EMPLOYMENT TRIBUNALS

Claimant: Miss C E Swan

Respondent: The Governing Body of Our Lady & St John Catholic College

HELD AT: Manchester **ON:** 16, 17, 18 and 19 February 2015
19 February 2016
29 February 2016
1, 2 and 3 March 2016
30 September 2016
3 and 4 October 2016(in Chambers)
9 November 2016
(in Chambers)

BEFORE: Employment Judge Feeney
Mr G Moore
Ms M Dowling

REPRESENTATION:

Claimant: Jenny Watson, representative
Respondent: Rachel Wedderspoon, counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim(s) of:

1. unfair dismissal succeeds;

2. disability discrimination under the Equality Act 2010 fail and are dismissed;

3. breach of contract succeeds.

REASONS

1. The claimant brings claims of unfair dismissal, disability discrimination and breach of contract. The issues are set out in more detail below.

The Issues

2. The issues for the Tribunal are:

Unfair Dismissal

(1) What was the reason or principal reason for the dismissal?

(2) Was the reason or principal reason for the dismissal misconduct?

(3) If so, did the respondent hold a genuine belief in the reason and was that belief held on reasonable grounds and arrived at following a reasonable investigation? (**BHS v Burchell** test)

(4) Was the sanction of dismissal fair in all the circumstances (in accordance with section 98(4) of the Employment Rights Act 1996)?

(5) What if any compensation is the claimant due and should it be reduced because she withdrew her appeal on 15 January?

Disability

(6) Disability is conceded as a result of the claimant's anxiety and depression, but it is not conceded that at the relevant time the respondent had actual or constructive knowledge of the disability.

(7) Did the claimant suffer from further conditions tempromanibular joint disorder, chronic fatigue syndrome and migraines and/or was the combined effect of these matters a disability?

(8) Did the respondent have, or ought it to have, known that the claimant had the impairment and that she was at a substantial disadvantage?

Direct Disability Discrimination – section 13 and 39(2)(d) of the Equality Act 2010

(9) Was the claimant treated less favourably because of her disability in relation to the following matters (as set out at paragraphs 32-34 of the claimant's further and better particulars – pages 27-28 of the bundle)?

(i) The claimant claims the actions of Mrs Gillen in 2010 when she pressurised the claimant in returning to work amounted to direct discrimination. This was in contrast to the way in which Mrs Gillen treated Nicky Chadwell who was allowed compassionate leave. The claimant will submit that this amounts to direct discrimination with the ambit of the Equality Act 2010.

(ii) The claimant further claims she has directly discriminated against by the claimant by disciplinary action being taken against her following the allegations which Peter Neal had made against her. In contrast Mrs Gillen had made Suzanne Hall aware that Peter Neal was making allegations against Suzanne and those allegations were not proceeded with. In the claimant's situation immediate action was taken against her.

(iii) The claimant contends the fact that she made allegations against other members of staff and those allegations were not pursued, whereas the allegations against her were pursued, would amount to a further act of direct discrimination.

Discrimination arising from disability – section 15 and 39(2)(d) Equality Act 2010

(10) Whether the respondent treated the claimant unfavourably because of something arising in consequence of her disability.

(11) Whether the treatment was justified and was the treatment a proportionate means of achieving a legitimate aim? The alleged acts are set out in paragraphs 35-42 at pages 27 and 28 of the claimant's further and better particulars in the bundle. They are:

(i) As a result of the claimant's disability she needed extra support in her employment especially when traumatic events occurred. From 2010 onwards the respondent treated the claimant unfavourably by not providing any support, for example failing to fully implement the recommendations in the OHP report in the early part of 2011.

(ii) Because of the claimant's disability she can come across as emotional, negative, critical, irritable, short-tempered, abrupt and over sensitive. The disciplinary action in 2011 arose from the claimant's disability due to the fact that the conduct alleged was a bi-product of her disability. While the claimant accepts that some of the examples given to her by Mrs Gillen did occur she did not wholly accept where, when and the manner in which they were reported to have happened.

(iii) The disciplinary action in 2012 in part related to the problems that the claimant was having with other members of staff. These problems were again arising from the claimant's disability and whilst it is not accepted that all of the alleged matters occurred, it is accepted that the claimant's behaviour can be perceived as being negative.

(iv) The disciplinary action taken by the respondent (in relation to the allegations of shouting in a public place, inappropriate comments made to Mrs Gillen and bullying, undermining and the harassment of Suzanne Hall, Peter Neal and M Topham) cannot be treated as being a proportionate means of achieving a legitimate aim on the following basis:

(i) The respondent knew that the claimant was having trouble with members of staff yet did not seek to resolve those issues informally.

(ii) The respondent did not consider whether or not the claimant's behaviour could be related to her disability and therefore make the appropriate allowances for it.

(iii) In respect of the matters that formed part of her disciplinary hearing which resulted in her dismissal Mrs Gillen said she was aware that at least one member of staff, Suzanne Hall, had long-term problems with the claimant. However, at no time did Mrs Gillen bring Mrs Hall's concern or any concern that a member of staff had to the attention of the claimant so that she could modify her behaviour before dealing with them formally.

(iv) The respondent failed to deal with the matter in an appropriate manner such as via mediation or the capability procedure.

(12) It is averred that the decision to discipline and punish the claimant for sending a text message to a person outside the school concerning the retirement of Mrs Gillen also amounts to discrimination arising out of the claimant's disability. As a result of the fear and panic which are a consequential symptom of the claimant's disability she needed to discuss the departure of Mrs Gillen with someone so the claimant attempted to send a text message to a person with no connection to the school.

(13) The decision to discipline and punish the claimant for sending that text message was not a proportionate means of achieving a legitimate aim on the basis that the intended recipient of the text was not connected with the school and so it was unlikely that anyone in the school could have found out the information thereby, and that rumours of Mrs Gillen's retirement had already been going round the staffroom.

(14) For the avoidance of doubt the claimant would aver that any disciplinary action arising out of the claimant's disability would amount to unfavourable treatment.

(15) Because of the claimant's depression she would often be seen to be down and upset and instead of offering the claimant support Mrs Gillen would criticise her. This was not proportionate and caused the claimant further anguish.

Failure to make reasonable adjustments – sections 20, 21 and 39(2)(d) Equality Act 2010

(16) Did the respondent apply a provision, criterion or practice?

(17) Did this place the claimant at a substantial disadvantage compared to non disabled people?

(18) Did it place the claimant at a substantial disadvantage? The alleged acts are set out at paragraphs 43-48 (pages 28 and 29 of the bundle):

(i) After the claimant's mother's death Mrs Gillen failed to properly listen to the claimant or the suggestion of the professionals in respect of the claimant's wellbeing. This happened from 2010 onwards and amounts to a PCP. Furthermore, this PCP put the claimant at a substantial disadvantage in that her health was negatively affected. It is the claimant's case that the respondent has

failed to make a reasonable adjustment i.e. to follow the advice of the claimant or professionals with regards to the claimant's health.

(ii) It is the claimant's case that the respondent refused to provide detailed minutes of meetings to the claimant and also refused to confirm matters which had been agreed when the claimant emailed Mrs Gillen. This practice amounts to a PCP. The PCP places the claimant at a substantial disadvantage in that the claimant's short-term memory was affected by her disability and she was not able to readily remember what happened in meetings. Minutes and confirmation emails would have helped her to refresh her memory and provide an accurate picture of what was agreed. A reasonable adjustment to help the claimant overcome this detriment would have been the provision of detailed minutes in meetings or responses to confirmatory emails. Because the respondent failed to do either of these things the respondent can be seen to have failed in its duty to make reasonable adjustments.

(iii) On a number of occasions the claimant asked for various documents e.g. job descriptions and policies. The respondent would either not provide these documents or provide them late. The claimant contends that this amounts to a practice. The respondent's failure to provide these documents put the claimant at a substantial disadvantage. A reasonable adjustment would have been to provide these documents or to have provided them quicker.

(iv) The claimant contends that the head teacher ignored the fact of her disability and its effect, turning her back on the possibility of informal resolution of any problems over the execution of her professional duties and dealing with such concerns via the disciplinary procedure. This practice, the PCP, placed the claimant at a substantial disadvantage because it worsened her symptoms and thus perpetuated the problem. A reasonable adjustment would have been for the head teacher to incept the supportive informal stage of the capability procedure.

(v) It is the respondent's policy that if a grievance is made against an employee that employee cannot speak to the school counsellor because it would be seen as a conflict of interest. This PCP placed the claimant at a substantial disadvantage on 30 June 2011 when the claimant was prevented from seeking the help of Nicky Chadwell. The claimant became extremely distressed about this policy; so distressed she had to go home. The respondent failed in their duty to make reasonable adjustments by not allowing the claimant the opportunity to speak to Nicky Chadwell.

<u>Harassment – sections 26 and 39(2)(d) of the Equality Act 2010</u>

(19) Did Mrs Gillen engage in unwanted conduct related to disability?

(20) Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or

offensive environment for the claimant? The acts relied on are set out at paragraph 51 (page 29 of the bundle):

(i) Pushing the claimant to return to work before she was ready.

(ii) Making the claimant attend counselling before she was ready.

(iii) Failing to provide relevant documents i.e. minutes, job descriptions and policy documents.

(iv) Failing to follow OHP recommendations.

(v) Being critical of the claimant because of her demeanour and attitude.

(vi) Failing to provide support to the claimant.

(vii) Trawling for allegations against the claimant.

(viii) Instigating three disciplinary processes and sanctions.

(ix) Pressurising the claimant to deliver the sixth form media course on her own.

Breach of Contract

(21) Did the respondent breach the terms of the contract of employment by failing to pay the claimant wages for the period 22 November 2013 to 14 January 2014?

Time Bar

(22) The respondent argues that the claimant's claims in respect of discrimination are in part time barred and it is not just and equitable to extend time.

Witnesses

3. The Tribunal heard for the claimant from the claimant herself; from Robert Young, NASUWT representative; Renia Przybysz; Lesley Ham, union representative at the respondent school; and Nula Dalton, ex colleague of the claimant.

4. For the respondent Colette Gillen, ex Head Teacher; Gillian Yates, ex HR Manager; Mr M Joyce, ex governor and Chair of the disciplinary hearing panel; Mr J Gilda, ex governor and investigating officer.

5. The claimant provided extensive diary entries. We believe these did reflect the claimant’s thoughts and anxieties but not that she necessarily shared all these with other colleagues. Where we have found them helpful we have referred to them in our decision.

Findings of Fact

6. The claimant began working for the respondent on 1 September 1991. The claimant began her career at the respondent school as a PE teacher. In 2004 following other promotions the claimant became Director of the Arts College.

Medical evidence 1991 to 2010

7. The claimant's evidence was that she told the then head master, Mr Humphries that she suffered from anxiety and depression. She said it was referred to on her application form. With the passage of time this documentation is no longer available. However, even bearing this in mind we find that on the balance of probabilities it is inherently improbable that there would be no documentation from 1991 to 1998 regarding this matter if the claimant had advised the Head Teacher of this; even if she had, there was nothing to indicate that her anxiety and depression amounted to a disability at this point in time.

8. There was a 1998 Occupational Health record available, however, which indicated that the claimant was prescribed Prozac for premenstrual syndrome, it was noted there were no other major illnesses and the claimant was not feeling depressed. In this the claimant, however, described intermittent stress with her principal symptoms being anxiety and panic attacks. She was diagnosed with chronic fatigue syndrome on the same date, which appeared to be 11 February 1998. In 2002 the claimant submitted sick notes referred to migraine and myalgia. In 2007 she was absent due to a chest infection and a cold. In 2012 her absence was related to vertigo and migraine. Therefore after 1998 there were no other references to stress or anxiety.

2010

9. At Easter 2010 the claimant was asked if she would take on sixth form media. She had declined a year earlier and somebody had been appointed externally to do this, however this was not working out. The claimant agreed she would do it if Suzanne Hall could teach some practical elements of the course as she did with Years 10 and 11. However, in May Mrs Gillen said that the school could not afford to keep Suzanne Hall on as artist in resident but following a discussion she agreed that she would pay Suzanne Hall to provide 28 days of work to assist the claimant.

10. She had a discussion around the BTech course with Mrs Gillen currently being studied by Year 12. The claimant stated there was a lot of it she did not know but she was sure she could learn and keep one step ahead of the students "so I could teach it". She said, however, she would need the support from someone who had experience of the admin side, "As I understand there's a lot of paperwork, evidence gathering and methods of assessment that I've never done before. I also feel we would need a technical workshop which I outline below".

11. It is relevant to note an email of 21 May 2010 as the claimant would later claim that many of her behaviours were due to her disability. In this email she apologised to Mrs Gillen for leaving her office abruptly and for her "unprofessional comments it's been reported I made publicly". She went on to say:

> "I've always been outspoken…it's not the first time my mouth engaged before my brain."

12. In September 2010 the claimant's mother became seriously ill and it was agreed that she could have some time as compassionate leave.

13. In October 2010 the claimant's mother died and she was devastated by this event. She lived with her mother. Following her mother's death she was absent from work. The head teacher, Mrs Gillen, referred the claimant to Occupational Health on 16 October for bereavement counselling. The claimant now complains that she was pushed into counselling when she was not ready for it. However on 1 November the claimant had said to Mrs Gillen:

> "As I have said before and will continue to say I will be eternally grateful to you for the support you have given me during mum's illness but I know I can't ask for you to continue to offer that level of support indefinitely."
>
> And in an email of 3 November to Mrs Gillen the claimant stated:
>
> "I have been to my GP this morning and he has arranged for me to see a bereavement counsellor but unfortunately there is a 12 week wait list in the NHS. He has advised me to contact Cruse to see if they can get me something sooner."

14. The claimant went on to discuss Suzanne Hall bringing in her sick notes. This is relevant as it shows that Suzanne Hall regularly visited the claimant and was happy to run errands for her. Ms Hall was also covering the claimant's classes whilst she was off sick.

15. By 9 November Mrs Gillen had found a counsellor who lived locally. The claimant was recorded as telling the counsellor how supportive Mrs Gillen had been. However, a diary note from 4 November suggests she pleaded with Mrs Gillen not to send her to counselling. Mrs Gillen agreed that the claimant had said her first counselling session had not been much use and as far as she could remember she said something like "that's a shame, give it a go it will help you". The second session was to take place in the New Year.

16. An Occupational Health appointment was arranged because it was needed in order to source paid counselling. However, there was no other evidence that she had "pleaded" with Mrs Gillen not to send her on counselling and therefore we do not accept that this was what was said to Mrs Gillen at the time.

17. The Occupational Health report following this meeting said that she was absent from work with signs and symptoms of impaired psychological wellbeing. This would appear to be a normal grief reaction following the death of her mother in the middle of October 2010. It stated that she had actively sought bereavement counselling:

> "Unfortunately there were lengthy waiting lists and therefore I advised that this department will be able to facilitate a referral for counselling therapy in order to expedite its provision."

18. It then said the claimant was not fit for work due to the severity of her symptoms and it is not possible to determine how long it may take for her recovery to be achieved, "she reports no other contributing factors and there are no other health

issues at present. She is exhausted as her sleep has been affected" and she said she believed that there would be another 4-6 weeks' absence.

19. The Occupational Health adviser stated that, "the Equality Act 2010 is unlikely to apply at this juncture".

20. The claimant at the time was speaking to the school counsellor, Nicky Chadwell, a friend of hers, who advised her that she had had six weeks off when her sister had died and it was taken as compassionate leave with no intervention, no sick note and no referral to Occupational Health. In respect of Nicky Chadwell, Mrs Gillen explained that her sister had been terminally ill for some 18 months before she died and that she had caring responsibilities as she had a disabled son:

> "She never asked for time off until the week before her sister passed away and when she was given a week to live she asked for the week off beginning 29 September so she could be with her sister who was in a hospice in Cumbria. Her sister died on 6 October and she was granted three weeks' compassionate leave on the basis that she would really not be fit to be counselling pupils when she was experiencing difficulties herself."

21. The claimant heard via Suzanne Hall that Mrs Gillen's feeling was that the claimant should come back by Christmas as this would be better for her. The claimant was unhappy about the referral to Occupational Health as she felt that this occurred too early. Mrs Gillen's thinking was that by doing this the claimant would be able to get access to counselling sooner. .

22. On 22 November Mrs Gillen wrote to the claimant with the Occupational Health report stating that at this point in time she would normally arrange a school welfare meeting but she said she was not going to rush into anything and to let her known when the counselling was going to happen. The claimant replied asking her what a welfare meeting was. Mrs Gillen replied that they were informal meetings that were held before the sickness absence policy was applied. The purpose is to discuss current health and the content of any Occupational Health reports if relevant, and was an opportunity to discuss a likely return to work and anything the school might do to support a return.

23. The claimant requested a copy of the sickness absence policy but did not receive it, as she wanted to check what the correct process was. She eventually received it in January 2011.

