EMPLOYMENT TRIBUNALS

Claimant:	**Miss Janet Parker**	
Respondent:	**Clifton Diocese**	
Heard at:	**Bristol (by video)**	**On: 1, 3, 6, 7 November 2023 (Evidence)** **8, 9 November 2023 (Chambers)**
Before:	Employment Judge Midgley Ms G Mayo Mr J Shah	

Representation

Claimant:	Miss Maureen Spencer (Counsel)
Respondent:	Mr Mark Green (Counsel)

RESERVED JUDGMENT

1. The claims under the Employment Rights Act 1996 relating to the claimant's flexible working request under section 47E (unlawful detriment), and 104C (automatically unfair dismissal) are dismissed on their withdrawal by the claimant.

2. The claim that the respondent unreasonably refused the claimant's flexible working request contrary to s. 80G of the Employment Rights Act 1996 is not well founded and is dismissed.

3. The claim that the claimant was unfairly dismissed is well founded and succeeds.

4. The claim that the claimant was wrongfully dismissed is well founded and succeeds.

5. The following claims that the respondent directly discriminated against the claimant on the grounds of her religion or belief are well founded and succeed, namely that:

a. The respondent added disciplinary allegations after the investigation commenced;
b. The respondent rushed the disciplinary hearing process and did not permit the claimant sufficient time to respond to the allegations,
c. The respondent failed to take the claimant's health issues into account; and
d. Mrs Lawrence mocked the claimant during the disciplinary hearing.

6. The claim that the respondent harassed the claimant on the grounds of her religion or belief (in relation to the conduct of Mrs Lawrence at 4(c) above) is well founded and succeeds.

7. The remaining complaints of direct discrimination on the grounds of religion or belief are not well founded and are dismissed.

8. The claim of indirect sex discrimination is not well founded and is dismissed.

REASONS

Claims, Parties and Case summary

1. By a claim form presented on 23 December 2021, the claimant brought claims of unfair dismissal, wrongful dismissal, discrimination on the grounds of sex and/or maternity, discrimination on the grounds of religion or belief, and unreasonably responding to a flexible working request.

2. The claimant is a non-Catholic who adopted a child in 2020.

3. The respondent is the Catholic diocese covering the West of England.

4. The claimant was employed by the respondent between February 2016 and October 2021 as a Diocesan Financial Administrator/Head of Finance.

5. The claimant alleges that the respondent failed properly to respond to her request for flexible working following the adoption of her child, arguing that the respondent's approached was tainted by negative views of adoption, emanating from the religious beliefs of its staff. She raised an informal grievance about her line manager's rejection of her flexible working request.

6. She alleges that when she presented a formal grievance in relation to the rejection of the flexible working request, her line manager inflated concerns about the systems she had in place the management of her staff and month end reconciliations to create charges of gross misconduct. Additionally, she argues that during the resulting disciplinary process she was treated less favourably as a non-Catholic than a Catholic would have been treated, and that her dismissal was therefore unfair and discriminatory. She further argues that her dismissal was a detriment done because she made a flexible working request and/or the principal

reason for the dismissal was that she had made such a request.

7. The respondent argues that it had a legitimate business reason for rejecting the claimant's flexible working request, and that during the period of the claimant's adoption leave significant errors in the respondent's accounts came to light. As Head of Finance, it alleges that the claimant was directly responsible for them whether she had undertaken the work herself or instructed junior members of staff to do so. It argues that it was appropriate for those errors to be investigated and considered through a disciplinary investigation and that it was open to it on the facts it found to conclude that the claimant had committed gross misconduct. It argues that the claimant's dismissal was therefore fair and was not influenced by the claimant's flexible working request or her religion or belief.

8. At a case management hearing on 14 June 2022 the claimant withdrew her claim of discrimination on the grounds of maternity. It was dismissed on withdrawal on the same date.

9. Following the case management hearing the claimant applied to amend her claim to include allegations of victimisation. That application was dismissed on 8 July 2022 on the grounds that the claim lacked the dates in respect of the allegations and some allegations were unclear. The claimant was advised that if she wished to pursue the application, she would need to include the necessary details and should review the number of allegations she sought to add by amendment, given the potential impact on the listed hearing.

10. The claimant did not renew her application.

Procedure, Hearing and Evidence

11. The hearing was conducted remotely by video. The parties had agreed the following documents which the Tribunal was referred to and considered:

    11.1. A liability bundle of 772 pages

    11.2. A remedy bundle of 114 pages

    11.3. The following statements: for the claimant, that of the claimant herself (16 pages), for the respondent, the following statements:

        11.3.1. Mrs Lyn Murray, the respondent's Chief Operating Officer and the claimant's line manager (11 pages)

        11.3.2. Mrs Carole Lawrence, the Financial Secretary for the Diocese of Shrewsbury, who conducted the disciplinary investigation (6 pages)

        11.3.3. Monsignor Massey, the Moderator and therefore most senior member of the Curia, who chaired the disciplinary hearing and dismissed the claimant (7 pages)

        11.3.4. Mrs Cathy Hipkiss, a Trustee of the respondent, who chaired the appeal hearing against the disciplinary and grievance outcomes (3 pages)

11.3.5. Mr Stephen McNulty, a Trustee of the respondent, who chaired the claimant's grievance (4 pages)

12. With the exception of Mr McNulty, all of the witnesses attended to give evidence and answered questions from counsel and from the Tribunal.

13. The claimant had made a covert recording of the disciplinary hearing and wished to play a short section of the recording of the incident in which she alleged Mrs Lawrence had mocked her. However, the recording could not be sent to the Tribunal or played in a form that enabled it to be heard over the CVP platform.

14. On the morning of the first day the Tribunal read the pleadings, orders, witness statements and, in so far as the time for reading permitted, the documents referred to in the statements. The claimant's evidence began on the afternoon of the first day.

15. On the morning of the third day the claimant withdrew her complaints under section 47E, 80G and 104C of the Employment Rights Act 1996.

16. We heard closing arguments from counsel and had the benefit of written submissions and replies (the respondent's were 19 pages in total, the claimant's 14 pages). We express our thanks to Counsel for the effort and time they devoted to the case; their submissions were of considerable assistance.

17. We carefully considered all those documents and reviewed our notes of evidence (51 pages) in our deliberations. It was not possible to produce a fully reasoned Judgment and initially it was proposed that the case was relisted for a further day for the handing down of Judgment and remedy, if appropriate. The parties were asked for dates to avoid for that reason but indicated they were content to receive a reserved Judgment. Regrettably, an administrative oversight resulted in that course not being drawn to the Judge's attention for some time. It was therefore necessary to find time during a period where judicial resources were under particular pressure to write what has proved to be a long set of reasons.

18. I apologise for the delay in the promulgation of Reserved Judgment and Reasons and any frustration and anxiety caused to the parties as a result. I hope that the care with which the Tribunal approached the evidence and arguments is apparent from the Reasons.

Factual Background

19. We make the following findings of fact on the balance of probabilities, taking into account the testimonial and documentary evidence we have heard and read.

20. The claimant is a qualified Chartered Accountant and a Fellow of the Institute of Chartered Accountants in England and Wales ("ICAEW"). She has been a member since January 1998. She is significantly experienced in Charity Sector accounts, having worked in that sector since 2009. She is a very intelligent, articulate, and able woman, obtaining a degree from Cambridge and subsequently working in London as a Manager of the Financial Services Audit and Advisory Group at Deloittes, before spells at Credit Swisse and Danske Bank.

21. The respondent is a registered Charity which is subject to the regulation of the Charity Commission, and to the requirements of the Company Act. The respondent has a turnover of approximately £12 million a year and assets exceeding £200 million.

22. On 25 February 2016 the claimant was appointed to the role of the Diocesan Financial Administrator. The role was based in the respondent's Curia offices in Bristol. The claimant's contractual hours were Monday - Friday 9am – 4:30pm, but the respondent agreed a variation to those hours to 9:45am to 5:15pm to assist the claimant with commuting. The salary for the role was £55,000 p.a; by the time of the claimant's dismissal, it had increased to £60,337.00 p.a.

23. On 6 January 2017 the claimant's job title was changed to Head of Finance. In July 2017 a further contractual change was made permitting the claimant to work from home once a fortnight on a Monday.

The Structure of the Curia

24. The claimant headed the Finance Department of the Curia. The Curia is the administrative office of the Diocese. The claimant's role was not, however, a 'reserved role' within canon law, and so it was not a requirement of the role to be a Catholic, whether practicing or not.

25. The Curia is under the direct authority of the Bishop of Clifton, Declan Lang. The Bishop appoints a Moderator of the Curia to oversee curial matters. Throughout the claimant's period of employment that position was held by Monsignor Bernard Massey.

26. The claimant was, by virtue of her office, a member of the respondent's Senior Management Team and reported to the Chief Operating Officer, Lyn Murray, throughout her employment.

The claimant's role and responsibilities

27. The Finance Department was responsible for the financial management of the respondent's parishes, its schools, trusts and grants, and the charitable donations made to the Diocese. At the time of her appointment, the Department had six staff but that grew over time to seven. The claimant was responsible for managing the Finance Department's staff, and for their training and development. She was the only accountant in the Department. She therefore sought to persuade the respondent to recruit a part qualified accountant as a Management Accounts Officer, and to train the staff on the use of SAGE and Excel.

28. The claimant was responsible for oversight of all regulatory submissions to Companies House, HRMC, and the Charity Commission, and as her role developed, for Trusts and Grants. As the only accountant the claimant was also responsible for preparing the respondent's accounts; that included the production of the Statement of Financial Activity ("SOFA"), the balance sheet and the cashflow statement.

29. Given the nature of the respondent's operation, the production of its management

accounts, tax returns and business accounts is a complex and time consuming activity. In the early years of her appointment the claimant worked to produce written policies and procedures to formally record the processes that were retained only in the minds of the Finance Department's staff, and to streamline those processes. That included updating the SAGE software used by the respondent and migrating the written records, such as the fixed asset register, to SAGE.

30. In 2018 the respondent became a company limited by guarantee with charitable status. This added various elements of regulatory compliance to the claimant's role. At the same time two members of the Finance Department left and their replacement took some time.

31. Prior to the events that form the subject of this claim, the claimant was regarded by the respondent as an excellent employee; she took very limited sickness absence and had never been the subject of any performance or disciplinary issues. Mrs Murray's appraisals of the claimant's work in 2017 and 2018 were very positive.

The claimant's mental health

32. Prior to her appointment the claimant had experienced periods of poor mental health, particularly anxiety and depression, which was first diagnosed in February 2013 and which was managed with antidepressant medication.

33. In the summer of 2019, the claimant's medication was changed and regrettably she then experienced symptoms of dizziness, light-headedness and nausea. In July 2019 she was diagnosed with 'antidepressant discontinuation syndrome' by her GP who produced a fit note which recommended amended duties for two weeks, requiring the claimant to avoid driving and to work from home. She emailed Mrs Murray, explaining she had been taking antidepressant medication for 6 years, and subsequently sent the fit note to Mrs Murray, who authorised her to work from home.

34. That arrangement was continued into mid August 2019 as a result of a further fit note; the claimant's GP believed that the claimant's symptoms of dizziness, hypersensitivity to noise, nausea, headaches and fatigue might be connected to a thyroid issue. Again, the claimant kept Mrs Murray fully informed of those developments.

The claimant's application to adopt.

35. In 2017 the claimant applied to adopt a child. Her application was made through a scheme supported by her local authority which permitted fostering with the purpose of adopting – 'Fostering for Adoption'.

36. In February 2018 the claimant openly discussed her application with Mrs Murray. Mrs Murray was in principle supportive; in September she wished the claimant well with her foster panel interview and advised her that the HR Committee had approved an enhanced maternity and adoption leave policy which permitted employees 18 weeks full pay, and then statutory pay. She sent the policy to the claimant.

37. On 26 November 2019 the local authority approved the claimant's applications for fostering and adoption. The claimant immediately informed Mrs Murray of that fact. The claimant alleges that from that point Mrs Murray's attitude towards the process and the claimant's application changed because the application was no longer theoretical, but actual.

38. On 28 November 2019, the child identified for adoption by the claimant was born prematurely (the due date was in December). The claimant informed Mrs Murray that a foster child had been identified.

2020

39. In late January 2020, the claimant sought to discuss the practicalities of her forthcoming adoption leave with Mrs Murray. The point that the claimant sought to impress on Mrs Murray was that she intended to take adoption leave from the point of placement and to take the full 52 weeks entitlement because that would give her and her foster child the best prospect of bonding. The claimant was concerned that Mrs Murray either did not appear to appreciate or was unwilling to consider that the claimant would be entitled to take leave from the moment of placement, which was imminent, and had not made arrangements to cover the claimant's post during her adoption leave. Whenever she asked about arrangements to cover the post, it seemed to the claimant that Mrs Murray had not in fact begun the necessary process, but instead suggested that it may be possible to cover the claimant's role with a part-time appointee.

40. On 24 January 2020, the claimant informed Mrs Murray that she could and would be taking adoption leave from the point of placement and that that could be imminently. Mrs Murray did not react well, arguing that she did not believe that the claimant could 'go on leave with no notice,' as she described it, and expressed dissatisfaction that the claimant would 'do that to her'. She asked why the child could not be placed into separate foster care before it was placed with the claimant so that the claimant could conduct a handover. Additionally, Mrs Murray asked the claimant whether it was really necessary for her to take her full entitlement of 52 weeks of adoption leave.

41. The claimant was deeply distressed by all aspects of that discussion, not least because Mrs Murray did not seem to engage with the point that that was in the child's best interests to be placed with the claimant for fostering until the Adoption Order was made and for the claimant to spend the first year with her child. The claimant therefore raised her concern and distress with her sister (the bundle contained messages she had sent to her raising the point) and with her social workers. In one message the claimant wrote "I was going to spend the next few weeks writing up extensive handover notes but right now I am hoping [the local authority] call me tomorrow!" The social workers provided the claimant with a leaflet detailing her rights to adoption leave and pay entitlements. Specifically, the leaflet confirmed that adoption leave and pay could start from the point that a child was placed with the claimant for fostering and was not dependent on a Placement Order from the Family Court or matching certificate. The clamant sent Mrs Murray the leaflet that day.

42. On or about 26 February 2020, Mrs Murray conducted the claimant's 2019

appraisal, noting that despite her health issues, the claimant had met all major deadlines and obtained a clean audit report; the necessary accounts were filed with Companies House in advance of the deadline. Mrs Murray further noted that the claimant had continued to implement process improvements generally, and specifically in relation to the monthly management reports.

43. In March 2020, the country was placed in lockdown as a consequence of the Covid-19 pandemic. The claimant, as with all of the respondent's Finance Department staff, worked from home during the pandemic.

44. The placement was delayed. On 12 March 2020 the final adoption hearing was relisted for 13 July. The claimant informed Mrs Murray of that fact and that it was almost certain that the child would be placed with her from 13 July, and she therefore proposed to begin her adoption leave in July.

45. Consequently, on 15 May 2020, at a meeting of the HR Committee, Mrs Murray raised that issue, noting that the claimant had indicated that she would take three weeks of annual leave at the point of placement and then take adoption leave. By 20 May Mrs Murray had contacted a recruitment agent to recruit a finance manager to cover the claimant's post. The claimant was present at a meeting on that date when that action was confirmed.

46. On 13 July 2020 the adoption hearing occurred, and a Placement Order was made; the child was placed with the claimant that day and the claimant was registered as the child's foster parent. A final Adoption Hearing was listed for 8 September 2020.

47. On 14 July the claimant began a period of 3 weeks annual leave prior to taking adoption leave from 9 September 2020, after the formal adoption order was made by the Adoption Matching Panel. Mrs Murray authorised the claimant to take the 3-week period of annual leave from her 2021 annual leave entitlement.

48. On 20 July 2020, the respondent recruited Mrs Rachel Lawes as cover for the claimant on a 12-month fixed term contract, however, Mrs Lawes could not commence work until 1 September 2020. Mrs Lawes was a member of the Chartered Institute of Public Finance and Accountancy, but she was not a qualified accountant nor was she an auditor. It follows that the claimant was on annual leave (to enable her to fulfil her obligations as a foster parent prior to adoption) at the time of Mrs Lawes' recruitment.

Completion of the 2019 Accounts

49. On 17 July 2020, the HR Committee met by Teams. Mrs Murray raised concerns that there was further work to be done on the notes to the respondent's 2019 accounts and therefore before the accounts could be completed. Mrs Murray is recorded as stating that she had scheduled a call with the claimant to discuss her progress with the completion of the accounts. That she did not know of the progress was surprising given her position as the claimant's line manager and the regular discussions the two women had had throughout the year. Mrs Murray suggested to the HR Committee that if the claimant was unable to complete the accounts, the respondent could instruct its auditors, Haysmcintyre LLP ("the

Auditors") to do so and/or to delay the submission date with Companies House.

50. In the event, the claimant agreed to help the respondent by assisting with the completion of the 2019 accounts whilst she was on annual leave (before her formal adoption leave started) during which period she was caring for her child as foster-parent pending the formal adoption Order being made. The accounts had to be completed in readiness for presentation at the AGM on 2 September 2020. It is unclear whether Mrs Murray informed the claimant of the other possible solutions she had raised with the HR Committee; Mrs Murray did not suggest that she had and certainly the claimant felt that she was pressured into agreeing to assist.

51. The claimant worked the equivalent of 8 days in the completion of the accounts (as she confirmed in an email to Mrs Murray on 26 February 2021). She had prepared draft accounts, pending the auditor's report and review, by 3 August 2021.

52. Mrs Murray telephoned the claimant a number of times in late August and at the beginning of September to clarify matters in the accounts and notes; those calls occurred on 24 August (20 minutes), 1 September (three calls lasting approximately 30 minutes in total) and 2 September (two calls lasting 3 minutes in total). The accounts were sent to the Auditors on 1 September and on 2 September they reported a rounding error which had caused a £1 discrepancy between the Statement of Financial Affairs ("SOFA") and the Business Statement ("BS"). It was that issue which Mrs Murray resolved with the claimant in the telephone call on 2 September. The Auditors approved the accounts.

53. On 1 September 2020, Ms Lawes began work and she and the claimant had a long Teams call to conduct a handover.

54. The AGM occurred on 2 September 2020; it was conducted via Teams. The claimant attended solely to table the accounts for approval and to provide a brief summary of the respondent's financial position for discussion. A representative from the Auditors and Mrs Murray also spoke to the accounts. The accounts were approved with one minor change which had been identified by the Auditors.

55. On 9 September 2020, the Adoption Panel unanimously approved the claimant's adoption of her child. The claimant emailed Mrs Murray the following day and it was agreed that the claimant's adoption leave would begin from 9 September, and the claimant would submit her hours for the work she did during her annual leave for those hours to be reallocated to the claimant.

2021

56. On 12 February 2021, Mrs Murray held a 1-2-1 meeting with Mrs Lawes. Mrs Lawes did not raise any concerns about the accounts or the information the claimant had prepared for them, noting that all the Trust funds had been reconciled.

57. On 23 February 2021, Mrs Murray spoke with the claimant. That was the first formal contact since the claimant's adoption leave began; Mrs Murray had arranged no prior Keeping in Touch days, nor for the claimant to be sent any

updates as to changes in her absence. The claimant expressed her desire to return to work, and a provisional date of 20 April 2021 was agreed.

58. However, by 26 February the claimant had notified Mrs Murray that she had only been able secure a nursery place for her child from 8 June 2021 for 3 days a week Tuesday to Thursday, and that she wanted to build her child's hours up to 10 hours a day over two to three weeks. She therefore wished to return work on 9 June, but asked that she should be able to work from home on a part-time basis for the first three weeks to facilitate her child's start at nursery, returning to the office on 29 June. She wished to work part-time for three days a week until her daughter could be offered a nursery place for 5 days a week on 28 November 2023. On 26 February, Mrs Murray emailed the claimant to confirm her understanding of the request.

Concerns with the claimant's performance

59. On 12 March 2021, the HR Committee met. Mrs Murray told the committee that the claimant wished to return to work at the end of April, working 3 days a week from the office and two days a week from home. That information was, simply, inaccurate and misleading; the claimant had expressly told Mrs Murray that she wanted to work 3 days a week. Mrs Murray did not provide any explanation as to why she had misled the Committee in that way. The minutes also record the following,

> *"Mrs Murray has some concerns over the performance of the [claimant] prior to going on adoption leave, which have come to light over the past few months. Mrs Murray will seek further advice from Mr Cook as there are many levels to consider."*

60. Mr Cook was the respondent's HR advisor and a member of the HR Committee. There was no evidence of what Mrs Murray's concerns were or any corroboratory evidence to show that they had in fact been raised with the claimant. However, in any event, Mrs Murray did not suggest to the committee that the concerns were to be characterised as negligence or gross misconduct. In her evidence, Mrs Murray suggested that the concerns had been reported to her by Mrs Lawes. We consider that evidence in our conclusions below.

