (in respect of the matters we have identified above), that the first respondent's conduct in relation to the relevant matters we considered had breached the implied term of trust and confidence, and that the first respondent's actions in respect thereof caused the claimant to tender his resignation on 13 December 2020. However, considering the burden of proof provisions set out at s 136 of the EqA, we do not find that the claimant was constructively dismissed because of sex (or that any of the events leading up to his constructive dismissal had any connection with sex). We reviewed the respondents' submissions at paragraphs 45 – 48. We did not accept that the claimant had shown

facts from which we could decide (in the absence of any other explanation) that the alleged contravention of section 13 of the EqA had occurred.

233. The first respondent had raised concerns in relation to a number of matters including but not limited to the claimant not disclosing the fact that his former partner had obtained a NMO, not fobbing in and out at work, using a mobile telephone during a training session, an alleged nursery incident in January 2020 (Ms Emmerson stated the claimant had not informed the school about this as he was required to do so), alleged fake text messages and attending an interview with another employer while the claimant was off sick. Ms Emmerson's concerns had led her to suspect that the claimant had committed misconduct or breached the duty of trust and confidence. However, we did not find that Ms Emmerson or the first respondent formed a genuine belief that the claimant was guilty of misconduct (or that the claimant breached the implied duty of trust and confidence) in respect of those matters. We did not accept that the first respond had a potentially fair reason for dismissing the claimant and we concluded that the claimant's dismissal was unfair in all the circumstances. Notwithstanding this, we do not find that Ms Emmerson's or the first respondent's treatment of the claimant was in any sense whatsoever connected to sex.

234. On the evidence before us, we are also unable to conclude that the claimant was treated less favourably because of sex having considered the claimant's treatment against a hypothetical comparator (whose circumstances must not be materially different from the claimant's circumstances).

235. In all the circumstances, we therefore find that the claimant was not treated less favourably by the first respondent because of sex.

236. The claimant's complaint of direct sex discrimination in relation to paragraph 4.1(9) of the agreed List of Issues is not well founded, and accordingly, it is hereby dismissed.

<u>Was the claim in relation to the remaining acts of direct discrimination presented within the time limit in section 123 of the EqA (agreed List of Issues paragraph 1.2)?</u>

237. The agreed List of Issues states that given the date the Claim Form was presented, any complaint about something that happened on or before 05 December 2020 may be out of time. The claimant and the respondents' representative agreed at the outset of the hearing that based on the date of presentation of the ET1 Form and the ACAS Early Conciliation dates, any complaint that occurred on or after the said date was in time in terms of section 123(1)(a) of the EqA.

238. In terms of the chronology of events, the claimant resigned from his employment on 13 December 2020. Section 5.1 of the ET1 Form states that the claimant's employment came to an end on 14 December 2020. The claimant commenced ACAS Early Conciliation on 04 March 2021and the ACAS Early Conciliation Certificate was issued to the claimant on 15 April 2021.

239. We considered that the alleged acts set out at paragraphs 4.1 (1) to 4.1 (8) of the agreed List of Issues took place before 05 December 2020.

240. Although the allegation at paragraph 4.1(2) refers to dates between 05 February 2020 and 14 December 2020, those dates do not reflect the evidence before us and the correspondences that we were taken to. This issue was first raised by the claimant in February 2020 and there was correspondence relating to this matter in February and March 2020, including correspondence in which Ms Emmerson refused to allow the claimant's solicitor to attend an internal meeting. We noted that there were correspondences thereafter between the claimant's solicitor and Ms Emmerson from November 2020. The claimant states at paragraph 50 of his witness statement that on 05 November 2020 Ms Emmerson sent correspondence to the claimant asking that the claimant's lawyer contacts her regarding the family law matters. The claimant says he requested her to speak to his lawyer between March and November 2020, and he was alarmed that the school was only seeking to speak to his lawyer in November 2020. At paragraph 75 of his statement the claimant says he is still unclear why Ms Emmerson decided to speak to his lawyer "only in November" (which was eight months after his request in March 2020).