24. The claimant submitted sick notes: one dated 1 December 2010 stated the reason for absence was bereavement and grief reaction.

25. The claimant was invited to a welfare meeting by a letter dated 3 December for 10 December. The claimant wished the meeting to be outside school and it was agreed to hold the meeting in the vocational centre. Mrs Gillen suggested that the claimant bring someone with her but she did not. The claimant was happy and thanked Mrs Gillen.

26. On 9 December the claimant, in an email to the head teacher, had said:

> "You couldn't be more supportive if you tried. I don't want you to think I'm ungrateful. Nothing could be further from the truth. I'd like nothing better than to be able to say 'thank you, I'll be there' but the anxiety I feel is overwhelming. I wish I could explain."

27. On 10 January 2015 Mrs Gillen suggested meeting the claimant after she had had two counselling appointments, and there was an invitation to a meeting on 31 January. She was told she could bring someone along, have breaks, and that the meeting was outside of any formal policy and the claimant thanked her for this.

28. At the meeting on 31 January a phased return to work was discussed and it was agreed the claimant was not expected to carry out all of her duties on her return. The claimant willingly discussed this and said to Mrs Gillen, "Thanks for all your understanding and support". The claimant also told Mrs Gillen to stop apologising for doing her job. Mrs Gillen also shared an experience with her son who had also suffered from depression and medication had really helped him. The claimant later complained that Mrs Gillen was pressurising her to return before her sick note expired but we do not accept this, the meeting was amicable. A further Occupational Health appointment was arranged for 16 February.

29. The claimant's sick note of 25 January stated depression and grief reaction, and the Occupational health report of 16 February stated that:

> "Caroline has completed four of the six counselling sessions that were authorised through the department and has found these to be of some benefit. She remains under the supervision of her GP and is in receipt of the appropriate medication. This has increased recently and it can take up to four weeks for this to achieve its optimum therapeutic effect. With this in mind and due to Caroline's continued symptomology indicating impaired psychological wellbeing I believe that a return to work will not be achievable prior to the end of the current sick note. However we discussed a phased return to work which would help facilitate a return to work after this date and I believe that this would be achievable. I would recommend that Caroline returns to work on half her normal hours and works half hours for the first two weeks of a return to work and in the third week I would recommend she returns to her normal hours. During the first week of her return to work I would recommend that she has no teaching responsibility and that this is gradually increased over weeks two and three. At the end of the third week it's the end of term and there is a two week holiday for Easter. On her return to work I would recommend that she work ¾ of her normal hours for the week commencing 3/5 resuming her full duties the week commencing 9/5. Presently she continues to remain apprehensive regarding re-engaging with work principally because of her symptoms of impaired psychological wellbeing and its impact upon her confidence about her capability within the workplace at this time. In my opinion it is imperative that Caroline be treated supportively with a degree of flexibility in terms of workload, intensity of work and other work related deadlines for 2-3 months following a return to work while her psychological resilience is restored…With the appropriate support Caroline does appear to be making a recovery from this episode relating to the difficult circumstances in her personal life."

30. The report from 16 February stated:

> "I would recommend that regular perhaps weekly meetings be held in order to ensure that she is capable of a return to work and that if any issues do arise that they can be dealt with. The open door policy should help to provide her with a supportive and empathetic approach from management which is likely to help sustain her in work."

31. The writer went on to say that the Equality Act 2010 was unlikely to apply.

32. Whilst the claimant was off sick the college lost its status as an Arts based college; there was nothing unusual in this, all specialist schools lost their status and as a result also lost additional funds. One option in schools where this occurred was for teachers who were undertaking roles related to the specialist status would simply return to just carrying out their substantive posts obviously on a reduced salary. The claimant had been carrying out a senior leadership role in respect of the Arts College and therefore that could have been the outcome for her; because she was absent she was not aware of this debate and Mrs Gillen did not want to worry her about it until it was confirmed. Mrs Gillen decided she wanted to try and keep the claimant on the Senior Leadership Team if possible and look for other duties she could do to warrant her position as a member of SLT as well as her teaching. In Mrs Gillen's view she created a role for her described as a Director of Pupil Advice and Guidance so she could remain part of SLT. Mr Gillen could have simply required the claimant to return to her original less senior role.

33. The claimant was panicked by this and rang Mrs Gillen. Her perception was the school had taken her post off her without discussion while she had been off sick. She was also unsure about her ability to do the new role.

34. The claimant emailed Mrs Gillen on 9 February to state that she had no desire to change roles and that when Mrs Gillen had told her the Arts College status had gone it seemed to indicate she had no choice but to change roles, "I was completely taken aback", and nothing after that had actually registered so she asked for clarification.

35. The claimant returned to work in March 2011 and she felt it was very difficult. Occupational Health had recommended support to help her build up emotional resilience but in her view the support did not materialise .

36. Mrs Gillen said she did meet with the claimant, mainly on Fridays, on one occasion until 7pm. They were not formal meetings but she felt a formal meeting would not assist the claimant and Mrs Gillen believed the claimant never hesitated to come and see her if there was something she was concerned about. She believed she only ever missed one Friday in the period in question because her husband had a hospital appointment as he had been diagnosed with cancer. . The claimant would also often come and see her early in the morning before school started. Whilst there was no formal record of a return to work meeting Mrs Gillen said they would have caught up at the end of the claimant's first week. We accept Mrs Gillen's evidence. We found her generally a credible witness and her statements certainly in relation to the support she gave the claimant at this stage were corroborated by emails.

37. The new role the claimant was moved into was Director of Pupil Advice and Guidance which would enable the claimant to stay in the Senior Leadership Team. Mrs Gillen said that her idea was that the claimant would first get back to teaching

duties, then to additional duties such as lunchtime supervision and then they would look at additional Senior Leadership Team duties. She was trying to avoid putting pressure on the claimant and wanted to agree the job description. When Mrs Gillen eventually did this she felt it was quite a "soft" job description which would not challenge her too much, and she believed the union's representative was happy with her approach to this.

38. On her return to work the claimant was paid at her usual rate of pay even though she did not fully resume SLT duties.

39. On top of the job issue the claimant complained that Mrs Gillen had told her off for not smiling and keeping her head down and looking miserable. Mrs Gillen stated that this was a longstanding joke because it had been raised by an LEA adviser in 2008 who had said, "Try smiling at the kids a bit" to which the claimant had responded, "I don't do smiling". Mrs Gillen said there was a conversation about colleagues not responding to the claimant, and Mrs Gillen then explained to the claimant that people were not ignoring her but she was going around with her head down and avoiding eye contact so that they did not know how to approach her. It was not a criticism. Again we accept Mrs Gillen's evidence on this.

40. The claimant complained in June that a colleague, Mr Fleming, had made some unprofessional comments in front of staff and pupils in the dining one lunchtime, and had shouted at her. Nicky Chadwell was with her and advised her to speak to Mrs Gillen. The claimant said she tried to do this and asked for her help in resolving relationship issues with him on 20 and 23 June but she refused. Mrs Gillen advised that Steve Fleming had made a flippant remark about the claimant not working when he had to – referring to the claimant taking lunchtime when he was having to supervise students.. Mrs Gillen said she took the view they were both members of the Senior Management Team and should be able to discuss this thing together, and that in any event she had asked Steve Fleming to sort the situation out with the claimant as she knew she was upset.

41. In that month a grievance was submitted against the claimant by Steve Fleming. Mrs Gillen said she had no choice but to deal with it as a formal grievance as that is how he had brought it. His letter of 22 June stated:

> "I have previously informed you about the conduct of Miss Swan when asking sixth form students about the units they were working on with me. To remind you, her line of questioning was unprofessional inferring that no work would be completed and there was no evidence of that work. My students did not know who to believe and were left confused. At no time was I consulted by Miss Swan about those units. Mr Neill witnessed this and brought it to my attention. After a discussion with you we both agreed you would have a word with Miss Swan and that was the end of the matter. Yesterday in class the students said they had been told by Miss Swan to produce evidence of an assignment that had been completed as part of my units. This is not a problem as I believe tasks can cover a number of assessment criteria. I find it strange that a colleague asked the student to ask me whilst maintaining total silence and blanking. The students all seemed to be worried again that the work had gone missing. The two unit files are currently with Mrs Phillips for verification complete with tapes. I resent the way that Miss Swan has asked for these materials and the throwaway inferences that it cannot be produced. I regard these actions as unprofessional and not

> becoming a member of SLT. Earlier this morning I asked Mr Neill if the students were losing confidence over my abilities. He informed me that he felt uncomfortable in an atmosphere of constant questioning by Miss Swan about what work had been completed: 'The students can't understand why she doesn't ask Mr Fleming'. He went on to say this constant questioning was undermining, subtle and unprofessional. "As you know I didn't want to write this letter, much better to sort these things out with a meeting, but a point has been reached where left unchecked this unprofessionalism will continue to the detriment of my career and reputation."

42. Mrs Gillen said other staff complained about the claimant - Mike Topham on 11 May, Carole Phillips (Sixth Form Achievement Coordinator) and Peter Neal. The claimant said she felt on returning to work in March these staff were resentful - she felt a holiday camp atmosphere had developed whilst she was absent and they did not like it when she was in charge again. Mrs Gillen had advised them at the time they would need to make formal complaints if they wished her to deal with the matters they were raising – they did not do so.

43. A meeting was arranged for 1 July to discuss the matters raised by Mr Fleming and the claimant was offered support. The claimant then went on further sick leave from 30 June with a sick note stating "anxiety and depression" for two weeks. Mrs Gillen offered more counselling for the claimant and thought it would help.

44. A meeting was held on 11 July where the claimant, with her trade union's advice, accepted she did want to go down the informal route in resolving the complaint. Issues regarding comments the claimant had made about pupils in front of them were raised, as well as the issues raised by Steven Fleming, with Mrs Gillen saying that, "one pupil has raised to another member of staff that they feel uncomfortable with the persistent and detailed questioning of them by Caroline about Steven Fleming's units".

45. A conciliation meeting with Steve Fleming was suggested, with Mrs Gillen saying she did not want to open an investigation and make it formal. The union official suggested a management instruction, which Mrs Gillen had clarified would not be included in any reference. There was a long discussion about who the claimant could speak to about the complaints and the school did not wish her to speak to other members of staff as they thought this would inflame the situation. The union official stated that if they were to accept a management instruction would she guarantee it would not be used in a redundancy situation, and Mrs Gillen agreed. There was a suggestion that the claimant would be referred again to Occupational Health.

46. A further meeting was held on 18 July where it is recorded that the claimant was to attend Occupational Health prior to being allowed to return to work. The claimant was argumentative in this meeting and Mrs Gillen said that:

> "You have said before 'you know what I'm like'. I do know you are like and it has to stop…you need to put a stop to flyaway comments."

47. The claimant agreed that she would make comments in anger and that they had been there twice before. Mrs Gillen said:

> "This is the third occasion and it has to stop, which is why we've taken a more formal approach."

48. The union said whether it was the second or third occasion was irrelevant. They needed to find a resolution, and it was agreed that a management instruction would be given to be reviewed in 12 months.

49. On 20 July there was a discussion about the claimant returning to work, but she did not want to work with Steven Fleming or Peter Neal, and then they went on to discuss the claimant's duties for the next year.

50. The record of the management instruction issued on 18 July stated:

> "Caroline Swan is reminded that she must refrain from:
>
> (1) Talking about pupils inappropriately or unprofessionally in open areas;
>
> (2) Talking about pupils to other pupils inappropriately;
>
> (3) Making inappropriate comments about staff, either directly to other staff or in an open forum."

51. The claimant was advised that any concerns should be discussed in private with the Head of Deputy Head.

52. The claimant would later regret taking this option as any opportunity to challenge the matters she was accuse of was lost and she felt they contributed to the later view of her in the disciplinary process.

53. It was confirmed on 20 July after she had attended Occupational Health that six further counselling sessions were to be approved. It was agreed that when she returned to work for the rest of the academic year Suzanne Hall would continue to support her during her delivery of the sixth form modules, therefore ensuring she would not be working alone with Steve Fleming or Peter Neal. Her lunch duty would involve her being in the canteen with Steve, but she agreed that she would be professional and undertake the duty.

54. The outcome letter continued:

> "A copy of the timetable for next year will be made available to you as soon as possible. In relation to the other member of staff Suzanne will be working within media one day from September. Steve will not be delivering the units and Peter will continue to be the full-time HLTA for the department. You stated that you may struggle with the mass on Friday but will do your best to attend. If you have to leave the service because you become emotional then you will endeavour to come back into mass after a short break. In the meeting of 18 July you were informed I was issuing you with a management instruction. The wording of this document was agreed with you and your union representative and a copy of the final document has been sent to you. As agreed this management instruction will be reviewed again in 12 months' time."

55. She went on to say it had also been agreed that they would try and resolve the relationship problems in September and she would be in touch in the new

academic year in relation to that. She noted that they had also discussed the role for the coming year "and you were happy with the responsibilities I described. I also advised you I propose your title be changed to Director of Student Advice and Guidance but I am happy to look at any alternative titles you may suggest".

56. The Occupational Health report of 19 July stated that:

> "Caroline is currently absent from work and has been since 1 July with depression which she robustly attributes to issues at work about which you are fully aware. At our meeting today Caroline described the ongoing situation at work which she believes has caused this episode of absence. I outlined your concerns with regards to her extremely distressed state at a recent meeting. She feels that this was a reaction to the uncertainties surrounding the meeting and that she had an acute anxiety response to this. She has sought the appropriate advice from her GP and has been commenced on an additional medication to combat this anxiety. She reports a significant reduction in her symptoms despite the fact that the situation has not yet been fully resolved. Caroline feels it would be beneficial in terms of her ongoing recovery for her to return to work before the end of term. Her GP has supported this and has provided a fit note stating she is fit to return with certain restrictions.
>
> <u>Management Advice</u>
>
> From the information available to me today I would also support an immediate return to work with some additional support i.e. that she does not work one-to-one (without another staff member present) with either of the parties to whom the outstanding issues are related. In addition I recommend that in order to protect Caroline's psychological wellbeing from further anxiety related to uncertainty her role and responsibilities for the next academic year are made clear before the end of this term. Caroline has accepted the offer of further counselling sessions and I have made this referral today. I am cautiously optimistic that with the support over the summer break and with the clarity regarding the next academic year her psychological resilience will be positively affected and that she will be able to engage with a meeting scheduled for September in which resolution of the outstanding issues is planned."

57. The claimant returned for one week at the end of the summer term and then began school again at the beginning of September.

58. On 22 September a letter from Mrs Gillen recorded that they had spoken a number of times regarding the claimant's role and her health situation and that she had "shared with me your concerns about delivering the first lessons of the year, and I wish to say well done for getting through these first few days". She also said that had discussed the role and the media course in more detail and confirmed that until half-term Suzanne Hall would be helping. "She would be working predominantly on marketing but was also available to assist with any of the technical aspects of the course which you need help to deliver".

59. It was recorded that the claimant had stated she could manage without Ms Hall, but that Mrs Gillen said:

> "If you change your mind they were happy for Suzanne to come into your lesson should you need the technical aspects demonstrating to the class."

60. Mrs Gillen indicated a further welfare meeting would be needed but she wanted to wait until the completion of the counselling.

61. In respect of the Steve Fleming grievance it was agreed that mediation would take place between them on 27 September. Simon Jones would be present to support the claimant and Paul Hogan to support Steve. Mrs Gillen and Gill Yates, a freelance HR officer the respondent was using, would also attend. Mrs Gillen went on to say:

> "I appreciate you're going through a difficult time at the moment and wish to stress that I want you to still feel able to come and talk to me about day-to-day concerns, your health, etc. However, to ensure I remain impartial I am asking both yourself and Steve not to discuss the grievance with me until we have hopefully resolved the matter with group mediation."

62. The claimant wrote back saying that she had not declined the offer of Suzanne's assistance. She stated:

> "Where I come unstuck is my lack of experience of the media industry and how it operates as well as some of the practical components such as camera techniques or writing for screen. I have always been honest about this. These are not things you can learn from books but are dependent on experience in the industry. With Suzanne now taking on the additional units needed for the third A level it provides the perfect opportunity for us to play to our strengths by planning together and teaching holistically."
>
> This shows the claimant was still saying at this point she was not capable of delivering some aspects of the course.

63. The claimant also stated that she did not understand why a welfare meeting was now required now she was back at school.

64. The mediation meeting with Steve Fleming took place on 27 September.

65. On the 4th October Mrs Gillen replied to the claimant

> " …I have always accepted your view that there were certain aspects of the course which required Suzanne's technical expertise…It seemed to make more sense for Suzanne to do the input and you learn from her alongside the students"

The plan being formulated at this point seems to have been for the claimant to attend SH's technical lessons and for the claimant to acquire the relevant skills that way. There was no indication at this point of any timescale to that.