61. On 16 March 2021, Mrs Murray had a 1:2:1 meeting with Mrs Lawes. She made a note in her diary of the key points. Mrs Lawes advised her that:

    61.1. The Fixed Asset Register did not reconcile;

    61.2. One journal entry at year-end related to unrestricted funds and an adjustment needed to be made to the profit and loss account;

    61.3. The Schools Devolved Formula Capital ("DFC)" grants account needed to be reconciled (the note read "*schools reconciliations to be completed*"); and

    61.4. It was unclear whether the proceeds from the sale of the respondent's St Joseph's Mass Centre ("St Joseph's") had been put into a designated account for restricted funds or a general account (the note read "*St Joseph's –*

designated or restricted.")

62. That is the first record of any concerns being reported to Mrs Murray by Mrs Lawes.

63. On 18/19 March 2021, Mrs Murray spoke with Mr Cook to discuss whether the issues with the St Joseph's sale proceeds were sufficiently serious to constitute misconduct. Mrs Murray's concern was that 50% of the sales proceeds should have been allocated to the Priests Retirement Fund and placed into a designated account for restricted funds. It was decided that it was a borderline case, but the agreed approach was that it should not be treated as misconduct but rather, once the claimant returned to work, Mrs Murray would conduct a full review of the corrections that needed to be made, advise the claimant of the new processes that have been put in place, and would then monitor her performance. In short, it was treated as a matter of performance and not a matter of conduct.

64. On 23 April 2021, Mrs Murray telephoned the claimant and discussed the claimant's return to work. During their discussion, the claimant confirmed that having discussed the matter with her social workers, her preference was to take her full entitlement to adoption leave and to return on 9 September 2021. The claimant suggested that she was looking for another nursery which might be able to take her child for the remaining two days a week, and, if that was not possible and only one day could be covered, the claimant suggested that she might be able to take annual leave to cover the other day in the period from 9 September until 28 November when her child had a place for five days a week at a nursery. Alternatively, she reiterated that she would seek to work part-time. Mrs Murray made no reference to the concerns relating to the St Joseph sale, the DFC, reconciliation of the fixed asset register or any other concern during the call.

65. On 4 May 2021, the HR Committee met. Mrs Murray updated the committee in relation to the claimant's proposed return to work. She advised that the claimant had agreed to return 4 days a week and would cover the remaining day with annual leave. Again, that was not accurate, that was a proposal that the claimant had made *if* she was able to secure a further day's nursery cover. Mrs Murray did not report any further concerns in relation to the claimant's performance and/or the completion of the accounts; however, she noted that she would ensure that there were 'clear definitions' of the claimant's role and that processes would be put in place for further reviews. (Mrs Murray's evidence was that what she meant by that was she anticipated the claimant's return to work, but she would require her to adopt Mrs Lawes' processes for her team's appraisal and monthly account reconciliations.)

66. On 11 June 2021, Mrs Murray had a further 1:2:1 meeting with Mrs Lawes during which Mrs Lawes suggested that on the SOFA the legacy monies from the St Josephs' sale should have been recorded as 'restricted income' as they were designated for the Priests Retirement Fund. That was a repetition of the point she had raised in March 2021.

67. On 7 July 2021, Mrs Lawes gave notice to terminate her fixed term contract early, with effect from 10 August 2021. Mrs Murray suggested in evidence that the reason that Ms Lawes gave notice was because of a house sale. That fact alone, without more, would not prevent her fulfilling the period of her contract. There was

no evidence to suggest that Mrs Murray sought to persuade Mrs Lawes to conduct a handover with the claimant or to continue until the claimant returned to work on 6 September.

68. On 12 July 2021, the claimant contacted a recruitment agency in relation to making applications for alternative employment.

69. On 16 July 2021, the HR Committee met. Again, Mrs Murray advised the committee that when the claimant returned, she would be required to adopt the monthly processes that Mrs Lawes had put in place. Mrs Murray's evidence was that the processes that she was then referring to were staff appraisals and monthly reconciliations. She indicated to the committee that the claimant would want to work from home, stating "this will be reviewed as with everyone, to fit in with the role and job description." The claimant had not however suggested that she wanted to work from home entirely. Mrs Murray did not, however, raise any further concern about the claimant's performance, the accounts or any aspect of the SOFA which accompanied them. The minutes record no reference to the concerns Mrs Lawes had raised on 11 June or in March.

The meeting of 29 July 2021

70. On 29 July 2021, Mrs Murray and the claimant met via Teams. The claimant's child was with her at the time of the meeting; the meeting was in the school holidays, and the nursery which the claimant had secured a place at was term-time only. Mrs Murray's displeasure at that was apparent to the claimant, notwithstanding that the claimant was on leave and was not working.

71. Mrs Murray asked whether the claimant had been able to find a nursery which would support 5 days a week or one which could take her child for a further two days a week. The claimant confirmed that, as she had expected, she had been unable to do so, she repeated her assertion that she would need to reduce her hours to part-time for 3 days a week. Mrs Murray told the claimant that it was not possible for her role to be done on a part-time basis.

72. The claimant therefore suggested that on days when she did have not a space at the nursery (for the three-month period between September and November) she could work from home; to that end she asked Mrs Murray for details of the home working policy, suggesting that she could work around the hours her daughter was awake, for example in the evenings. Mrs Murray said the policy had not yet been approved but it was not intended to provide a replacement for childcare, adding that in any event it would not be feasible for the claimant to work from home or to work part-time as she had to manage a team, and the team worked from 9am until 4:30pm. Mrs Murray was firmly of the view that the claimant could not focus on her work and look after a child and that she had an obligation to ensure that she had childcare to cover her contractual hours. Mrs Murray raised the concept that the claimant could take annual leave to cover the days she did not have a nursery place; but given that was 62 days Mrs Murray knew the proposal was unworkable.

73. The claimant's evidence, which we accepted, was that the impression Mrs Murray created was one of opposition to any alternative to the claimant working her contractual hours of 9am to 4:30pm, 5 days a week, largely from the office, and

that the moment the claimant proposed a possible alternative, Mrs Murray closed it down without engaging with it to explore whether it was feasible. That that was the case is apparent from Mrs Murray's stance: she required the claimant to work as we had described, notwithstanding that the claimant had not previously worked either five days a week from the office, nor 9am – 4:30pm. The respondent had agreed changes so that the claimant could work from home on one day a week every other week, and could attend at 9:45 – 5:15. Moreover, during the lockdown, the claimant had worked entirely from home. Mrs Murray did not seek to analyse in any meaningful way how many hours the claimant needed to be available to supervise her team, whether that supervision could be provided by telephone or by Teams rather than in person, or how regular such supervision needed to be; for example whether a fortnightly meeting would provide an appropriate opportunity to conduct reviews, appraisals etc, and other support could be provided remotely when the claimant was not in the office. The claimant was particularly upset by Mrs Murray's approach given it seemed to her that Mrs Murray was quite prepared for the claimant to work from home in her words 'with a baby on her lap' in August 2020, when Mrs Murray needed the accounts completed because she had not arranged cover to begin from the point that the claimant's adoption leave had begun.

74. Mrs Murray then told the claimant that performance issues had come to light which she would discuss with the claimant on her return, that the accounts had been re-stated as a consequence, and that she would be required to adopt the procedures that Mrs Lawes had put in place during her tenure.

75. Immediately after the meeting, Mrs Murray arranged a meeting with Mr Cook for 2 August 2021.

76. At or about the same time, 29 July, the claimant sent her CV to the recruitment agency and asked them to propose her for vacancies. She had made the decision to resign as she could no longer envisage working with Mrs Murray and needed to 'a back-up plan' as she had exhausted her savings during the period of her adoption leave.

The claimant's email of 30 July 2021

77. On 30 July 2021, the claimant sent Mrs Murray a three-page email attaching a flexible working request. The email was highly critical of Mrs Murray. In summary, the claimant complained that Mrs Murray had ambushed her with allegations of wrongdoing, and objected to Mrs Murray unilaterally making changes to the manner in which the Finance Team was to be managed without any consultation with her, particularly the suggestion that there should be constant supervision of the team by the claimant. The primary focus of the claimant's ire and criticism was Mrs Murray's inherent opposition to the claimant's need for flexible working. She wrote,

> *"It makes me very angry that every time I attempt to suggest a flexible way of returning to work full-time with a mix of home and office-based working I am immediately shut down and told this is not possible without any attempt to fully consider the proposal, or being given the opportunity to trial it for a period so that I can demonstrate that it will work."*

78. The claimant made further complaints about Mrs Murray's failure to secure a replacement for her role before her adoption leave, and her subsequent failure to arrange a handover between Mrs Lawes and the claimant. Specifically, the claimant wrote,

> *"I will never forgive you for suggesting that I put my [child] into foster care in the interim whilst you sort out my replacement cover…. This demonstrates that despite my lengthy explanations of what adoption means and how different it is to normal maternity leave, you have no empathy for my situation and just think about the inconvenience to you."*

79. The claimant set out that she had repeatedly said that she would be returning to work part-time, but that Mrs Murray had not put a plan in place to cover that reduction in capacity. She ended by stating that she was feeling very stressed and anxious about her return to work.

80. Mrs Murray forwarded that email to Mr Cook.

The claimant's flexible working request

81. The claimant's flexible working request recorded that she had wanted to return to work on a full-time basis but only had childcare for 3 days a week, that she had therefore proposed working for home on the two days her daughter was not at nursery, but Mrs Murray had refused to consider it. The claimant therefore requested working part-time, 3 days a week.

82. The request did not comply with the statutory requirement in sections 80F(2) (c) ERA 1996, because it did not explain what effect the change reflected in the request would have on the respondent and how it might be overcome.

83. On 2 August 2021, Mrs Murray sent the claimant an email, the terms of which she had agreed with Mr Cook. The email confirmed that the flexible working request would be considered by the HR committee at the next meeting on 13 August; Mrs Murray also acknowledged the claimant's email. Although Mrs Murray noticed that the flexible working request did not comply with the statutory requirements, she neither raised that with the claimant nor sent her the respondent's or government guidance on flexible working requests. She was unable to explain why she did not do so and suggest that the claimant should resubmit the request. On the balance of probabilities, we concluded that the reason was because that was the approach she had agreed with Mr Cook, in other words it was a deliberate and conscious decision.

The Disciplinary Process

84. On the same day, Mrs Murray met with Mr Cook. This was the meeting which had been scheduled immediately after the claimant's heated discussion with Mrs Murray on 29 July 2021. No note of that discussion was produced; the discussion was not addressed in Mrs Murray's statement; it was mentioned for the first time in her evidence to the Tribunal.

85. On 12 August 2021, Mrs Lawes conducted a handover with Mrs Murray. Mr Cook

subsequently produced a document entitled "Synopsis of Events" which detailed the concerns which she had reported to Mrs Murray (hereinafter referred to as "the Synopsis"). In summary, the concerns were identified as follows:

85.1. Incorrect coding of funds as unrestricted funds: primarily the concerns related to the categorisation of funds:

85.1.1. obtained from the closure of the Priest Retirement Fund;

85.1.2. obtained from the sale of St Joseph's

85.2. Incorrect allocation funds to unrestricted funds:

85.2.1. funds allocated to the Clergy Welfare Fund

85.2.2. funds allocated for School's Capital Funding Costs

85.3. The bank nominals in SAGE did not reconcile for 3 bank accounts.

85.4. The notes of the 2019 accounts contained errors and needed to be restated in the 2020 accounts.

86. On 13 August 2021, HR Committee met. Mrs Murray, Mr Cook, and Mrs Hipkiss were amongst the attendees. In a closed session of the meeting the flexible working request was reviewed. The Committee noted that the application did not meet the statutory requirements and agreed that the application could be reconsidered if a revised application was submitted before the next board meeting, which was scheduled for 8 October. Mrs Murray reported to the Committee that Mrs Lawes had identified several errors in the accounts, and the Committee agreed that an independent expert should conduct an investigation into what were described as "potential competency issues." It will be noted that Mrs Murray did not describe the concerns as potential gross negligence or gross misconduct. There is no evidence to suggest that the Synopsis was presented to the HR Committee at that stage.

87. On the same day Bishop Lang emailed Mrs Carole Lawrence, the Financial Secretary for the Diocese of Shrewsbury, asking her whether she would conduct an investigation. Mrs Lawrence is a Fellow of the ICAEW and had been a partner in a firm of Chartered accountants as a Registered Auditor 12 years prior to her appointment as the Financial Secretary in 2009. She called Bishop Lang and was informed that the case involved the claimant, the Head of Finance for the respondent.

88. On 16 August 2021, the HR committee responded to the claimant's flexible working request. It wrote that it could not "agree to your request as it stands." The letter noted that the claimant's application contained no reference to the likely effects of the proposed change in her working arrangements on the business of running the Diocese, nor any consideration of how those effects might be dealt with. The claimant was informed that that was a statutory requirement of a flexible working request, and that the committee would be open to reconsidering the request if it were amended and resubmitted, noting that the next meeting of the HR Committee was 8 October.

89. On 17 August 2021, the claimant made enquiries with the respondent to identify what period of notice she would have to provide to the respondent.

90. On the same day, 17 August 2021, Mr Cook provided Mrs Murray with a number of documents, the first was entitled 'advice on conduct a disciplinary process' (hereinafter referred to as "the Note"), the second 'briefing on conducting investigation' (the "Briefing").

91. We make the following observations about the Note. First, it records that the allegations were regarded as prima facie potential gross misconduct. Secondly, it is slanted towards dismissal. It begins "a *dismissal* should be carried by someone of seniority…" in circumstances where it is in fact addressing the point that a *disciplinary hearing* should be carried out by someone of seniority. Whilst it records that the purpose of the investigation was to establish whether there was a sufficient basis to proceed to disciplinary action on the basis of gross misconduct, and, almost in passing, notes that one possible outcome is that the investigator may recommend that no action or action short of disciplinary sanction would be appropriate, the direction of travel in the Note is entirely towards dismissal. For example, the Note records as a matter of fact issues which were for investigation and determination as part of the disciplinary investigation:

> *"In this case we are dealing with potential gross negligence which has misrepresented the financial position of the employer to such an extent that accounting rules may have been broken and decisions have been taken, or could have been taken, based on a false picture of the financial position of the Diocese. This did or could have had a negative impact on the Diocese's financial position and/or reputation"*
>
> (emphasis added)

92. Similarly, it records that there "remains a wider issue of loss of trust and confidence on the part of the Trustees and Executive in the [claimant's]'s ability to perform [her] role." There is no evidence that the Trustees or the Executive had reached that conclusion; it was certainly not a view expressed at the HR Committee meeting only days before. Moreover, if that were an expression of a concluded view that had been shared with Mr Cook, it was one that necessarily had been reached before the claimant's explanations had even been considered.

93. The Briefing directly addressed the manner of the initial investigation meeting with the claimant, noting the fact that she was then on adoption leave. It proposed a meeting in person, but noted,

> *"She may indicate she cannot do this due to her childcare circumstances. An alternative would then be to try and arrange this via Teams, emailing her the allegations."*

94. Mr Cook recorded that it may be necessary to arrange a follow-up the claimant if further clarification of her response to the allegations was required.

95. On 19 August 2021, Mrs Murray sent the Note, the Briefing and the Synopsis to Mrs Lawrence.

(a) The Investigation

96. On 24 August 2021, Msgr Massey sent an email to the claimant which read simply "please read the attached letter." The letter was entitled "Notification of investigation meeting" and required the claimant to attend an in person meeting on either the first or third of September. It merely recorded "a very serious matter has come to light regarding the Diocesan finances which necessitates an investigation to be undertaken as soon as possible." It provided no details of the allegations at all. Mrs Lawrence was identified as the investigator, and the claimant was informed that she would conduct the meeting which would be a fact find. The claimant was told that as it was an investigation meeting, she had no right to be accompanied.

97. The claimant was deeply distressed to receive the letter and immediately replied to Msgr Massey, indicating that she was unable to attend a meeting because she was still on statutory adoption leave and would not be returning to work until 9 September. She wrote,

> "*I'm not willing to attend an investigation meeting without knowing beforehand what is to be discussed. I find it extremely upsetting and disappointing that just before I am due to return to work following my statutory adoption leave I'm suddenly being accused of wrongdoing. The timing of this is very suspicious indeed.*
>
> *Please provide details of the 'very serious matter' that has suddenly come to light regarding the Diocesan finances*."

98. She stated that she was informing Msgr Massey in strict confidence that she was seeking legal advice and preparing a formal grievance against her line manager, Mrs Murray, and stated that she would not be attending an investigation meeting with Mrs Murray in attendance.

99. Msgr Massey immediately breached the claimant's requested confidence, because he forwarded the email to Mrs Murray, who in turn forwarded it to Mr Cook.

100. On 25 August 2021, four events occurred:

100.1. First, Msgr Massey sent a letter which had been drafted by Mr Cook to the claimant suspending her on full pay. It was however his decision to suspend the claimant. The suspension letter recorded that the claimant faced allegations of potential gross misconduct in relation to "incorrect allocation Diocesan reserves and number of significant reporting errors in the published annual accounts." However, it provided no details of the specific allegations. The claimant was instructed that she must attend an investigation meeting on 13 September, at which details of the allegations would be provided, and that she must not attend work or contact any of her colleagues or access the respondent's IT systems during the period of her suspension.

100.2. Secondly, the respondent suspended the claimant's access to her work email and the respondent's financial systems. Furthermore, the respondent

blocked any email address which contained the claimant's name. The claimant was not told of either of those two latter actions, but the effect was that she was entirely cut off from the respondent's operation and from its staff.

100.3. Thirdly, Mrs Hipkiss emailed Mr Cook seeking advice about who should make a welfare call to the claimant, noting it was important that someone should enquire as to her wellbeing, and to advise her about the Employees Assistance Programme.

100.4. Lastly, the claimant attended an interview for the post of Head of Finance and Resources for Carer Support Wiltshire, in respect of a role advertised the salary of £31,200 for 3 days a week. She was offered the Head of Finance and Resources role the following day and confirmed her acceptance of the role on 27 August. The role was to commence in December 2021.

101. It is worthy of note that despite Mr Cook envisaging only a week earlier that the claimant might not be able to attend a meeting in person because of her childcare commitments and proposing the option of a Teams meeting with the allegations emailed to the claimant, the claimant was not offered that option. Mrs Murray did not inform Mrs Lawrence of that option, of the claimant's depression and anxiety or of her references to being stressed and anxious in her recent correspondence; she was unable to offer any explanation why she did not do so.

102. Shortly after receiving the suspension letter the claimant spoke to ACAS, seeking advice as to the consequence of her resignation in circumstances of allegations of gross misconduct. ACAS advised her that if she were to resign her resignation would be deemed to be acceptance of the allegations. She therefore elected not to resign.

103. On 26 August 2021, multiple events occurred:

103.1. First Mr Cook responded to Miss Hipkiss advising her that a Trustee should be appointed to enquire after the claimant's health; but also writing "*It would be important to define the extent of this involvement. For example, I could see that Janet might press this individual to promote the hearing of her grievance."* He did not explain why such a course was undesirable, particularly as the formal grievance had not been submitted and he did not know whether it would bear directly on the disciplinary allegations.

103.2. Secondly, in a further email to Mrs Murray, Mr Cook noted "*in principle there is no need to delay a disciplinary process if a grievance is raised. If it is prima facie gross misconduct there would be even less justification for delay*." He suggested referring the matter to the respondent's solicitors for advice if the claimant presented a grievance, stating "*we would need them to explain the rationale of any advice to the contrary."*

103.3. Those two emails are suggestive of the fact that the respondent was (or, at the very least, that Mr Cook and Mrs Murrary were) determined to progress the disciplinary without delay. At that stage they had no idea what the claimant's response to the allegations was and whether they could be properly categorised as gross misconduct. That is striking in circumstances where prior

to the 29 July they had been regarded as 'performance concerns' which did not constitute misconduct.

103.4. Thirdly, Mrs Murray sent the details of the respondent's Employee Counselling Service which was offered through its insurers. Mr Cook responded:

> *"I do have feeling that if Janet were pointed in this direction it could backfire. I can imagine she might say something along lines of, "My employer referred me to a help line for stress when they were the cause of it in the first place*".