241. In the circumstances, we proceed on the basis that the latest date to which allegation 4.1(2) can relate is 05 November 2020. If we are wrong to so find (and the alleged dates between 05 February 2020 and 14 December 2020 were correct), we would not have found that Ms Emmerson gave a false reason to the claimant in correspondences between those dates for refusing to meet the claimant's lawyers. It is not clear from the claimant's witness statement or written submissions on what basis he asserts that he was provided a false reason for the first respondent refusing to meet with his lawyers. On the evidence we heard and the documents which we were referred to, we did not accept that a false reason was provided to the claimant for refusing to meet with his lawyers having reviewed the communications between 05 February 2020 and 14 December 2020. We considered that it was reasonable not to allow the claimant's lawyers to attend the relevant meetings in the circumstances. The first respondent's policies to which we were referred did not permit the claimant's lawyers to attend such meetings.

227. Allegations 4.1(6) and 4.1(7) do not specify any specific dates. Based on the evidence we heard and the documents that we were referred to, the claimant says he informed Ms Emmerson on 11 December 2019 that he intended to obtain a NMO, and he also says that on 21 January 2020, he once again informed Ms Emmerson about being a victim of abuse. He refers to not being offered off site counselling and two weekly reviews not taking place in line with the risk assessment which he received on 29 January 2020. He was provided with leave to attend court hearings. The claimant did not identify what further or additional support he required from Ms Emmerson as a victim at the relevant time.

228. We determined that any alleged acts in relation to allegation 4.1(6) are likely to relate to the correspondences between Ms Emmerson and the LADO in February 2020.

229. We also considered that this allegation could be put as an omission on the first respondent's part to be willing to challenge or to investigate the claimant's former partner's account. Section 123(3)(b) states "failure to do something is to be treated as occurring when the person in question decided on it." Section 123(4) of the EqA states:

> "In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a)when P does an act inconsistent with doing it, or
>
> (b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

230. We reviewed the facts in terms of when Ms Emmerson did "an act inconsistent with doing it" in relation to allegation 4.1(6). We determined that the inconsistent acts were Ms Emmerson providing the claimant with the relevant policy and offering some support on 21 January 2020 and 04 February 2020 respectively.

231. If we were wrong to so conclude and there had been no inconsistent act, we would have found that Ms Emmerson might reasonably have been expected to do the act in question (having had strong guidance from the LADO in email correspondences dated 24 March 2020 that much of the nursery incident could be cleared up if she could obtain collaborative evidence), and that it would have been reasonable for her to carry out the LADO's advice on 24 March 2020.

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

232. Except in relation to allegation 4.1 (9) in relation to which we set out our conclusions above, the complaints set out at allegations 4.1(1) to 4.1 (8) were not made to the Tribunal within three months (plus ACAS Early Conciliation extension) of the act to which the complaints relate.

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

233. We considered whether there was conduct extending over a period in terms of section 123(3)(a) of the EqA. As the complaint relating to allegation 4.1(9) of the agreed List of Issues was dismissed the Tribunal having considered its substantive merits (this was the only 'in time' complaint pursuant to section 123(1)(a) of the EqA), there were no other in time complaints before us. None of the direct sex discrimination complaints were both in time and actionable. In the circumstances, we did not conclude that there was any conduct extending over a period.

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

234. As we have determined that there was no conduct extending over a period in terms of section 123(3)(a) of the EqA, we were not required to give separate consideration to this issue. Therefore, there is no conduct extending over a period that ended with the last act falling within the statutory time limits.

Issue 1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Issue 1.2.4.1 Why were the complaints not made to the Tribunal in time?

235. We determined that there was no good or satisfactory reason to explain why the claimant had not presented the complaints in time that are listed at paragraphs 4.1 (1) to 4.1 (8) of the agreed List of Issues, either within the claimant's witness statement or in the claimant's oral evidence.

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

236. We proceeded to consider whether in any event, it is just and equitable in all the circumstances to extend time in respect of the complaints at paragraphs 4.1(1) to 4.1(8) of the agreed List of Issues in terms of section 123(1)(b) of the EqA.

