EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Kirke	**v**	**Lady Bankes Junior School**

Heard at: Watford

On: 22 and23 May 2017, 14, 15, 16 August 2017

Before: Employment Judge Henry

Representation

For the Claimant: In person on 22 & 23 May 2017
Ms Belini – Friend on 14 August to 16 August 2017

For the Respondent: Mr J Braier, Counsel

RESERVED JUDGMENT

The Judgment of the tribunal is that:

1. The claimant was not unfairly dismissed when her employment was terminated on 31 December 2015, for misconduct.

2. The claimant's claims are dismissed

REASONS

1. The claimant by a claim form presented to the tribunal on 16 February 2016, presents complaints for unfair dismissal and discrimination on the protected characteristic of disability.

2. The claimant's claim for discrimination on the protected characteristic of disability, was dismissed following a preliminary hearing determining that the tribunal did not have jurisdiction to entertain those claims, the complaint having been presented outside of the prescribed time period, in circumstances where it was not just and equitable for the tribunal to consider the claim.

3. The claimant commenced employment with the respondent on 1 November 1993. The effective date of termination was 20 December 2015, the claimant then having been continuously employed for 22 complete years.

The issues

4. The issues for the tribunal's determination were set out and agreed following a preliminary hearing on 18 April 2016, as follows:

Unfair dismissal

4.1. Has the respondent shown the reason for the claimant's dismissal? That is, what were the facts and/or belief which caused them to dismiss her.

4.2. Does the reason amount to a potentially fair reason under s.98 of the Employment Rights Act 1996, for the dismissal of an employee? The respondent contends that the reason was related to her conduct.

4.3. If so, did the respondent act reasonably in treating that reason as the reason for the claimant's dismissal? That will require the tribunal to consider, in particular, the following matters:

4.3.1. Did the respondent conduct an investigation to the standard of the reasonable employer in relation to the allegations brought against her?

4.3.2. Did that investigation yield evidence upon which the respondent could reasonably hold the claimant responsible for the misconduct alleged?

4.3.3. Did the respondent's dismissal and appeal officers actually believe the claimant to be responsible for that misconduct?

4.4. Was dismissal a sanction that was within the range of reasonable sanctions open to the employer in all the circumstances? In particular:

4.4.1 Was it reasonable for the respondent to rely on the previous final written warning? Was that warning manifestly inappropriate or given in bad faith?

4.4.2 Was the giving of a further written warning reasonable having regards to any matters raised by the claimant in relation to the reason for her actions which the respondent treated as misconduct in 2015?

4.4.3 Did the respondent's investigating officer demonstrate a lack of impartiality in the investigation?

4.4.4 Did the respondent fail to keep under review the claimant's period of suspension?

4.4.5 Did the respondent fail to hold the disciplinary hearings within a reasonable period of time?

4.4.6 Did the claimant raise a grievance during the disciplinary process and did the respondent fail to deal adequately with it?

4.4.7 Did the respondent fail to hold an appeal hearing to the standard of the reasonable employer, in particular not to adjourn in the claimant's absence?

4.4.8 Was the disciplinary allegation unreasonably brought or insufficiently particularised?

4.4.9 Did the respondent's disciplinary panel demonstrate a lack of understanding of the evidence?

4.5 Insofar as the dismissal was unfair, should injustice to the respondents be avoided on the basis that the claimant is likely to have been dismissed fairly, either when she was dismissed or later, assessed on a percentage or time basis, or both.

4.6 Did the claimant contribute to or cause her dismissal to any extent? Should any tribunal award for unfair dismissal be reduced on the basis of any misconduct before the dismissal or conduct which caused or contributed to her dismissal?

The evidence

5. The tribunal heard evidence from the claimant and from the following witnesses on behalf of the respondent:
   Mr Geoff Mattey, parent governor;
   Mr Paul Wray, parent governor;
   Mr Peter Furness, senior HR advisor, school's HR co-operative; and
   Ms Meena Kanda, senior HR advisor, school's HR co-operative.

6. The witnesses' evidence in chief were received by written statements upon which they were then cross-examined.

7. The tribunal was also presented with a statement of Mr Matthew Ratcliffe on behalf of the claimant. On the witness not attending before the tribunal, this statement was not admitted into evidence and was not considered by the tribunal.

8. The tribunal had before it a bundle of documents, exhibit R1.

9. From the documents seen and the evidence heard, the tribunal finds the following material facts.

The facts

10. The respondent is a state maintained junior school, within the London Borough of Hillingdon. The claimant was employed by the London Borough of Hillingdon as a finance officer working at Lady Bankes Junior School, contracted to work 16 hours a week term time only.