104. Mrs Murray, who knew of the claimant's previous experience of depression, forwarded that email to Mrs Hipkiss; and the claimant was not referred to the Counselling service.

105. In the event the claimant consulted with her GP in August 2021 because of a flare in her anxiety and as a result her prescribed dosage of Citalopram was increased. She also accessed support from IAPT to help her manage the symptoms of her anxiety.

106. On 31 August 2021, the claimant submitted a formal grievance against Mrs Murray. The grievance is a detailed eight-page letter in which the claimant alleged that Mrs Murray had bullied her, particularly in relation to return to work discussions during her adoption leave, with an intent to prevent her from returning to work and had made an allegation of gross misconduct against her "*in order to pre-empt the grievance that she is worried I will make against her."* She recorded that she had been diagnosed with severe stress and anxiety, was suffering from panic attacks and had been prescribed medication in respect of those matters. Msgr Massey's evidence was he did not regard the claimant's account of her health in the grievance as genuine. We find unhesitatingly that it was.

107. In what may be regarded as an inflammatory manner the claimant ended the grievance by noting,

> *"This behaviour is not in accordance with the professed beliefs of the Catholic Church. I know that the Catholic Church does not have a blemish-free history when it comes to adopted children or children in care, but I hoped that this kind of prejudice had been eradicated long ago. Maybe I am wrong."*

108. She intimated she would take legal action if necessary.

109. On 1 September 2021, the claimant emailed Msgr Massey stating that she was not willing to attend a face-to-face meeting because of the incidence of Covid-19 and because she was suffering from work related stress and anxiety, and driving long distances could trigger a panic attack. She proposed a meeting by Teams and asked that the meeting should be recorded because of fears that a note taker might be biased.

110. In consequence, Mr Cook, Mrs Murray and Msgr Massey discussed how to

respond, and Mr Cook drafted a letter which Msgr Massey sent in his name on 8 September, moving the meeting to Trowbridge (from Bristol) and refusing the request for it to be recorded. Mrs Lawrence was not shown a copy of the letter that was sent.

111. Mrs Lawrence conducted a video meeting with Mrs Lawes on 1 September, seeking in her words to see "if she had additional information" in relation to the disciplinary allegations, but Mrs Lawrence did not ask Mrs Lawes to provide her with any financial records or memo accounts to support the allegations she was making, nor did she ask her to talk her through such documents to explain the allegations. She made handwritten notes of those discussions. They were not produced to the Tribunal.

112. On 9 September 2021, Msgr Massey sent the claimant a further letter which had been drafted for him by Mr Cook inviting her to a grievance meeting on 16 September 2021 with Mr Stephen McNulty, a Trustee of the respondent.

113. There is a dispute as to whether the respondent sent a second letter to the claimant on 9 September 2021 from Msgr Massey, seeking clarification of whether her anxiety and stress had been diagnosed by her GP and why an in person meeting would place her at a disadvantage. The respondent produced a draft letter; in contrast with all the other letters sent by Msgr Massey both before and after it, it was unsigned. Additionally, whereas Msgr Massey had emailed other letters to the claimant, the respondent did not produce an equivalent email for this letter. Msgr Mssey made no reference to the letter in his witness statement. The claimant disputed that she had received it. On the balance of probabilities, we were therefore not persuaded that it had been sent.

114. Furthermore, it is notable that the answers to the two questions posed in the draft letter had already been provided by the claimant in her grievance of 31 August (in which the claimant confirmed that her condition had been diagnosed and she had been prescribed medication) and her email of 1 September (in which she identified the risk of a panic attack if driving long distances). It is inconceivable that Msgr Massey and, by extension, (as he was providing advice and drafting letters for Msgr Massey) Mr Cook were not aware of the content of those two emails at the time that the email letter of 9 September was drafted.

115. On 9 September 2021, the claimant emailed Msgr Massey in response to his letter of 8 September. She maintained that the continued pursuit of the disciplinary process was inappropriate in circumstances where her grievance, which was connected to that process, remained unresolved. She reiterated her objection to attending a face-to-face meeting, suggesting that permitting her to attend by Teams would be a reasonable adjustment for her stress and anxiety, and further reiterated her objection to attending an investigation meeting prior to knowing what the allegations of gross misconduct were, which would prevent her from properly preparing for the investigation meeting. She repeated her request for the meeting to be recorded.

116. Msgr Massey viewed the claimant's correspondence only as an attempt "to avoid the investigation meeting." He did not engage with the substantive points raised in the email. Again, Msgr Massey did not provide Mrs Lawrence with a copy

of that email, but rather advised her that the claimant was refusing to attend a meeting in person, would not attend an investigation meeting until she was aware of the allegations, and wanted the meeting recorded. Mrs Lawrence considered those requests and determined that it was better for her if the claimant attended in person, because she believed that an in-person meeting would "*not provide a suitable medium to enable a sufficiently rigorous dialogue to establish the facts of the case*." She took umbrage at the claimant's suggestion that she would not trust a note produced by the Diocese, believing it would affect her professional integrity to accept the claimant's request for it to be recorded, and so refused that request as well.

117. Mrs Lawrence had had some historic training in equality and diversity law through another role as the chair of governors for a multi-Academy trust, but had not received any training which specifically focused on mental health and, although she was aware of the existence of the ACAS code of practice, she did not consider it in reaching her conclusion that the investigation meeting should go ahead. She did speak with Mr Cook in that regard, but he did not inform her that the basis of the claimant's request for a remote hearing was connected to her anxiety and depression.

118. On 10 September 2021, Msgr Massey wrote to confirm Mrs Lawrence's decision that the investigation meeting would proceed on 13 September and that the claimant would not be permitted to record it, noting that the request was "*effectively questioning her professional integrity which itself is a very serious matter*." The letter was not emailed, as the other letters had been, but rather was sent by post; the reason for that choice is not immediately clear.

119. Prior to receipt of that letter, shortly after 8pm on 12 September, the claimant emailed Msgr Massey, stating that as she had not received written details of the allegations of gross misconduct, she would not be able to attend the investigation meeting and that she was still waiting for a response in relation to the format of the meeting.

120. Msgr Massey replied at 9:38pm on 12th September and the following terms,

> *"You have received everything that is legally required for such a meeting. Failure to attend will be treated as a significant refusal, and could have serious consequences."*

121. The claimant replied by email shortly thereafter, reiterating that she was suffering from extreme stress and anxiety and was not able to attend a face-to-face meeting as a result, adding "if you require medical evidence I will get letter from my doctor." She reiterated that she would not attend an investigation meeting until after the grievance meeting, and required a remote meeting and provision of the details of the allegations which were to be discussed in advance. Msgr Massey's evidence was that he did not regard the claimant's description of her health condition to be genuine and that he believed that if she had "facts to give" to meet the allegations she would have done so.

122. Once again, Msgr Massey did not share that email with Mrs Lawrence, nor did he respond to the claimant's proposal. He could provide no explanation for why he did not inform Mrs Lawrence that the reason for the claimant's requests was

connected to anxiety and depression. Neither Msgr Massey nor Mrs Murray informed Mrs Lawrence that Mr Cook had proposed a Teams meeting as an alternative and, again, neither could provide any explanation for that omission. Msgr Mssey and Mrs Lawrence discussed the claimant's request and considered that the claimant was simply trying to be obstructive and wanted the disciplinary "to be conducted on her terms not ours." Mrs Lawrence's evidence was that if she had been informed that the claimant was seeking a remote hearing as a reasonable adjustment because of her anxiety and depression she would have granted that request.

123. In a separate email exchange with Msgr Massey, the claimant requested access to her email account with the respondent for the purposes of producing evidence in support of the grievance.

124. On 13 September 2021, Mr McNulty, who had previously sent the claimant an agenda setting out the items which he believed the claimant wished him to explore as part of her grievance, received a call from the claimant confirming that she was happy to agree an agenda and advising him that she had received an email from Msgr Massey in relation to any failure to attend the investigation meeting that day which had left her "feeling very troubled and tearful." Mr McNulty informed Mr Cook that he had spoken to the claimant that morning, and informed him of the detail that discussion. Mr Cook instructed him not to speak to the claimant again until he had had the opportunity to speak to Mr McNulty.

(b) The respondent's disciplinary policy

125. The respondent has a disciplinary policy. The introduction to the policy identifies that poor job performance will normally be addressed through performance management systems and, as a last resort, through a capability procedure. It notes that in the case of persistent or wilful failure to reach appropriate standards the disciplinary procedure may be invoked.

126. The policy provides for informal discussions where performance is not at the required standard, moving to a formal disciplinary procedure where the required improvement is not demonstrated, or in circumstances where there has been any breach of Diocesan rules, procedures, or policies, or a breach of standards of good conduct, quality of work or performance.

127. Amongst the principles listed for the management of poor performance is the need for an employee's line manager to take prompt corrective action through informal coaching and counselling or, if the breach is serious, through the formal disciplinary procedure. The policy expressly provides that no formal disciplinary action should be taken unless the case has been fully investigated and, where applicable, written statements from witnesses had been obtained. Counselling is specified where minor breaches of rules or conduct occurred, or where job performance standards are deemed to be inadequate.

128. Summary dismissal is specified as being reserved for occasions where an employee commits an act of gross misconduct. Amongst the examples of gross misconduct listed is serious negligence which causes or might cause unacceptable loss.

(c) The investigation report.

129. On 13 September 2021, Mrs Lawrence conducted the investigation meeting in the claimant's absence. She reviewed the Financial Statements to 31 December 2019 and 2020, the Audit Finding Reports from 2017 to 2020 and some other documents (which did not include the memo accounts or journals and which she did not identify in the investigation report or her statement). Mrs Lawrence subsequently produced an investigation report in relation to the allegations on 24 September.

130. Although Mrs Lawrence was aware of the respondent's Disciplinary policy, she did not specifically refer to it in the production of her report. Given that her view (which she expressed to the Tribunal in her evidence) was that where there was an employee Handbook, containing a disciplinary policy, she would refer to that rather than the ACAS code of practice, that omission was surprising.

131. Mrs Lawrence made the following findings, which were necessarily largely dependent upon the evidence given by Mrs Lawes, as Mrs Lawrence did not consider any supporting documentation beyond that we have detailed, but instead merely asked Mrs Lawes whether it existed:

131.1. Handover to Mrs Lawes: the claimant had failed to conduct a handover and that failure was serious enough to be considered misconduct;

131.2. the accounts did not comply with Charities SORP (FRS 102) with the result that the unrestricted reserves of the charity were overstated by in excess of £1 million:

131.2.1. In December 2019, the claimant closed seven bank accounts and caused approximately £305,000 to be transferred into the main Diocesan bank account. The monies from the seven bank accounts were restricted funds, and no record was maintained to track the mix balances on that account. Further, the mixing of the funds placed the Trustees in breach of their duties to account separately for Restricted Funds. She found that was a serious failing in professional competency on the claimant's behalf.

131.2.2. The sale proceeds from the St Joseph's Mass Centre in Bath (which was sold in the 2019 financial year) of approximately £0.5 million were treated as unrestricted monies, despite a specific management instruction detailing how the fund should be accounted for.

131.2.3. Restricted Clergy Welfare Fund transfers: Mrs Lawrence stated that Endowment Funds were a separate class of Restricted Funds and should have been held separately and accounted for; but instead were transferred to general unrestricted reserves. Again, Mrs Lawrence stated that that was in breach of the relevant SORP.

131.2.4. Investment income on unrestricted funds; Mrs Lawrence found that the claimant should have allocated any investment income to the Restrictive/Endowment funds, but they were allocated to general unrestricted funds.

131.2.5. Other transfers; Mrs Lawrence found that the claimant had on three further occasions identified restricted fund items as unrestricted fund items.

131.3. Mrs Lawrence concluded that each of those matters was sufficiently serious to be treated as gross misconduct, and deemed the matter relating to the designation of the proceeds of Mass Centre to be a failure to follow reasonable management instruction.

131.4. Bank reconciliations: Mrs Lawrence found the claimant had failed to ensure that accounting records were up to date and maintained in compliance with Charity and Company law and accounting standards. Mrs Lawrence deemed the two incidents below to be gross misconduct:

131.4.1. adjustment to bank nominals: these related to concerns raised by the auditors in respect of movements into bank accounts. It was alleged that the claimant had stated that they were memo account movements when Mrs Lawes believed they were historic year-end adjustments and that the timing issues with transactions which had not been reversed.

131.4.2. Small charity bank accounts had not been reconciled for three years at the time the claimant commenced adoption leave.

131.5. Schools DFC: Mrs Lawes alleged that the bank account in which the Devolved Formula Capital received from the Education Skills Funding Agency had not been reconciled for three years. Mrs Lawrence did not herself investigate matter but deemed that to be gross misconduct.

131.6. Monthly Management Account Controls: Mrs Lawes stated there were no monthly management controls and no routine of producing schedules. Mrs Lawrence did not herself investigate the matter but deemed that to be gross misconduct.

131.7. Memo accounts: Mrs Lawes alleged that memo accounts had not been updated since 2017 in relation to restricted funds. Mrs Lawrence did not investigate that matter but deemed it to be gross misconduct.

131.8. Annual report and financial statements to 31 December 2019: Mrs Lawrence reviewed the documents noting that there were anomalies in respect of the restricted funds because the opening balances differed from the total and detailed notes to the accounts, but the closing balances agreed. Separately, an item had been incorrectly recorded in the cash flow as a positive number when it should be negative (the example given was the proceeds from the sale of plant). Mrs Lawrence deemed that to be misconduct.

131.9. Audit reports: Mrs Lawrence noted that in the 2019 Audit Findings Report two Audit and Accounting matters were included which had been present in previous reports: fixed asset register for parochial properties and investment properties. In respect of the latter Mrs Lawrence noted that no external valuations been obtained since 2016. She regarded that as gross misconduct.

131.10. The claimant's company (Parker Chapman Ltd) filed its accounts late: Mrs Lawrence concluded that failure to file accounts on time was a deliberate act or omission on claimant's part and concluded that it would bring the respondent into disrepute, and therefore was gross misconduct.

132. The last allegation was not one of the matters identified by Mrs Lawes, or Mrs Murray, but came into being as a disciplinary allegation solely as a result of Mrs Lawrence's actions.

The grievance

133. On 14 September 2021, the claimant was given access to her respondent's email account for the purposes of the grievance.

134. The claimant's grievance meeting with Mr McNulty occurred on 16 September. The claimant attended in person at the same address as had been scheduled for the investigation meeting and with the same notetaker. During the meeting the claimant stated that in light of the allegation of gross misconduct, all trust between her and the respondent had gone, and she could not see how she could return to work even if the allegations were dismissed.

135. Mrs Murray was interviewed in respect of the claimant's grievance on 29 September. In preparation for the meeting, she prepared a written response to the allegations in grievance. Mrs Murray addressed the complaints relating to the gross misconduct allegations in a specific section of that document; she recorded that at the HR Committee meeting on 16 July it was agreed that the claimant would be required to follow the procedures that had been implemented by Mrs Lawes, and that it was anticipated that the claimant would request working from home on her return to work. Mrs Murray than wrote as follows:

"It was agreed that this would be reviewed along will [sic] all the request to fit in with the requirements of the role and job description.

Things changed when JP forced the issue during the meeting on 29 July 2021."

136. During the grievance investigation meeting, Mrs Murray informed Mr McNulty that it may have been possible for the claimant's role to have been fulfilled on the basis of working full time, two days from home three days from the office but that was,

"if the person/manager was totally competent and able to fully support and manage their team, they would need to be flexible around meetings, with no impact on the business of working from home."

137. Mrs Murray also suggested that she would have been amenable to a job share, and that she had discussed that possibility with Mrs Lawes in February 2021, but Mrs Lawes had said that as result of what had come to light in the accounts she did not believe she could work with the claimant. Mrs Murray's account of that discussion was, we conclude, inaccurate and false: Mrs Murray spoke to Mrs Lawes in February, but her note records no discussion of part-time work and critically no reference to Mrs Lawes raising any concerns about the accounts or

being unwilling to work the claimant upon her return. Had there been such a discussion we are certain that Mrs Murray would have recorded it in her notes and would have explicitly raised it with Mr Cook and/or the HR committee. Furthermore, we note that Mrs Murray did not discuss the possibility of a job share with the claimant during the telephone call on 23 February. Moreover, Mrs Murray's account is inconsistent with that which she gave to Mr McNulty later during the grievance investigation meeting when she said at that the HR Committee meeting on 12 March,

> *"concerns were raised around Miss Parker's work processes.… It was agreed to meet with Mr Cook. The full extent of the issues were not highlighted until a July meeting with Mrs Lawes."*

(d) The disciplinary hearing

138. On 30 September, Msgr Massey cancelled the claimant's access to the respondent's IT systems on the grounds that he had only permitted it purpose of the grievance and not the disciplinary hearing.

139. On 3 October 2021 Mrs Lawrence made a formal report to the ICAEW under its misconduct procedures in respect of what she deemed to be the claimant's conduct which she believed constituted a breach of the ICAEW standards of conduct. She had sent the report before she had the benefit of the claimant's account in respect of the allegations.

140. On 5 October 2021, Msgr Massey sent the claimant a letter instructing her to attend a disciplinary hearing on 13 October 2021. Again, the letter was drafted by Mr Cook. Msgr Massey attached the investigation report and spreadsheets containing the Fixed Asset register and Reserve Transfers, both for 2020. He instructed the claimant to provide him with any other documents that she wished to rely on at least 24 hours before the hearing. Given that the terms of her suspension precluding her from attending the respondent's offices and the claimant's IT access had been cut off once again, it is difficult indeed to understand precisely what the respondent expected the claimant to be able to produce which could be relevant to her defence of the allegations. The claimant was told that if she failed to attend a decision would be made in her absence.

141. The letter set out the disciplinary allegations. They mirrored those detailed in the investigation report, but included one further allegations that the claimant had failed to follow a reasonable management instruction to attend the investigation meeting. It is unclear whose decision it was to add those charges, as they did not form part of the investigation report. The respondent did not explain who added the allegation in its evidence.

142. On 5 October 2021, the claimant responded to the disciplinary invitation letter. She queried why the investigation meeting had not been rescheduled, indicating that she was anticipating that that would have occurred as she had set out why she needed reasonable adjustments to the proposed process. She alleged that Msgr Massey appeared set on accelerating the process to achieve her dismissal and that she would not therefore receive a fair hearing if he chaired the disciplinary hearing. She requested that her IT access was restored so that she could respond

to the allegations, the majority of which she asserted were misconceived and did not constitute gross misconduct.

143. Msgr Massey referred that email to Mr Cook, commenting that he regarded her claims as 'outlandish.' Mr Cook drafted a letter in response which was sent to the claimant on 7 October agreeing to restore her access to emails and SAGE. The claimant replied, repeating her concerns about Msgr Massey's impartiality, his failure to acknowledge or respond to her concerns about her mental health and requesting that the meeting was held remotely.

144. The claimant sent three further emails to Msgr Massey on 7 October:

144.1. In the first, noting that emails for any account with the name Janet or Parker were blocked and that she regarded it as "a complete breach of trust;"

144.2. In the second, which was misaddressed, providing a self-isolation notification from the Government for the claimant, relating to Covid-19' and

144.3. In the last, querying certain of the allegations, in particular asking which SORP regulation had been breached; and which charity bank accounts had not been reconciled. That was not responded to.

145. On the same day, 7 October 2021:

145.1. the ICAEW wrote to Mrs Lawrence seeking further information from her in relation to the report that she had made; and

145.2. Msgr Massey emailed Mr Cook in relation to the claimant's request for the hearing to be conducted by TEAMS asking ,"do we agree to a remote hearing?" Mr Cook replied directing Msgr Massey to reject the request. It is necessary to quote that response at length.

> *"Absolutely not. This is far too important a meeting to be held remotely, when there is no barrier to JP attending. A remote meeting hinders a proper interactive dialogue, which is necessary to you to understand exactly what has taken place in order to make a properly informed decision.... It should be re-iterated that if she fails to attend you reserve the right to make a decision in her absence."*

146. We make the following observations about that exchange. First, it is abundantly clear that Msgr Massey was not only out of his depth in terms of the decision he was required to make, but, crucially, he had entirely abdicated the decision making to Mr Cook. Secondly, Mr Cook wholly failed to engage with the issue of the acuteness of the claimant's mental health symptoms and whether they would or might have any impact on the fairness of the hearing, whether in terms of her ability to present a response to the allegations or more broadly to participate effectively within it. His focus appears to have been solely on completing the disciplinary process as soon as possible, irrespective of whether proceeding in that manner was fair.