66. On 23 November Mrs Gillen informed the claimant confidentially about her intention to retire and ask her to tell no-one else. In breach of confidence the claimant texted a friend, who used to work at the school but no longer did so, about Mrs Gillen's retirement. However, the claimant accidentally sent it to Mrs Gillen rather than her friend. Mrs Gillen was very upset about this as the claimant had breached her request to keep this confidential.

67. On 28 November, therefore, the claimant was informed a formal investigation was to commence concerning the text message for misconduct and the claimant was invited to attend a meeting on 9 December. The claimant provided a statement for this and stated she had made a huge error of judgment and she was truly sorry. She did not say that her conduct was because of any mental or emotional issues, and she stated on 30 November she would accept whatever came her way as a result of "my stupidity and thoughtlessness". The claimant was happy to move straight to a hearing and the hearing was listed for 9 December. Meanwhile 12 further sessions of counselling were paid for by the respondent.

68. At the meeting on 9 December the claimant was accompanied by her union representative and was given a written warning for 12 months for a breach of confidence. Again, no-one raised on the claimant's side that her conduct was related to her mental health, and the respondent was concerned that this had occurred only a few months after she had been reminded about her requirement to work professionally via the management instruction.

2012

69. In January the claimant emailed Mrs Gillen about her concerns regarding her work/life balance and Mrs Gillen did discuss these with the claimant, stating that she thought there was no need for her to sitting up until 2.00am preparing her lessons; she had a small group of students and far less teaching time than most teachers. The claimant was asking for more non contact time and said that other people in SLT had more than her. Mrs Gillen took the view that it depended on what role they were performing. She gave an example of one of the Deputy Heads who did not teach at all on a Friday because he was responsible for behaviour and spent Fridays meeting parents discussing poor behaviour of their children.

70. On 24 February there was a meeting between the claimant, the Head Teacher with Gill Yates from HR to discuss the further training requirements and SLT duties. It was minuted but the claimant did not see the minute at the time.

71. The claimant had by that stage identified a course which would help her deliver the training. She said that she felt it would be difficult for Suzanne Hall to train her, partly because they were also friends, and the Head Teacher agreed to look at other options to ensure she was trained to deliver the course; therefore the details of the course she had identified were to be passed to Mrs Gillen.

72. At this meeting the claimant informed the Head Teacher she could deliver 2-3 of the 13 units required on the course. Some units were mandatory and "Caroline would like to run next year with seven units in the first year of the course, five in the second year, to allow time to recap in year 2". There was a discussion about the 3 'A' level equivalent option (a course which would be the equivalent of three 'A' levels) and it was noted that, "if this is going to happen school will still retain SH for this delivery. Further discussions need to take place at a later date on how this would work in practice. Concentration needed at present on up-skilling Caroline to be able to deliver 13 units for the two 'A' level equivalent course". It was noted as action that, "Caroline was asked to look at the units and pick ones she could deliver on her own at the start of the new academic year and which would also still appeal to students".

73. Again the claimant was raising issues as to her ability to deliver some of the course.

74. It was noted that the claimant also raised that media was not her subject and she had felt obliged to accept it at a time when her mother was ill and she would not have taken on the role if she had felt stronger at the time. It was noted that the Head Teacher did not agree that she had been under pressure to take on the role and that the school was trying to support her to obtain the skills for the course and "had committed to having Suzanne supporting for the last two academic years", but she was worried in case she did not manage to pick up the required skills on the five day course. Mrs Gillen said she should think positively as she did not consider that she would fail.

75. There was then a discussion about SLT duties and Mrs Yates was confident that the claimant had enough contact and non contact time.

76. There was a discussion of the additional duties of the SLT job (student guidance). It was suggested that she speak to prefects at lunchtime rather than separately, but no further definition about that responsibility was articulated. The claimant said that she did not want to take on pupil voice (this was one of the duties of her new Director of Student Guidance job). She stated she had spent four days of half-term marking and did not complete it. She has 15 Year 10s, eight Year 11s and seven in the sixth form, "Caroline has PPA time in her timetable but said does not use this as PPA is busy doing other tasks". It was noted that at present it looks like there was adequate time within the timetable for the SLT duties required of the claimant. She was asked to give a breakdown of what time she was spending on each task if she still feels there is too much work and they would look at it again. She was told she should use the PPA time in school for marking and preparation and this would reduce the time she needed to spend at home. She should also just concentrate on essential tasks rather than desirable. She was also asked to look for support for administrative tasks and that Lynee Nuttal maybe able to assist.

77. On 26th February the claimant sent an email and a note to Mrs Gillen out the requirements for the courses she was running,who was teaching which part including "SH completing a minimum of 2 more giving year 13 and 14 their 3rd A level (supposed to do 6 so ideally will complete 3 more)" and setting out the 13 units the claimant would be teaching in 2012.

78. In March 2012 an internal advertisement was put on the staff notice board for a senior post advertised on the same salary as the claimant and it was a topic of considerable interest. The claimant was wondering whether it might suit her better than the Director of Pupil Advice and Guidance, but also that part of it looked like it was to assist the claimant in that post so she went to see the Head to query the latter. The claimant would later discover that the job had been wrongly advertised on the same scale as the claimant and that Julie Ackroyd had drafted it, but at the time she did not know this.

79. The claimant was confused as a feature of this post seemed to be encouraging participation in student council activities, and the claimant was concerned about this as she felt that was what she was being expected to do as

Director of Pupil Advice and Guidance. She said to Mrs Gillen, "So I'll do all the work and they'll just applaud me from the sideline", and she clapped as she did it. Mrs Gillen said there was no need to be facetious. The claimant said she was not being facetious. She then returned to the staffroom where she was asked what Mrs Gillen had said about the post as her colleagues were interested in it.. The claimant, somewhat ungraciously, repeated Mrs Gillen's explanation and her response including the clapping. She said she regretted doing so and that she was unaware that Mrs Ackroyd was in the staffroom and had designed the job description and was offended by this. Mrs Ackroyd had advised Mrs Gillen of what had happened. Nothing was mentioned at all to the claimant at the time about this incident: neither the one with Mrs Gillen nor the sequential one in the staffroom.

80. On 15 April 2012 Mrs Gillen sent a draft job description to the claimant for the Director of Student Guidance. The claimant had some queries about this and Mrs Gillen amended it and there were a few other minor queries from the claimant..The correspondence shows an amicable discussion taking place.

81. In April the claimant attended a week long training course on filming. Nothing significant the happens until June.

82. By an email dated 22 June Suzanne Hall informed the claimant she and her would have to work separately. Suzanne Hall has not been referred to in depth so far in our narrative. She was an actor and she was helping, as can be seen with marketing and with part of the claimant's course.

83. The claimant and Suzanne Hall were extremely good friends. On 22 June she sent this letter to the claimant. It began:

> "Hi Luvvi,
>
> Don't really know where to start in reply to your text but I am glad that you have told me how you feel. I'm gonna try and respond with each bit of your text."

84. The text message was obviously about the claimant feeling let down as Ms Hall remonstrated with her saying:

> "I was simply trying to make things easier for you, you needn't worry. With regards to not valuing you, I really can't believe that you would ever think that! I've not been anything but a true friend throughout! I'm actually really upset that you said that! I dunno. I think you are mixing up our friendship with our roles at work. You are right that things have changed at work and you know that Clare has made it very clear that we have to be separate. I know that is really hard for both of us but that is the way it has to be. I obviously want to hep you with things that you find difficult but you're right that I do have to think about myself. I'm worried that I'll get done big time because Clare is keeping an eye on what we are both doing. She has made it clear she is my line manager. So you know I'll do anything for you but its got to be agreed with Clare first. I can't risk losing my job and to be honest hun there are too many eyes in that building that will let the powers that be know what is going on. You know that more than anyone!!"

85. She carried on using the endearments "hun" and "luvvi" and added:

"This has got nothing to do with how I value you as a friend and I really love you to bits even though you are a bloody nightmare at times lol. I know what you like and that's that. I choose to be your friend because I want to be not because I want to use you for my own gain. That's not me or who I am."

86. The letter continued, and ended with: "Luv always Suze".

87. The claimant's reply was important as it became the basis of disciplinary action taken against her. It was timed at 9:13 on a Friday night. It started:

"Hi Suze,

What you've got to understand is that Colette and to a lesser extent Clare have implied on a number of occasions that you have said I was taking advantage of you and you were doing all my planning and teaching. They made out that they were protecting you from me abusing our friendship to make use of you. I didn't and don't want to believe that but because you are not upfront with me, probably because you want to avoid me getting upset, you always say 'yes' you'll help, later seem edgy about it and then along comes a reason why you can't do it. I would have preferred for you just to say that you couldn't do any of the filming or work with Year 10 because Clare had warned you against it. You told me to stop worrying, just go along with what they said, and then that we would do our own thing, so that's what I did. This has left me in an impossible situation because I can't do the filming and never would have said I could if I'd thought for a minute you weren't going to it. Over the last few weeks I'd begun to realise that I had made a mistake and should have fought on for them seeing sense that if the two of us are there surely you doing the filming bits of the units would be the best all round.

I was upset on Tuesday because you cut me to the quick when you told me that the work experience was none of my business and that I should butt out. I always put on a harsh exterior when I'm really in bits and have absolutely no confidence in my own ability. Yesterday I couldn't put the front on anymore and I just fell apart. I know this is no-one else's fault but my own. I knew I could do the job with your help and so I had bucked up thinking Colette would go and I'd be able to speak to Keith and Clare who would listen and see reason. Having found out tonight that I was right to think Clare is on the case I now see my situation as hopeless, to be honest. I certainly was not insinuating that you don't value me or were using me for your own ends, and if that's how I sounded I'm sorry. What amazes me is if they're watching so closely how come they haven't picked up on the fact that I taught two of the units to Jo, Joanna and Sean and you only taught four units this year? Anyway I digress.

I now need to decide what to do. Are you willing to help me with the filming if I do it after school and at weekends? Would you still need to check with Clare? Maybe we can look at the units for next year and see whether I can avoid filming as much as possible. Could you teach the kids the single camera techniques (including filming workshop) first so that they can film projects themselves? Would you teach me to film in your own time? Say maybe some time in the summer or at weekend? Lots of questions but to be honest earlier tonight I wrote my resignation and sat and cried as I did it. I don't want to leave but I got so panicked I couldn't see any other solution. I am now thinking I can probably blag

my way through the next 12 months one way or another which will give me a chance to make a calm and considered decision on the way forward. I'm not blaming you for any of this. I know you. I know you don't like confrontation and avoid it at all costs.

Recently I have seen that with Clare…What I will say is I didn't ask you to go behind Clare's back. You said to me just to agree with them and then we'd sort it. However, I know you and so knew you would never take the risk that Clare or Colette would find out so I shouldn't have told them I was ok to do it all because I'm not. I'm angry with myself because one thing I never do is lie, and yet I lied to them and now I have to decide what to do about it. (Our underlining)

I'd appreciate if you'd answer honestly the questions I have asked in this email as it will help me make the right decision on the way forward… Yes you're right, I'm a total paranoid fruitcake. I know that when most of the time I can keep the paranoia at bay. In actual fact Nicky told me where Colette's concerned I'm not paranoid. She just doesn't like me anymore. I've got to accept this and move on. Sometimes the truth hurts but its necessary to hear it to be able to move forward.

Well there it is, I've laid myself bare. I don't want to lose you as a friend. We need to talk rather than both not saying how we are feeling.

Love ya!

Caroline"

88. On 23 June Suzanne replied to the claimant. In this she says that she cannot do any of the filming for Year 10 and 11, and:

"Regarding the sixth form Years 12 and 13 we can sit down and look at the units you're happy teaching and I'll take the ones you're not happy with. I don't think that's a problem. I'm happy to go to Colette with you and show her what we are both doing so she can see clearly that we are not doing anything that we shouldn't. There are loads of units that we can do that we are both happy with.

(3) I suggest we have departmental planning time to go through ideas on how we can best deliver the course. This means on Tuesdays that the students will have to go period 5.

(4) More training: I suggest that you ask Clare for time so I can train both you and Peter in camera techniques and also editing for Peter. I can't do this in my own time unless school pays for me to do it. We could have time in the summer holiday to do it. I've no problem with that but it would need to be booked as I have got to get another part-time job. Financially I don't earn enough solely from the school, especially since Actors Studio is no longer. I'm actually on less than Peter.

(5) Friendship: this is separate from school and I don't care what goes on there. We are friends. Colette, Clare and everyone knows that. Perhaps I am guilty of not differentiating between the two and this has been an eye opener for me. In retrospect I should have been completely honest and told you I'd been told not to do any other work other than my own. I don't

> want to upset you anymore, I'm sorry. We have been through so much with Jean passing and then the disciplinary then the keeping things separate palaver. I didn't know what to do. I've been in turmoil trying to keep everyone happy and at the end of the day no-one is.
>
> Finally I understand how difficult you find media practical and to some extent the ideas part of the course. I think you should have that conversation with Colette, Clare and maybe Keith to surely understand that this is a new subject to you, that you will need time and guidance to be able to do your job properly.
>
> I hope that this has helped you in some way. I will always be here for you as I love you to bits you soft bugger! I more than anyone know what you are like and how kind and caring and supportive you are! Under that bit bull exterior! LOL all I want is for us to be happy both in and out of work. I know you have a very demanding role at the school and its hard, but at the end of the day it's a job, it's not life or death. All you can do is your best, nothing more.
>
> Lots of love
>
> Suze"

89. The claimant replied the same day saying:

> "No point in me speaking to Colette or Clare about the filming as I've done that and it doesn't make a blind bit of difference. Looks like they've won. They want me out and I've no choice but to go because I can't do the filming. My Year 10s will now not complete Unit 5 this year and I am at a loss as to what I can do about it. Even if I was confident with the filming the fact that there are 15 of them and a minimum of five groups and five films makes this impossible to do in lesson time. I'm certainly not going to talk to Colette about. I'll just have to spin a yarn to the kids and plan to film from September so I can discuss the problem with Keith once he is Head. Obviously he will have Colette's side of it and so I'm probably wasting my time but it's all I can do. Clare did say to me she wanted to help and wanted me to tell her what she could do. I may ask if I can trust her not to speak to Colette if I tell her my concerns. I'm not sure though as I don't feel like I can trust her, especially now I know she is so against you helping and that she's watching us. I will also get in touch with my union, explain the situation and see what they advise."

90. There was considerable discussion at the hearing about what the lie actually was. Mrs Gillen was cross examined about this and her answers were equivocal. She had never felt however that the claimant had lied to her although her witness statement described a scenario of the claimant being dependent on Suzanne hall and the respondent trying to reduce this. Even to the point where Mrs Gillen described the situation as the 'net closing in 'on the claimant. The claimant would later say it was the pupils she had lied to as they would not be able to do the course as promised. The claimant's diary entries say that by not continuing to tell Mrs Gillen that she couldn't deliver all aspects of the course Mrs Gillen might think she could. We find that was the explanation. The claimant was in a heightened emotional state and used a perjorative word where another teacher may have been more equivocal or kinder on themselves. In addition we note the claimant in effect was saying that Suzanne Hall had helped to lead her into this situation by encouraging her to play

along with the situation in the belief they would be able to sort it between them. Little notice was taken by the respondent of this aspect of the exchange.

91. On 28 June Suzanne Hall (SH) and Peter Neal met with Colette Gillen and Gillian Yates regarding allegations of bullying. In her statement given on 1 July Suzanne Hall reports four specific incidents which occurred on 19 and 28 June and does not rely on any matter arising earlier.

92. She says on 19 June the claimant asked her if she would help put pupils on the Edexcel system. The claimant believed they had been put on incorrectly She shouted at Mike Topham and went to find Carole Phillips. She was flustered and angry. She was publicly blaming them for the problem. Later when SH was teaching the claimant was in the same room using the computer and interrupted SH undermining her. She shouted to Peter Neal during the lesson too about his working days then stormed out when SH said she would sort it out with Clare as “don’t worry hun its nothing to do with you” She stormed in again and out again then returned one last time to grab her bag and said she was going to watch the news and “I have had enough of this place it’s a joke”. SH said she tried to approach her but she left and did not speak to her again until Friday. SH then attached the emails and said she believed she became hostile because she had stood up to her for the first time. She said she was like this on a daily basis and she had had sleepless nights as a result.

93. She then recounted a further incident on 28 June about a box of tapes. The claimant asked her if she knew where they were. SH explained where they were. The claimant then got angry because she had been looking for them all morning. She threw her arms up and stormed out.

94. The third incident was when the claimant came into the room whilst SH was teaching and moved a metal cabinet causing a massive noise. The last incident involved SH’s son’s school ringing to say he was ill. SH said to the claimant she would ask Clare Spicer if she could leave but the claimant was ‘really horrible and vicious’ to her saying “Oh for goodness sake, he’s not a baby. Get a grip! Why can’t Shaun pick him up? Clare wont allow you to go home” So SH rang her parents and they had to return from a shopping trip to pick him up. Her husband wasn’t available.