11. It is not in dispute that, the claimant had flexible working arrangements whereby she would, on a weekly basis, inform the school of the hours she would be working the following week, which hours would then be accommodated by the school. It is also fair here to note that, the claimant would sometimes work from home, which arrangement was not challenged by the respondent and equally accommodated.

12. As a finance officer, the claimant's duties inter alia, were to; complete the monthly reconciliation for the local education authority, to give advice to the head teacher and governors on finance matters and of changes that needed to be made to maximise financial control, to administer and have delegated control of the school's accounts, to monitor financial control monthly and present details to the finance sub-committee, to issue invoices and collect monies relating to any aspects of the school, to make payments subject to authentication of invoice or statements of payment, to complete VAT returns, to liaise with financial controllers within the infant school, to support all school staff with ordering supplies and maintain records of ordering schedules, to assist the head teacher and governors with the financial implications of contracts, to organise and maintain all staffing and financial records using the current computer systems and to effect bank statement reconciliations.

13. In November 2014, the claimant, following a disciplinary hearing, was issued a final written warning effective for one year. This warning had been imposed on the claimant's successful appeal against a sanction of dismissal.

14. The claimant challenges the issuance of the final written warning, and submits that it should not have been taken into account, in respect of subsequent acts of misconduct.

15. It is pertinent here to note that, the claimant's claim is premised on her work environment, which she alleges gave rise to the disciplinary action for which she was sanctioned in 2014, and which environment she maintains had caused her to suffer stress and depression, giving rise to the allegations then against her.

16. The environment of which the claimant complains, is that she was required to work alone within the admin section which, having been an issue until 2003, was then remedied by her having the facility to work at a desk with other staff in the reception area, which circumstance then changed in 2012 when the claimant was again restricted to working alone in the area known as the "tower", giving rise to stress, depression and anxiety, for which she

was signed off work and in receipt of medication; the issue of the claimant's lone working environment being of concern.

17. The tribunal pauses here and sets out the relevant circumstance giving rise to disciplinary action being taken against the claimant, and the subsequent commuting of the sanction of dismissal to that of a final written warning.

18. In 2012, the school had created a new post of welfare officer who was to be accommodated in the reception area. The reception area only has room for three desks. There were two admin workers who did reception duties and the claimant had over the years taken to working in the reception area when others did not need to use the extra desk. However, on an appointment of a welfare officer, this would curtail the claimant sitting in the reception area for which she would then be expected to work in the finance office.

19. The claimant working 16 hours a week had great autonomy over when she worked, sometimes working very early in the mornings and sometimes late in to the evening. At times the claimant would work in the finance office as the reception was not always appropriate for dealing with some of her confidential work, as too when she needed to get away from the hustle and bustle of the reception area; where phones rang and door buzzers would go, and parents, staff children often needed attention.

20. It was common knowledge within the reception area that, the claimant saw the third desk in the reception area as hers. It is also the tribunal's understanding that, the claimant had a difficult time at home managing the care of her mother, for which her working arrangement facilitated such care. However, this impacted on staff within the office, who felt that at times the stress of the claimant was reflected in how she behaved towards them, and that she had been known to get very emotional at times.

21. It is understood further, to be the case that, in the period leading up to the incident in question, staff felt that the claimant was getting increasingly anxious, making it clear that she was unhappy that she might not be able to use the desk whenever she wanted, on the appointment of the welfare officer and indeed, which the claimant accepts, in one instance she had moved a desk into the reception area to demonstrate that an extra desk could be fitted in. It is also the case that the claimant suggested that a colleague Ms Sheehan, could work in the sick room, however, given its size and its use this was not feasible.

22. The incident in question arose on the claimant's first day back from a period of sick leave, on the deputy head asking her to leave the premises on account of her doctor's recommendation, on her return to work. Despite agreeing to go home, the claimant did not then do so, attending to matters that she had been concerned with before her absence. On the claimant then being requested by a senior colleague to leave the premises, as the claimant was leaving, she went up behind Ms Sheehan, grabbed her shoulder and said: "Hope you are happy you've got what you wanted".

23. Ms Sheehan, who had not seen or heard the claimant approach, and given tensions that had been building up in the office on her being interviewed for the post of welfare officer, she was shocked and felt threatened, being brought to tears.

24. The allegations against the claimant were that she harassed a teaching assistant, Ms Sheehan, and was then violent towards her by grabbing her from behind. The claimant was suspended from work on 19 October 2012

25. The matter was investigated by Mr Baines, deputy head teacher concluding that, on the claimant admitting to the behaviour which was construed as misconduct, she had made clear that her motives were not malicious offering alternative interpretations pointing to mitigating circumstances, which circumstances were not held to amount to justification for the admitted behavior, and for which the matter was referred to a disciplinary hearing.

26. The disciplinary hearing was subsequently held over two days, 19 July 2013 and 5 September 2013, notes of which are at R1 page 745-791.