237. The claimant suffered from anxiety, and he was away from work for a substantial period as a result. He was able to attend a job interview with his prospective new employer, he was clearly successful at the interview, and he made arrangements to start another job (and started another job) within a relatively short space of time.

238. We considered at which point he knew about the alleged discrimination. The claimant's written grievance evidenced that he knew about alleged discrimination by the first respondent or that he had strong suspicions about the alleged discrimination on 09 November 2020. The claimant's grievance refers to unconscious bias and unlawful conduct. He made allegations of prejudice and gender bias in his resignation letter dated 13 December 2020.

239. The claimant had a trade union representative who provided him with advice and support in relation to his employment matters with the first respondent. The claimant's trade union representative accompanied the claimant during the first respondent's internal investigatory meeting.

240. The claimant also had a family law solicitor who was representing him. According to the correspondence before us, the claimant had been in correspondence with Ms Emmerson in relation to her meeting his lawyer in February and March 2020. We considered that the claimant could have asked them for guidance on Employment

Tribunal time limits or to have signposted him to a relevant lawyer. There was no explanation in terms of why the claimant did not take any such steps.

241. The claimant also referred to his sex discrimination complaint and the relevant Tribunal time limit in his correspondence to the first respondent which was dated 24 February 2021. It is not clear what steps (if any) the claimant took of his own accord to seek legal advice or to inform himself about time limits. Even if the claimant was not aware of the relevant time limits prior to 24 February 2021, we considered that it was reasonable for the claimant to have taken steps to have informed himself as to the relevant time limits earlier.

242. We took into account that the claimant had contacted ACAS and engaged in Early Conciliation between 04 March 2021 and 15 April 2021. The ACAS website contains information relating to time limits in Employment Tribunal claims. We did not consider that the claimant provided an adequate explanation in terms of the delay in presenting his sex discrimination complaints.

243. The claimant had a reasonable opportunity to present his claim within the time limit contained within the EqA. The claimant had ample opportunities to inform himself of the relevant time limits.

244. The claimant set out a number of discrimination allegations at paragraphs 4.1 (1) to 4.1 (8) of the agreed List of Issues. Some of the allegations were not dated and there was also a date that was provided which was not accurate. We considered the content of the ET1 Form. There was potential prejudice to the respondents as the respondents were required to undertake additional disclosure and to make enquiries of relevant witnesses as a result of those complaints having been made. The allegations in question required the Tribunal to investigate and determine events from the end of 2019. The delay in bringing the complaints that were presented outside the statutory time limit may have also affected the quality of the evidence and witness recollections.

245. The claimant has a complaint of constructive unfair dismissal (which was presented within the relevant statutory time limit) and, accordingly, that complaint was investigated and determined by the Tribunal during this hearing (and it ultimately succeeded).

246. We also took into account that the claimant has an in-time complaint of direct sex discrimination relating to paragraph 4.1(9) of the agreed List of Issues which was investigated and determined during this hearing (albeit which did not succeed).

247. We therefore concluded that balancing the hardship and prejudice between the parties, we would not extend time on a just and equitable basis. Therefore, we did not have jurisdiction to consider the claimant's complaints of direct sex discrimination referred to at paragraphs 4.1(1) to 4.1(8) of the agreed List of Issues, and those complaints stand dismissed.

248. Having considered all the circumstances, we determined that it was not just and equitable to extend time in accordance with section 123(1)(b) of the EqA, and accordingly, we dismiss the complaints of direct sex discrimination set out at paragraphs 4.1 (1) to 4.1 (8) of the agreed List of Issues.

Conclusion – direct sex discrimination

249. For the above reasons, the claimant's complaints of direct sex discrimination are dismissed.

Unauthorised deductions from ages

Issue 1.3.1 - Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

250. This complaint was clearly presented outside the time limit within section 23(2) of the ERA 1996 as it relates to payments that were allegedly not made to the claimant in respect of the Easter holidays in 2020. Any claim should have been presented "…before the end of the period of three months beginning with (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction is made."

251. We determined that the claimant should have been paid in respect of the alleged money owed to him within the April 2020 or May 2020 payroll. Therefore, he should have expected to receive any payment owed by 15 May 2020 (at the latest).