95. SH said she thought she was friends with the claimant and had made allowances for her because she believed she was vulnerable but now she realised she was just being bullied. She said the atmosphere was intolerable and was making her ill.

96. Mrs Gillen said that the claimant had always been difficult. She felt her poor behaviour tended to be with people superior to her rather than inferior. We do not find that is supported by the evidence given that some of those complaining about the claimant were ‘inferior’ to her eg Peter Neal. Mrs Gillen further said that the school should have tackled the problem much earlier.

97. On 29 June the claimant was informed a complaint had been received about her conduct, including discussing a pupil in front of other pupils, bullying employees, withholding information about her abilities, unauthorised use of school equipment for her own gain and working for private gain.

98. On the same day the claimant asked for a copy of the disciplinary procedure, and she frantically emailed Gillian Yates to say she was struggling not being able to discuss it, which she had obviously been told not to do when she had been told about the allegations on 29 June, and she wanted to know if she could speak to a particular individual, but Ms Yates said she would not be able to get hold of Colette over the weekend to find out. She also emailed her union representative pointing out the management instruction was nearly due to end (ie from 17th July the previous year).

99. The claimant was sent the disciplinary policy on 2 July. The claimant was suspended on 5 July.

100. On 6 July Mrs Yates contacted Ms Hall to ask her about other allegations she had made which were not included in her statement such as the claimant asking her to bring school equipment to her house whilst she was off sick. The claimant had promised to film a Dance event for a colleague but was then off sick .At first Ms hall had agreed to do the filming at the weekend because she was sick but then the claimant asked her to bring the equipment over as she felt better and was going to do it. There was no mention as to how Ms Hall was going to do it without borrowing the same equipment herself.

101. Peter Neal supplied a four page statement including various examples of the claimant being rude and condescending. He also complained that she expected him to do too much work and would disappear for various amounts of time. Further she had criticised a pupil in front of other pupils. He also complained that she would be constantly trying to impress him with the long hours she had worked, he said as an ex head teacher he was unimpressed with such talk. Ms Phillips and Mr Topham provided short statements regarding IT/enrolment issues where they felt the claimant had publicly criticised them.

102. On 17 July Mr James Gilda, a School Governor, was appointed as investigating officer.

103. An Occupational Health report was obtained on 18 July which stated that:

> "Caroline is currently feeling very low in mood and is suffering from anxiety and panic attacks. She reluctant to leave her house as is worried about bumping into people who know her. At the consultation today she appeared anxious and agitated and struggled to make eye contact. She has been referred to a psychological wellbeing practitioner within the Mental Health Team who she saw yesterday. Caroline tells me that the practitioner told her she was moderately to severely depressed. Caroline previously had CPB via Occupational Health which she reports that she did not find particularly beneficial, and the wellbeing practitioner has suggested that she may find CAT (Cognitive Analytical Therapy) helpful and has referred her to this service. Unfortunately there is a long waiting list for this speciality service. I have referred Caroline for two further sessions of counselling in the meaning as agreed by the school to provide her with additional support. She has been signposted to various other organisations which she can access for help and support. Caroline is not currently fit to attend investigation meetings in the school due to her state of anxiety and having panic attacks on leaving her house which are particularly with regard to the school and the people whom she knows. If it is organisationally feasible Caroline would consider having

> the meeting at her house provided she has a schedule of what is to be discussed. In my opinion she is fit to write a written response to the allegations. She is very anxious regarding which questions she will be asked and I have suggested that she discusses this further with school in an email or letter if she feels unable to speak on the phone, as it's a management issue rather than a medical issue."

104. On 30 August Colette Gillen provided a witness statement. She said she had had to speak to the claimant about her attitude to orther members of staff on a number of occasions and she had acknowledged she expressed her opinions without thinking. Ms Gillen said SH had spoken to her about the claimant in the past but not wanted to take things further saying 'she was a softy really' .She mentioned the Fleming and the clapping incident . She referred to things coming to a head with SH who 'broke down' – presumably a reference to 28th June.

105. . On 5 September the claimant was given an update. Her suspension was reviewed in September and October and kept in place.

106. On 21 September Julie Ackroyd provided a witness statement and Mr Topham provided a further statement in an interview. Peter Neal was interviewed in October and Suzanne Hall was interviewed.

107. By October the claimant's sick notes were describing her condition as depression.

108. On 11 October 2012 from the NASUWT wrote requesting full details of the allegations and stating that the claimant was unfit to attend any meetings and including a letter from Dr Chattree, a Consultant Psychiatrist who had been treating the claimant for some time. His letter was dated 8 October 2012 and this stated:

> "I have previous knowledge of Miss Swan from providing consultation and treatment in the past. She suffers from recurrent depression and has been on long-term maintenance medication. She is experiencing significant work related stress and she tells me she has been suspended on the basis of allegations made by certain colleagues. She considers these allegations totally false. She is describing increasing anxiety and fears total breakdown. She cannot stop thinking about the matter and sleep is suffering."

109. He went on to say:

> "I now consider her as unfit to attend a meeting at work to investigate the matter."

110. He also pointed out she did not have appear to have all the relevant information, and went on to say:

> "The stress is no doubt causing an increase in her symptoms of anxiety. There is a risk of relapse of depression even with adequate maintenance medication."

111. By 18 October 2012 Mr Gilda said that he required her to "complete a written statement in response to the allegations contained within these statements, emails,

documents and CCTV footage as detailed above, and this should be submitted to me no later than Friday 9 November".

112. The claimant's union wrote back on 24 October saying that CCTV footage could not be opened or played on any software and stated:

> "In regard to the investigation it is unclear exactly what the specific allegations are that you are investigating. The statements sent to my member do not specifically identify allegations directly and are as much description and observation from the writer's point of view…You are well aware that my member is ill – as was made clear in the letter dated 8 October written by her treating physician. This expressly set out the importance of Caroline having details of the allegations. So in respect of your duty of care to my member can I request that you clarify in detail the specific matters raised in the various statements you would wish a response to; ideally by stating clearly the detail of the allegation you are investigating and in addition by posing any questions you would wish her to answer as opposed to seeking a 'free response' to a whole mass of statements. I am sure you would not wish to hinder my member's recover nor seek to deny her the chance to explain the circumstances or issues you wish to explore. I would suggest that responding as I set out above would both benefit her medically and progress your enquiries."

113. The initial allegations on the suspension letter were a breach of confidentiality; bullying and intimidatory conduct raised by S Hall, P Neal and M Topham; breach of trust and confidence (the email saying she lied to the Head about her abilities); an unauthorised use of school equipment; and an allegation of using school equipment for her own gain.

114. On 22 November Mr Gilda wrote to the claimant again in respect of the two letters from the NASUWT, and he attached with the letter a 14 page document separating the allegations with some questions he wished her to respond to. The CCTV footage was sent again. He noted that he felt the school had met their duty of care by sending her to Occupational Health, funding counselling sessions, arranging meetings off site and allowing the matter to proceed by way of written representations.

115. After further documents were received 12 areas of concern were identified which were:

(1) Unauthorised use of school equipment.

(2) Use of school equipment for her own gain.

(3) Use of school equipment while on sick leave for her own gain.

(4) Presence in classroom when not required to teach caused disruption and undermined S Hall and P Neal.

(5) SH alleges being bullied and intimated in an ongoing basis over a long period of time.

(6) Inappropriate IT usage.

(7) Harassment of Peter Neal.

(8) Admission of having lied to school management.

(9) Inappropriate conduct in relation to an incident with M Topham.

(10) An allegation of giving students access to CSW's IT network.

(11) Unprofessional conduct – making inappropriate comments which were seen as rude and sarcastic. (This was the clapping incident).

(12) Discussing a pupil in the presence of other pupils.

There was also a (13) – general concerns

116. As the claimant was not fit to be interviewed the investigation proceeded by way of questions and answers. The claimant was asked questions in relation to each allegation, which she answered in writing. Three sets of questions and answers were sent. The claimant explained a number of matters – she said that they all interrupted each others lessons, it could be that the class was having a discussion it was legitimate and accepted , that she had had to move cabinets etc because they were short of time to do it, if SH had complained she would have stopped also SH wasn't teaching she was making banners and the pupils were working independently, regarding the issue about Peter Neal's working days she had been expressing frustration at the system not the individuals although she was hurt that SH had spoken sharply to her in front of Mr Neal; she did sometimes eat lunch in the teaching room as she had to work and eat; she didn't believe she had shouted at SH on the 28th SH had spoken abruptly to her; regarding the tapes she was frustrated but not nasty, they were friends who could speak to each other frankly; she said she would never bully or intimidate anyone least of all her closest friend in school; she did not accept Peter Neal's view of her and SH's relationship – he had been difficult himself with both of them; she admitted she could be sarcastic and people sometimes took it the wrong way. One issue referred to a conversation where Mr Neal had referred to something on radio 4 and the claimant had commented it was unlikely any of the pupils had heard of it, she felt in a jokey not a nasty way. In respect of questioning Peter Neal about a conversation he had had with Mrs Gillen as there was an outstanding issue regarding his teaching timetable, and Mrs Gillen had been looking for him. She had taken him into a separate room as she did not want an outburst from him in public, she had asked him if she had done anything to upset him, They had had a conversation and then left the room, there was nothing sinister about it.

117. In respect of the 'lying' allegation : the year 10s were ahead of the course and were due to do filming in the next academic year but she had raised with them the possibility of doing it earlier then they might also be able to get 2 GCSEs rather than 1. She could do the filming but not as well as Suzanne. She implied that the lying might have been to the pupils about doing the filming early which once SH had told she would not be able to help her she realised she could not deliver the early filming option. She had referred to 'blagging' her way through it, but she had a fantastic track record at delivering good results she just was lacking in confidence at that point in time, there were a no of contributing factors to this in her personal life, regarding 'lied' she had simply stopped communicating with Mrs Gillen and simply would agree

with her so had probably failed to get across fully her difficulties with some of the elements of the course.

118. Regarding the dance filming she had done this for a number of years and had always been open about it. There had been a system of signing equipment out but last time she had tried to do this she was told there were no forms and there wouldn't be any, so she thought the policy might have changed. She had charged a notional amount for the DVDs and given it to charity but had simply put it in a collection box and had no proof.

119. This is a summary of the points she raised in respect of the more serious complaints. She also commented that "…my accent doesn't help as it can sound quite harsh...when I feel threatened…I can be abrupt…it something I have worked hard to eradicate…people who know me well know I am a kind and caring person. At times of extreme stress I tend to shut up and put up an impenetrable brick wall. It's a defence mechanism a coping strategy I developed when I was a young child….I was in a poor emotional state as a result of a number of contributing factors". She said she would never send emails of the nature she sent to SH to anyone else, they were extremely close and often communicate like this, she said it was clear she was in a poor emotional state and she should have gone to see her G.P. and not gone back into work till she felt well enough.

2013

120. On 26 March 2013 Mr Gilda's investigatory report was sent out. He came to the following conclusions:

(1) Unauthorised use of school equipment – This allegation concerned the claimant using school equipment to film dance events unconnected with school and then producing discs which the parents paid for and for which she alleged she gave the proceeds to charity. There was no formal written policy to describe the process for staff taking equipment off site. A number of staff were asked what procedure was used for taking equipment off site. Some staff said there was a form that you had to get in approval, but that was only introduced after something had been stolen from Suzanne Hall's car. Peter Neal said he was not aware of a policy. Mike Topham said that there were forms and that the claimant had put a system in place four years ago but departments control their own equipment. The claimant said there was no formal policy. Forms had been available in the past from Mrs Fielding but they were no longer available. Mr Gilda considered the allegations were proved on the balance of probabilities as there was evidence the claimant did not ask for permission to use the school equipment or to charge for them; that the equipment would not have been insured whilst off site; and that although there was no written policy it was obvious you do not use school equipment for personal use.

(2) Using school equipment while on sick leave for own gain – The claimant admits that money was paid to her for the production of DVDs. These payments were only made possible by using school equipment to film the events. She stated the money was given to charity but the documentation provided does not prove this. It is irrelevant whether she subsequently donated the money to charity. Permission was not obtained from the

school to donate these monies to charities. Further, filming was carried out whilst the claimant was on sick leave in November 2010 and 10 July 2011 when the claimant was on sick leave again. Suzanne Hall had said that the claimant has said to her, "It looks bad that I'm off sick". This was an example of the claimant exerting her authority over Suzanne Hall by asking her to lie to the school if questioned. The claimant admitted she gave some of the money to Suzanne Hall – half the money received for the production of the DVDs. 40-45 DVDs were produced on each occasion. The amount generated would have been at least £1,200. Considering expenses there was still a deficit of £200 unaccounted for. He considered the allegation of using school equipment whilst on sick leave was considered proved and the allegation of earning money by using school equipment was considered proved.

(3) Presence in the classroom when not required to teach caused disruption and undermined S Hall and P Neal – This was the allegation that the claimant would be sitting in the classroom where teachers were teaching interjecting into the lesson, making noises by moving items round the room and also eating her lunch in the room while teaching was going on, and that the interruptions made staff feel intimidated. The claimant's answer was there were no other PCs available for her to use and she only had one PPA time when the media classroom was not being used therefore she had to use it. The claimant said she did not recall contradicting Suzanne Hall during media lessons. The investigating officer's comments were that the claimant had an Apple Mac laptop which was portable so that she could have used it in the main school and she had two PPA sessions on a Wednesday afternoon. He found that there was sufficient evidence that she entered the classroom while teaching was taking place which disrupted the education and learning of students. Comments and actions she made were upsetting to Suzanne Hall and Peter Neal and therefore this allegation was found proved.

(4) S Hall alleging bullying and intimidation on an ongoing basis over a long period of time – The claimant's answer was that Suzanne Hall was her close work friend and she would never deliberately do anything to upset her. There were various allegations and the claimant admitted to be abrupt in relation to one of them. She admitted "tutting" as well when she was stressed. The investigating officer felt there was sufficient evidence of Suzanne Hall being upset over a period of time to consider this allegation on the balance of probabilities to be proved.

(5) Inappropriate IT usage – This was evidence from Peter Neal that the claimant used IT equipment during lesson time for personal use. He alleged that it appears that she was booking flights. The claimant asked that the review of IT logs be considered. The investigation officer said, "There was no evidence to substantiate or refute this allegation. It's one person's account against another. There is the added concern that the alleged activity took place during a time that CSW was teaching. Given that PN heard about lost money on a flight to Florida during a lesson and immediately after CSW had used a PC this allegation is considered proved on the balance of probabilities".

(6) The harassment of Peter Neal – Peter Neal had referred to being questioned by the claimant about a private conversation he had with the Head Teacher and he felt intimidated by this. He gave other examples. The claimant agreed she had asked him about this conversation and that she had shut the door standing with her back to it. She agreed she had made a sarcastic comment but it was not directed at Peter and he should have known this. The investigating officer found there was sufficient evidence to consider the allegation proven.

(7) Admission of having lied to school management – This refers to the exchange of private emails between the claimant and Suzanne Hall where the claimant had discussed a number of her concerns about the subject she was teaching, and where she also states she had lied to the school. The claimant said that the pupils were ahead of schedule and she was looking to complete the filming prior to the summer to give them the opportunity to gain two GCSEs. The investigating officer noted that the claimant was supposed to pick up skills from Suzanne Hall in order that she could deliver the course unaided and that the email was in relation to Year 10 Expressive Arts. The claimant had also attended a five day training course. The school was not aware that the claimant still needed help for Suzanne Hall for this Expressive Arts curriculum. The conclusion was, “There is evidence from SH and a supply teacher to show that the pupils’ work from Year 10 was not complete when they moved into Year 11. This contradicts the claimant's statement that the children were ahead. The claimant said she lied to the Head as she can’t do the filming. There is sufficient evidence to consider this allegation to be proved”.

(8) Inappropriate conduct in relation to the incident with M Topham – This referred to an incident on 25 June 2012 and Mr Topham obtained the CCTV footage although this did not include sound. He described himself as feeling belittled as a result of the claimant's rant at him; that she was confrontational; that he backed away and raised his arms in self defence. The claimant denied that her body language was aggressive. Suzanne Hall reports an incident where the claimant went mad, shouting at MT but it was not clear if they were the same incident. The investigating officer’s view was that the CCTV was consistent with Mr Topham’s description of it and therefore he found the allegation proved.

(9) The allegation of giving students access to the claimant's network – The claimant denied this, and that students received log on details either at the induction or in September. While saying this was one person’s word against another, the investigating officer went on to say: “However the students were clearly not on the system at one point in time. They were ultimately able to access the system without MT giving them the necessary level of authorisation, therefore someone other than MT must have allowed the students to their particulars. This allegation is considered is considered to be proved on the balance of probabilities”.