27. It was the finding of the disciplinary hearing that the allegations of harassment had not been proved, but the allegation of violent conduct was upheld, amounting to gross misconduct determining to terminate the claimant's employment on 12 weeks' notice.

28. The claimant appealed the decision of dismissal, which grounds of appeal are at R1 page 798-801.

29. The disciplinary appeal hearing was heard on 29 January 2014, notes of which are at R1 page 811-836.

30. The claimant's grounds of appeal were against (1) the severity of the disciplinary action; (2) the finding of the disciplinary hearing on a point of fact that may have influenced the outcome, (3) the failure to adhere to the agreed procedure that may have affected the outcome of the hearing and (4) new evidence.

31. It was the finding of the appeal panel, which panel was chaired by Mr Paul Wray – parent governor, that in respect of the severity of action, on the findings of the disciplinary panel, both the claimant's verbal and physical conduct towards Ms Sheehan, could be considered a violent act, and that the finding of gross misconduct was appropriate, not upholding the claimant's appeal on this point.

32. With regards to the finding on point of fact, on the claimant not pursuing this contention, the appeal was not upheld on that point, and in respect of the failure to adhere to agreed procedures, the following was stated:

> "Your appeal was presented around a number of concerns regarding this point. The panel considered that with regards to the management of your suspension and the decision to consider your grievance prior to the arrangement of the disciplinary hearing, was correct, and that it was not appropriate for the disciplinary hearing panel to have taken these matters into account in the decision reached at your disciplinary hearing.

> The appeal panel did consider on the evidence presented that, on the balance of probability it could not be confident that, in determining the severity of the sanction to impose, the disciplinary panel were not influenced by the impartiality of some of the statements made during the investigating officer's presentation to the hearing. As a result, the appeal panel chose to uphold your appeal on this point and substitute a lesser penalty."

33. It is in respect of this finding that the sanction of dismissal was commuted to that of a final written warning.

34. With regard the claimant's contention as to new evidence, on the appeal panel considering the evidence presented, it determined that whilst it provided background into the claimant's personal situation and health at the material time, these issues had been considered at the disciplinary panel and for which this ground of appeal was not then upheld.

35. On the claimant having the sanction of dismissal commuted to that of a final written warning by correspondence of the of 3 February 2014, the claimant did not then resume duties until September 2014.

36. On arrangements for the claimant's return to work being made, the claimant was instructed not to discuss the reasons for her absence following her reinstatement, the correspondence providing:

> "Your return to work week is the week commencing 15 September. In order for your return to work to be a success the following criteria will apply:
>
> - Your work base will be the finance office. I will set out arrangements for working with other staff once you are back.
> - I will need to know at the end of the previous week, your work schedule for the following week. This is so that I can manage your return to work and schedule any meeting.
> - The reason for your absence from work is not a matter for discussion with other staff or among other staff."

37. And in respect of the claimant suffering stress, the tribunal notes this instruction:

> "Below are set out the arrangements for your return to work. I do not think it is appropriate for you to be filling out stress assessments after having returned. These were sent to you in March and you have had plenty time to complete them. If you do not wish to do so, please let me know in writing… You are welcome to send me your stress forms or letter stating you do not wish to complete them."

38. With regard the claimant's absence and expected return to work, the respondent had sought the services of a restorative practitioner to facilitate the claimant's re-integration back into the school. By the restorative practitioner's assessment of circumstances, she found that the staff were a close-knit team who worked well together and supported each other, some having worked at the school for a long time, but who nevertheless portrayed the claimant as "quirky, unpredictable and often sarcastic but they all

tolerated and supported her, recognising she was under a great deal of stress at home", which team was shocked by the incident, but felt that tensions had been building up over time, but concerned by the claimant's inappropriate approaches whilst she had been suspended and by the lack of awareness of how her conduct could be perceived, which had led them feeling anxious about them being on their own with her; the team asking that, they should know when the claimant was going to be in the building, ie set working hours, that she should work in the finance office, that she should not work at the reception desk, that she should not discuss the incident or the incidents during her period of suspension, and that they were happy for there to be a facilitated meeting with the claimant before her return to work to break the ice and discuss a plan going forward.

39. On meeting the claimant, it was the restorative practitioner's assessment of the claimant that a restorative mediation process was not appropriate, concluding that, the claimant was happy to meet with her and discuss her feelings surrounding the incidents, but felt that was all she had to do, the restorative practitioner observing that the claimant had not proposed anything towards the mediation process, with the claimant stating: *"the only way of solving the problem is for me to come back to work as if nothing has happened and work together and talk about what happened,"* and that the claimant had no acceptance that she had committed a violent act towards Ms Sheehan suggesting: *"She (Louise) has to take some responsibility as her reaction and perception was incorrect. It was a mistaken reaction."*

40. It was the restorative practitioner's further view that, the claimant did not demonstrate that she had an understanding of how her actions had impacted on her work colleague and others in the school, and that she did not accept that she needed to change any of her working practices in order to accommodate her re-integration back into work.