147. On 8 October 2021, the claimant emailed Msgr Massey seeking some particularisation of the allegations relating to Parker Chapman Ltd, given the acts

or omissions which were said to have brought the respondent into disrepute were not detailed in the disciplinary allegations.

148. By 10 October the claimant had made some progress in responding to the disciplinary allegations. She emailed Msgr Massey advising him that she had a considerable body of evidence to present to respond to the allegations and querying how she should present the evidence. There was a discussion about the provision of a projector for her to do so.

149. On 11 October, the claimant received the response to her grievance. Her grievances were rejected. Separately, she emailed Msgr Massey requesting a postponement of the hearing from 13 to 15 October because the process of compiling the documents necessary to mount her defence of the allegations and the historic nature of the some of the events which were formed part of those allegations was causing her to be very stressed. She wrote,

> *"I would like to make it clear that I am NOT trying to avoid the disciplinary hearing, but given my current health problems and having to bring myself up to speed again after over a year's leave, I need more time to finish compiling my response."*

150. Msgr Massey emailed Mrs Murray and Mr Cook in relation to that request. He indicated that he did not wish to agree to postpone, writing "my own mental health has been impacted by this process and I need it to come to a speedy conclusion." He proposed that it might be possible to agreed that if all the allegations were not covered during the disciplinary hearing it would be possible to conduct a remote video hearing to address the remaining allegations. We pause to note that Msgr Massey had again entirely failed to turn his mind to the pertinent issues which were ensuring a fair disciplinary hearing, addressing the need for the claimant to have sufficient time to prepare, and conducting the hearing in a format that enable her to participate effectively. Msgr Massey's focus on his own mental health was utterly misguided. Nevertheless, neither Mr Cook nor Mrs Murray drew those factors to his attention.

151. Instead, Mrs Murray replied to confirm that Mrs Lawrence was not available on the proposed postponed date and was travelling down that afternoon. Again, that was to focus on the inconvenience caused to the respondent, not on the need for a fair hearing.

152. Msgr Massey refused the claimant's request. The claimant phoned Msgr Massey on 12 October; she was in deep distress, very tearful and was suffering from anxiety in relation to the suggestion that she would be dismissed if she did not attend the hearing. She had suffered several panic attacks since receiving the disciplinary allegations letter on 5 October. Msgr Massey was indifferent to the claimant's health, her concerns about a fair hearing and the process generally. In his evidence to the Tribunal, he described that Mr Cook's advice had been that the entire disciplinary process should be completed on the day. That attitude imbued his approach to his discussion with the claimant. He told the claimant that if she did not attend, he would make the decision whether to dismiss her in her absence. The claimant understood from that that she would inevitably be dismissed. The claimant broke down in tears; Msgr Massey was unmoved.

(e) The claimant's written response to the allegations

153. The claimant therefore stayed up all night trying to prepare a written response to the allegations. Her response was 13 pages long; she emailed it to the respondent at 7am on the morning of the hearing.

154. In the response the claimant identified that she had been diagnosed with stress, depression and anxiety, that her mental health had deteriorated through the period of August to October, and that she had been having panic attacks and had been prescribed medication to manage her depression and anxiety.

155. She noted that Mrs Lawrence had only interviewed Mrs Lawes and had not considered the primary financial records and raised concerns that Mrs Lawrence and Mrs Murray worked together on a number of committees and were friends. She addressed the specific allegations as follows:

155.1. She set out the history of the process of fostering and adoption, identifying had it had been impossible for her to conduct a handover because she had begun leave to foster her child prior to the recruitment of Mrs Lawes. She refuted the account of Mrs Lawes in relation to the handover meeting that had taken place on 23 September. She refuted Mrs Lawrence's suggestion that a handover pack had been prepared by the claimant's predecessor which had been given to the claimant.

155.2. In relation to Mrs Lawes reported account to Mrs Lawrence, the claimant raised concerns as to why Mrs Lawes had conducted a pseudo audit of the accounts going back to 2017 and who had provided her with instructions to do so.

155.3. *Allegation 1(a) the closure of the Priest Retirement Fund*, the claimant refuted the allegation and asserted that the funds were not moved into unrestricted accounts, rather that the Reserve Memo accounts recorded that the funds were restricted, although they were held in the main bank account;

155.4. *Allegation 1(b) Sale of St Joseph Mass Centre* the claimant disputed the allegation. She denied that she had received an instruction as alleged, noting that the only email relating to the purported instruction was from an individual who was not her manager, did not have authority to direct how to allocate funds from sales, and consisted only of a proposal which had not formally been agreed. That email predated the sale by 6 months. The claimant noted that neither Mrs Murray (who reviewed the monthly management accounts on a monthly basis) or the Finance, Property or Clergy Welfare committees or Board of Trustees had raised any concern at the time. She observed that designated funds were unrestricted and not restricted.

155.5. *Allegation 1(c) Restricted Welfare Fund transfer* – the claimant refuted the allegation, noting that the journal showed that the funds had been moved to a restricted reserve memo account.

155.6. *Allegation 1(d) Investment income on restricted funds* – the claimant refuted the allegation. She asserted that the Investment Committee were

responsible for the distribution of income from the fund, who determined the distribution of the income biannually, and that the income had been paid out in accordance with their instructions. She noted that the Charity Statement of Recommended Practice ("SORP") FRS102 permitted Trustees (the Investment Committee) to diverge from the recommended approach to the treatment of income, and that s. 2.18 SORP permitted income from endowments to be transferred to unrestricted funds. Further s.2.24 SORP did not prescribe that the only method of spending income from restricted funds was by adding it to the fund from which the income was derived; other methods were permitted. She noted that income derived from restricted funds was transferred to the relevant budget in unrestricted funds, but the reserve movement was recorded on the SOFA. She observed that the auditors had never raised any concerns with that process.

155.7. *Allegation 1(e) other transfers* – again the claimant refuted the allegations. She stated that restricted funds were transferred to the unrestricted budget to cover expenditure, but were listed in the capital budget and were signed off by the Finance Committee and the Trustees. She noted that she had developed transfer lines in the management accounts to show which funds were being utilised from restricted and designated funds so that the Trustees could understand what was funded by revenue and by capital (reserves) and all were recorded as transfers on the SOFA.

155.8. *Allegation 2(a) Adjustment to bank nominals* – the claimant refuted the allegation. She accepted that there was an anomaly in the Schools DFC account but asserted that a project had been put in place to investigate and resolve it. She disputed that she had told the auditor that they were only memo account movements but had suggested that might be a possibility; but she had been on leave at the time the query was raised. In any event the account was not part of the Diocese reserves.

155.9. *Allegation 2(b) Charity Bank accounts* – the claimant noted she had not had time to check the alleged reconciliations, but the accounts were all managed through one bank account and the amounts involved would be immaterial.

155.10. *Allegation 3 Schools DFC account* – the claimant refuted the allegation. She noted it was a known issue due to a prior employee's failure to reconcile the balance sheet accounts. She stressed that Mrs Murray had been aware of that anomaly and the consequent issues for several years and that the claimant had a project to resolve the issue and an employee with the necessary skills had been recruited in September 2020. The balances were managed with the Knowledge and approval of the Trustees and Mrs Murray by a third party, Hookways. The claimant had set up the necessary spreadsheets and account codes before going on leave.

155.11. *Allegation 4 Monthly Management Account Controls* – the claimant refuted the allegation; stating that she designed and built new management account spreadsheets and that Mrs Murray had previously praised her management accounts on many occasions. She reported that the year end spreadsheets and working schedules she produced linked directly to Sage and

produced all the calculations for the statutory accounts.

155.12. *Allegation 5 use of memo accounts* – again the claimant refuted the allegation. She stated that she had developed new charts for the accounts and a method of tracking reserves in Sage which included the use of memo accounts which identified funds, CIF and GDF balances. She asserted that the reserve memo accounts had all been updated and the allegation that they had not since 2017 was simply false.

155.13. *Allegation 6 Review of Annual Report and Financial Statements to 31 December 2019* – the claimant stated that she had not had time to review the allegations, but they appeared petty. The claimant explained that her practice had been to have the draft accounts reviewed by the auditors and proofread by others, such as Mrs Murray, to identify and correct typographical errors. She noted that she had not done that for the 2019 accounts as she was on adoption leave.

155.14. *Allegation 7(a) Audit Reports: fixed asset register* – Generally, the claimant noted that the Audit Findings report was produced by the auditors and not updated by her, but she had email trails showing discussions relating between her and the auditors in relation to issues they identified; however, for these accounts the claimant had been on adoption leave. In relation to the specific allegation, the claimant asserted that she had identified the anomalies and brought them to the auditor' attention, proposing that the register was not fit for purpose and would be migrated to Sage, and had emails evidencing that.

155.15. *Allegation 7(b) Audit reports: Investment Properties* – the claimant refuted the allegations; she stated that there was no requirement for an external valuation and that the properties were valued annually by an internal chartered surveyor with the auditor's and Trustees knowledge and approval and she had emails to prove it.

155.16. *Allegation 8* – The claimant queried the relevance of the allegation, noting that there was no evidence that the respondent had been brought into dispute, but stated that she had good reason for the late filing of her returns and the issue had been resolved.

156. The claimant concluded by noting that her appraisals had been positive and there had been no issue raised about her performance until she challenged Mrs Murray in relation to her flexible working request. She asserted that the allegations were the product of a campaign to seek to identify minor errors to construct a false pattern to incriminate her. She reiterated that she did not have sufficient time to prepare a full response to the allegations.

157. We pause to note that the claimant had therefore identified for following necessary lines of enquiry:

157.1. Handover – the need to speak to Mrs Lawes to verify whether there had been a teams discussion etc and for how long;

157.2. Priest Retirement Fund – a review of the reserve memo accounts;

157.3. St Joseph Mass Centre sale – locating the 'instruction' which was alleged to have been breached;

157.4. Restricted Welfare Fund – location and reviewing the relevant journal entries

157.5. Investment income – obtaining and reviewing the minutes of the Investment committee to verify whether it had given the claimant the instruction she argued for

157.6. Other transfers – obtaining and review the relevant minutes of the finance committee to verify whether it had instructed and approved the transfers to unrestricted funds

157.7. DFC – speaking to Mrs Murray to verify whether the claimant had raised the issue with her and whether a process for rectifying the anomalies had been put in place with her knowledge and approval.

157.8. Monthly management accounts – review of 1:2:1 and appraisals notes and discussion with Mrs Murray to see what concern if any had been raised about the monthly management accounts and the processes adopted to produce them.

157.9. Reserve Memo Accounts – reviewing them to see whether they had in fact been updated since 2017

157.10. Fixed asset register – searching the claimant's email account and/or that of Mrs Murray for emails to and from the auditors and the claimant in relation to the reconciliation.

157.11. Valuations – interviewing Mrs Murray and/or other relevant trustees to verify whether the process of internal valuations had been approved as alleged.

<u>The disciplinary hearing 13 October 2021</u>.

158. The claimant attended the hearing in person. Msgr Massey and Mrs Lawrence attended for the respondent.

159. Mrs Lawrence conducted the hearing; Msgr Massey spoke only twenty times throughout the two and half hours it lasted. During the meeting the claimant endeavoured to find evidence in relation to the points raised and sent it to Msgr Massey and Mrs Lawrence.

160. Mrs Lawrence ran through the claimant's response, asking questions about it and asserting that the position set out in the investigation report was correct; her approach was overly hostile and aggressive; that is apparent even from the minutes (as detailed below), but we accept the claimant's evidence that Mrs Lawrence spoke to the claimant 'as if she was a naughty school child' and that she was humiliated and degraded by Mrs Lawrence's attitude and demeanour. In particular, the minutes show that during the hearing, Mrs Lawrence:

160.1. Admonished the claimant for the late presentation of her response to the allegations (thereby failing to address the claimant's repeatedly raised concerns that she had had insufficient time to prepare).

160.2. Referred to the claimant's adoption leave as 'holiday' – at this stage the claimant became deeply distressed and tearful.

160.3. Asserted that it was for the claimant to disprove the allegations (and by implication, not for the respondent to demonstrate they were soundly based). In particular, she raised that argument when the claimant suggested that there was no evidence that the late presentation of accounts for her firm, Parker Chapman Ltd, had brought the respondent into disrepute.

160.4. Asserted that the claimant had had sufficient time to prepare for the hearing;

160.5. Asserted that the claimant had provided no evidence that she was not well enough to attend the hearing (immediately after the claimant had said that she was being treated for depression, panic attacks, was not sleeping and was taking prescribed medication).

160.6. Asserted that the claimant had not operated to the standard expected by the ICAEW's Code of Ethics because she had accepted journal entries made by other staff. Mrs Lawrence made that allegation in relation to a transfer of £500k from the sale of the St Joseph Mass Centre which had been made by Adrian Rogers in 2016. Mrs Lawrence asserted that the claimant must have given an instruction to Adrian Rogers. She had not a shred of evidence for that assertion.

160.7. Asserted that all bank accounts should be treated as restricted;

160.8. Asserted that SORB required that income from endowments was attributed to a restricted fund;

161. During the hearing the claimant raised the following matters (in addition to the points raised in her written response):

161.1. she required more time to respond to the allegations. In relation to allegation 1; she needed more time to obtain the screen shots which would show that the memo accounts tracked all restricted funds, and she would need time to look back to identify the transfer made by Adrian Rogers.

161.2. The Investment Committee provided instructions on the use of income from endowments, and the Trustees, which included Msgr Massey, had approved the approach she had taken in reflecting that in the accounts. She had never been instructed by the Trustees or the auditors (despite having discussed it with the latter) that her accounting method was unlawful or inappropriate because it was necessary to provide a separate budget for restricted and unrestricted funds. She complained that Mrs Lawrence had not looked at the information on Sage and the management accounts which recorded the differentiation of the funds.

161.3. In relation to allegation 4 – monthly management accounts, the claimant reported that she had trained another employee so that she could produce monthly management accounts;

161.4. In relation to allegation 5 - memo accounts: the claimant had informed Mrs Lawes that she needed to complete journals to reconcile the memo accounts with the spreadsheet.

161.5. In relation to allegation 6 – production of 2019 Financial Statements – the claimant thought including a complaint that there was a typo in the charity number was 'petty' and she had told Mrs Murray of adjustments that needed to be made and Mrs Murray had confirmed that she would make them.

161.6. In relation to allegation 7 – Audit finding reports: the claimant had discussed the audit findings and the necessary corrections at finance meetings when Mrs Murray was present. The auditors had agreed that the difference in the fixed asset register and accounts was not sufficiently material to require an amendment to the accounts; it had been discussed every year and adjustments had been made.

162. Each of those matters required some limited further investigation before a conclusion on the disciplinary actions could reasonably been reached on them.

163. Towards the end of the meeting, when the claimant had raised the fact that she was being treated for depression and panic attacks, and after Mrs Lawrence said that the claimant had no evidence to demonstrate that, Mrs Larence asked whether she was fit to attend. The following exchange ensued (as it is recorded in the minutes):

JP - I don't know if I am fit to attend. I have not had a panic attack this morning. I can clearly see that you do not believe me from tone of your voice.

CL – No, I said it was good to know you have not had a panic attack

164. The claimant alleges she said that she had not had a panic attack as she had taken her medication and that that Mrs Lawrence said "that's good" in a mocking manner; Mrs Lawrence denies that. We resolve that dispute in our findings below.

165. At the close of the meeting, Msgr Massey said that he believed he could make a decision in half an hour. He had not at the stage read or considered all of the documents produced by the claimant to support her defence, nor had he conducted any investigation of those matters we have detailed arising from the claimant's written response to the allegations or the points she raised in the hearing.. He was unable to provide any credible explanation as to why he did not chose to adjourn the disciplinary to enable the claimant to submit the documents she wished to answer the allegations (even if limited to those where she had expressly said that she had had insufficient time to respond to them) or to allow him to read them and consider them before making his decision, as he had proposed to Mr Cook on 11 October. He provided no explanation for his decision not to conduct any further investigation into any of the points the claimant had raised.

The dismissal

166. The meeting finished at 12:21; it had lasted just under two and a half hours. At 14:38 Mr Cook emailed Msgr Massey a draft dismissal letter, noting that Msgr Massey would need to provide his findings in relation to each of the allegations, taking into account the claimant's explanations and Mrs Lawrence's "view/questioning."

167. At 16:07 on 13 October 2021 Msgr Massey emailed the claimant a letter confirming that she was dismissed for gross misconduct with immediate effect. No reasons for that outcome were included in the letter. On 16 October 2021, in response to a request for reasons for the claimant, Msgr Massey emailed the claimant a further copy of the disciplinary allegations against which he had simply written 'proven' or not 'proven.' He found as follows:

167.1. *allegation 1 – Non compliance with SORP*: (a) – (d) proven; (e) 'partially prove' (although he provided no explanation of what the meant);

167.2. *Allegation 2(a) Adjustment to bank nominals* – proven.

167.3. *Allegation 2(b) Charity Bank accounts* – proven

167.4. *Allegation 3 Schools DFC account* – not proven.

167.5. *Allegation 4 Monthly Management Account Controls* –partially proven.

167.6. *Allegation 5 use of memo accounts* – partially proven.

167.7. *Allegation 6 Review of Annual Report and Financial Statements to 31 December 2019* – proven.

167.8. *Allegation 7(a) Audit Reports: fixed asset register* – Proven.

167.9. *Allegation 7(b) Audit reports: Investment Properties* – 'insufficient information but partially proven.'

167.10. *Allegation 8 – Parker Chapman* - proven.

168. The letter contained no conclusion in relation to the allegations which had been added that the claimant had failed to comply with a reasonable management instruction to attend the investigation meeting, and had failed to carry out a proper hand over. Further the letter contained no analysis of the evidence or the points that Msgr Massey had found 'proven,' no assessment of whether the proven conduct was misconduct, gross misconduct generally or by reference to the respondent's disciplinary policy, no reference or assessment of mitigation, and no expression of how the conclusion that the appropriate sanction was gross misconduct had been reached.

The claimant's post termination emails

169. The claimant emailed her team members on the evening of 13 October 2021, informing them of her dismissal, recording that she would appeal but that she would

not return to her employment even if she won the appeal.

170. Later that evening, the claimant emailed Mrs Murray, writing "there is just one thing I always wanted to say to you. Now I can. Fuck off you bitch." In two social media posts sent to her friends (which included some of the respondent's employees), she again referred to Mrs Murray as "my bitch of a boss" and wrote "Clifton Diocese – you asked for it, and I am coming for you. Nolite te bastardes carborundorum, *bitches*" attaching to the remarks an image from *The Handsmaid's Tale* by Margaret Attwood.

171. Upon receipt of Msgr Massey's email of 16 October, the claimant replied "re your reasoning for your decision – are you f**king kidding me? I need more information that proven/partially proven. You had better come up with something better for the appeal."

172. On 18 October 2021, the claimant downloaded the entire SharePoint file for the financial department. She did so in order to secure evidence to present as part of her appeal. The respondent subsequently referred the claimant to the police in respect of the download, and, rather than face a criminal trial in relation to the allegations, the claimant accepted a police caution.

<u>The appeal</u>

173. On 19 October, the claimant appealed against her dismissal. Her grounds of appeal were that the allegations had inappropriately been classified as gross misconduct, but should have been raised as performance issues, and that the process was unfair, in particular:

173.1. her mental health and its effects had been ignored throughout the process, despite the claimant offering to provide evidence of it, both in relation to the investigation meeting and the disciplinary hearing (in respect of the latter the claimant's request for a remote hearing had been refused, and it had been intimated that the claimant would be dismissed if she did not attend in person), and she had been mocked by Mrs Lawrence during the disciplinary hearing;

173.2. the investigation had been completed without any reasonable attempt to obtain information from the claimant or her staff;

173.3. the investigation was not impartial because Mrs Lawrence had a close working relationship with Mrs Murray;

173.4. the claimant was given insufficient time to prepare for the disciplinary process, which was rushed; the claimant was not permitted time after the hearing to submit additional evidence and was unable to present the evidence she had because the respondent had failed to take the necessary steps to secure a projector and screen;

173.5. the disciplinary was conducted by Mrs Lawrence, who had conducted the investigation;

173.6. the disciplinary outcome was predetermined and the hearing was conducted to intimidate and harass her.

174. On the same day Mrs Lawrence emailed Mrs Murray and Mr Cook a draft letter which included the reasons for the dismissal, which she purported to have recorded from her discussions with Msgr Massey. The respondent did not explain why it was necessary for Mrs Lawrence to have drafted the letter rather than Msgr Massey setting out his reasons for his conclusions.