(10) Unprofessional conduct – making inappropriate comments which were seen as rude and sarcastic: Mrs Gillen stated that during her meeting with the claimant to consider duties in the job description the claimant was rude and sarcastic about the role with the school council. The claimant

acknowledged that she clapped and Mrs Gillen had told her not to be facetious. She repeated the same behaviour in the common room. She stated she did this as she was angry but she did regret it. This behaviour in the staffroom was witnessed. She said she would not repeat this. The allegation was found proved. She had been told she was acting facetiously and yet she continued the behaviour in the classroom.

(11) Discussing a pupil in the presence of other pupils – This was pupil JW and the claimant was alleged to have discussed him in the presence of staff and pupils after JW had left the room; also that Carole Phillips related an experience when the claimant was shouting about the enrolment of students in a public place and the pupil's name was mentioned, with the claimant commenting, "They wouldn't have been allowed on the course" had the claimant enrolled them. The claimant said that it was appropriate to talk about the incident with the pupil as a way of setting expectations. The investigating officer considered it might be contrary to the management instruction she had been given. The investigating officer did not believe it was professional behaviour and that the students should not be talked about other than to the students themselves. She denied shouting about the male pupil, however this was clearly documented and the allegation was considered proven.

(12) General concerns – The claimant admitted that she could be quite abrupt and that it was something that she had worked hard to eradicate for most of her life, "Anyone who knows me knows I am a kind and caring person who would never deliberately upset anybody". She also said, "In the past three years my ability to control this part of my personality has diminished due to a number of issues in both my personal and professional life…There is no doubt I was in an extremely poor and emotional state as a result of a number of contributory factors, particularly around Thursday June 21st when I broke down in the presence of Clare Spicer. I will at times have come across as abrupt and abrasive, particularly to people who don't really know me". The comment was, "The claimant acknowledges she can be abrupt but does not intend to deliberately upset anyone. She reports being under stress for three years and has struggled to control her personality during this time. There is evidence that the claimant has been spoken to in the past about her conduct. Previous discussions and actions have not changed her behaviour".

121. The conclusion was that all the allegations had been proved and that a disciplinary hearing was warranted.

122. On 30 April the claimant was invited to a disciplinary hearing originally scheduled for 15 May and subsequently rearranged for 4 June. Governor Mike Joyce was to chair the hearing. This letter said that Mr Gilda would not be calling any witnesses. The claimant advised that she would be calling seven witnesses and that she requested the attendance of the "management witnesses, Suzanne Hall, Peter Neal, Mike Topham, Colette Gillen, Julie Ackroyd, Clare Spicer and Carole Phillips".

123. On 21 May 2013 the claimant had obtained an opinion from a Consultant Psychiatrist, Dr Chattree. This said:

> "(1) Miss Swan suffers from recurrent depression. When referred initially to myself by her General Practitioner in July 2011 I noted a degree of the depressive episode at the time as moderate. At that time I also diagnosed prolonged bereavement reaction following her mother's death in October 2010. I also noted work related stress at the time and considered the impact of her psychiatric condition on her functioning at work. She has been maintained on antidepressant medication I understood for over 15 years with previous documented episodes in 1982. Since the referral in July 2011 I have continued to treat her as an outpatient with antidepressant and psychotherapy. In my opinion her condition is likely to be covered by the provisions of the Equality Act 2010, previously the DDA 2005, as her condition has been present for longer than 12 months and is recurrent in nature with episodes occurring despite maintenance medication.
>
> (2) The nature of her illness as noted earlier is recurrent, with episodes since 1982 and requiring long-term treatment. Depression can affect individual's behaviour functioning and reduce resilience to day-to-day premises. Social withdrawal, poor concentration, irritability, heightened sensitivity, reduced self confidence and anxiety can affect the individual in their interactions with others. One cannot generalise but fitness to remain in work is dependent on the degree of the illness at the time. If symptoms are apparent and result in behavioural changes it is usually the employer who is able to provide additional support for the employee or recommend work absence until health condition improves."

124. Ms Yates replied to Mr Young's letter (of NASUWT) and said they would not be compelling any witnesses to attend and they needed to confirm that the witnesses they were calling would be relevant. Mr Young continued to protest about the failure to call witnesses as he said their evidence needed to be tested and he understood that the CES model disciplinary policy at 7.2.5 required this. Ms Yates replied saying that all the witnesses deemed potentially hostile had said they were either unwilling to attend or had not responded to the letters, except for Suzanne Hall who was considering attendance and would confirm on Monday 3 June.

125. On 30 May Mr Young indicated that he wished to lodge formal grievances. He produced a table of the people he wanted to bring to the grievances against and the nature of the grievances. This included Peter Neal, Colette Gillen, S Fleming, Gill Yates, Suzanne Hall, Clare Spicer, Jim Gilda. Ms Yates took the view that the grievance matters related to the disciplinary and would be dealt with by the disciplinary, and anything that was not related could be dealt with separately later.

126. The claimant then prepared an extremely lengthy and meticulous opening statement which was 51 pages long. The claimant managed to attend the hearing and at the beginning of it Mr Young raised some procedural issues.

127. Mr Young raised the fact that the claimant was technically unfit and the panel stated that they were happy to give her breaks and Mr Young indicated she may need to go home if she was too unwell to continue. He then said that her medical conditions affected her concentration and memory and therefore it was important she received detailed minutes. That would be a reasonable adjustment and the note taker said she would do her best. It was said her conditions impacted on her

behaviour which the panel needed to be aware of for two reasons: any behaviour today during the hearing and any previous behaviour alleged as part of the proceedings that the panel feels proven. Clearly therefore he did raise the argument that the claimant's behaviour arose from her illness/conditions.

128. Mr Young then raised the fact that there had been a change of governor on the panel and they had not been notified. It was explained that they withdrew due to illness and also because they had been an ex colleague of the claimant.

129. He then raised specific procedural issues:

(1) The non attendance of hostile witnesses;

(2) Whether the Local Authority needed to be involved;

(3) Whether the Diocese needed to be involved;

(4) Whether there was a conflict of interest as Gill Yates was advising on her own advice;

(5) The grievance.

130. The panel then withdrew to consider whether they should proceed and the panel then postponed the hearing. In the interim Mr Young had discussions with Gill Yates over a potential settlement. Those negotiations ended in July and a second day of hearing was listed for 7 October. The claimant was to record the disciplinary hearing but this was unknown to the other parties involved until after her employment had ended.

131. The hearing began with Mr Gilda making a short address following which Mr Young questioned him for the rest of the day and an hour the following morning. Mr Young's evidence was that Mr Gilda's answers and demeanour showed him how inadequate and flawed his investigation had been, and that it had been simply collecting evidence for the creation of the case. In particular he said that none of the witnesses suggested by Miss Swan had been followed up. Not even Mrs Gillen had been interviewed, and at one point he withdrew an allegation because he recognised the person he said had witnessed it was not actually present. Mr Young said he came across as arrogant in his presentation of the case. Mr Gilda said he was not going to read the report line by line and he was quoted as saying, "Waste of my time, waste of your time".

132. An example of Mr Gilda's attitude would be, Mr Young said:

> "Item (k) General Concern – this isn't an allegation is it? Correct, there's no allegation. You said you sought advice from Gill Yates and questions to ask Caroline. I've just explained that."

Mr Young asked him to refer to something that he said was in the report. He refused, saying "No, it's in the report, you've read it". Michael Joyce said, "Jim, will you please do that, please?". Mr Young asked him whether the delay in completing the report was due to him going on holiday. Mr Young pointed out that there was a requirement under the policy to expedite cases as quickly as possible. He agreed he went on a six week visit to France.

133. Mr Young argued that he had already decided she was guilty as his questions were, "Why did you do that?" rather than "Did you do that?". There was a discussion about what policy was being used, and Ms Yates said it was the 2004 policy.

134. Mr Young was unhappy with the anti bullying and harassment policy because it was from May 2001 and had not been revised since the Equality Act 2010, and offered no protection to a disabled employee.

135. Mr Young pointed out that all the people Mr Gilda asked about the equipment policy were people who had complained about the claimant i.e. that he had not been impartial in looking for evidence for the claimant, only evidence against her. He said he had asked Mrs Fielding. He agreed he had not asked Mrs Gillen because she had left by then.

136. Mr Gilda was argumentative with Mr Young, for example in relation to Mrs Gillen Mr Young said:

> "You took over the investigation on 17 July. She remained in post until 31 August and she was available over the holidays. Do you not think you should have made contact?"
>
> Mr Gilda said:
>
> "I didn't start the investigation before the holidays. If I had you would have been complaining about it."

137. Mr Young asked him about the fact there was no policy in respect of equipment. Mr Gilda said:

> "No, it's an implied policy. You don't make personal use of use of equipment from your place of work."
>
> Mr Young said:
>
> "Are you saying that personal use of any school equipment is effectively a breach of contract?".
>
> Mr Gilda said:
>
> "What do you mean by equipment? You've said it, Mr Young, it's an implied policy."
>
> He quoted:
>
> "Please explain."

The claimant's notes then say:

> "Long discussion. Mr Young tried to clarify by asking further questions. Mr Gilda becoming angry. Refuses to ask questions as they are hypothetical. He seems to be saying its ok to use some things – just not equipment. Camera equipment totally different."

Mr Young then resumes by saying:

> "So you're saying there's a world of difference between the personal use of a textbook and ……"
>
> Mr Gilda interrupted saying:
>
> "Staff know where the line is."
>
> Mr Young said:
>
> "Do they?"
>
> And loudly Mr Gilda replied,
>
> "Yes, as does Caroline."
>
> Mr Young said:
>
> "How do you know that? Did you ask any questions about where the line is?"
>
> Mr Gilda:
>
> "I wasn't allowed to."
>
> Mr Young said:
>
> "You weren't allowed to ask questions?"

138. Mr Joyce decided that they would need a break.

139. There was another exchange where Mr Young said:

> "What evidence is there to show that Caroline personally benefitted from doing the filming?"
>
> He said
>
> "Caroline received the money."
>
> Mr Young said:
>
> "That's not the question I'm asking."
>
> Mr Gilda replied:
>
> "No, I'm answering it."
>
> Mr Young then said:
>
> "Well if I can ask you the question, the question is…"
>
> Mr Gilda then interrupted saying:

"Caroline received income from producing a DVD."

Mr Young repeated:

"Is there any evidence that she was personally financially better off as a result of filming the DVDs?"

Mr Gilda said:

"That's irrelevant."

We accept from the transcript of the hearing and Mr Young's evidence that Mr gilda was difficult and argumentative in the hearing.

140. Mr Joyce had to interrupt and say, "Jim, can you answer the question?". Mr Gilda said, "No, just let me answer". Mr Joyce interrupts, "No, would you answer Rob's question please?", and says something along the lines of higher rate tax, HMRC, charity donation relevant, additional income, etc. Mr Young asked the question again.

141. Mr Young then took him to Joan Scholes' answer where she explained that she did not give the claimant any money until September when she received the DVDs. .

142. Following the questioning of Mr Gilda the claimant's witnesses gave evidence, where they talked about how the claimant was. Mr Gilda questioned them, reducing one of them to tears, and Mr Young spoke to Gill Yates about this as he said it was intimidating. The head of Dance said she had herself filmed her daughter using school equipment and was unaware of any policy about it. She said that people took iPads home and it was unlikely that they had just used them for schoolwork, and she used them for other than schoolwork, and another dance teacher had taken the camera home over the summer. The issue had not been raised in the course of inset training. She had not filled in any paperwork regarding borrowing equipment and she did not think she had to.

143. There was some discussion about Mrs Gillen having changed her mind about paying for a coach for the dance shows, and Mr Gilda said to Sophie:

"Do you know why Colette said no to you having said yes? Well I'll tell you why she said no, because I know exactly why."

144. Mr Joyce interrupted to say, "Tell me where we're going with this", and Mr Gilda said, "We're going to…she's casting doubt on Colette. Yeah, and I'm trying to explaining why the Head changed her mind". Mr Young said:

"It's not relevant. The fact that she changed her mind was a point we will make."

Mr Gilda said:

"And is she not entitled to change her mind?"

145. Mr Gilda then said it was because he had told her to change her mind. Mr Gilda then said:

"Why did you take the camera home without asking permission?."

She said:

"I've done it before. I wasn't doing anything wrong. I don't think there's anything wrong with that."

146. It was noted that the witness had started crying at one point.

Renia Przybysz

147. Ms Przybysz gave evidence. She confirmed that she was unaware of any policy for taking school equipment home. She said Music Department assisted at weddings at the weekends or holidays or funerals in school time. She had taken amplifiers, piano and lots of electrical equipment. She said it was not a school trip it was personal. For example at Mrs Gillen's dad's funeral during the school day, it was not a school activity. Mr Young said, "Was it custom and practice for people to take stuff out to use for each other?" and she said yes, that it was a caring school and they looked after each other. They performed at "Joy and Matt's" wedding on a Saturday taking all the school gear there, and that no paperwork was completed at all. She herself had also sung at another staff member's daughter's wedding and took school equipment down for that and it was videoed for her daughter by Suzanne Hall. Senior school staff were present at the wedding. There had never been any training about it and that she had taken school equipment, never seen a form to fill in and never filled in a form. She agreed that the claimant was forthright but she said she was very very helpful to her.

Jo Baldwin

148. Jo Baldwin stated that she had borrowed school equipment; she knew PE Department borrowed school equipment; other departments borrowed the department's camera, and she was unaware of any policy regarding using school equipment for personal matters. No inset training, no forms. She would tell her Head of Department just to clear it with her and would not check with the Head Teacher. She said she did not feel she had to do that but Sophie was a friend and she would just say, "Is it alright if I borrow this?". Sophie was Head of Department. She said she had her own dance school and Caroline came and filmed her shows and that other members of staff were actually at those shows. She agreed she sold the DVDs, collected the money and have it to Caroline.

Matt Baldwin

149. Matt Baldwin confirmed he was not aware of any policy about school equipment. He had never asked permission or filled in a form. It was unlikely that Caroline would have kept any money from the DVDs. He said that the Head of PE had taken things home which he had seen so he felt it was alright to do so. He said, "The Head of PE has taken home a stereo system which he used at football training", and was aware of indoor athletic equipment being used for kids' parties.

Paddy Higginson

150. Paddy Higginson said he had made personal use of the school computer equipment for checking emails. He expected to take them home and bring them back. The Music Department had a lot of equipment which they used: could be instruments, could be recording equipment. He talked about the situation with weddings and funerals and that the Head of Music had accompanied him on a piano when he was student at a paid gig and he believed it was the school piano she had used. He said that Suzanne had filmed Judith Oakes' daughter's wedding, not sure whose camera it was, and there was a payment for that filming, and he said that Judith Oakes had said she paid Suzanne for that but Suzanne took quite a while to get the final copy back to Judith, which she was not happy about as she had given the money to Suzanne but did not have anything to show for it. He said there was no policy as far as he knew and he was completely of any form or having to check with the Head Teacher. He would make Judith aware if she was around out of politeness if it was new equipment. He stated he always thought that the claimant's relationship with Suzanne Hall was absolutely fine. He advised he had still got an old laptop from school at his house. He did not know who insured and likewise in relation to Judith Oakes bringing the piano to a gig he was not sure whose insurance would cover it.

Mick Ashcroft

151. Mick Ashcroft was the Assistant Head Assessment Line Manager for Maths and Music in charge of curriculum, timetable and options, and he taught Maths. He had been at the school since November 2000. He said he found the claimant abrupt and brusk; no small talk; found her strange until he got to know her better and then he respected her. He had no experience of her being a bully but she was very focussed and she was straightforward talking. She does not pull any punches. It said it was very unlikely that the claimant would keep any money from the DVDs. He was then asked about the Level 2 BTech Media course that is offered as an option in school: Suzanne Hall says Caroline should have taught the two GCSE qualifications but Caroline says the course offered was the one GCSE qualification. Which one was it?" Mr Ashcroft confirmed it was the one GCSE option. He stated if he looked at the options book it clearly states "One A-C equivalent".

152. In respect of the allegation that Caroline had failed to complete the work she should have done with her Year 10 group in 2011/201 2 – Mr Young asked him what did he say about that? He replied, "As Exams Officer and now I/C I see the moderator's report. I know which department hasn't submitted their coursework on time or were over deadlines. Caroline never missed a deadline. She never got an adverse moderator's report. Never had to chase her up for inputting data into the system for reports". He confirmed he looked at personal stuff on the school ICT equipment but only to look at the news of football transfer. He was unaware of any policy. He did not think there was a written policy on taking school equipment but he did not work in a department like that. He said it would certainly take the text book home to do work planning. He took his iPad home, he took his calculator home. He did not have to fill a form in.