41. Equally, it was the restorative practitioner's observation that, the claimant had no understanding of how her actions, during her suspension period, had fundamentally affected the staff so much, such that they did not want to be on their own with her, and that the claimant had demonstrated that her distress was concerned with how she had been affected by being accused of a violent act and been "excluded" from work, leading the practitioner to believe that the claimant would repeatedly say this to her colleagues during any restorative meeting which would cause harm and distress.

42. On the restorative practitioner's determination that restorative mediation was not appropriate, she then considered the claimant's re-integration back into work, stating:

> " I suggest that Sue's vulnerability was clear in the way she reacted to having to work fixed hours in the finance office, limiting what she sees as her rightful autonomy. Sue's expectations of how she should return to work and the schools are very different so the school is manifestly not able to support her in the way she needs

> I suggest the school review the occupational health report… now that it has been established that a restorative mediation is not an option and that she will potentially find her more ordered working conditions stressful.
>
> I suggest that Sue should be re-referred so she can have support and help to accept the reality that she has to permanently change how she works and stick to agreed boundaries in order to return to work".

43. The restorative practitioner's report is at R1 page 262-271A.

44. The claimant was subsequently referred to occupational health for a further assessment. The claimant was seen on 13 June, for which a report was furnished on 16 June 2013. Occupational health was asked to report on the claimant's fitness to; attend and carry out her substantive duties; whether if fit to return to work, whether this should be on a phased return basis, and if the claimant was unfit, whether ill-health retirement should be recommended; whether there were any underlying medical reasons for the claimant's absence record, and whether any adjustments would alleviate the condition to facilitate rehabilitation and of the likelihood of re-occurrence

45. It was occupational health's finding that, the claimant had significant symptoms of anxiety and depression and had not been compliant with taking her medication, and whilst having received cognitive behavioural therapy (CBT), she had not been able to apply the techniques in areas within her control, the report stating:

> "Her thinking is dominated by the perceived injustice of her situation despite her re-stated wish today to move forward in a more positive way. This rumination appears to be an involuntary thinking pattern and she has no insight on how to move towards acceptance of events that are beyond her control e.g. the need for management to require her to work in the specified office (which she calls the tower and she tells me results in isolation) or the need for a regular pattern to working hours, instead she has reacted to her reduced autonomy that these changes pose, by challenging the need for change and therefore remains in conflict with the school over these points. The features of embitterment therefore still predominate…"

46. It was the recommendation of occupational health that, on the claimant remaining vulnerable, given her despair and the severity of the symptoms of anxiety and depression, that the school acts with sensitivity, and to offer adjustments to help her cope with the additional anxiety of any future meetings eg. meetings to be in neutral locations and with union representation.

47. It was further recommended that, the claimant see her GP, and reminded of her need to take her medication to advance her recovery

48. The report further advised the claimant to *"aim to behave in a way that reduces conflict by seeking to understand with empathy"* and move from anger towards an acceptance of the areas that were beyond her control and greater consideration of the impact of her communication on others, and that all staff should accept personal responsibility for modifying their own behaviours, to facilitate a satisfactory working environment

49. It was further observed that, the claimant's relationship with management had significantly broken down from her perspective, in that she appeared to have lost trust in the respondent's processes, the reasons for the proposed changes affecting her work, and the respondent's ability to work with her to resolve the situation to mutual benefit. The report advocated that alternative options be considered, to include redeployment in a different workplace, if feasible, and that a risk assessment be undertaken in respect of any new role, the report 's author advancing that, "I would expect her symptoms and vulnerability to reduce significantly once a way forward can be identified by management."

50. The report further recommended that facilitated meetings with the claimant, management and HR, be arranged to explore options for redeployment or other ways that the school could identify, to lessen work-related factors, the report concluding that, *"if trust cannot be restored then the relationship between management and Sue is likely to be irretrievably broken".* The report further advised that there was insufficient evidence of permanent incapacity, in that anxiety and depression were common mental health conditions that were usually treatable, and in the claimant's case, it was expected that improvement would occur when work-related factors were addressed.