174.1. In relation to the allegation 1 - breach of SORP, the letter recorded that the knowing transfer of funds from a restricted bank account to an unrestricted bank account were in breach of the SORP because it failed "to properly account for the restricted monies [sic]." Additionally, the letter concluded that

174.1.1. The sale proceeds from St Joseph's centre had been recorded as unrestricted, despite being designated funds, and that the claimant's account that she would need time to identify what had happened with the £500k transfer made by Mr Rogers was not accepted, because the claimant had researched other allegations in the ledgers.

174.1.2. The allegation relating to the Clergy Welfare fund was proved because the claimant had been unable to demonstrate that the £45,000 had been transferred to the Clergy Welfare Fund as restricted funds, although it was accepted that there were £74,000 of transfers to the fund that year.

174.1.3. The allegation relation to the income of endowments was proven as the claimant's explanation that SORP section 2.24 was advisory not mandatory was rejected and that the claimant identified restricted funds in memo accounts and schedules was not accepted, because it was not accepted that SORP was advisory and further the claimant had been unable to produce the relevant memo account schedule for the funds.

174.2. Allegations 2a and 3 were not proven as the claimant had proved that she had put in place corrective actions.

174.3. Allegation 4 management accounts was partially proven because whilst the claimant had shown that she had produced schedules and that there were checklists for her staff to follow, it was concluded that they were not sufficiently robust.

174.4. Allegation 5 - memo accounts was partially proven because the claimant had not been able to produce comprehensive evidence that the memo accounts had been updated, although there was evidence of some journal entries showing updates reflecting certain transactions.

174.5. Allegation 6 - Financial statements was proven as the claimant had accepted that the cashflow statement she had produced noted the errors but the claimant had not corrected them and said that auditors must have accepted the errors.

174.6. Allegation 7 in relation to the Audit report were proven because whilst the claimant had identified that there were errors in the fixed asset register and had corrected some, others had been left on the basis that they were

'immaterial' and would be reconciled when the register was transferred to Sage. The allegation relating to the investment asset valuation was partially proven because the claimant had not adduced evidence to show that she had considered the new SORP or how or why she considered the continued valuation by a Diocesan officer rather than an external valuer was appropriate.

174.7. Allegation 8 – Parker Chapman was found proven because the claimant had not offered any explanation or mitigation for the fact that the accounts were filed late.

174.8. Allegation 9 – failure to comply with a management instruction to attend the investigation meeting was found proven. The claimant's explanation of her health was not accepted and the writer noted that the claimant had attended a grievance meeting three days later.

174.9. Allegation 10 – failure to conduct a proper handover. The allegation was found proven on the basis that a handover document had previously been prepared, entitled 'Magnum Opus.'

175. On 21 October Mrs Lawrence emailed the ICAEW in relation to her referral of the claimant to them. She provided a copy of the information she had used to prepare her investigation report and a copy of the claimant's 13 page letter in response to the allegations.

176. On 12 November 2021, the ICAEW wrote to Mrs Lawrence seeking further evidence in relation to her referral. The ICAEW:

176.1. Asked Mrs Lawrence to confirm why holding restricted and unrestricted funds in one bank account resulted in a breach of the Charity accounting regulations; it was evident from that the ICAEW did not regard the point as so obvious as not to require further explanation and that Mrs Lawrence's interpretation may be incorrect;

176.2. Noted that the documentation provided to ICAEW showed that the money received from the Sale of St Joseph's Mass Centre should have been treated as designated "which is effectively unrestricted."

176.3. Asked Mrs Lawrence to provide any document which showed that the income from the endowments should have been treated as restricted and not unrestricted;

176.4. Noted that the draft audit findings showed only one reconciliation error of £833; and

176.5. Asked whether the auditors had picked up the errors in the 2019 financial statements.

177. Mrs Lawrence did not provide that ICAEW letter to Mrs Hipkiss for her consideration as part of the appeal.

<u>The appeal</u>

178. An appeal was arranged before Mrs Hipkiss and Ian Burrell, a qualified accountant and member of the ICAEW, on 17 November 2021. Mrs Hipkiss was a Trustee who sat on the HR Committee, she was therefore aware of the background to the disciplinary issues, if not the specific details. She had previously conducted disciplinary appeals in her employment for the NHS and in the private sector. She had received equality and diversity training.

179. The appeal was by way of a review. Although it is not material to this Judgment, Mrs Hipkiss simultaneously considered the claimant's grievance appeal at the hearing.

180. In developing her appeal against her dismissal, the claimant raised her concerns about the insistence that the investigation meeting should take place in person, despite her requesting a remote meeting, that it proceeded in her absence, and that Mrs Lawrence had only considered the financial statements and accounts but did view the memo accounts or the supporting schedules and notes which underlay them. New grounds of her appeal were that Msgr Massey had not acknowledged that the approach taken by the claimant in relation to two allegations had been agreed by Trustees, including Msgr Massey himself in meetings. Additionally, the claimant argued that the allegations of gross misconduct were not justified as there was no financial loss to the respondent. She noted that at least one 'proven' allegation was not included in the dismissal letter but was included in the reasons for dismissal. The claimant agreed to send Mrs Hipkiss the evidence she relied upon.

181. Mrs Hipkiss closed the meeting and indicated that she would need to conduct further investigations.

182. The Claimant notified ACAS of the dispute on 14 October 2021 and the certificate was issued on 24 November 2021.

183. On 29 November the claimant sent Mrs Hipkiss a zip file of relevant email correspondence. On 30 November the claimant sent Mrs Hipkiss a folder or relevant evidence. Amongst the evidence were the following documents:

183.1. The minutes of the Respondent's Audit Committee of 24 February 2021 which was attended by Msgr Massey, Mrs Murray and Mrs Lawes, which noted that "the issue of revaluing investment properties was raised. This is in hand and is being done in house… which is acceptable to the auditors." Additionally, Msgr Massey reported that the Trustee's modus operandi (from an audit perspective) had been reviewed in 2017 and found to be satisfactory, and that the Trustees received better information than in the past.

183.2. An email from the claimant to the auditor, copied to Mrs Murray in August 2020, discussing draft audit findings and explaining adjustments to the fixed asset register. The email trail showed that the issue had first been raised by the auditor with Mrs Murray.

183.3. Confirmation that Mrs Murray had filed the respondent's Annual return late in 2020 and the respondent had had to pay a late payment charge.

183.4. The minutes of the respondent's investment sub-committee in May 2018 attended by Msgr Massey in which the distribution of income from CIF investments was discussed and approved by the Trustees.

184. On 30 November the claimant emailed Mrs Hipkiss a 12-page summary of her position in light of the evidence she had provided. She asked why she had not been provided with a copy of the Magnum Opus handover book which was relied upon to uphold the allegation of gross misconduct in respect of the handover. The additional points she raised were that:

184.1. Allegation 1(a) – the closure of the Priest Retirement fund was approved by the Finance Committee which was attended by Msgr Massey but he had not raised that during the investigation or the disciplinary meeting. She reiterated the central argument relating to the process of holding restricted and unrestricted funds in a single account.

> *"If fund accounting is managed correctly there is no need for restricted and unrestricted cash balances to be held in separate bank accounts. The tracking of unrestricted, restricted and designated funds can be successfully managed in the ledger with an appropriate chart of accounts."*

184.2. Allegation 1(d) – the £45k unallocated endowment income was posted to the Clergy Welfare Fund with the approval of the auditors. The funds were transferred to the Fund which consisted of a restricted reserve account; the allegation, the claimant argued, was simply wrong. The claimant identified that the transfer was shown in the 2017 accounts, and demonstrated how the £74k in question shown in the accounts had been composed.

184.3. Allegation 1 (e) – the CIF dividend had been determined by the Trustees as shown by the minutes, but Msgr Massey did not raise that fact during the disciplinary hearing.

184.4. Allegation 2 – the claimant noted that her predecessor had not reconciled the accounts for 9 years at the point the claimant took up her post, but was no charge of gross misconduct had been levelled at her. However, the claimant noted that Sage screenshots for the memo accounts showed the movements in the charity bank account of income and expenditure.

184.5. Allegation 4 – the claimant noted that her monthly spreadsheets had automated checks within them which necessarily produced the required control for the monthly management accounts.

184.6. Allegation 5- the claimant relied upon Sage screen shots to show that the reserve memo accounts had been updated in 2018 and 2019; she argued that the completion of the 2019 journals and their posting to Sage had been referred to Mrs Lawes.

184.7. Allegation 6 – the claimant argued that she had not completed the 2019 accounts and financial statements, but had only prepared draft accounts and the auditors had not completed their audit. She accepted that she assisted with

the auditor's enquiries, but it was Mrs Murray who produced the finalised accounts.

The ICAEW Outcome

185. On 5 January 2022 the ICAEW wrote to Mrs Lawrence providing an outcome to her referral in respect of the claimant. Of relevance to these claims are the following outcomes:

185.1. That the claimant failed adequately to account for restricted funds when transferring funds from the Priest retirement restricted fund into the respondent's main bank account: there was no evidence to show that the claimant had failed to adequately account for restricted funds or to demonstrate "how keeping the charities funds together in one bank account results in a breach of Charity accounting regulations."

185.2. That the claimant failed adequately to account for the sale proceeds of the St Joseph's Mass Centre as restricted income: there was no evidence to support the allegation, but the evidence provided suggests "that the income should have been treated as designated funds which effectively are unrestricted funds."

185.3. There was no evidence to suggest that the claimant had failed to undertake controls over the charity bank accounts, the draft audit findings identified only one error relating to a closed bank account of £833.

185.4. That the claimant produced 2019 financial statements with various fundamental errors, including notes not agreeing to primary documents, and errors in the cash flow statement: "whilst there are certain errors in the 2019 financial statements… It was unclear who had control over the financial statements once the audit started, if they were as a result of audit adjustments and if they were identified by the auditors."

186. Mrs Lawrence's complaints against the claimant were therefore entirely rejected. However, Mrs Lawrence did not provide Mrs Hipkiss with a copy of the outcome letter during her discussion with her relating to the claimant's appeal (as detailed below) or at any time after its receipt before the appeal outcome was produced.

187. Mrs Hipkiss met with Mrs Lawrence to ask her whether the new documents would have led her to conclude that there was sufficient mitigation to reduce the disciplinary finding from gross misconduct. She also met with Mrs Murray in relation to the respondent's procedures and systems and with Msgr Massey, although it is unclear what was explored with him. No note of those discussions was produced and the claimant was not advised of the evidence they provided or offered the opportunity to respond to it before the disciplinary outcome was produced.

The appeal outcome

188. On 13 January 2022, Mrs Hipkiss sent the claimant an outcome to her appeals

rejecting them. In relation to the disciplinary allegations, the outcome letter did not identify which allegations were found proven or why, and Mrs Hipkiss was unable to explain what conclusion she had reached in relation to each at the time of the Tribunal hearing. In relation to the specific allegations the letter recorded as follows:

188.1. Allegation 1(a) it was accepted that the closure of the bank account was part of an approved strategy and that it was acceptable to transfer the funds into a single account, provided there was an accounting trail. Mrs Murray alleged that there was no journal entry in the nominal ledger from the funds transfer from the Priests retirement fund. The claimant had accepted that there was an error in the spreadsheet analysis for the reserves (which was part of allegation 6). Mrs Hipkiss did not reconcile or resolve whether the memo accounts contained the relevant record as alleged by the claimant. There was no clear finding on whether there was any misconduct, and if so whether it could be characterised as gross misconduct.

188.2. Allegations 1(b) and (c) – the claimant had made journal entries in the memo accounts recording and tracing the movement of the restricted and unrestricted funds; Mrs Murray had confirmed that. The claimant had been instructed to post to an unrestricted account which she did. The allegations relating to the failure to produce records and to comply with management instructions was therefore unfounded. Mrs Hipkiss observed that the funds should have been placed into a designated unrestricted account, not a general restricted account. She provided no basis for that assertion and had not seen the ICAEW letter requesting Mrs Lawrence to identify the legal basis for it. Mrs Hipkiss did not indicate whether she reached any conclusion as to whether that conduct was misconduct and, if so, whether it could be characterised as gross misconduct gross misconduct.

188.3. Allegation 1(d) – it was agreed that it was not a material item and was historic, however, Mrs Hipkiss recorded that “all agreed” that the records should have been “much better to meet accounting disclosure standards”, and that responsibility for that lay with the claimant. The claimant had not agreed that there was a proper distinction within SORP distinguishing between designated and unrestricted accounts; and Mrs Hipkiss did not identify any basis from the SORP for that conclusion, nor did she express any conclusion as to whether there had been misconduct and, if so, whether it constituted gross misconduct.

188.4. Allegation 1(e) and (f) – it was noted that as the error was not restated in the 2020 accounts it was not considered material.

188.5. Allegation 2(b) it was noted that the absence of reconciliation for the small charity bank accounts did not constitute good control, but that it was not a material concern.

188.6. Allegation 4 Monthly management accounts – it was noted that the claimant had routines in place for her and the staff, but they were undocumented and therefore lacked robustness. Mrs Hipkiss noted that Mrs Murray had said that she had raised that issue with the claimant in 1:2:1s. Mrs

Murray's account was false; the 1:2:1 did not raise such a concern. Mrs Hipkiss did not express a view as to whether in those circumstances she concluded that there was any misconduct, and, if so, whether it was gross misconduct.

188.7. Allegation 5 – updating memo accounts - it was noted that the claimant argued that she had master spreadsheets which she updated once the accounts were signed which she then posted to Sage. Mrs Hipkiss did not resolve whether there were accounting errors in the memo accounts, as Mrs Lawrence had alleged, but concluded that the claimant's method appeared not to be adequate or robust. Again, she did not indicate whether that amounted to misconduct and, if so, whether it constituted gross misconduct, although she recorded that it had been classified as a "serious disclosure error.

188.8. Allegation 6 – anomalies in the Annual Report and financial statements – it was noted that the claimant accepted that there were errors, but argued that she was not responsible as she as on adoption leave. Mrs Hipkiss observed that the claimant could have produced a checklist of any outstanding anomalies at the point she began leave. She found that the claimant was responsible for the error in the cashflow statement by which a positive entry had been recorded as a negative and a negative as a positive and, that as the cash flow statement was a primary and important document, that was a serious error. She did not indicate in the letter whether she regarded that as misconduct or gross misconduct.

188.9. Allegation 7 – in relation to the audit report it was noted that the claimant had argued that she had been reviewing historic issues with the fixed asset register with the knowledge of the auditors, albeit the process been delayed. In relation to the valuation of investment properties, it was noted that the 2020 published accounts had followed the same process and Mrs Murray agreed that it was standard practice for the Head of Property to carry out re-evaluation of investment properties. Mrs Hipkiss did not record any conclusion as to whether there was therefore any misconduct.

188.10. Allegation 8 – Parker Chapman Ltd; the letter expressed no views at all in relation to the allegation;

188.11. Allegation 9 – failure to comply with a reasonable management instruction. In considering this allegation, it is clear that Mrs Hipkiss had not understood that the claimant had a pre-existing mental health condition that was being treated with medication or that Msgr Massey knew as a consequence of the claimant's grievance that she had stated that she had been diagnosed with severe work-related stress and anxiety, had been suffering panic attacks, and had been prescribed medication for those matters. Furthermore, it is also apparent that Mrs Hipkiss operated on the basis that Msgr Massey's letter requesting medical evidence had been sent to and received by the claimant. Given its importance to her conclusion it is surprising that she did not ask the claimant whether she had received it.

188.12. Allegation 10 – the failure to carry out a proper handover. Mrs Hipkiss noted the claimant's argument that there were detailed financial procedures on the Finance Department's e-drive and that she had conducted a virtual

handover on 23 September. She further recorded Mrs Murray's argument that there was a very old reference folder entitled "magnum Opus". She noted that it was reasonable to have expected the claimant to have prepared a handover pack, but she made no finding as to whether there had been a failure to conduct proper handover and, if so, whether it amounted to misconduct or gross misconduct. (The investigation report had categorised it as misconduct)

189. It is clear that Mrs Hipkiss looked at the allegations in the round, so as to assess Mrs Lawrence's argument that overall there was a pattern of poor performance which was so serious as collectively to be regarded as gross misconduct. She concluded that whilst there was no evidence of loss or damage, and whilst the errors could be rectified in the accounts, the error relating to the cashflow was a serious disclosure error. However, that was not the basis for her conclusion, which followed as below.

'However, the allegations were, in summary, concerns about poor attention to detail, lack of review and poor disclosure, which falls far short of what is expected of a Head of Finance, who was accountable for proper accounting controls and compliance.

While I have not concluded on the outcome of each individual allegation, due to her level of accountability I am satisfied that there are a sufficient number of allegations of misconduct which are proven therefore, I do not uphold the appeal."

190. In her evidence, when asked whether she had considered any mitigation and if so what its effect was in relation to the appeal, Mrs Hipkiss stated that she believed mitigation was the employee's explanation of each allegation. She did not therefore understand that the fact that the errors which she had identified had occurred largely in relation to reports which were produced during the period of the claimant's adoption leave might be a factor that could reduce the severity of any default that she had concluded was properly attributable to the claimant.

The Issues

191. The issues were agreed at the case management hearing on 14 June 2022 and revised at the case management hearing on 1 June 2023. They are attached as Appendix 1 to this Judgment.

The Relevant Law

<u>Unfair dismissal s.98 ERA 1996</u>

192. The right not to be unfairly dismissed is governed by section 98 ERA 1996 which provides in so far as is relevant:

98 General.

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

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

and

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

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

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

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

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

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

193. The reason for the dismissal relied upon was conduct which is a potentially fair reason for dismissal under section 98(2) (b) of the Employment Rights Act 1996 ("the Act").

194. The principal reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323). in Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC. The Supreme Court affirmed that in determining the employer's reason, an employment tribunal 'need generally look no further than at the reasons given by the appointed decision-maker'. However, if a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the tribunal's duty to penetrate through the invention rather than to allow it also to infect its own determination.

195. We have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588. The Tribunal directs itself in the light of these cases as follows.

196. The starting point should always be the words of section 98(4) themselves. In

applying the section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair.

197. In judging the reasonableness of the dismissal, the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.

198. The tribunal must consider the fairness of the dismissal on the basis of the facts found by the employer (see London Ambulance Service v Small [2009] EWCA Civ 220, CA); not on the basis of the facts as it finds them to have been. In conducting that enquiry, it must not substitute its own evaluation of a witness or of the evidence for that of the employer (see Morgan v Electrox Ltd [1991] ICR 369, CA), unless the conclusion reached by the employer on the facts was one which no reasonable employer could have reached in light of the evidence before it.

199. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. The degree of investigation will depend on the severity of the allegations and their consequences and extent to which the allegations are admitted or disputed; see:

199.1. ILEA v Gravett [1988] IRLR 497, per Mr Justice Wood (then President of the EAT): 'at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase.' And

199.2. A v B 2003 IRLR 405, approved in Salford Royal NHS Foundation Trust v Roldan 2010 ICR 1457, CA

200. Whether the involvement in the disciplinary hearing of an individual who has investigated the allegations, such as by chairing it or steering the discussion, has the effect as to render the dismissal unfair is a question of fact for the tribunal, having regard to the nature of the allegations made, the manner of the investigation, the size and capacity of the employer's undertaking, and all other relevant circumstances (see Premier International Foods Ltd v Dolan and anor EAT 0641/04.)

201. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd [2006] EWCA Civ 702, CA.

202. A tribunal hearing an unfair dismissal claim does not necessarily have to consider whether the employee's conduct amounts to gross misconduct (in the contractual sense applicable where a claim of wrongful dismissal was pursued) in the course of deciding whether dismissal for that conduct was within the range of reasonable responses (see Hope v British Medical Association 2022 IRLR 206, EAT per Mr Justice Choudhury.)

203. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion. A helpful approach in most cases of conduct dismissal is to ask three questions (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral - see Boys and Girls Welfare Society v Macdonald [1997] ICR 693, and Singh v DHL Services Ltd EAT 0462/12.):

203.1. whether the employer believed the employee to have been guilty of misconduct;

203.2. whether the employer had in mind reasonable grounds on which to sustain that belief; and

203.3. that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case.

Wrongful dismissal

204. The question of the necessary components and appropriate test of gross misconduct was considered in Neary and Neary v Dean of Westminster [1999] IRLR 288 and Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] 12 WLUK 559. Neary at paragraph 22 is authority for the proposition that in order to constitute gross misconduct the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment. In Sandwell at paras 110-113 HHJ Hand QC, applying Wilson v Racher [1974] ICR 428, defined the conduct that might cause such a loss of confidence as a "repudiatory breach of the contract justifying summary dismissal" which must include either "a deliberate and wilful contradiction of the contractual terms" or "gross negligence."