Claimant's evidence and rest of hearing

153. The claimant then went through her statement. Rob Young summed up. He stated that the witnesses had stood up to cross examination; they were independent; they knew about the school; they knew about Caroline and they had no axe to grind; whereas Mr Gilda had not called or presented any witnesses himself, and:

> "They had been unable to cross examine which was very unfair. He had not followed up any lines of investigation suggested by the claimant; he did not find it necessary to question any of the complainants or independent witnesses. It was his responsibility to follow all lines of enquiry to look at things that could exonerate the claimant as well as evidence that might support the allegations. He was asked time and time again if he thought he needed to interview any of the independent witnesses and he stated that he did not. He did not provide any detailed rationale to justify that decision. Instead "he simply appears to have chosen to take the word of the complainants when in many cases other and better evidence would have been available."
>
> Mr Young went on to say:
>
> "We say this because he was only interested in proving the allegations and in not genuinely seeking to explore the truth and reach a balanced judgment. In short I'm questioning the appropriateness of the investigation and the judgments that Mr Gilda made. I do accept he had a difficult job to do."

154. Mr Young went on to say that Gill Yates confirmed that she had not had any previous involvement and therefore Mr Gilda did not have her HR advice during carrying out the investigation, and the investigation was fundamentally flawed. Mr Young also stated that the delay had not been beneficial to the claimant because it created extra stress and anxiety for her. His main point was the failure to call any witnesses which they could question, and they needed to consider the evidence regarding disability: that she was covered by the Equality Act 2010 in this respect, and that because the policy had not been re-written since 2004 it cannot have taken into account the provisions of the Equality Act 2010. He said they needed to satisfy themselves that disability issues had been properly taken into account. He said:

> "We have heard Mr Gilda does not now claim that Caroline personally kept any money but has raised an issue about income tax rules which were no part of the original investigation and therefore was beyond the ambit of the hearing. The school's position appeared to be if someone raised money for a good cause and passes it over they should declare it as income and pay tax on it."

155. Mr Young said that lots of schools raised lots of money for good causes and if that rule applied the implications would be enormous. He said witnesses had turned up and confirmed lack of formal policy about taking kit home. In terms of the lying allegation, they could see that Caroline had been entirely honest. The only mention of lying is in a private email to SH. The email, Caroline explained, is not accurate:

> "There is no evidence of her lying to senior leadership or to the employer at all or to management. There was no evidence at all of lying. She has got 20 years' service and no disciplinary findings against her, and I would suggest the evidence is insufficient to uphold the allegations against her. Even if you were to uphold them you should take into account her record and service and that in the light of that to contemplate dismissal would be beyond the bounds of reasonable responses in any respect. Regarding her medical conditions you need to take into account her longstanding disability and that as a reasonable adaption you need to take into account the effect this had on her behaviour and her judgment in case of anything she did or did not do.

> Re the filming, she has been totalling upfront about doing filming. It was a therapeutic activity following her mother's death. Her witnesses had faced up to cross examination and their accounts of her behaviour confirmed her own account. She had been promoted and her skills and aptitudes recognised."

156. Mr Joyce confirmed that the grievances would not be considered until after they had made a decision on the disciplinary charges..

157. Mr Gilda than asked Miss Swan some questions about the purpose of the form for taking equipment off site and she thought it was to make the member of staff realise that they were not covered by any insurance and would be responsible for the cost if it was damaged or stolen. She said she had been told there were not any forms last time she had asked about that. She agreed that she had used Roxio software for producing the DVD and that that was paid for by the money Jo Scholes had given her to do the DVD and used on three occasions. It was part of the cost of producing the DVDs. She asked her what she meant by "they want me out and I've no choice but to go because I can't do the filming". She said, "At the time I was a mess". She believed that Colette was ignoring her requests for help, felt she wanted her out of the school because she could not do the filming, and Suzanne was now saying she could not help her because she would lose her job if she helped her. The claimant saw Colette as pushing her out because that was the state of her mind. It was a conversation between two close friends. She said she did not really understand why she said the lying thing in the email. She had made it clear to Mrs Gillen how ill she was and felt she had misled the Head by not continuing to say "couldn't do the filming". In her head she felt she had lied because she had not continued to make it plain. She had told the class they would do what she could now not deliver. She denied there was a specific procedure in place for taking equipment. She said that she went to try and get a form; there were none. It was not that they needed photocopying, etc., but that there were no forms. She was asked why she did not give the DVD sales funds to the school's charities. She said Macmillan was one of the school charities which is who she had given it to, but she did not bring it into school, "No, it didn't enter her head". She talked openly about doing the filming and never felt the school would have any issue with it. Other staff members were present.

158. Mr Gilda summed up saying that it was clearly an awareness that there was a policy about equipment; that she had given the money to charity as an individual not as part of the school; and a lot of the other issues depended on Caroline's word against other people's word. She did not seek to excuse her behaviour regarding Julie Ackroyd and Colette Gillen. She regretted it so she has admitted it. There was a management instruction and a written warning in place.

159. Mr Young did a further summing up where he repeated some of his points, emphasising the claimant's illness and that she had not sought to deny things which were true. He said she regretted some things and she had turned up to be cross examined. In terms of behaviour:

> "I ask you to bear in mind that he disability affects her behaviour and her ability to function. This would have impacted on her decision making at the time when some of the incidents took place so I would suggest that that needs to be taken into account when you are judging her behaviour for anything you feel she has done. The school was aware of her health conditions and should have taken

these into account. You likewise should take them into account by looking at anything you feel she has done and asking 'was that her or was it just the manifestation of the illness?' It would be a reasonable adaption to her disability for you to do that. Caroline gave you a detailed rebuttal of the allegations in her presentation so I don't wish to go on making the points she has already made. Caroline, is there anything else you think we need to say?"

160. Mr Young commented to the Tribunal that he was astonished that Mr Gilda only asked the claimant 14 questions that confirmed answers she had given during the investigation, and did not deal with anything she had raised in her presentation. The panel's questioning he felt took no longer than half an hour and did not cover all the allegations.

161. An email was sent to Mrs Gillen after the hearing by Ms Yates and this had been relied on as evidence to dismiss Miss Swan. This said the claimant had had no opportunity to challenge Mrs Gillen's contentions and the panel had no way of testing their voracity. Mr Young told the Tribunal he felt this was "disgraceful". Mr Young said that when Mr Joyce had said this about "they might contact witnesses" he thought it was unusual but he did say he had heard of it happening, and when they received the outcome letter and the reference to Colette Gillen's evidence he realised why that had been said.

162. On 21 November 2013 Mrs Yates had emailed Mrs Gillen to say that:

"The panel hearing the case against Caroline Swan wished to ask you two questions to aid their deliberations:

(1) Did you ever give Caroline permission for Caroline Swan to use school equipment to film events for Jo Scholes' dance school? If so, how was this permission and when?

(2) In relation to paragraph 5 of your preliminary statement, prior to June/July 2012 over what time period were you made aware of how Suzanne Hall was feeling in regard to Caroline Swan?"

163. Mrs Gillen's reply was:

"(1) I can categorically state I have never given Caroline Swan permission to use school equipment to film events for Jo Scholes' dance school. Jo Scholes' dance school was/is a private concern and I would not consider it appropriate for school equipment to be used for what I would consider to be commercial purposes.

(2) For at least 18 months possibly longer prior to June/July 2012 it had been brought to my attention by various members of staff that Suzanne Hall was often intimidated/threatened by Caroline but that she seemed afraid to stand up to her. Staff informed me they had witnessed Suzanne on many occasions physically upset by Caroline's actions and/or sharp tongue. I was made aware over a long period of time prior to June/July of occasions when Suzanne had been publicly humiliated by Caroline. The difficulty in addressing the concerns was the fact that the evidence to support the concerns raised was anecdotal. Suzanne has always been very loyal to

> Caroline and when I have raised matters with her she has always defended Caroline saying, 'you know what's she's like, she doesn't really intend to upset me'. Suzanne was always very reluctant to allow me to pursue the concerns she had brought to my attention fearing it would only make matters worse. In fact she had made it clear she did not want me to address the concerns raised because she feared the consequences. Without factual evidence or Suzanne's willingness to speak out it was impossible to take matters further. Matters came to a head last June/July following further concerns raised by colleagues. When I spoke to Suzanne about the claims she was visibly distraught, I would say 'in bits', and was very open about what had gone on. She told me that she could not take any more, that she had had to put up with so much bullying from Caroline and that she had covered for her and defended her so many times but she could not do it anymore. She confided that the situation with Caroline made her dread coming into work and it was making her ill. This time Suzanne agreed to let me go ahead and start a preliminary investigation. She expressed her view that the consequence of doing so could not be any worse than what she was already going through."

164. On 22 November Gill Yates emailed the claimant copied to her union representative providing the evidence Mrs Gillen had given and giving a summary initially of the outcome.

A1.1 Unauthorised use of school equipment – proved.

A1.2 Use of school equipment for own gain – proved.

A2 Use while off sick – dismissed.

B Presence in the classroom undermining staff – proved.

C S Hall being bullied and intimidated – proved.

D Inappropriate IT usage – dismissed.

E Harassment of Peter Neal – not proved.

F Admission of having lied – proved.

G Incident with M Topham – dismissed

H Pupils network access – dismissed.

I Unprofessional conduct – proved.

J Discussing a pupil in the presence of other pupils – proved.

165. She went on to say:

> "It has been decided that three of the proven allegation individually amount to gross misconduct and as such your employment is to be terminated without notice or compensation. Your employment is therefore terminated with

immediate effect of you having receipt of this email on Friday 22 November 2013."

The three gross misconduct allegations upheld were the bullying of SH, the lying, and the clapping incident.

166. The claimant was asked to return property and advised that she could appeal within ten working days, following the more detailed letter that they were going to send to her.

167. In respect of A1.1, unauthorised use of school equipment, they found there had been a historic procedure but no written evidence could be found. There mixed evidence from staff about this, with at least one person saying she did ask her immediate member, "As a member of a Senior Leadership Team she would be well aware equipment should not be taken off site bearing in mind a previous incident with a camera which had been stolen from Suzanne Hall's car and the consequences in respect of insurance". In the absence of a written policy, however, they considered this was misconduct rather than gross misconduct.

168. In relation to A1.2, use of school equipment for your own gain, she had taken ownership of the money in deciding how it should be used, given to charities of her own choice, and it should have been directed to the school. Without receipts there was no evidence the expenses and donations were made as detailed. It was decided this was misconduct.

169. Allegation A2 was dismissed.

170. In relation to B, presence in the school classroom whilst not required to teach caused disruption and undermined S Hall and PN – She admitted eating lunch in the classroom and moving furniture while another member of staff was teaching. There was evidence she had made comments in a mocking tone in the presence of pupils whilst learning was taking place. It was considered to be unprofessional behaviour. The panel decided this was misconduct.

171. In relation to C, Suzanne Hall being bullied and intimidated on an ongoing basis over a long period of time, they said Mrs Gillen had confirmed that Suzanne Hall had raised concerns over a period of time as her subsequent evidence showed this was ongoing for over 18 months prior to July 2012. Ms Hall's accounts gave examples of behaviours and conduct. Events had been witnesses by P Neal and C Phillips, "Bullying can take many forms and is characterised by persistent deliberate actions". Suzanne stated these issues occurred on a weekly if not daily basis and this was considered to be gross misconduct.

172. In relation to D, inappropriate IT usage – lack of evidence. This was dismissed.

173. In relation to E, harassment of Peter Neal – This was based on Peter Neal being asked about a private conversation. As it was one person's word against another and the evidence conflicted they found this had not been proved.

174. In relation to F, admission of having lied – this was proved. The claimant had written it in an email and could not explain the context of why she said that. The

panel did not accept that she could not remember as she relied heavily on the forensic detail of her diary and sent and received emails. It was unprofessional conduct. She had deliberately misled the Head Teacher with respect to the provision of the education of children. This was gross misconduct.

175. In relation to G, M Topham – this was dismissed because the evidence was conflicting.

176. In relation to H, network access to pupils – this was dismissed.

177. In relation to I, unprofessional conduct, making inappropriate comments which were seen as rude and sarcastic – this was proved. This was in relation to her clapping regarding the school council. When she was told her actions were inappropriate she repeated it in the staffroom. This was unprofessional conduct. They found this constituted gross misconduct.

178. In relation to J, discussing a pupil in the presence of others – it was acknowledged she was setting an example in relation to a pupil, JW, and this was not proven, but the other element of shouting in a public place was unprofessional and is proven. Again this was misconduct.

Conclusion

179. The panel considered the mitigation, considered the live written warning in place at the time of the allegations being made, and as there were three proven allegations which individually were gross misconduct it was decided the claimant's employment should be terminated without notice or compensation.

180. On 30 November the claimant asked Gillian Yates for the hearing minutes. She also asked for details of the procedure which was being applied as the claimant and her union official had been working on the Catholic Education Services Model Disciplinary Procedure for Schools with Delegated Budgets 2004. It was stated that there were 14 days to appeal. She asked them to tell her the three governors delegated to the appeal panel, the name of the person advising the appeal panel and the name of the proposed note taker. It had been agreed that the grounds of appeal could be particularised on receipt of the minutes.

181. On 4 December the claimant's union representative indicated they would be lodging an appeal, in which they assert dismissal was too harsh and beyond the band of reasonable responses.

182. The minutes were sent on 7 December but on the same day in the evening the claimant challenged that they were accurate.

183. On 8 December the claimant sent an email to Sue Fielding who was the note taker, saying:

> "I personally met every deadline asked of me throughout this case. It is disappointing therefore to note that I have had to wait 8½ weeks for the notes from the October 7 and 8 hearing and just over two weeks for the notes from the hearing on November 21."

184. She said because of the omissions and errors it would take her and her union official a considerable amount of time to work through the minutes and suggest amendments and rectifications, and therefore they would not be able to provide a draft for the disciplinary panel before the Christmas holidays.

185. On 13 December the claimant submitted an appeal challenging the findings in relation to A1.1, A1.2, B, C, F, I and J in respect of the findings and the sanctions imposed, and they listed the following issues:

(1) Investigation fundamentally flawed.

(2) Perverse verdict given in the evidence.

(3) Procedural breaches.

(4) Failure to make reasonable adjustments on account of my member having the protected characteristic of disability as per the DDA/EA.

(5) Dismissal was not reasonable in all the circumstances as required by the provisions of the Employment Rights act 1996.

186. A hearing was arranged for 21 and 22 January and the claimant was asked to provide amendments/alterations to the minutes by 7 January. The claimant said she would not be able to do that because Mr Young was away for two weeks over Christmas and she said that she felt it was necessary that the minutes should be agreed before the appeal hearing. The deadline was then extended to 14 January.

187. On 14 January the claimant said that:

> "Due to the number of corrections and amendments it was not going to be possible to produce that by that date, particularly as Mr Young had been ill and was unable to pass her his notes until yesterday."

188. The claimant reminded her that it took 8½ weeks to produce the notes from 7 and 8 October and yet she had been originally given only seven working days. She listed some serious concerns. The points she made were that:

(1) That Mrs Williams had said that all parties had agreed to the minutes from 4 June – this was incorrect.

(2) She recorded that allegation H was withdrawn at the beginning of the day and made no reference to anything said about this allegation, whereas in fact it was withdrawn when Mr Young's questioning of Mr Gilda revealed serious errors and omissions in his investigation. That was then withdrawn. As Mr Gilda's fairness and balance in his investigation was being challenged it was imperative that this was referred to.

(3) As Mr Gilda was questioned for over five hours and was asked over 330 questions but only 68 questions are recorded. This paints a false picture of the proceedings.

(4) She then went on to say one particular error jumped out: that Mr Higginson had said that he said he knew that Ms Hall was paid for Mrs Oakes'

daughter's wedding's filming, and he said he knew because Judith Oakes had told him and went into detail why she had brought it up; whereas in the school's notes it said "JO wedding, SH filmed, didn't know if there was any payment made" – this was an extremely serious and misleading error. She said that she did not feel that the appeal panel could make a proper decision without an agreed set of minutes.

189. On 15 January Mrs Fielding wrote to Mr Young asking for his grounds of appeal.

190. On 15 January the claimant emailed the school and said that she had still not had a reply to her email from the previous day requesting a reply in 24 hours. Given her anxieties and the fact that she was unwell she needed clarity. She could not cope with the idea of an appeal in three working days with all the imponderables unsettled and therefore she withdrew her appeal because she could not see how it could be conducted fairly. The school replied and asked her to confirm whether she would be attending and assuring her it would be a fair procedure. She replied saying she had withdrawn her appeal as her concerns were unaddressed.

191. On 16 January the claimant was written to by the school again stating that they were giving her the opportunity to review he decision over the next 24 hours. When they did not receive a reply they accepted that the appeal was withdrawn.