51. The claimant returned to work on the 15 September 2014.

52. On returning to work, the claimant was again working alone in the finance office, "The Tower".

53. On 10 October 2014, the head teacher, Mr Knox, wrote to the claimant in respect of her return to work, advising:

> "… To clear up any confusion that may still exist, the daily priority unless I instruct otherwise, is to deal with the invoices and prepare cheques.
>
> I do have a concern still with your timekeeping arrangements which have been put in place so that your return to work can be effectively managed. My main concern is that you are not able to keep to the schedule you have arranged for yourself, this is not relating to change of schedules that we have agreed.
>
> The infant school have asked me that in future all communications about finance matters is through me. This relates to a meeting you had well after the completion of your work schedule on Monday."

54. On the headteacher having further concerns, on 6 November 2014, the head teacher again wrote to the claimant regarding work arrangements, advising the claimant:

> "This letter is to clarify once again line management arrangements relating to your job role.
>
> Your line management is through me. The invoices, delivery note and other pertinent documents usually will come to me before being passed on to you. I check through the information then pass them on to you. Your role with regards the invoices is to check through and then prepare the cheques. These are then returned to me the following day unless there is a good reason why not.
>
> There may well be odd occasions when invoices come straight to you from someone else, ie Mr Baines. You will then process these in the same way, and send them on to me. If there are any issues on any of the paperwork, then this needs to be brought to my attention the following day.
>
> It is not your role to deal with any issues yourself. These are to be addressed through me, and I will deal with them.
>
> I was very concerned therefore to find out on two occasions that despite me giving you direct instructions not to follow up issues around invoices and payroll, this is precisely what you did. Not only is this a duplication of effort and a waste of time, it is a blatant disrespect to your line manager. I am sure that I will not have to remind you again, that deliberately disregarding specific instructions from your line manager can have disciplinary consequences."

55. On further issues arising, on 17 November 2014, Mr Knox again wrote to the claimant regarding her role, advising:

> "I need to confirm with you arrangements for sending and retaining cheques. Once the cheques have been signed, it is your responsibility to send them out. This should be done within one day. If this is not done within one day then on the second day I need to be informed.
>
> With regard to cheques for the infants, please place them in an envelope which you can then give to me, and I will deal with it. Again, this needs to be dealt with within the two day deadline. If I am absent, the envelope can be given to Mr Baines. If we are both absent, the envelope can be given to Ms Bales.
>
> I hope this has clarified the matter. I do not expect cheques to be laying around in your office for over a month. If there are any queries, then we meet very regularly and these can be discussed. However, I will expect there to be very few queries as the cheques will have already been prepared and signed."

56. Equally on 17 November, the claimant wrote to Mrs Lea Tuffey, head of the infant's school, stating:

> "…
>
> The purpose of this note is to apologise unreservedly for causing delivery delays of what was previously "normal communication" between the finance officers of the two schools, as we share the same site.

> This started because of a letter George handed to me on 10 October 2014, that I interpreted as precluding this. I was stunned and asked for an explanation, but none was given. I also asked if phone calls/emails were okay, but was told not. Although when your staff rang me they knew nothing of this "interpretation", and joked about using "carrier pigeons", I was keen to resolve any misunderstandings and remedy the situation ASAP. But I was also anxious, that in doing so, I did not make the situation worse/longstanding or cause offence/"unforeseen consequences" or cause anyone to feel undermined. It is this anxiety (fear not to cause further difficulties) and lack of confidence (ardent desire for success), that has led to the delay, though I have tried to justify my tardiness to myself (I do not yet have access to the invoice template to reciprocate re charges).
>
> I was hoping inadvertent casual contact would resolve any misunderstandings verbally/informally, but unfortunately, as currently I am confined to what you previously called my "Rapunzel" tower most of the time, this hasn't happened. Also that my role at LBJ would better reflect reinstatement as defined and promised – however some personal comments by staff closely involved such as (water under the bridge) have been positive. I own [sic] above is an excuse, not a reason, but remain optimistic as reasonable adults we can communicate, understand each other's perspective, understand the reasons for a way forward and you will accept my apology. With regard to LBJ, I was told "upheld but unintentional" is a terrific allegation outcome, as it validates both parties, so it's a matter of perspective.
>
> Disappointingly at LBJ this discussion never happened, but I sincerely hope it's not necessary to begin at LBI, a different school, what is, in effect the same as the "terms of suspension" that have lapsed at LBJ: now re-integration is LBJ's stated aim.
>
> Please can we meet to attempt mutual understanding as well as to make "deliveries"? On Friday (14 November) I became aware LBJ had received their Ofsted report and reading it am also concerned that clerical co-operation at "finance officer"/personal level is not prohibited or blurred with other political issues between the two schools, that may arise again."