205. In Adesokan v Sainsbury's Supermarkets Ltd [2017] ICR 950 Lord Justice Elias observed obiter at paragraph 24 that "a failure to act, without any intention to contradict or undermine the employer's policies, should not readily be found to be such a grave act of misconduct as to justify summary dismissal."

206. In Mbubaegbu v Homerton University Hospital NHS foundation Trust [2018] WLUK 02268950 the EAT observed, approving Neary, at paragraphs 32 and 33 that an employer's definition of gross misconduct was not determinative and the key issue was whether the matters relied on cumulatively were of sufficient

seriousness to undermine the relationship of trust and confidence between employer and employee; there was no need for there to be a single act amounting to gross misconduct or for each of the series of acts relied to supply the warrant for summary dismissal.

Just and equitable reductions

207. The Tribunal's power to order compensation for unfair dismissal are addressed in sections 118 to 126 inclusive of the ERA 1996. Potential reductions to the basic award are addressed in section 122. Section 122(2) provides:

> "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

208. The compensatory award is dealt with in section 123. Under section 123(1)

> "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

209. In determining the loss sustained, as was observed in Software 2000 Ltd v Andrews [2007] ICR 825 at para 31 "it is plainly material for a tribunal to consider what would have happened had no dismissal occurred." This is sometimes referred to as the 'counterfactual position.'

210. S.123(6) ERA 1996 permits a Tribunal to make a reduction to the compensatory award to reflect the likelihood that a claimant would have been fairly dismissal had a fair process been followed (see Polkey v A.E Dayton Services Ltd [1988] ICR 142, HL). It is not an "all or nothing" question but permits degrees or percentage chances (see para 96 of the Judgment).

211. The Polkey approach requires a predictive exercise, focusing on the employer's likely thought processes: Attrill v Granchester Construction (Eastern) Ltd (2013) UKEAT/0327/12/LA, [2013] All ER (D) 364 (Feb).

212. The burden is on the employer, not to prove any fact on the balance of probabilities, but to satisfy the tribunal that that future chance of dismissal would have happened: Grayson v Paycare (a company limited by guarantee) (2016)UKEAT/0248/15, [2016] All ER (D) 31 (Jul), [2016] ICR D13 per Kerr J at [17], [32], [46], [48], [51].

213. Furthermore, the Tribunal may alternatively consider whether the claimant's employment would have ended for some other reason at a certain point, and so

limit compensation to a period during which the claimant's employment would have continued but for the unfair dismissal (O'Donoghue v Redcar & Cleveland BC [2001] EWCA Civ 701 at paras 44 and 53).

214. However, if it adopts that approach, the Tribunal must be 100% certain that a dismissal would have occurred within that period (Zebrowski v Concentric Birmingham Ltd [2017] UKEAT/0245/16/DA per Mrs Justive Laing at para [34).

215. Where there is uncertainty as to whether employment would have continued, the percentage approach is the appropriate one to adopt in making any Polkey reduction (see Laing J in Zebrowski at paragraph 54:

> "In other words, in my judgment, the approach of the Court of Appeal in O'Donoghue, properly understood, is that it is only open to an ET to limit compensation to a period as opposed to making a percentage deduction where the ET is 100 per cent confident that dismissal would have occurred within that period…."

216. The approach to be taken in respect of both of those issues was set out in Software 2000 Ltd v Andrews and ors [2007] ICR 825. In essence,

216.1. A tribunal must assess the loss flowing from a dismissal, using common sense, experience and a sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

216.2. If an employer asserts that the claimant might or would have been fairly dismissed had a fair process been followed, or would not have been employed indefinitely, it must adduce relevant evidence to establish the chance that a future dismissal would have occurred. The Tribunal must assess that evidence against all the evidence available on the point, including the claimant's own evidence.

216.3. The Tribunal may conclude that the evidence is insufficient to determine when a fair dismissal would have occurred had a fair process been followed, however, it must still make an assessment of whether there was a realistic chance that a fair dismissal would have occurred. It must do so on a percentage basis, and cannot elect to avoid the issue because it is difficult - "the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

216.4. The Tribunal must assess the question of whether a fair dismissal would have occurred had a fair process been followed separately from the assessment on a percentage basis of whether the employment would have ended for some other reason. It cannot conflate the two processes.

216.5. Having considered the evidence, the Tribunal may determine:

216.5.1. That there was a chance of dismissal in which case compensation should be reduced accordingly;

216.5.2. That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

216.5.3. The employment would have continued indefinitely. (However, this last finding should be reached 'only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.')

216.6. An Employment Tribunal may take different approaches to a Polkey reduction under s.123(6) ERA. It can apply a percentage reduction to the compensatory award or it can limit compensation to a particular point in time; it cannot do both. Zebrowski.

Contributory conduct

217. Potential reductions to the compensatory award are addressed in section 123(6) which provides:

"where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

218. A similar power is contained in relation to the basic award in s.122(2) ERA (as quoted above) in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the basic award where it considers that it would be just and equitable (see Optikinetics Ltd v Whooley [1999] ICR 984, EAT).

219. Three factors must be satisfied if the Tribunal is to find contributory conduct (see Nelson v BBC (No.2***)*** [1980] ICR 110, CA):

219.1. the conduct must be culpable or blameworthy

219.2. the conduct must have caused or contributed to the dismissal, and

219.3. it must be just and equitable to reduce the award by the proportion specified

220. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (Audere Medical Services Ltd v Sanderson EAT 0409/12).

221. In determining whether conduct is culpable or blameworthy, the Tribunal must focus on what the employee did or failed to do, not on the employer's assessment

of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR56, EAT).

Discrimination

222. The claimant brings three claims under the Equality Act 2010. The first for direct discrimination (s.13 Equality Act 2010 ("EQA")), the second that she was harassed (contrary to section 26 EQA 2010), and lastly that she was subject to indirect discrimination (contrary to section 19 EQA). The relevant statutory provisions are as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

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.

19. Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

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.

s.26 Harassment

(1) A person (A) harasses another (B) if—

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

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

Section 13

223. The basic question in every direct discrimination case is why the complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

224. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

225. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

226. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

(2) If there are facts on 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.

227. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

228. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

229. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

230. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

231. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

232. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA at [56] ; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

233. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr

Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

234. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Indirect discrimination

235. The burden of proving the PCP, the group and individual disadvantage lies on the claimant (Dziedziak v Future Electronics Ltd EAT 0271/11*).*

236. To ascertain the disadvantage, section 19 requires a comparative exercise and the EHRC Employment Code of Practice ("the Code") endorses the pool approach as a method (although not the *only* one) of establishing particular disadvantage under the EqA. The tribunal must identify a hurdle that has been placed in the way of the complainant and consider the range of persons affected by it. This will direct attention on the 'pool for comparison', which is the focus of this section. The Code at para 4.18 stipulates the pool should be formed as follows: 'In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively'.

237. In Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 the Supreme Court observed at [14] that the (then) new formulation of indirect discrimination in s.19 Equality Act 2010:

> "was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in *Equality: the New Legal Framework*, Hart 2011, pp.64–68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question"

238. In Essop v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice, addressing Naeem, the Supreme Court had to resolve an issue about the correct choice of pool. Lady Hale JSC dealt with that issue as follows:

> "40. The second argument relates to the group or "pool" with which the comparison is made. Should it be all chaplains, as the employment tribunal held, or only those who were employed since 2002? In the equal pay case of

Grundy v British Airways plc [2008] IRLR 74 at paragraph 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in Allonby v Accrington and Rossendale College [2001] IRLR 364, at paragraph 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that "There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition."

41. Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under s.14 of the Equality Act 2006, at para. 4.18, advises that:

> In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively.

In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of s.19(2)(b) which requires that "it" – i.e. the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

239. The Code makes it clear that 'a statistical analysis may not always be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of people are too small to allow for a statistically significant comparison' — para 4.13.

240. In London Underground Ltd v Edwards (No.2) 1999 ICR 494, CA, the claimant was one of only 21 women in a total pool comprising 2,044 train operators. All 2,023 men were able to comply with a requirement for flexible working hours, as were all the women save for the claimant herself. An employment tribunal held that the claimant had nonetheless been indirectly discriminated against on the ground of sex. Given the background of the disparity in numbers between male and female train operators, it was appropriate to go beyond the specifics of the pool in question and take account of common knowledge that women are more likely to be single parents and have primary responsibility for childcare. The tribunal accordingly held that the requirement for flexible working was one with which the proportion of women who could comply was considerably smaller than the proportion of men.

241. Both the EAT and the Court of Appeal upheld the tribunal's decision. In doing

so, the courts specifically sanctioned the right of tribunals to use their general knowledge and expertise to look outside the pool for comparison and to take into account national statistics showing that ten times as many women as men are single parents or look after children. In the words of Lord Justice Potter: '[T]he comparatively small size of the female component [in the pool] indicated… without the need for specific evidence, both that it was either difficult or unattractive for women to work as train operators… and that the figure of 95.2 per cent of women [able] to comply was likely to be a [maximum] rather than a [minimum] figure.

242. If it is established that the PCP causes a disadvantage to the group, that is enough - there is no need for the claimant to establish a causal link between the PCP and the protected characteristic, only that there is a causal link between the particular disadvantage suffered by the group and the individual (see Essop per Lady Hale at para 25). The reason why a particular group or an individual cannot comply with the PCP may be 'many and various'. The reason for the disadvantage need not be unlawful or under the control of the employer (Essop para 26).

243. In Essop the Supreme Court held that the Court of Appeal was wrong to hold that there was a need under s.19 EqA for a claimant to show both that there was a group disadvantage, and *the reason why* the PCP caused the group to have been subject to such a disadvantage. Lady Hale JSC, giving judgment of the Court, said at paragraph 24:

> "The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. Thus, there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

244. All that is required is *correspondence* between the disadvantage suffered by the group and that suffered by the individual (Essop para 31).

Harassment

245. The words 'related to' in S.26(1)(a) have a broad meaning; conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it, what is required is some connection even if not directly causal between the conduct and the protected characteristic — Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT.

246. The context in which unwanted conduct takes place is an important factor in

determining whether it is related to a relevant protected characteristic—particularly in cases where the conduct cannot be described as 'inherently' racist, homophobic, etc. (see Warby v Wunda Group plc EAT 0434/11). It is not enough however that the conduct complained occurs 'in the circumstances of' a disability, it must be related to it.

247. Some key concepts set out in Dhaliwal and Grant v Land Registry [2011] ICR 1390 are as follows:

247.1. when assessing the effect of a remark, the context is always highly material. Context will also be relevant to deciding whether the response of the alleged victim is reasonable (Grant, para. 13);

247.2. tribunals must not "cheapen the significance" of the meaning of the words used in the statute (i.e. intimidating, hostile, degrading, etc.). They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. Being "upset" is far from attracting the epithets required to constitute harassment (Grant, para. 47);

247.3. it is not enough for an individual to feel uncomfortable for them to be said to have had their dignity violated, or the necessary environment created (Grant, para. 51);

247.4. if a tribunal finds that a claimant was unreasonably prone to take offence, then, even if he did genuinely feel his dignity to have been violated, there will be no harassment (Dhaliwal, para. 15).

Discussion and Conclusions

Unfair dismissal

Issue 1.3 Did the respondent have a genuine belief that the claimant had committed misconduct

248. In the circumstances, we concluded on balance that Msgr Massey and Mrs Hipkiss both genuinely believed that the claimant had breached Charities law, specifically SORP (FRS102), in respect of allegation 1. In reaching that conclusion both were solely reliant on Mrs Lawrence's evidence both as to the relevant provisions of the SORP and the basis on which they had been breached. We doubt that Msgr Massey or Mrs Hipkiss would be able articulate, even in a broad sense, either of those two matters.

249. However, Mrs Lawrence did not provide Mrs Hipkiss with the ICAEW outcome letter which brought her interpretation of the SORP into question notwithstanding that she accepted in cross examination that the letter addressed the very issue which was at the centre of Allegation 1. She offered no explanation in her evidence or her witness statement as to why she chose not to present the ICAEW's letter to Mrs Hipkiss.

250. Considering the disciplinary and appeal hearings as a whole, and leaving

allegation 1 aside for the present, the remaining disciplinary allegations which caused Mrs Hipkiss to conclude that there was misconduct were as follows (as the other allegations had fallen away by the time of the appeal outcome):

250.1. Allegation 4: that the claimant had failed to put in place monthly management account controls – the finding at the point of the appeal was that the claimant had routines and checklists in place, but they 'lacked robustness;' which matter Mrs Murray had discussed with the claimant in 1:2:1 meetings.

250.2. Allegation 5: the memo accounts had not been updated since 2017 – the finding at the time of the appeal was that the claimant had updated them, but her practice of using of a master spreadsheet and uploading the entries to Sage after the accounts had been approved was not "adequate or robust."

250.3. Allegation 6: there were anomalies in the financial schedules of the 2019 accounts. The finding at the time of the appeal was that the claimant had produced the draft accounts, and Mrs Hipkiss concluded that she could have produced a checklist detailing any outstanding issues which required completion. Additionally, Mrs Hipkiss found that there was an error in the Cashflow statement which was a serious disclosure error.

251. We accept that the respondent had a genuine belief in those three additional allegations.

Issue 1.3 Did the respondent have reasonable grounds for that belief following as reasonable an investigation as was warranted in the circumstances?

252. We unanimously decided that the respondent's investigation fell so far short of what was reasonably required as to be far outside the range of reasonable responses. In reaching that conclusion we considered that the disciplinary allegations were very serious, went the root of the claimant's professional competence, and were therefore potentially career ending. Mrs Lawrence considered that some amounted to professional negligence. In those circumstances, applying ILEA v Gravett; A v B and Salford Royal NHS Foundation Trust v Roldan, a reasonable employer would have conducted a very thorough and robust investigation and resolved the significant points of dispute before reaching any conclusion on the allegations.

253. In relation to the first allegation, as stated, the respondent's belief in misconduct was based solely on the evidence of Mrs Lawrence. Msgr Massey accepted that evidence without testing it or seeking external verification of it, even when the claimant had identified the need to do so in light of the explanations that she provided. Mrs Lawrence had asserted that the SORP had been breached by the claimant because unrestricted and restricted funds were held in the same bank account, and that failing was a matter of professional negligence amounting to gross misconduct. The claimant had challenged that interpretation of the SORP. It was incumbent upon the respondent to resolve that dispute before upholding the disciplinary allegations in respect of them on the basis of Mrs Lawrence's assertion alone. That need was all the greater given that the respondent's professional auditors had not raised any concerns in respect of those matters.

254. At the time of the appeal, the respondent had constructive knowledge through Mrs Lawrence that the very basis of Mrs Lawrence's interpretation was in issue. Any reasonable employer would have shared that information with the decision maker; this allegation, consisting as it did of five separate allegations, created an impression that the claimant had failed to demonstrate the expertise and knowledge required in her role and had, in so acting, had exposed the Trustees to significant financial risk and personal liability. Those allegations were so serious that they risked tainting a decision maker's view of the remaining allegations. It was imperative to a fair process that the apparent conflict was resolved. That need was greater where the available evidence suggested that the claimant's view was correct and, by extension, that it was Mrs Lawrence's knowledge and/or understanding of the matter that was fallible (namely that the auditor had raised no concern and the ICAEW letter suggested there was no basis for it).

255. In our view, it was outside the range of reasonable responses not to have resolved the dispute, whether by obtaining an independent second opinion (whether from the ICAEW or from the Auditors, or from an independent accountancy firm recognised as a specialist in Charities law) or otherwise, before concluding that the claimant had breached the SORP and therefore committed gross misconduct. We note that the respondent had access to both professional auditors and specialist charity lawyers. The failure to take any step to obtain an independent view of the application of SORP and whether there was a breach on the facts of this case was therefore unfair.

256. More generally, Mrs Lawrence's investigation was we regret to say derisory in its depth, unbalanced, and focussed on establishing fault; it fell far outside the range of reasonable responses open to a reasonable employer. We repeat the matters detailed at paragraphs 157 and 162 above in terms of outstanding lines of enquiry for the investigation. The failure to consider those matters was outside the range of reasonable responses. Furthermore, Mrs Lawrence failed to consider and review any of the relevant source data, such as the memo accounts, journals or schedules; but simply accepted as accurate assertions made to her by Mrs Lawes without seeking to verify the allegations in any meaningful way.

257. Furthermore, she entirely failed to look for any exculpatory evidence but instead appears to have sought additional matters that could be added to the disciplinary allegations. The consequence was an investigation which gave, at times, the appearance of a witch hunt. By way of example, Mrs Lawrence's addition of the allegations of gross misconduct relating to the claimant's failure to attend the investigation meeting in circumstances where she had not asked Msgr Massey, Mrs Murray and Mr Cook for copies of the emails detailing the claimant's request for the investigation meeting to be adjourned, or made any enquiry into the claimant's health conditions or the respondent's knowledge of them, was prejudicial and impartial. The addition of the allegation of gross misconduct in relation to the late filing of accounts for the claimant's business was in the same vein.

258. Mrs Lawrence's approach to the investigate is exemplified by her comments in the disciplinary hearing that it was for the claimant to disprove the allegations.

That mindset was misguided, it was part of her responsibility to conduct a fair and balanced investigation to look for evidence which established the claimant's innocence as much as that which showed guilt, and to review, in light of that evidence, whether there was any substance to the disciplinary allegations, such that they should proceed to a final hearing. Her approach to investigation was far outside the range of reasonable responses.

259. Those failures were compounded by the abject and inexplicable failure of Mrs Murray and Msgr Massey to raise with Mrs Lawrence matters which were well within their knowledge and which demonstrated that some of the disciplinary allegations were unsustainable and could not and should not reasonably be pursued. Given that Mrs Murray was party to the production of the Synopsis and that Msgr Massey conducted the disciplinary hearing, that failure is all the more significant.

260. Had Mrs Lawrence investigated the source data and/or spoken to the committee members, or had Mrs Murray and Msgr Massey acted fairly and reasonably by sharing their knowledge of events pertinent to the allegations, Mrs Lawrence would have discovered the following (which represent Mrs Hipkiss's findings at the time of the appeal):

260.1. *Allegation 1(a): closing bank accounts* – the closure was part of an agreed strategy approved by the Trustees and the Financial Committee (Mrs Murray and Msgr Massey were entirely aware of this; the latter was on the committee).

260.2. *Allegation 1(b): sale proceeds were transferred to unrestricted funds in breach of a management instruction as to their use* – there was no specific management instruction as to their use; in so far as there was any direction for the sale proceeds it was for them to be placed in unrestricted funds, not restricted funds. The claimant had produced Journal entries recording that approach. Mrs Murray was aware of the existence of the Journal entries.

260.3. *Allegation 1(c): restricted Clergy Welfare Funds were transferred to unrestricted funds and no journal entries were made*. The management instruction was for the funds to be transferred to unrestricted funds, that instruction had been made by the Financial Committee of which Msgr Massey was a member. The claimant had made journal entries showing the movement of the funds; Mrs Murray was aware of those.

260.4. *Allegations 2(a) and 3 Bank reconciliations*: *audit concerns not actioned in relation to the schools Devolved Fund* – the problem predated the claimant's appointment. The claimant had devised a project, including the appointment of a new employer, to resolve the known issues. She had discussed that approach with Mrs Murray, who had approved it.

260.5. *Allegation 4: failure to implement monthly management controls*. The claimant had designed and completed spreadsheets in Excel to create the

monthly management accounts and was training an employee to produce them. Given that the claimant presented the monthly accounts to Mrs Murray she was necessarily aware of the format of the monthly accounts, the spreadsheet used to create them, and the progress of the claimant's efforts to train another employee in their production.

260.6. *Allegation 5*: *the claimant had failed to update the memo account since 2017*. The memo accounts had been updated, the claimant used a master spreadsheet of the reserve balances which she posted to Sage once the accounts had been approved.

260.7. Allegations 7(a) and (b) the claimant has failed to respond to audit reports raising concerns about the fixed asset register and the valuation of the respondent's investment properties. The concerns had been discussed with the auditors and Mrs Murray, and a process of review had been agreed but it completed had been delayed due to staffing issues. Mrs Murray was aware of those matters. Additionally, the Trustees (including Mrs Murray and Msgr Massey) had approved internal valuations of the investment properties, the auditors were aware of that and had raised no issue, and in consequence Mrs Murray had overseen the same approach for the 2020 accounts.