192. Prior to this Mr Young had also asked for the grievance documents which he had taken to the disciplinary hearing and tabled by him but had not been considered by the disciplinary panel to be included in the appeal, but this was refused. He said this was contrary to what Ms Yates had said, that any relevant grievance items would be considered as part of the disciplinary process, and he made it clear that he intended to deal with the failure of the first panel to look at unresolved grievances as an issue for the appeal. Mr Young said he did try to persuade the claimant to go ahead with the appeal but she felt that they were taking on board any of her concerns about the notes, the constitution of the panel, and she decided to give up.

193. It is also relevant to consider Mrs Yates's position .Contrary to Mr Youngs belief Mrs Yates had been involved in the investigation, as is evidenced by emails between herself and Mr Gilda and then ofcourse the disciplinary hearing. There is nothing necessarily unusual in that as she was the HR advisor. It was slightly unusual that she had been involved in a preliminary investigation before Mr Gilda became involved.

194. Mrs Yates also gave evidence regarding the breach of contract matter. She confirmed that the 2004 disciplinary policy was being used. This policy had a strange mechanism whereby by obliging the school not to inform the local authority of a dismissal until an appeal had been concluded the employee would be paid until the outcome of the appeal rather than the dismissal. We agree this was the effect of the 2004 policy and indeed we have come across the provision in old claims before the tribunal. The respondent took the view those provisions were not contractual and in any event had been superseded by the 2012 policy which removed these provisions.

The Law

Unfair Dismissal

195. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

> "A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee."

196. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

> "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 sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

197. In relation to a conduct dismissal **British Home Stores Limited v Burchell** sets out the test to be applied where the reason relied on is conduct. This is:

(1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?

(2) were there reasonable grounds on which to base that belief?

(3) was a reasonable investigation carried out?

198. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982]** states that the function of the Tribunal:

> "…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

199. The Tribunal must not substitute its own view for the range of reasonable responses test.

200. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

> "The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

201. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

202. The claimant relied on the case of **Ramphal v Department for Transport [2015] EAT**, which concerned the influence of a Human Resources Officer on the final decision to dismiss. It was stated:

> "If the integrity of the final decision to dismiss has been influenced by persons outside the procedure it in my opinion will be unfair all the more so if the claimant had no knowledge of it."

203. Serrota in that case went on to say:

> "Although a dismissing or investigating officer is entitled to seek guidance from Human resources or others such advice should be limited to matters of law and procedure and to ensuring that all necessary matters have been addressed and achieve clarity.

Polkey

204. In addition, if it is found that the claimant's dismissal was unfair, in relation to remedy the following issues must be considered (**Polkey v A E Dayton Services [1988]**). If the Tribunal finds there was a failure to adopt a fair procedure and the consequence was that dismissal was unfair then the Tribunal can consider whether, had a fair procedure been followed the claimant would still have been dismissed? If the procedure failings were so severe that no reasonable employer acting reasonably would have dismissed the claimant then **Polkey** does not act to reduce any compensation.

205. In relation to disciplinary dismissals in **Chagger v Abbey National PLC [2010]** the Court of Appeal held the like principle applied where the dismissal was discriminatory. The question to be asked is not what would have occurred had there been no dismissal but what would have occurred had there been no discriminatory dismissal. The question requires consideration of whether dismissal might have occurred even had there been no discrimination.

<u>Contributory Conduct</u>

206. Section 123(6) of the Employment Rights Act 1996 says:

> "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…compensation award by such proportion as it considers just and equitable."

There must be a causal link between the blameworthy conduct and the dismissal.

<u>Time Limits</u>

207. Section 123 of the Equality Act 2010 sets out a time limit of three months beginning with the date the act was done. It can be argued that a series of acts if continuing treatment over a period. In particular in Hendricks v The Commissioner of Police for the Metropolis [2003] it was said that:

> "Either by direct evidence or by inference from primary facts that numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period. A distinction should be made between an act extending over a period and a succession of unconnected or isolated specific acts from which time would begin from the date on which each specific act was committed (**Sougrin v Haringey Health Authority (1992) CA**)."

208. The Tribunal has discretion to extend time if it considers it is just and equitable to do so, but the claimant should provide evidence of why it is just and equitable to extend time (**Chief Constable of Lincolnshire v Caston [2010] CA).**

Definition of Disability

209. The respondent in this case disputes disability in part, therefore it is relevant to consider section 6 of the Equality Act 2010 which says that:

"(1) A person (P) has a disability if –

(a) P has a physical or mental impairment; and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities…

(2) This Act (except part 12 and section 190) applies in relation to a person who has a disability as it applies in relation to a person who has a disability; accordingly excepting that part and that section) –

(a) A reference (however express) to a person who has a disability includes a reference to a person who has had the disability; and

(b) A reference (however express) to a person who does not have a disability includes a reference to a person who has not had the disability."

210. A long-term adverse effect" is defined in Schedule 1 as:

"(1) The effect of an impairment is long-term if –

(a) It has lasted for at least 12 months;

(b) It is likely to last for at least 12 months; or

(c) It is likely to last for the rest of the life of the person affected."

Disability Discrimination

Burden of proof in discrimination cases (direct discrimination)

211. Section 136 of the Equality Act 2010 states that:

> "(2) If there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) Subsection (2) does not apply if A shows that A did not contravene the provision."

212. This is often described as the claimant having to establish a prima facie case of discrimination following which the respondent has to provide an explanation, the bear fact of a difference in status and treatment is not sufficient; there must be something more, and as established in **Zafar v Glasgow City Council [1998] ICR 120** unreasonable treatment by itself is not sufficient to establish a prima facie case: the circumstances surrounding the respondent's action need further scrutiny.

213. The burden of proof is considered in a number of cases, including **Igen v Wong [2005]** Court of Appeal and **Madarassy v Nomura International PLC [2007]** Court of Appeal.

214. In **Martin v Devonshire Solicitors [2011]** the EAT stressed that:

> "While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation…They have no bearing on whether a Tribunal is in a position to make positive findings on the evidence one way or another, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law."

215. In **Laing v Manchester City Council [2006]** the EAT also said it was not improper for the Tribunal to move directly to the respondent's explanation for the action and accept it if it was fully adequate, and it was not necessary to go through a stage of establishing whether or not there was a prima facie case.

216. In respect of reasonable adjustments, the claimant is required to establish the PCP relied on and demonstrate substantial disadvantage. The burden would then shift to the respondent to show that no adjustment or further adjustment should be made (**Project Management Institute v Latif (2007) EAT**).

Direct Discrimination

217. Direct discrimination is defined in section 13 of the Equality Act 2010, which states that:

> "(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."

218. In respect of disability it is obviously a protected characteristic and there can be no justification for direct discrimination.

Harassment

219. Harassment is defined in section 26 of the Equality Act 2010, which states:

"(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 –

(ii) Violating B's dignity, or

(iii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …

(3) …

(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; and

(c) Whether it is reasonable for the conduct to have that effect."

Section 15 – discrimination arising out of disability

220. The claimant makes a claim under section 15, something arising in consequence of disability. Section 15 states that:

"A person (A) discriminates against a disabled person (B) if –

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

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

221. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe (2015) EAT** which stated that:

"In a section 15 claim a Tribunal must firstly establish that the disability has the consequence of something; and that the treatment complained of as unfavourable was because of that particular 'something'.

222. An employer also has a defence to a section 15 claim if they can establish they had no knowledge of the claimant's disability (section 15(2)). Section 15(2) also states that it should be established that the employer could not be reasonably expected to know of the employee's disability. The employer, in accordance with the EHRC Employment Code, must do all it reasonably can to find out if the person has the disability, and knowledge held by the employer's agent or employee, such as Occupational Health adviser etc., will usually be imputed to an employer.

223. In **Hardys and Hansons PLC v Lax [2005]** Court of Appeal it was said, in respect of justification:

> "It is for the Employment Tribunal to weigh the real needs of the undertaking expressed without exaggeration against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate…A critical evaluation is required and is required to be demonstrated in the reading of the Tribunal. In considering whether the Employment Tribunal has adequately performed its duty appellate courts must keep in mind the respect due to the conclusions of the fact finding Tribunal and the importance of not overturning a sound decision because there are imperfections in the presentation. Equally the statutory test is such that just as the Employment Tribunal must conduct a critical evaluation of the scheme in question, so the appellate court must critically consider whether the Employment Tribunal has understood and applied the evidence and assessed fairly the employer's attempts at justification."

Section 20 – Reasonable Adjustments

224. The claimant also makes a reasonable adjustment claim. Section 20 says:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person this section, sections 21 and 22 and the applicable schedule apply, and for those purposes a person on whom the duty is imposed is referred to as A.

The duty comprises the following three requirements. The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."

225. In **The Royal Bank of Scotland v Ashton [2011] EAT** it was stated that the PCP must be a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled, and by comparing to non disabled comparators it can be determined whether the employee has suffered a substantial disadvantage. The correct comparators are employees who could comply or satisfy the PCP and were not disadvantaged.

226. In **Environment Agency v Rowan EAT [2007]** the EAT said:

> "A Tribunal must go through the following steps:
>
> (1) Identifying the PCP applied by or on behalf of the employer;
>
> (2) The identity of non disabled comparators where appropriate;
>
> (3) The nature and extent of the substantial disadvantage suffered by the claimant."

227. Serota J stated:

> "In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments…without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed amendment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."

228. Paragraph 21 of schedule 8 to the Equality Act provides that:

> "A person is not subject to the duty if he does not know and could not reasonable be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace or a failure to provide an auxiliary aid."

229. This encapsulates the idea of constructive knowledge i.e. that either someone within the respondent's organisation who is responsible for these matters, such as Occupational Health, knows of the substantial disadvantage, or that the respondent should have known from all the factors available but closed their eyes to it.

230. Further, the adjustment has to be reasonable and effective. Section 18B(1) of the Disability Discrimination Act 1996 (these matters are no longer in the Equality Act but they are useful to have in mind in considering what would be a reasonable adjustment) set out some factors to take into consideration as follows:

> "(1) The extent to which the step would prevent the effect in relation to which a duty was imposed.
>
> (2) The extent to which it was practical for the employer to take the step.
>
> (3) The financial or other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities.
>
> (4) The extent of the employer's financial and other resources.
>
> (5) The availability to the employer of financial or other assistance with respect to taking the step.
>
> (6) The nature of the employer's activities and size of its undertaking and matters relevant to a private household."

231. We were also referred by the claimant to the case of **Aderemi v London and South East Railway Limited** which concerns the definition of disability and states that the Tribunal should concentrate on the activities which someone cannot do rather than those that a claimant could do.

Dismissal

232. The claimant also claimed disability discrimination in relation to her dismissal. However, she had not made clear whether this was direct discrimination or a section 15 claim.

Breach of Contract

233. The issue here was which disciplinary policy applied. The respondent's case was that the 2004 disciplinary policy was replaced in September 2012. The 2004 policy was a non contractual policy and since 2012 the policy was operated so that dismissals took effect after the disciplinary, and were only revoked on successful appeals. The claimant states the opposite: that the 2004 policy was contractual and operated to ensure she was paid up until the date of an appeal outcome.

234. In order for a document extraneous to a written contract of employment to be considered incorporated into the contract the tribunal should consider whether the terms are 'apt' for incorporation. Where a term is important for 'the bargain struck' it will be apt for incorporation. Also where it is expressed in detail and with the flavour of a contractual term.

Conclusions

Unfair Dismissal

235. We find that the claimant was unfairly dismissed for the following reasons:

(1) The respondent failed to conduct a reasonable investigation on the following grounds –

(i) It was not even-handed as Mr Gilda did not follow up any lines of enquiry which might exonerate the claimant other than listening to her evidence.

(ii) Mr Gilda took the part of the management side's witnesses at every opportunity.

(iii) If it was one persons word against another he always believed the person other than the claimant

(iv) Mr Gilda's inability to justify his conclusions as was embarrassingly revealed at the hearing where Mr Young questioned him.

(v) There was an inordinate delay to the conclusion of the investigation, despite the fact that there was no robust interviewing of staff.

(vi) It was clear from the claimant's statement of case to the hearing panel that there was extensive other evidence which needed to be considered.

(2) In particular, we make the following findings:

(a) Re the rude and sarcastic comments to the Head repeated in the staffroom – this was one incident where the claimant was told not to be facetious. Mrs Gillen did not take any disciplinary action whatsoever against the claimant for this incident and just mildly remonstrated with her. It had occurred more than 12 months before the main disciplinary action was commenced against the claimant. It was clearly unfair to add it at this late stage.

(b) In relation to lying to the Head – we find it was unfair that this became an allegation as it was a matter relayed in a private communication to Suzanne Hall who the claimant thought was her "best friend" at the time and it is well known and commonsense that irrespective of the claimant's frame of mind which appeared to be very vulnerable at the time, that individuals will say things to friends that they would never dream of saying to anybody else and the expectation of total confidentiality. In respect of this Mrs Gillen was never asked whether she considered Miss Swan had lied to her. Suzanne Hall was not questioned about it either. In cross examination Mr Joyce was asked what the "lying" was and when did it take place. Finally Mr Joyce said she had told them she could deliver a course that she could not. This was also influenced by the idea that the claimant was behind on Year 10 work; however Mr Topham had said this was completely untrue.

(c) It seems unreasonable and disingenuous to us to accept the use of one word in an extremely personal email from somebody who was clearly distressed about personal matters irrespective of her disability that that should be taken as proof that the claimant had "deliberately misled the Head Teacher with respect to the provision of the education of children".

(d) Mrs Gillen's evidence was that Mrs Swan had not got to the point where doing the course on her own was viable and had never said she could do all the filming work needed, but she was never asked about this at the time. If she had given that evidence at the time then it is highly unlikely this accusation could have been sustained. Mrs Yates' witness statement also stated, and she agreed in cross examination, that the claimant had never said she was able to do the course on her own.

(e) Mrs Gillen in cross examination did not reply to questions aimed elucidating what the lie was and whether the claimant had misrepresented her abilities to deliver the course. This is supported by the informal meeting of 24 February 2012 which shows that Mrs Gillen knew that the claimant still needed further training.

(f) The claimant's own diary provides evidence of the situation in that it says that by not keep telling Mrs Gillen she could not do the practical elements of the L3 course without training Mrs Gillen might think she could. To move from somebody saying in a private email "I have lied to them" to finding that this was gross misconduct is not a reasonable conclusion to draw from the evidence.

(3) Regarding the bullying of Suzanne Hall over 18 months or more – it was not a reasonable conclusion to reach that this had occurred, firstly because –

(i) The information regarding the timescale was obtained from Mrs Gillen after the disciplinary hearing. The claimant was never given any opportunity to reply to it. There was no documentary evidence

of this and Mrs Gillen never took any action if it was true, neither did she attend as a witness. Suzanne Hall concentrates totally on events in June 2012 in her own witness statement.

(ii) The allegations of bullying made by Suzanne Hall and Mr Neal in 2012 related to a small period of time and where the claimant was guilty of the actions it was entirely understandable that the claimant would have no idea they were bullying as Suzanne Hall throughout purported to be the claimant's best friend, and the investigators appeared to take absolutely no notice of this or, in reading the emails between the two parties, to draw any conclusion as to Ms Hall's character. Certainly the relationship between them evidenced by the emails is extremely what might be described as "lovey-dovey, emotional, quite dramatic". In those circumstances we find the panel and the investigator were simply not careful enough and did not address their minds to the context of these allegations. The emails show Ms Hall accepting and understanding the claimant's difficulties and behaviour. She was aware her friend could come across as abrupt and abrasive but was also aware that she had "a heart of gold". She also said to her in the email correspondence that she was "a softy really".

236. Accordingly the respondent has not met the **BHS v Burchell test** as the investigation was inadequate and there was insufficient evidence to reach the conclusion the panel reached.

Procedural Unfairness

237. We find the hearing was procedurally unfair in the following respects:

(1) Obtaining evidence from Mrs Gillen which the claimant was never given the opportunity of considering.

(2) Failure to call any witnesses: whilst this might be acceptable to some extent in a bullying case the respondent did not explore any alternatives such as enabling the claimant to put written questions to the witnesses who are present in another room for example.

238. In respect of the claimant's contention that Mrs Yates was over involved in the decision making process, she took a great role in the investigation and then advised the disciplinary panel. However we do not find that is enough to make the procedure unfair and was not akin to the situation in Ramphal.

Gross misconduct/capability

239. The respondent believed that the issues raised where of conduct not capability however we find that was outside the range of reasonable responses of the reasonable employer as the Mrs Gillen agreed she should have tackled the problem earlier, she let it run on; the claimant thought SH was her best friend so had no conception that her behaviour was affecting her in this way – if it was; that the claimant was clearly struggling with aspects of the course – Mrs Gillen knew that but described it as 'the net closing' rather than tackling it via another route . Some of

these matters were capability and could have been resolved without formal proceedings. A reasonable employer would have chosen a different route particularly in view of the claimant's length of service.