57. In respect of the claimant's contact with the Junior school, on 24 November 2014, Mr Knox wrote to the claimant raising concern, inter alia, that:

> "…
>
> My second concern is in your correspondence to Mrs Tuffey, head of the infant school. You made comments which attempt to undermine me. This is clearly not appropriate. You also raised the issue of your disciplinary case and this is confidential.
>
> I will therefore remind you again, and now in writing, about your liaison with the infants. You are welcome to phone them on issues relating to finance, and only finance. Any face to face meetings I will continue to deal with…"

58. On 27 January 2015, internal audit provided advice on data protection, that all discussions had with the bursar was to be documented, that clear written instructions were to be given, and that forthwith, no work related data, documents etc, were to be removed from the school, and that the bursar (claimant) should not be working from home, and agreement should be had that any work related data/info which the bursar had at home on a USB or on personal emails would be immediately destroyed, and that the practice

would not occur in the future. Internal audit further advised that, continued practice would be evidence to support disciplinary action, and that an IT audit testing, and governance testing of the school would be carried out, on 12 February 2015.

59. On 28 January 2015, Mr Knox wrote to the claimant in the following:

> "… Thank you for discussing your work on staff salaries with me earlier this week. There are a couple of points I would like to make with regard to this.
>
> Firstly, in order to avoid any lack of clarity, I am giving you clear and written instructions that forthwith, NO work related data or documents are to be removed from the school and you do not work from home.
>
> Secondly, any work related data or information which you have at home or on a USB, must be destroyed immediately. You must write to me by 2.30pm on Thursday 29 January confirming this has been done."

60. On 30 January, the claimant wrote to Mr Knox, advising:

> "Further to you stressing this point I should like to say again I have taken your advice and spent a considerable amount of time ensuring personal confidential salaries information could not be found at my home.
> …
> At an admin network meeting Karen Rook spoke of the high security of the new Google mail system. However due to your recent sudden concern, please could you confirm it is okay to send emails/attachments, etc re salaries (such as my recent one to TLRS) with names to you and Linda etc. and/or electronic copies of salary reports with names eg FMS/FPS. Or is there another protocol in place? Similarly when changes are forwarded to payroll, eg using names if correcting overtime/back pay calculations."

61. In response hereto, Mr Knox wrote to the claimant, advising:

> "This letter is a follow up to my letter of 28 January, with regard to information held outside of school.
>
> Thank you for your email of 30 January in which you confirm that "personal confidential salaries information could not be found at my home". In order to ensure clarity on this matter, can you please confirm in writing by Monday 9 February, that all information on staff salaries held by you electronically has been deleted, this includes any information on emails, USB sticks or any other portable device, and that all paper copies that you held outside of school have been returned or destroyed."

62. On 9 February 2015, the claimant wrote to the head teacher, which is here set out in detail, as it is the basis upon which the claimant was found to have acted in breach of instructions in respect of confidential information, and for which her employment was terminated. The claimant's correspondence provided:

> "Dear George
>
> I would not be sending this email now if you had not asked for a prompt reply to your letter dated 6 February 2015. Much can, and imho should, be left until after your HMI

visit. Although you mentioned this at the post-OFSTED plan meeting, I had not given it any thought since. Working in such isolation/without information, I was not aware it was imminent. I have felt stressed recently and I hope this is associated with heightened tensions due to the visit next week and will lessen afterwards. I am sure you realise stress affects everyone and often reduces productivity. On Friday I am afraid, I neither completed the tasks I intended, nor re-wrote a schedule excluding working on Wednesday. Even counting coins took an unreal length of time! You are already aware I am attending the funeral of an ex-colleague today. I intend to work on Tuesday and hope this is more productive.

- On Wednesday (4 Feb) the staff with notice board stated there was an audit and it was obvious to all that I was not involved.

- On Thursday (5 Feb) you insisted I did not need to be told if there was a returned cheque and I was at fault to contact a supplier to establish clarity re payment due. That you perpetually continue to emphasise that this invoicing/payment are my priority tasks led me to find this particularly perplexing.

- On Friday (6 Feb) you told me you don't want me in the building on the day of the HMI visit. To my mind this mirrors the suspension, as did the officious joint approach of yourself and Graham on Wednesday 28 January 2015, the original incident on 17/10/12. Thankfully you did not actually turn off my computer, although I had to vocalise I was already tidying away paperwork and closing my computer down. To say I found both of these occasions unkind understates their effect; similarly criticism of my reaction. Having brought this to your attention I hope you will endeavour to be more sensitive and supporting in future – as indeed you were the following afternoon.