Did the respondent adopt a fair procedure?

Issue 1.3.1 adding allegations of misconduct after the commencement of the investigation

261. It is not outside generally outside the range of reasonable responses for an employer to add allegations of misconduct which are identified during the course of a disciplinary investigation. What is required for a fair hearing is that the employee is given notice of them and provided with a reasonable opportunity to respond to them. However, in the circumstances above, the addition of the allegations were part of a prejudiced approach by Mrs Lawrence to the investigation. In the circumstances of this case, that approach fell outside the range of reasonable response for the reasons we have given above.

1.3.2 The same person conducted the disciplinary hearing as the investigation

262. We address this allegation within the broader consideration of the fairness of the dismissal.

Issue 1.3.3 the hearing was rushed and the claimant did not have sufficient time to respond to the allegations

263. In the present case, the issue of a reasonable opportunity to respond to the allegations is focused on two specific points, first the claimant's opportunity to attend the investigation meeting, and secondly her opportunity to provide explanations at the disciplinary hearing prior to a decision being made.

264. We address each of those matters in turn.

(a) The investigation

265. Generally, the respondent's approach to the procedure was determined by Mrs Murray and Mr Cook, but was communicated to the claimant through Msgr Massey. He was, we concluded, an unresisting mouthpiece who capitulated to the recommendations of Mr Cook without first applying his own judgement to consider whether the actions that he was encouraged to take were appropriate and reasonable. Mrs Murray was aware that the claimant had a long-standing condition of anxiety and depression; all of the three were made aware that claimant was suffering with anxiety, depression and panic attacks for which she had received prescription medication but all choose to reject that account without first obtain. They were also aware that the circumstances of the claimant's return to work anda the disciplinary investigation were a particular source of stress and anxiety to her, as the claimant had identified no less than five times: first in her email of 29 July to Mrs Murray and subsequently in her emails of 31 August, 1, 9 and 12 September to Msgr Massey.

266. Furthermore, they knew that they were about to subject the claimant to a disciplinary investigation which not only involved allegations of potential gross misconduct but also allegations of professional negligence, which could be career threatening, and which in consequence necessarily increased the degree of stress and anxiety that she would experience.

267. Notwithstanding that knowledge, they each made (or in Msgr Massey's case, acquiesced in) a conscious and a deliberate decision not to:

267.1. refer the claimant to a free source of support and counselling which may have assisted in ameliorating the symptoms of her condition, so that she may have been better able to consider and respond to the allegations (issue 1.3.5);

267.2. provide the claimant with advance notice of the allegations so that she could sensibly respond to them and identify and provide the relevant supporting documents and emails to support her case. In fact, they had deliberately removed her access to the systems which contained that information (issue 1.3.3);

267.3. inform Mrs Lawrence of the reasons for the claimant's request for the investigation meeting to be conducted remotely by video, and so procured the situation by which the claimant was not permitted to attend remotely as she had requested (issue 1.3.5);

267.4. delay the investigation meeting so that the claimant's claims in the grievance (that the disciplinary allegations were manufactured as a consequence of a dispute with Mrs Murray) could be investigated (issue 1.3.3).

268. We concluded that the first three of those procedural failings fell far outside the range of reasonable responses open to a reasonable employer. We provide more detailed reasons for that conclusion below.

Issue 1.3.5 the claimant's health issues were not taken into account.

269. Mrs Murray and Mr Cook knew that the claimant was a single mother, who had previously suffered with depression, and who was stressed and anxious; in those circumstances the decision not to refer her to a free source of counselling and support was, we regret to conclude, a callous and wholly unattractive act, which was entirely at odds with their Christian beliefs. Mr Cook did not attend the Tribunal to give evidence to explain his advice in that respect or the rationale behind it. Either he chose not justify it or the respondent choose not to call him to do so; quite possibly because both knew that it could not reasonably be justified. Neither Mrs Murray nor Msgr Massey (who was the assigned welfare point of contact) could provide any explanation for it.

270. The only explanation which is apparent from the wording of Mr Cook's email is that he believed a referral might undermine the respondent, either because the claimant might say something to a third party which would damage the respondent's reputation (which was a misconceived concern, as anything said in the counselling sessions would be confidential) or that it might undermine the respondent's legal position.

271. Furthermore, Msgr Massey could provide no explanation for his continued failure to make Mrs Lawrence aware of the underlying health conditions which were the expressed basis of the claimant's desire for a remote hearing. The closest that he came in his evidence was to suggest that the respondent was determined that the procedure should not be conducted on the claimant's terms, but on the respondent's. That view was consistent with his evidence in his witness statement that the claimant was seeking to avoid the investigation meeting. That was a view, which in the tribunal's opinion, was misconceived and misguided. The claimant was not seeking to avoid the investigation meeting, she was seeking for it to be conducted in a reasonable manner which permitted her a reasonable opportunity to understand the detailed and very serious allegations against her and to be given an opportunity fairly and properly to respond to them. Msgr Massey's expressed view (at paragraph 11 of his statement) that "putting it off wasn't the answer" was one made without any supporting medical assessment or advice, and was formed entirely from the respondent's perspective rather than through consideration of what was fair or appropriate.

272. Insofar as Mrs Lawrence's belief that a remote meeting would not be appropriate for the investigation meeting (as she recorded in the investigation report) was based on the perceived difficulties in navigating different pages in the same document, there was no reasonable basis for it. Insofar as it related to her belief that an in person hearing made it "more practical to gauge the impact on the interviewee" it was misconceived. Whilst such a view might have fallen within the range of reasonable responses, in circumstances where it was formed without the benefit of the relevant material facts underlying the request for a remote hearing,

it consequently fell outside the range.

273. In relation to the last of the procedural issues relating to the investigation meeting, given the serious allegations that were levelled against Mrs Murray it was entirely outside the range of reasonable responses for her to have any involvement in the decisions that were made in relation to the process of the investigation. However, as Msgr Massey confirmed in paragraph 8 of his witness statement, Mrs Murray continued to have an active part in such decisions, including consideration of the claimant's request for a remote hearing. Instead of engaging with the claimant's concerns about those matters, Msgr Massey merely dismissed them as "outlandish claims."

(b) The disciplinary - Issue 1.3.3 the [disciplinary] hearing was rushed and the claimant did not have sufficient time to respond to the allegations

274. Next, we consider the second aspect of the alleged procedural failings: whether the time afforded to the claimant to respond to the allegations prior to the disciplinary decision fell within the range of reasonable responses. Again, we unhesitatingly conclude that it did not. Notwithstanding the complexity of the allegations, the fact that the claimant had not been at work for the year prior to the allegations being raised and so would need more time to re-familiarise herself with the relevant documents, the number of documents that needed to be considered, and the fundamental legal issues that were in dispute, the claimant was permitted just eight days to prepare a response when she was also a single mother caring for a young child.

275. Both Msgr Massey and Mrs Lawrence accepted that it was open to the respondent either to have adjourned the disciplinary hearing to permit the claimant more time to respond, or to have reconvened the disciplinary hearing at a later point so as to permit the claimant more time to respond and the respondent more time to consider her responses before determining the allegations. Neither was able to identify any good reason during their cross-examination as to why either course could not have been followed. In his witness statement, Msgr Massey identified two reasons. First, he argued that the lack of time for preparation was a matter that the claimant brought on herself by her (unreasonable) failure to attend investigation meeting, and secondly, that whilst it was possible to reconvene at a later date "all of the correspondence back-and-forth was impacting my mental health too." Neither reason fell within a range of reasonable responses. The first for the reasons that we have detailed above, the second because Msgr Massey had unreasonably placed his own health above that of the claimant in circumstances where he was not facing disciplinary allegations which were potentially career ending and did not have an underlying mental health condition.

276. Whilst the failure to permit the claimant a reasonable period to respond was remedied by the appeal, because by the time of the hearing before Mrs Hipkiss the claimant had been able to set out a detailed written response to each of the allegations and provide the supporting evidence, the disciplinary process as a whole did not result in a decision to dismiss which was substantively fair for the reasons we detail below.

Issue 1.3.4 The suspension was unnecessary

277. It is unnecessary to address this allegation as a free-standing complaint, because it's impact on the fairness of the process has been consider as part of the claimant's broader complaints. Generally, a suspension will not have a significant impact on the fairness of the decision to dismiss; here the issue was the terms of the suspension coupled with the impact of the decision to suspend the claimant's access to the respondent's systems and her email account.

Issue 1.4 Was the decision to dismiss a fair sanction, being one within the range of reasonable responses open to a reasonable employer.

278. The claimant argues that from the moment she intimated that she would raise a grievance, the respondent closed ranks to protect its reputation and determined to 'drive her out.' There is, in our view, some force in that argument on the facts of this case for the reasons detailed below.

279. The allegations which were 'subsisting' at the conclusion of the disciplinary and appeal process were:

279.1. Allegation 1 (breach of SORP).

279.2. Allegation 4: the claimant had put routines and checklists in place in relation to the production of monthly management accounts, but they 'lacked robustness;' Mrs Murray had discussed those concerns with the claimant in 1:2:1 meetings.

279.3. Allegation 5: the claimant had updated the memo accounts, but the claimant's practice of using of a master spreadsheet and uploading the entries to Sage after the accounts had been approved was not "adequate or robust."

279.4. Allegation 6: the claimant had produced the 2019 accounts and financial statements, and Mrs Hipkiss concluded that she could have produced a checklist of items detailing any outstanding issue which required completion (after the claimant began her adoption leave). Additionally, there was an error in the Cashflow statement which was a serious disclosure error where the claimant had mis-identified a negative entry as a positive and vice versa in relation to the same item, the resulting discrepancy was £196,000.

280. For the reasons we have given above the decision to dismiss in relation to allegation 1 was outside the range of reasonable responses; a reasonable employer would have sought a second independent opinion.

281. Furthermore, in light of the distinction between performance issues and misconduct in the respondent's disciplinary policy and the finding that the claimant had processes in place for the production of the monthly management accounts and memo accounts, but that they were not sufficiently robust or adequate, in our

judgment, it was not within the range of reasonable responses to categorise them as conduct issues. That is because the conduct which is the subject of allegations 4 and 5 could not reasonably be regarded as "a persistent or wilful failure to reach appropriate standards" so as to amount to a conduct rather than a performance issue. These were not instances of breaches of Diocesan rules, policies or procedures. Instead, they were categorised by Mrs Hipkiss as "poor attention to detail" and a "lack of review." Those are performance issues. There was no evidence that Mrs Murray had raised any concerns about the robustness or adequacy of the claimant's procedures with her, whether in 1:2:1s or elsewhere, and certainly no evidence that the claimant had been warned that any further repetition or failure to remedy them would constitute a conduct issue.

282. Allegation 6 was similarly a performance issue; it was not a persistent or wilful failure to reach an appropriate standard'; Mrs Hipkiss concluded that the error in respect of the cashflow statement was a careless but "serious disclosure error;" not that it was negligent. It occasioned no loss to the respondent. She also found that the claimant had failed to prepare a checklist of items for completion; again, whilst that might have been reasonably regarded as a performance issue, it is difficult to conceive how a reasonable employer would have regarded it as a wilful error so as to amount to a conduct issue on the facts of this case.

283. Mrs Hipkiss did not suggest that allegations 8, or 9 had any material influence on her decision. In any event, in our judgement, it was entirely outside the range of reasonable responses for the respondent to consider that allegation 9 constituted gross misconduct or was capable of contributing to a course of conduct which was so categorised, given fact that the claimant was suffering from acute depression and experiencing panic attacks and had raised those matters with the respondent. The respondent argues that the claimant was able to attend the grievance hearing in person and therefore it was disingenuous for her to argue that she could not attend a disciplinary in person. That argument, we concluded, was misconceived on the facts of this case and more generally; a grievance hearing to explore an employee's concerns is at the opposite end of the spectrum of stress to a disciplinary hearing in which allegations of negligence and gross misconduct are levelled, and particularly (on the facts of this case) where the respondent had unreasonably not permitted the claimant to understand them or to prepare for them prior the meeting. That distinction is best demonstrated by the contrast between the sensitive and reasonable approach of Mr McNulty in the grievance hearing and the more persecutory approach adopted in the investigation and disciplinary process by Mr Cook, Mrs Murray, Mrs Lawrence and Msgr Massey. The former was empathetic, if not sympathetic, the latter a hostile, condemnatory and aggressive inquisition.

284. Mrs Hipkiss regarded allegation 10 (the failure to provide a handover) as a serious matter, but it was only categorised as misconduct and so cannot have justified a summary dismissal.

285. Considering all the allegations as a whole, we concluded that no reasonable employer could have regarded them as constituting "seriousness negligence" so as to amount to gross misconduct. It was outside the range of reasonable

responses for the respondent to have reached that conclusion.

286. Even were we wrong in that conclusion, and it was within the range or reasonable responses for the respondent to have concluded that there was gross misconduct, we concluded that it was outside the range of reasonable responses to have regarded the appropriate sanction as being one of summary dismissal. Such a sanction was at odds with the respondent's disciplinary policy which required the claimant to be given a chance to improve, but moreover, Mrs Hipkiss wholly failed to consider whether there was mitigation which was relevant to the appropriate sanction. In her evidence to the Tribunal, she was asked whether she had considered mitigation; she said she had not. The Judge then asked her to explain what she understood 'mitigation' to mean and how it was to be considered within the context of the disciplinary policy. Mrs Hipkiss replied that "mitigation, to me, is the claimant's perspective of each allegation."

287. It was clear to the Tribunal that Mrs Hipkiss therefore did not consider whether the fact that the claimant was asked to complete the 2019 accounts at a time when she was the sole carer for an adopted child and was on adoption leave might have had any bearing on the degree of the claimant's culpability in making the error in the cashflow statement. It is equally clear that she did not consider whether the claimant's acute anxiety and depression operated to mitigate her failure to attend the investigation meeting. Those failures were outside the range of reasonable responses; had Mrs Hipkiss considered those matters in our judgment any reasonable employer would have concluded that they presented significant mitigation.

288. The claim that the claimant's dismissal was unfair because the respondent failed to follow a fair procedure and because dismissal was outside the range of responses available to a reasonable employer is therefore well founded and succeeds.

Wrongful dismissal

289. The task for the Tribunal is to determine whether the respondent has shown on the balance of probabilities that the claimant committed gross misconduct meriting summary dismissal.

290. In conducting that assessment, we are not bound by the respondent's findings of fact but can take into account our own.

291. In this case there was no evidence of a deliberate or wilful contradiction of the contractual terms, nor of gross negligence, so as to bring about the necessary repudiation of the contractual terms by the claimant. Whilst allegation 1 might have been capable, if established, of constituting gross negligence on the grounds of a breach of the relevant SORP, the respondent did not adduce any evidence to corroborate Mrs Lawrence's assertion. That assertion was itself fundamentally undermined by the ICAEW outcome letter, such that we were unwilling to accept it without corroboratory evidence. The respondent was aware of the content of the letter and could have produced further evidence at the Tribunal from the auditors

or another third party to support its reliance on the position adopted by Mrs Lawrence. It did not.

292. Allegations 4, 5 and 6 were not deliberate and wilful failures, but rather, on the respondent's finding, reflected a lack of robustness in the claimant's processes. They were properly to be treated as performance issues, moreso in relation to allegation 6 (the 2019 spreadsheet), given the significant mitigation of the claimant's ill health and the fact that she prepared the draft accounts whilst on adoption leave.

293. The respondent did not adduce the 'Magnum Opus' which it said that the claimant should have provided as part of an effective handover in support of Allegation 10. It was not produced during the disciplinary or appeal hearings. The respondent has therefore not persuaded us on the balance of probabilities that such a document existed. In those circumstances and given the chronology detailed in our findings above relating to the claimant's adoption leave and the recruitment of Mrs Lawes, we concluded that the provision of the various financial procedures and checklists and the Teams meeting between the claimant and Mrs Lawes constituted an adequate, but far from perfect, handover. Mrs Lawes was able to raise queries with Mrs Murray or, if required, with the claimant. We note that Mrs Lawes did not suggest that she was hindered by the alleged lack of a more detailed handover at all. Consequently, we concluded that this allegation was not made out. For the avoidance of doubt, we rejected Mr Green's assertion that the failure to conduct a handover was "a matter of professional negligence"; neither Mrs Lawrence nor Mrs Hipkiss reached that conclusion and Mrs Lawrence had categorised it as 'misconduct' which is not consistent with a view that it was professional negligence. That 'tag' of professional negligence is no more than the construct of counsel for the tribunal hearing.

294. For the reasons that we have given previously in our conclusions above, the allegations relation to Parker Chapman Ltd and the failure to attend the investigation meeting did not constitute gross misconduct or misconduct. They add nothing to the factual position to be considered when applying the test in Neary.

295. The respondent has argued that the disciplinary issues collectively had the effect of destroying trust and confidence in the claimant's ability to perform her role. In reaching that view, the respondent relies upon three matters: the claimant's lack of remorse, her actions in blaming Mrs Murray for the errors in the 2019 accounts and her description of those errors as 'petty.' That argument is consistent with the approach advocated in Mbubaegbu that the tribunal should assess whether the matters relied on cumulatively were of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee.

296. However, we remind ourselves of the guidance in Adesokan that "a failure to act, without any intention to contradict or undermine the employer's policies, should not readily be found to be such a grave act of misconduct as to justify summary dismissal." That is relevant in so far as Mrs Hipkiss concluded that the claimant should have produced a checklist of outstanding anomalies in the accounts. That 'failure to act' was not done with the intention detailed in Adesokan but simply because of the circumstances. It does not have the necessary quality of gross

misconduct.

297. Furthermore, we concluded on the balance of probabilities that that accounts were *finalised* by Mrs Murray, a draft having been prepared by the 3 August by the claimant. That was the reason for Mrs Murray's calls to the claimant in August and September. We rejected Mrs Murray's evidence that the claimant had finalised them. Mrs Murray must therefore be treated as having ultimate responsibility for the failure to identify the mistake in the cashflow statement, even were it initially made by the claimant. In any event, she was the COO and had ultimate responsibility for the accounts.

298. In reaching that conclusion we took into account, when assessing Mrs Murray's credibility, that she had repeatedly told untruths to the HR committee about the claimant's return to work, that her evidence to the Tribunal relating to the concerns raised by Mrs Lawes was inconsistent with the contemporaneous documents, contradictory between her own accounts to us, and, we concluded, untrue, and that she had failed to disclose her notebook entries relating to those discussions (which demonstrated their untruth) in response to the claimant's DSAR or in the disclosure process in these proceedings.

299. Specifically, Mrs Murray and Mr Cook had concluded as at 18/19 March that the concerns were *not* misconduct and would be treated as performance issues and that that position persisted as at 16 July at the time of the HR Committee. We rejected Mrs Murray's explanation as to why those same concerns were suddenly escalated to matters of gross misconduct (for the reasons detailed in the paragraph above). Consequently, we were left with a position where the only credible explanation was that advanced by the claimant, namely that as a result of the discussion with the claimant on 29 July 2021 (which Mrs Murray had contrived with Mr Cook to recategorise the performance issues as matters of gross misconduct so as to precure the claimant's dismissal. That was consistent with Mrs Murray's comment in the grievance investigation that that discussion had "forced the issue" and with the fact that Mrs Murray knew that a number of the disciplinary allegations were entirely untrue (as we have detailed in our findings) but permitted them to proceed to a disciplinary hearing.

300. In short, we found her evidence to unreliable and untrue on central issues. This was one such issue. In consequently, we concluded that she had finalised the accounts but had not told the truth about that matter in the disciplinary hearing.

301. The claimant was therefore both entitled and correct to suggest that Mrs Murray had finalised the accounts. That assertion would not therefore, objectively, destroy the necessary trust and confidence in the claimant. Secondly, the claimant did not suggest that all of the errors in the 2019 account were 'petty', she suggested that including an allegation relation to the use of an expired charity number (which was easily corrected) was petty.

302. It follows that none of the matters relied upon by the respondent were, objectively viewed, capable of causing the necessary loss of trust and confidence

in the claimant.

303. We therefore concluded that the respondent did not prove that the claimant had committed gross misconduct such that it was entitled to dismiss her summarily. Her claim of wrongful dismissal is therefore well founded and succeeds.