Was it within the range of reasonable responses to dismiss?

240. Having found that the respondent did not meet the **BHS v Burchell** test we have gone on to consider in any event whether it would be reasonable to dismiss. Clearly if the claimant was found guilty without any mitigation of bullying Suzanne Hall then dismissal becomes a consideration. We find in respect of the other two matters dismissal is outside the range of reasonable responses.

241. However, we find it would not have been within the range of reasonable responses in the light of the claimant's long service and her illness, and the context of the friendly relationship between Ms Hall and the claimant and the school's failure to alert her to the seriousness of her behaviour and give her chance to improve.

242. The respondent failed to properly take the claimant's mitigation into account in relation to her illness, a pattern of her difficulties and behaviours since her mother's death and the nature of her relationship with Suzanne Hall.,even in the light of the written warning and management instruction as these matters were not directly on point with the issues she was accused of in relation to the dismissal.

Disability Discrimination

Time Limit

243. We find that a continuing act took place from June 2012 onwards in respect of the claimant's disciplinary process. The other matters complained of were separate acts with considerable time between them. The claimant gave no evidence as to why it would be just and equitable to extend time. In submissions her illness was relied on however the claimant was able to raise matters throughout her employment and did provide a detailed response to the allegations against her. There has been considerable prejudice to the respondent in trying to answer the older allegations although evidence has been presented. Accordingly the claims arising before June 2012 are out of time and we find no compelling evidence on which to exercise our discretion.

244. We have gone on to consider the whole of the claimant's claims in any event.

Disability Discrimination

245. The respondent conceded that the claimant was disabled in respect of anxiety and depression throughout the period in question; however they disputed that she was disabled because of migraine, chronic fatigue syndrome and temporomandibular joint disorder.

246. We find that the claimant was not disabled because of these three things separately as there was no evidence that they had had a substantial adverse effect on the claimant. She had mainly attended work save for absences due to anxiety and depression as related above. There were no significant absences due to any of the matters described. We consider even the combined effect did not have a

substantial adverse effect; there was some adverse effect but considering the claimant's absence record we do not accept that it was substantial enough to regard the claimant as disabled because of these three conditions separately or combined.

Knowledge

247. Did the respondent have the relevant knowledge?

248. The claimant's case was that the school knew from the beginning of employment she had the conditions of anxiety and depression because she disclosed these on appointment. There was no supporting evidence of this at all, and we find on the balance of probabilities that the school was unaware of these conditions at this point in time. If we are wrong on this then we find that the claimant's description of these conditions to the then head Teacher, Mr Humphreys, would not be sufficient to fix the respondent with knowledge of disability: simply saying that she had anxiety and depression without sufficient detail would not fix the respondent with knowledge, nor would they be reasonably expected to know at that stage that she had a disability. In relation to the evidence from 1998, this stated the claimant suffered from chronic fatigue syndrome and that she had had anxiety and panic attacks and had had anxiety management with a psychologist. It mentioned that she was on fluoxetine but without more evidence we do not accept that that is sufficient to put the respondent on notice that she might have anxiety and depression to the extent that it had a substantial adverse effect on her day-to-day activities. .

249. We find that the respondent did have knowledge of the claimant's disability from 6 October 2012 when Mr Young sent Dr Chattree's report to them which stated the claimant had recurrent depression. This was sufficient to put the respondent on notice that the claimant had a disability, and was either direct knowledge or constructive knowledge from that point onwards.

250. Regarding knowledge of the claimant's chronic fatigue syndrome, etc., although we found these were not a disability in case we are wrong we accept the respondent had some knowledge from 1998 onwards of the chronic fatigue syndrome and that the claimant was occasionally suffering from migraines. However, there was nothing to put the respondent either with actual knowledge or constructive knowledge in relation to these conditions.

251. We have gone on to consider the claimant's separate claims, referring to their numbering in the further and better particulars.

Direct Discrimination

252. We find as follows:

(32) Pressuring the claimant into returning to work compared to Nicky Chadwell – we find there are real and significant differences between the claimant's situation and Nicky Chadwell. The claimant was off work for a much longer period; Nicky Chadwell had a defined period. In addition Ms Chadwell had a disabled son. In total Nicky Chadwell had one week when her sister was dying in a hospice and then three weeks of compassionate leave after she died. The two situations were not comparable.

(33) Decision to take disciplinary action against the claimant when Peter Neal complained about her but not against him when Suzanne Hall complained about him. There was no convincing evidence regarding any complaints against Peter Neal or the nature of any such complaints against Suzanne Hall. The factual basis of this claim has simply not been established.

(34) Regarding complaints made by the claimant against Peter Neal these were never put in the same way as the complaints made by Suzanne Hall. They were, as far as any were evidenced, simply one off 'moans' Therefore there was no less favourable treatment. As far as the claimant's grievance was concerned these were in part dealt with in the disciplinary process and as she was dismissed and did not appeal were not pursued any further. The respondent's explanation was reasonable and unconnected with the claimant's disability.

Harassment

253. Referring to paragraph 51 of the claimant's further and better particulars which referred to nine separate incidents of harassment, and paragraph 50 where the claimant states all the matters she relies on from 2010 until her dismissal amount to harassment under section 26 Equality Act 2010. We find as follows.

254. Regarding paragraph 50 – We have not dealt with this as one single claim as it was insufficiently pleaded and therefore we have concentrated on 51 below.

255. In general the claimant has failed to establish that the actions she complains of were related to the 'relevant characteristic' of disability. In each case where an action was taken there was a rational motivation unconnected with disability .

256. Regarding paragraph 51:

(1) Pushing the claimant to return before she was ready: Mrs Gillen was supportive of the claimant at this juncture and was seeking to encourage a return to work as any employer would do. She genuinely believed it would assist the claimant in recovering from her mother's death. Therefore there was no "purpose" of harassment involved, and further it was unreasonable of the claimant to consider the effect of it was harassment.

(2) Making the claimant attend counselling before she was ready: She certainly encouraged the claimant to attend counselling for genuine reasons. She referred to the situation of her son. There was no purpose or effect here.

(3) Failing to provide relevant documents: Again there was no purpose or effect. There was after the disciplinary hearing delays regarding the minutes. The claimant was represented by the union at that stage so in all the circumstances of the case we do not believe the purpose was to create an intimidating environment nor was it reasonable for the claimant to consider it had that effect. Nor was the delay connected with her disability it was simply an enormous task to produce the minutes of a long involved hearing. Whilst the claimant and her union representative had raised that

her condition meant she needed accurate minutes that was not the motivation behind the delay.

(4) Failing to follow OHP recommendations: We do not find that the respondent at any time failed to follow the OHP recommendations – so the claim fails on a factual basis - save that the agreement on the job description was delayed. However the discussion about the job description was necessary and was carried out in a totally reasonable way and there was no sign of distress from the claimant about this at the time. Accordingly this could not be unwanted conduct etc, and in any event it was not related to her disability.and therefore this part of the claim fails.

(5) Being critical of the claimant because of her demeanour and attitude: We accept Mrs Gillen's evidence that this was a sort of ongoing joke between the two of them and the claimant described herself as a "dour scot". Accordingly it was unrelated to anything to do with the claimant's disability. We find nothing was said with the purpose of harassing or intimidating the claimant, and that it was unreasonable of her to consider it had this effect; in fact it was disingenuous given her own description of herself.

(6) Failing to give the claimant support Given our findings above this claim fails. The respondent did give the claimant lots of support. In any event it is far too vague to be sustainable. There are no specifics attached to it.

(7) Trawling for allegations against the claimant: There were some allegations which were old that were put to the claimant, but these were allegations which arose out of the interviews which took place with staff. They did not trawl. We have criticised the respondent for including these complaints in the disciplinary matters to be considered, but that is not the claim here. It is misconceived to consider them as harassment. That was not the purpose and it was unreasonable of the claimant to consider they had that effect. Further, there was no connection with the claimant's disability.

(8) Instigating three disciplinary processes and sanctions: Again this was not because of the claimant's disability; it was because of the matters which arose.

(9) Pressurising the claimant to deliver the sixth form Media Studies course on her own: We do not agree with the characterisation of pressuring the claimant to deliver the course on her own. There was an ongoing dialogue about the issue. Further, there was no evidence this was connected with the claimant's disability whatsoever.

<u>Discrimination arising from disability</u>

257. The respondent submitted that they had insufficient knowledge of the claimant being a disabled person for this claim to proceed. We have agreed that the respondent did not have knowledge before October 2012 and therefore any claim arising before then would fail. i.e. 35,36,39,40,42

258. For the claimant to succeed the claimant has to establish that the "something arising" that she relies on did arise from her disability, and that any detriment she suffered or less favourable treatment was because of that "something arising".

259. We find the claimant has not established that the matters she relies on are matters arising from her disability. She relies on her irritability, bad temper, etc., and provided very limited evidence that this behaviour was because of her disability. DR Chatree's letter of 21st May 2013 was the best evidence. However we found this equivocal. It said it was difficult to generalise and that a change in behaviours could result from the illness. However there was no changes in the claimant's behaviours The claimant had been content to characterise herself as somebody who said what she thought, implying that this was a personality issue or a temperament issue, not anything to do with any disability. She said she "engaged her mouth before her brain" and was a "dour Scot", that it was her personality and a coping mechanism since childhood. Neither did her temperament change over time to coincide with when the claimant was more 'stressed' or anxious or depressed, or when she was on stronger medication,she was always difficult.

260. In respect of her actual claim, we make the following findings. Again the numbers refer to the numbers in the further particulars:

(35) We find that the respondent did provide support to the claimant irrespective of issues of knowledge and causation.

(36) and (37) The disciplinary action instigated in June 2012 – this fails as at the time the respondent did not have knowledge and the claimant has not established that her behaviour arose because of her disability. The continuation of the disciplinary action – Again although the respondent was aware of the claimant's disability during the course of the disciplinary action, there was no evidence that the claimant's behaviour which led to the disciplinary action was "something arising" out of her disability. She assets it but has no real evidence. She has always referred to it as her personality, being a dour Scot. etc

(37) This referred to the claimant sending the text message to he friend after being told of Mrs Gillen's retirement. Again there was no evidence; it was simply an assertion that fear and panic were a consequence of the claimant's disability and that she would need to discuss this with someone else. We do not accept the claimant has established that these matters were either true or were something arising from her disability.

(38) The disciplinary action in respect of the text message could not be seen as unfavourable treatment due to something arising out of disability as the claimant has not established her behaviour was something arising out of her disability. Even if it was, we accept the respondent's case that taking disciplinary action in those circumstances would have been objectively justified. The claimant had been given an extremely clear instruction and she had immediately breached it. We do not think that was disproportionate given the claimant's senior position.

(39) and (40) The very vague allegation that because of the claimant's depression she would often be seen to be down and upset and that Mrs

Gillen would criticise her. This was simply unsubstantiated. The claimant does not set out any specifics and we did not come across any specifics in evidence of Mrs Gillen criticising the claimant. If it is a reference to the issue (5) under harassment, it was not unfavourable treatment as it was an accepted joke or banter between the claimant and Mrs Gillen.

Reasonable Adjustments

261. Did the employer know both that the employee was disabled and that her disability was liable to affect her in the manner set out in section 4A(1)? If the answer to that question is no, (b) ought the employer to have known both that the employee was disabled and that her disability was liable to affect her in the manner set out in section 4A(1) (often referred to as constructive knowledge)? We have found that the respondent had constructive knowledge of disability from October 2012 but not necessarily that there was a substantial disadvantage – either actual or constructive. We address this below in relation to each issue raised as far as it is relevant.

262. There was a failure to set out properly what the PCPs were in relation to the failure to make reasonable adjustments. Considering each one as far as we can:

(43) that Mrs Gillen failed to properly listen to the claimant or the suggestions of professionals in respect of the claimant's wellbeing – the PCP has to be something which is applied to everyone and it is difficult to see how this could comprise a PCP. It would to be that Mrs Gillen consistently failed to properly listen to staff and the suggestions of medical professionals generally. There was no evidence of this. We reject the contention factually in general; and in respect of the claimant we reject that Mrs Gillen did not listen to the claimant. From everything we have seen she was supported by Mrs Gillen whilst off sick and when returning to work. For example she had long periods off work without any formal capability proceedings being instituted, the school paid for counselling on several occasions, she had a phased return, she was paid in full although she did not resume SLT duties.

(44) Detailed minutes: There was some evidence the respondent was slow in providing detailed minutes, possibly just enough to establish a PCP. This could potentially have put the claimant at a disadvantage in the disciplinary process. However, we do not accept that the claimant's short-term memory was affected by her disability as the claimant was able to provide extremely detailed and effective answers to all the questions she was asked. In addition, as the claimant had taped the disciplinary hearing she did not suffer any disadvantage as a result. Mr Young did raise it so the respondent was aware of the possibility but we do not accept that there was in reality a substantial disadvantage.

(45) Relates to the same matter

(46) States that the respondent failed to provide the claimant with policies, including the claimant's job description. We do not accept there was a PCP that the respondent did not provide staff with policies, for example. They did provide policies that the claimant requested, and in respect of the job description it took time for this to be agreed. Again there was no

evidence the respondent was aware the claimant would be put to a substantial disadvantage by any delay in providing her with policies at the time they were requested.

(47) This appeared to be that the Head Teacher ignored the fact of the claimant's disability and turned her back on the possibility of informal resolution. The PCP, therefore, in our mind was applying the respondent's disciplinary policy for gross misconduct to the claimant. Did this put the claimant at a substantial disadvantage because of her disability. It seems to us that the claimant's complaint was that the respondent chose to go down the disciplinary route rather than an informal resolution route which was open to them. We agree that the informal route was open to the respondent in respect of the Suzanne Hall and other relationship issues. However, we cannot see that it put the claimant at a substantial disadvantage because of her disability. It simply put her at a substantial disadvantage as the outcome of disciplinary for gross misconduct was highly likely to be more of a disadvantage than an informal resolution but any employee would be put at a substantial disadvantage by the application of the respondent's disciplinary process. Nothing was added to that as a result of the claimant's disability.

(48) The inability of the claimant to speak to the school counsellor: this was perfectly explained in the Tribunal. This was in effect a PCP in that the school counsellor cannot speak to a member of staff about an issue relating to them and that put the claimant at a substantial disadvantage because she could not get Nicky Chadwell's help. It put her at some disadvantage but not a substantial disadvantage as she was obtaining counselling elsewhere. In any event it is entirely justifiable that the respondent took this step Nicky Chadwell was employed for the pupils not the staff and a conflict could occur if staff started to go to her when they had issues with other members of staff.

Discriminatory Dismissal

263. In terms of "something arising", the claimant would have to show that the reason she was dismissed was because of "something arising" out of her disability, which would mean finding that the behaviours for which she had been dismissed were something arising out of her disability. We have rejected that proposition.

Polkey/contributory conduct and failing to appeal

264. We were invited to make findings in respect of the above matters but have decided that we did not have sufficient evidence and submissions to consider these issues fully. Accordingly they will be considered at the remedy hearing.

Breach of Contract

265. The issue here was whether the 2004 policy was:

(1) still applicable; and

(2) if it was, was it contractual?

266. In respect of the first question, the respondent argued that the 2012 policy had usurped the 2004 policy. We accept that the 2004 policy did include provision that a school teacher would be paid pending the outcome of an appeal. This worked by the mechanism of the Governing Body not giving notice to the Local Authority that, in effect, the individual had been dismissed. The 2012 policy removed this provision

267. As it was agreed that the claimant's disciplinary proceedings where undertaken under the 2004 policy it appears to us that this policy still applied and therefore the claimant was entitled to be paid in accordance with that policy. Whilst her new model policy may have been issued in 2012 when the claimant's disciplinary procedure was ongoing, there was no evidence that this had been formally adopted or that there was an agreement that any new policy would be automatically incorporated into an individual's contract. Accordingly, we accept the claimant's submissions on this matter and her claim succeeds.

268. We accept that the 2004 policy was contractual in this respect, as it was of its very nature a matter to be contractual rather than subject to any discretion, as it concerned pay which is the most fundamental term of any contract. It was apt for being a contractual effect; it was clear, it was prescriptive, it was not advisory.

269. Accordingly the claimant was entitled to be paid following her dismissal up to the abandonment of her appeal.

Summary

270. The claimant was unfairly dismissed.

271. The claimant was not disabled because of her non conceded conditions.

272. The claimant is out of time in relation to matters before June 2012.

273. The respondent had constructive knowledge that the claimant was disabled from October 2012.

274. The claimant's claims of disability discrimination under the Equality Act 2010 fail and are dismissed.

275. The matter should now be listed for remedy in respect of the unfair dismissal and breach of contract. The parties are invited to agree case management orders once a date has been set.

Employment Judge Feeney

Date 17th July 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

18 July 2017

FOR THE TRIBUNAL OFFICE