And then, also on Friday, further to emails dated 28, 29 and 30 January giving reassurances that I have checked to ensure compliance with confidentiality, you send me yet another letter insisting on another prompt reply. What even caused this to be written, especially after verbal and previous written emails is discussed in my email dated 29 Jan - let alone yet another! Thus I am not able to delay it until after the visit when I hope there will be less strain and more time and opportunity to communicate and resolve any potential contraventions, for which I will need more information and clarity. I have access to confidential files at school and so theoretically could copy/post/email them from that location. In addition to confidential salary information being sent from school, it could be downloaded from websites or school emails, such as those sent to Lyndsey, Linda or yourself. Similarly from web access to secure sites and confidential information. But of course, I wouldn't dream of doing so. That this access continues gives me reassurance you know this already. So the only "not insulting", explanation I could think of for your continued concern in your letters was a burglary. Thus my wording was to give assurance that a burglary could not result in salaries being taken (and published, for example). However, clearly if anyone knew the passwords they could either access the data off site/or indeed it could be sent from school by any member of staff with appropriate access. Which of course I don't think anyone would dream of doing! As I asked previously, please let me know what you are concerned about. For example, are you suggesting that Linda and I, or indeed any HGFL users, should not use HGFL emails with names and/or amounts and/or not at all for any salary related information in future, as it would be possible to access these outside school? This doesn't make any sense to me as it could just as easily be downloaded directly from epaysafe, with the password. But if that is the case, I need to know, and change working practices/maybe using pay numbers or "codes" instead of names? FYI I have not deleted emails or files that do not include "personal confidential salary information",

such as the wording below or files in the public domain that list national rates. I recognise I am slow at "words", so if time constraints require offsite working to meet deadlines, then this appears to be a suitable option. And the need to reply to your letters takes me far longer! As did dealing with matters 2012-4. I am really looking forward to the time when writing to you to relate the facts and explain my perspective isn't necessary to avoid a letter with "misinterpretation", insomuch as impact is different from intent, from you, and no longer invades my personal time. Similarly writing "interpretations" to ensure we are on the same page and there is communication and clarity re actions/the way forward and their effect. Imho this is only necessary due to the location and operational constraints you have put in place. And this takes far longer than any "operational e-mails"!

I'm sure you can understand that I find above counter-productive to my "reinstatement", for which you are responsible. I endeavour to take on board preferences, advice and instructions re working methods and to understand that you are likely to have, especially currently, other priority demands on your time.

Relates TO CONFIDENTIAL INFORMATION

Payroll J

Thank you for offering to contact Lyndsey – I'd be grateful if you could let me know if your understanding or intention is different to that listed below and answer the questions and/or let me know of any further concerns/instructions.

My understanding re timescale is:

UPLOADS… as discussed in my email dated 29 January will be less strain to be uploaded to Epaysafe by the date given by Dataplan on Epaysafe calendar. This is usually 1st of the month but this may change if this falls at the weekend. This includes

(1) Overtime claims
This spreadsheet includes TA and SITE overtime on a regular basis and occasionally another e.g. KIT hours for teacher.
The source data is signed by GK.
This has a tight timescale as the data is for the whole month and the deadline is 1st of the month of pay.

(2) Supply claims for the month.
It is handwritten on forms, signed by GK and then scanned and uploaded.
This has a tight timescale as the data is for the whole month and the deadline is the 1st of the month of pay.

(3) SMART forms for contract changes are input as soon as confirmed.
The effect date can be in the future all historic. The latter may lead to back pay.

(4) Absence report from SIMS for the previous month.
This has a tight timescale as the data is for the whole month and the deadline is for 1st of the month of pay.
Dataplan are not obliged to include any new uploads after this time but may do so at their own discretion.
(It may be preferable/less work for them to put changes in place than calculate back pay/recoup money the next month, but it is their choice whether to do this or not.)
The 1st version of the PAYSLIPS is run before or on 9th of the month payment is to be made.
Additional files to check calculations of recoupment/backpay or implementation of new rates or "calculator" may be uploaded to Epaysafe at this time.

(5) Any changes made at this time should NOT be new material but communication/speculation recalculation or interpretation errors made either by the school or dataplan.

Checking and authorisation must be completed by 3pm, two days prior to pay day; usually 15th of the month, but if 15th is at the weekend, this may be earlier.

If there is a lot of back pay to calculate there will not be time for Dataplan to do this between 1st and 9th of the month.

If submitted earlier the chances will be increased for – but retrospective payments may require the production of an "audit file". This itemises previous payments and is more convenient than accessing payroll data online from payslips. However producing this slows up the system for all Dataplan users and is only done during "quiet" periods.

I don't know the data included, or format for this.

If there is a lot of checking e.g. back pay for many persons, one day will not be sufficient time to check/understand/authorise this. This may lead to authorisation with out detailed checking, to ensure all staff are paid on time – and possibly further changes the following month, when there has been sufficient time to check.

Questions (or suggestions):

a) Can LBJ ask Lindsay to calculate overtime and upload it for school's perusal/authorisation but NOT include this in payslips until it has been authorised by school?

b) Can Lindsay delay all backpay payments until they are calculated and authorised to all staff that will receive them, so they all receive them at the same time?

c) imho the likely potential calculation errors re Louise and Tina's back pay and the likely potential of "interpretation/calculation" errors re Laura's TLR of the type that LBJ should be looking for after the payroll is run for the first time and before the payslips/payroll are authorized.