Just and equitable reductions to the awards

304. It is clear from the claimant's evidence to us and her actions that by on 29 July 2021 she had decided that she would resign and could not work with Mrs Murray. She had accepted an offer of new employment which would start in December 2021. At the time of the grievance meeting on 14 September 2021, she was adamant that 'all trust had gone' between her and Mrs Murray. The primary cause of the claimant's view was not the respondent's conduct of the disciplinary procedure but consisted solely of Mrs Murray's response to her request to work flexibly on her return from adoption leave. Although Mrs Murray's approach was unsympathetic it was not argued to be in breach of an express or implied term of the contract. Critically, the claimant had not made a formal flexible working request and Mrs Murray had not denied it. Miss Spencer has not sought to argue for the claimant that that conduct constituted a breach of the implied term of mutual trust and confidence.

305. In those circumstances, we find it was a certainty that the claimant's employment would have ended irrespective of the disciplinary process because she would have given notice so that her employment terminated to enable her to commence employment in December 2021 with Carer Support Wiltshire. It would not therefore be just and equitable pursuant to section 123(1) ERA 1996 to award compensation for any period after the date on which that employment began.

306. We turn to consider the respondent's arguments that the claimant would have been fairly dismissed either for the existing disciplinary charges or in relation to her social media posts and/or her act of downloading the Financial Department's SharePoint file.

307. First, on our findings the respondent could not have fairly dismissed the claimant in respect of the existing disciplinary charges.

308. Secondly, in creating the counter factual situation, we have to consider whether the claimant would have acted as she did had the respondent followed a fair procedure. We have found that the very genesis of the disciplinary allegations was the improper and unfair decision made by Mrs Murray that the claimant would be dismissed following the discussion on 29 July 2021. Put simply a fair process would not have even led to disciplinary charges being instigated, but rather (at most) a performance improvement plan being implemented.

309. Even were we to have erred in that conclusion, and a fair process could have led to disciplinary charges, such a fair process would have required the respondent to permit the claimant access to the SharePoint file for a reasonable period before the disciplinary, and to allow her sufficient time to respond to the allegations and during the disciplinary. In that counterfactual scenario the claimant would not have downloaded the SharePoint file unlawfully for the purposes of her appeal.

310. Similarly, the respondent has not persuaded us that the claimant would have made the social media posts if it had followed a fair process. The claimant's evidence, which we accepted, was that she was in a mental health crisis at the point of her dismissal. That account was supported by the medical evidence and was, we find, consistent with the respondent's treatment of the claimant. Had the respondent had taken the claimant's mental health into account in the conduct of the investigation and disciplinary proceedings, and not dismissed her, we are not persuaded that she would have been in crisis and/or that she would have made the social media posts in question. She would simply have given notice, resigned, and moved to her new employer.

311. We therefore decline to make any Polkey reduction.

Contributory conduct

312. The respondent argues that the claimant's accountancy failings and disingenuousness about her role in the production of the 2019 accounts during the disciplinary hearing were culpable or blameworthy and caused or contributory to her dismissal. It is for the respondent to prove those matters. We remind ourselves that in determining whether conduct is culpable or blameworthy, we must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR56, EAT).

313. On our findings the claimant was not disingenuous in relation to her account about the error in the 2019 cash flow statement. We did not find that the claimant made any error in the preparation of the accounts that was so serious or fundamental that she could or would have been fairly dismissed for gross misconduct. As we have repeatedly noted, Mrs Hipkiss concluded the issue was one of robustness of process, not fundamental error in accountancy practice. The issue was one of performance and would not, we find, have led to her dismissal. In those circumstances, even had we been persuaded that the claimant's conduct was culpable or blameworthy, which we were not, it would not be just and equitable to reduce her award.

314. We therefore make no reduction for contributory conduct.

Issue 3.2 Unreasonable rejection of the claimant's flexible working request

315. The claim remains before the Tribunal. However, the claimant did not make a request which met the statutory definition for the reasons given at paragraph 82 above. The claim is not therefore well founded and is dismissed.

Indirect Sex Discrimination

316. It is for the claimant to prove the PCPs alleged: namely that there was a requirement for the Head of Finance to work 5 days from the office and/or to constantly monitor their team.

317. There are two fundamental issues with the claimant's ability to prove such PCPs. First, that PCPs were never applied to her; the issue of her working pattern and practice on her return to work was never concluded. Evidentially that makes it more difficult for the claimant to prove the PCP, she must rely upon a hypothetical situation (we recognise that it is sufficient for a respondent to proposed to implement a PCP, they do not actually have to do so). Secondly, in so far as the claimant relies upon her conversation with Mrs Murray on 29 July 2021 as the articulation of the PCPS, she necessarily relies upon inferences she drew from what Mrs Murray told her about the need for her to supervise her team. We note that when Mrs Murray was interviewed as part of the grievance process, she informed Mr McNulty that her view was it was necessary for the claimant to be in the office for three days a week and for more regular supervision of her team members. Further, the second of the two PCPs (the constant monitoring of the claimant's team) would be logically impossible if the claimant were to undertake any other meaningful work.

318. Assessing those matters in the round, we concluded that the claimant failed to persuade us on the balance of probabilities that the respondent operated the PCPs alleged. The claims of indirect discrimination are not well founded and are therefore dismissed.

Direct discrimination on the grounds of religion and belief

319. We have found that the respondent did rush the disciplinary hearing and failed to permit the claimant sufficient time to respond to the allegations. Further we found that the claimant's health issues were not taken into account and that Mrs Lawrence was the defacto decision maker at the disciplinary hearing in relation to allegation 1, because Msgr Massey had effectively abdicated his role to Mrs Lawrence because of his complete reliance on her knowledge and account of SORP. Lastly, the respondent added disciplinary allegations after the commencement of the investigation and suspended the claimant.

320. To that extent the factual allegations which form the subject of the direct discrimination claims are made out.

321. We have to consider two additional factual issues:

321.1. Was the suspension unnecessary – we prefer to rephrase that as "was the reason for the suspension influenced more than trivially by the claimant's religion or belief." We will therefore address that issue when considering issues 6.3 (less favourable treatment) and 6.4 *was it because of the claimant's religion and belief).

321.2. Did Mrs Lawrence mock the claimant during the disciplinary hearing – we address that factual issue below

Issue 6.2.1.5 Did Mrs Lawrence mock the claimant

322. The claimant alleges that Mrs Lawrence mocked her during the disciplinary hearing by sarcastically saying to her that she was pleased that the claimant had not had a panic attack on the morning of the disciplinary. The claimant maintained that she had, Mrs Lawrence adamantly denied it. We concluded that the following matters were relevant:

322.1. First, Mrs Lawrence accepted in cross-examination that she believed that the claimant was 'grandstanding' and 'playing a game' at the disciplinary, by which she meant that she was exaggerating the state of her health generally as a part of her defence to the disciplinary allegations, particularly allegation 9.

322.2. Secondly, despite seeing the medical evidence which verified the claimant's mental health condition, Mrs Lawrence maintained that belief at the time of the tribunal hearing and stood by her assertion that the claimant was grandstanding and game playing, reaffirming it both in her witness statement and in cross-examination.

322.3. Thirdly, Mrs Lawrence stated that her expression that she was pleased that the claimant had not had a panic attack was entirely genuine and she was demonstrating empathy towards the claimant.

323. We concluded that in circumstances where Mrs Lawrence firmly believed that the claimant did not have a serious mental health condition and was simply using the 'flag' of mental health in an effort to delay and/or frustrate the disciplinary process, it is difficult if not impossible as a matter of logic or probability for her to have been genuinely empathetic. How could Mrs Lawrence be pleased that the claimant had not suffered a panic attack, when she did not believe that she was suffering from anxiety, but rather was game playing? On the balance of probabilities, we concluded that Mrs Lawrence's remark was made to see off at the pass what she regarded as a further attempt at grandstanding, but her veneer slipped, and her tone was sarcastic and mocking. In reaching that conclusion we note that the claimant immediately reacted - "I can clearly see from your tone of voice that you don't believe me" - and repeated the point as part of her appeal. The claimant made no similar complaint about any other of Mrs Lawrence's remarks during the disciplinary hearing.

324. The factual allegation is therefore made out.

Issue 6.3 was that less favourable treatment and *Issue 6.4 Was the treatment because of the claimant's religion.*

325. In the circumstances, we concluded that this was an appropriate case to focus our inquiry on the reason why the conduct occurred i.e. is was the claimant's status as a non-Catholic the reason why the respondent:

325.1. Suspended the claimant;

325.2. Added allegations after the commencement of an investigation;

325.3. Permitted Mrs Lawrence such a degree of influence over the conduct of the disciplinary hearing;

325.4. Rushed the investigation and disciplinary process; and

325.5. Mrs Lawrence mocked the claimant at the disciplinary.

326. In considering that issue, we took into account the respondent's explanations as detailed below:

327. The claimant has argued that from the moment she challenged the respondent, particularly from the point at which she referenced the Catholic Church's treatment of vulnerable children, her card was marked, and the respondent closed ranks to protect itself and dismiss her. Those are very serious allegations; the claimant is required to produce some evidence from which we could, properly directing ourselves, conclude that the reason for the matters she complains of was her religion or belief – i.e. that she was a non-Catholic.

328. In our view, the following matters were matters which were more than just 'unreasonable' conduct and which were therefore potentially matters from which we could draw an inference to support the claimant's allegations and in respect of which the respondent was unable to provide any explanation:

328.1. The disciplinary allegations were contrived by Mrs Murray and Mr Cook;

328.2. Mrs Murray withheld her notebooks, which demonstrated that the disciplinary allegations were contrived, and failed to disclose them either in response to a data subject access request or as part of the disclosure process in the Tribunal. Their existence was only revealed as a consequence of questioning from the Judge.

328.3. The decision that the claimant should not be alerted to the existence of the Employee's Assistance Program, evidenced by Mr Cook's email in which he stated that such a course might "backfire", which was made by Mr Cook and endorsed by Mrs Murray and/or Msgr Massey.

328.4. The fact that Mrs Murray continued to be included in decisions relating to the disciplinary notwithstanding the claimant's allegation in a formal grievance that she had contrived the allegations.

328.5. The deliberate and conscious decision made by Msgr Massey, Mr Cook and Mrs Murray not to inform Mrs Lawrence that the claimant had acute mental health issues, which formed part of the basis for her request for a remote hearing, with the result that she refused the claimant's request for the investigation hearing to be conducted remotely.

328.6. The fact that Msgr Massey and Mrs Murray failed to raise matters during the disciplinary process which demonstrated that the factual basis of certain disciplinary allegations was false and without basis, notwithstanding their first-hand knowledge of those matters, because they involved in the meetings/decisions in questions.

328.7. Msgr Massey's decision not to adjourn the disciplinary hearing (whether initially to permit the claimant more time to respond to the allegations or after the initial meeting to investigate the matters raised by the claimant) notwithstanding that he had canvassed that possible course previously.

328.8. Mrs Lawrence's failure to draw the ICAEW outcome letter to Mrs Hipkiss' attention prior to the determination of the appeal.

329. In determining whether we could draw an inference from those matters we took into account that the respondent was unable to provide any explanation for the majority of them, as we have detailed above. Each of those actions was one which cried out for an explanation.

330. We were persuaded therefore that the burden transferred to the respondent to demonstrate that the claimant's religion or beliefs had no influence whatsoever on the factual allegations which we have found were proved.

331. The respondent advanced the following reasons or arguments in relation to those matters:

331.1. *The claimant's suspension*: The claimant was suspended because of concerns that she could or might seek to alter financial records once alerted to the allegations and/or seek to influence members of her department to do so. Whilst we are not concluding that there was a reasonable basis for that concern, it is a common one when serious allegations are made, and a common response is suspension. Msgr Massey made the decision and was able to articulate the rationale that applied. Given we have not found that Msgr Massey was not involved in the initial discussion between Mrs Murray and Mr Cook when the disciplinary allegations were contrived, we accepted his evidence on this matter, which fell at an early stage of the process, and it was credible. The respondent has therefore proved a non-discriminatory reason for the suspension. The claim in respect of it is not well founded and is dismissed.

331.2. *The addition of allegations:* the decision was Mrs Lawrence's. Miss Spencer did not develop the claimant's arguments on this point with any force when cross-examining her. Nevertheless, despite the allegation being clearly identified in the list of issues, Mrs Lawrence did not identify any reason for the addition of the allegations in her witness statement. Given the allegation relating to Parker Chapman Ltd did not directly relate to the claimant's performance of her role, and was therefore outside the common or usual form of allegation which might be added, we concluded that it required an

explanation from Mrs Lawrence. She stated that she had added the allegation because she looked at all matters which effected the claimant's status as a member of the senior leadership team and any matter that was relevant to her role as an employee. That is a reason unconnected to the claimant's religion.

331.3. However, we rejected that as being the true reason because:

331.3.1. Mrs Lawrence did not provide that explanation previously and had produced no evidence to support that it was her practice as she alleged, and

331.3.2. she categorised the offence as gross-misconduct which in itself called for an explanation as, in the Tribunal's experience, such matters would rarely if ever be regarded as that serious in the absence of actual damage to an employer's reputation,

331.3.3. the investigation was desultory and one-sided as detailed above,

331.3.4. Mrs Lawrence failed to provide the ICAEW letter to Mrs Hipkiss, which would have been a key indicator or fairness, and provided no explanation for that failure, and

331.3.5. Mrs Lawrence's was found to have been untruthful in her account about mocking the claimant.

331.4. *Mrs Lawrence conducted the investigation and disciplinary hearing* – Mrs Lawrence's account, which was provided in her statement, was that it was necessary for her to lead and guide the disciplinary process because of the detailed and specialist subject matter of the allegations. That is a reason unconnected to religion. We accept that it was inevitable that Mrs Lawrence would lead the disciplinary discussions because (a) she had not had an opportunity to explore the claimant's account at an investigation meeting and would want to do so and (b) because of her experience as an accountant and auditor; that had been the reason for her appointment as the investigator. We accept that that was the reason for the degree of her involvement; it is not connected to the claimant's religion or belief. This allegation is not well founded and is dismissed.

331.5. *Rushing the investigation and disciplinary hearings and failing to take the claimant's health issues into account*. We found that the respondent has acted as detailed above, and that the burden transferred to the respondent to demonstrate that they were in no way influenced by the claimant's religion or belief. The respondent was unable to provide any or any reasonable or coherent explanation for why it acted as it did. We have addressed those matters at length above; it is unnecessary to repeat them here. The respondent has therefore failed to discharge the burden to show a non-discriminatory reason for its actions. The claims relating to these allegations are well founded and succeed.

331.6. *Mrs Lawrence mocked the claimant*. We have found that Mrs Lawrence mocked the claimant as she suggests. Mrs Lawrence has advanced no explanation for acting as we found she did, rather she denied the allegation. The respondent has therefore failed to discharge the burden to demonstrate a non-discriminatory reason for that action. The claim is therefore well founded and succeeds.

332. In summary, the claims of direct discrimination on the grounds of the claimant's religion or belief succeed in relation to allegations concerning (a) the addition of disciplinary allegations, (b) rushing the investigation and disciplinary process and (c) failing to take the claimant's health into account, and (d) mocking the claimant during the disciplinary hearing.

Harassment related to religion or belief

333. A necessary consequence of our conclusion that Mrs Lawrence mocked the claimant and that her actions constituted direct discrimination on the grounds of religion and belief is that the claimant's religion or belief was more than a trivial cause of Mrs Lawrence's comment. That is sufficient to establish the necessary nexus or connection required by section 26(1)(a) EqA 2010 when determining whether the conduct 'related to' the claimant's religion or belief.

334. We unhesitatingly conclude that the conduct was unwanted for the purposes of s.26(1)(a) and that it violated the claimant's dignity and created a hostile, degrading, humiliating and offensive environment. The claimant's immediate and marked reaction to the comment is clear proof of those matters, and we accepted her evidence about the effect of the remark on her. It was, in our view, reasonable in the circumstances of the case for the claimant to form that view and for the remark to have had that effect on her.

335. The allegation of harassment is therefore well founded and succeeds.

336. The remedy to which the claimant is entitled will be determined at a further hearing.

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Employment Judge Midgley

Date 26 April 2024.

Appendix List of Issues

1. Unfair dismissal

1.1 Was the claimant dismissed? This is admitted.

1.2 What was the reason for dismissal? The respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

1.3 Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

1.3.1 Adding allegations of misconduct after the commencement of the investigation.

1.3.2 The same person conducted the disciplinary hearing as the investigation.

1.3.3 The hearing was rushed and the claimant did not have sufficient time to respond to the allegations.

1.3.4 The suspension was unnecessary.

1.3.5 The claimant's health issues were not taken. into account and she was mocked by Carol Lawrence.

1.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

1.5 Did the respondent adopt a fair procedure? The claimant challenges the fairness of the procedure as set out above.

1.6 If it did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?

1.7 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

2. Wrongful dismissal; notice pay

2.1 What was the claimant's notice period?

2.2 Was the claimant paid for that notice period?

2.3 If not, did she do something so serious that the respondent was entitled to dismiss without notice?

3. Flexible Working Request

3.1 it is agreed that the claimant submitted a Flexible Working Request in according with the Flexible Working Regulations on 30 July 2021. This is the request relied upon.

3.2 Did the Respondent deal with the Claimant's application for flexible working in a reasonable manner? The claimant contends that it did not because it was rejected without consideration.

3.3 Did the respondent only refuse the application because of one of the grounds in 80G(1)(b) Employment Rights Act 1996. The claimant says it did not because it rejected the application without consideration.

4. Dismissal (Employment Rights Act s. 104C)

4.1 Was the making of any request for flexible working the reason or the principal reason for the claimant's dismissal?

5. Detriment (Employment Rights Act 1996 section 47E)

5.1 Did the respondent do the following things:

5.1.1 Adding allegations of misconduct after the commencement of the investigation

5.1.2 The same person conducted the disciplinary hearing as the investigation'

5.1.3 The hearing was rushed and the claimant did not have sufficient time to respond to allegations

5.1.4 The suspension was unnecessary

5.1.5 The claimant's health issues were not taken into account and she was mocked by Carol Lawrence

5.2 By doing so, did it subject the claimant to detriment?

5.3 If so, was it done on the ground that she had made a flexible working request?

6. Direct religious discrimination (Equality Act 2010 section 13)

6.1 The claimant describes herself as non-Catholic.

6.2 Did the respondent do the following things:

6.2.1 Isolating the claimant from and shutting her out from the disciplinary by

6.2.1.1 Adding allegations of misconduct after the commencement of the investigation.

6.2.1.2 The same person conducted the disciplinary hearing as the investigation.

6.2.1.3 The hearing was rushed and the claimant did not have sufficient time to respond to the allegations.

6.2.1.4 The suspension was unnecessary.

6.2.1.5 The claimant's health issues were not taken into account and she was mocked by Carol Lawrence. Namely that she said "Good to know you haven't had a panic attack".

6.3 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The claimant has not named anyone in particular who s/he says was treated better than she was and therefore relies upon a hypothetical comparator.

6.4 If so, was it because of religion?

7. **Indirect discrimination (Equality Act 2010 s. 19)**

7.1 A "PCP" is a provision, criterion or practice. Did the respondent have or apply the following PCPs:

7.1.1 An expectation that staff in the role of the claimant would work in the office for 5 days per week;
7.1.2 A requirement that staff in the role of the claimant would constantly monitor their team.

The Respondent does not accept it applied either PCP.

7.2 Did the respondent apply the PCP to the claimant?

7.3 Did the respondent apply the PCP to persons with whom the claimant did not share the same protected characteristic (sex), or would it have done so?

7.4 Did the PCP put persons with whom the claimant shared the characteristic, at a particular disadvantage when compared with persons with whom she did not share the characteristic?

7.5 Did the PCP put the claimant at that disadvantage in that she had childcare responsibilities.

8. **Harassment related to religion (Equality Act 2010 s. 26)**

8.1 Did the respondent do the following things:

8.1.1 Mock the claimant in the disciplinary hearing on 13 October 2021 in respect of the claimant's health issues;

8.2 If so, was that unwanted conduct?

8.3 Did it relate to the claimant's protected characteristic, namely religion.

8.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. **Remedy**

Unfair dismissal

9.1 The claimant does not wish to be reinstated and/or re-engaged

9.2 What basic award is payable to the claimant, if any?

9.3 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?

9.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

9.4.1 What financial losses has the dismissal caused the claimant?

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

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

9.4.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

9.4.5 If so, should the claimant's compensation be reduced? By how much?

9.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

9.4.7 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his/her compensatory award? By what proportion?

9.4.8 Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

Detriment (s. 47E)

9.5 What financial losses has the detrimental treatment caused the claimant?

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

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

9.8 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

9.9 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

9.10 Is it just and equitable to award the claimant other compensation?

9.11 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

9.12 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

9.13 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?