252. Considering the time limit set out in section 23(2) of the ERA 1996, any complaint should have been presented by the claimant by 14 August 2020. He did not present a claim before that date. He did not contact ACAS to start Early Conciliation on or before 14 August 2020, so the claimant is not entitled to any extension of time in terms of engaging in ACAS Early Conciliation.

Issue 1.3.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

253. If we considered that the alleged payments due in respect of work carried out during the Easter holidays in 2020 by the claimant were a series of deductions on the basis they are all alleged to have occurred within a similar time period (Easter 2020) and under similar circumstances, as the latest payment would have been due to be made by no later than 15 May 2020, we do not consider that the complaint was made to the Tribunal before the end of a period of three months from that date.

Issue 1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

254. We determined that it was reasonably practicable to present a claim on or before 15 14 August 2020. The claimant provided no good or satisfactory reason in terms of the claimant not complying with the statutory time limit. There were no

circumstances that show that it was not reasonably practicable for the claimant to present his complaint by 14 August 2020. If the claimant did not have knowledge about Employment Tribunal time limits at that time, we consider that he could reasonably have asked his solicitor or trade union for guidance, and he could have taken steps to inform himself of any relevant time limits (including by undertaking online research and consulting the ACAS or Citizens' Advice Bureau websites). He did not demand payment from the school in writing until after his employment had ended. In addition, at the end of February 2021 he sent correspondence to the first respondent in which he indicated that he was aware of the relevant statutory time limit. It was reasonably practicable for the claim to be made to the Tribunal within the relevant time limit in the circumstances.

Issue 1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

255. If we are wrong to so find and it was not reasonably practicable for the claim to be made within the statutory time limit, we would have decided that the claim was not made within such further period as we consider reasonable in terms of section 23(4) of the ERA 1996. We considered all the circumstances including but not limited to the fact that the claimant sent correspondence to the first respondent in which he indicated that he was aware of the relevant statutory time limit in February 2021, but he did not present his claim until 19 April 2021 (almost one year after the alleged payment was due to be paid to the claimant).

Issue 6.1 - Were the wages paid to the claimant for the period of the Easter holidays 2020 less than the wages he should have been paid and issue 6.2?

256. Even if this complaint were presented within the time limit at section 23(2) of the ERA 1996, the claimant says that he worked for ten days during the Easter holidays in circumstances where under his employment contract he was only required to work for an additional five days. In those circumstances, he claims he should have been paid for a further five days' pay by way of 'overtime'. There was no evidence before us to show that the claimant worked more than two dates during the Easter period. On both those dates the evidence shows he worked for a limited period of time. He was informed that employees should only attend to urgent meetings at that time. No timesheet or other documentary evidence of the alleged hours worked were provided. The claimant's additional work on the two dates in question appears to fall within his contracted hours. In those circumstances, we would not have found that there was an unauthorised deduction from wages in any event.

Issues 6.3 and 7

257. In light of the above, the claimant's complaint of unauthorised deductions from wages (wage arrears) is dismissed.

Conclusion

258. The claimant's complaint of unfair dismissal (constructive) succeeds.

259. We decided to dismiss the remainder of the claimant's complaints in their entirety.

Remedy

260. As the claimant's complaint of unfair dismissal (constructive) has succeeded, we direct that the claimant and the respondents' representative shall liaise and attempt to agree the appropriate remedy in respect thereof.

261. By agreement, we have listed a Remedy Hearing to take place **on 09 October 2023 at 10.00am at the East London Hearing Centre, Import Building, 2 Clove Crescent, London, E14 2BE before Employment Judge Beyzade, Mrs McLaughlin and Mr Wood for one day** to investigate and determine the issues relating to remedy in respect of the claimant's constructive unfair dismissal complaint.

262. If the parties are able to reach agreement prior to the Remedy Hearing, they may make an application to vacate the hearing date (which must be made as soon as possible).

263. Case Management Orders were issued to parties in relation to the Remedy Hearing under separate cover.

Employment Judge B Beyzade
Date: 11 April 2024