   A work identified soon after January's payroll and with lots of time to spare and I fail to understand why they were not and cannot be passed on prior to the payroll being run.

   I realise the 1st of the month has now passed and hence actioning would be at Lindsay's discretion.

      a) Is this a one-off decision and usually finding/highlighting/correcting would be expected between 9-11th of the month, or would you never want this picked up and corrected before affecting staff pay?

d) Please can LBJJ ask Lindsay to upload the "audit" file she mentioned could be produced to help with their backpay calculations. It is possible this will provide a method for the school to check their "time worked" data from this.

e) Please confirm, or otherwise, that any previous inaccuracies should be taken into consideration as is likely to be the case if/when data plan are asked to do this; i.e. previous overpayments may lead to lower backpay than estimated. FYI estimates were calculated on a "theoretical" marginal basis i.e. the additional pay using National APT &C rates, rather than payroll data of actual monies paid.

   NB all estimates did NOT take into consideration the 1% lower pay rates pre April 2013

f) Currently Jill rounds all timetabled hours up to the nearest integer. I understood this to be "policy". But Natalie has a 2nd duty of 20.5 hours.

   Should all TA timetables the adjusted to the nearest ½ hour from a fixed date (1st/4/15?), i.e. not integer?

g) From 1/9/09 all non-teaching staff were paid a total of 30 hours for all training days i.e. 9am-3pm including a whole staff "working lunch" in the canteen for teambuilding etc

heard a review of hours, i.e. reduction from 30 hrs to 27.5 hrs for ALL non-teaching staff, from 1/4/15, also include a review re O/T due for time off in lieu (TOIL) taken, (as monitored/recorded by Jill)
at times flexibility may be to the advantage of both school and employee i.e. attendance may not always be required at school on some days/hours, but extra is needed on others (e.g. extra hours worked to cover staff sickness, or TOIL to meet a personal commitment). Thus, if known in advance, reductions to "actual hours" on Training days could be "hours due" to be worked at school, without incurring overtime costs? Or NB
They were identified soon after

FYI:

h) Natalie is not paid the allowance for training days at present. This means:
(i) There is no obligation for her to attend on training days – it is her choice whether she does so as additional hours or not

(ii) If she chooses to work on training days, she will be paid a rate approximately £1 per hour less than the rest of the time she works, as the rate will not reflect her full holiday entitlement.

i) Natalie was appointed on Scale 2 and will receive an increment after six months, ie from 2/8/15. Her pay rate will be higher than all four of the TA's on scale 1, many of whom have worked for the school in a TA role for many years. Historically, current staff had the opportunity to apply for similar roles within the school. I have no idea if this happened, or indeed this practice/policy has been superseded/suspended or was not appropriate for another reason. Please could you update me?

See you on Tuesday"

63. The correspondence was sent by the claimant from her home.

64. With respect this correspondence, the claimant was suspended on 10 February 2015, by the head teacher, advising:

> "The reason for your suspension is to facilitate a full investigation into the allegation that you failed to follow instructions on the management of confidential information. The school will endeavour to conclude the investigation as soon as possible."

65. The claimant was advised not to return to school unless with the head teacher's express agreement.

66. The claimant was further advised that, should there be considered a case to answer, the school's disciplinary procedures would then be followed and the claimant notified accordingly. A Ms Gurr, was identified as the designated point of contact for the claimant during the period of her suspension

67. The school subsequently instructed a Mr Peter Quinn, an independent consultant, to investigate the allegations against the claimant and compile a report, in accordance with the school's disciplinary procedure. The school's disciplinary procedures are at R1, page 70.

68. Mr Quinn, carried out interviews with the head teacher, Mr Knox, on 24 February and 9 March 2015, and the claimant, on 25 February and 16 April

2015, notes of which interviews are at R1, pages 121-163, and from which, the tribunal notes the following, from the claimant's interview, with regards the instructions she had been given:

> "PQ: Regarding the letter of 24 November re: your contact with LBS Infant School. Did you go back to the head teacher and discuss this?
>
> SK: That letter was triggered by my apology to the infant head teacher. I was extremely unhappy and we discussed it… As far as I was concerned it was the head teacher's responsibility to re-integrate me into the junior school. And what he was actually doing was creating a separate problem with the infant school, a completely separate school, and I was not allowed to meet or talk with people in a separate school to do aspects of the job. He was very unhappy that I had written. I agree it should have been confidential but in fact he was talking about me to the infant school, separating me and saying I couldn't talk to people in a separate school. I thought it was a misunderstanding that I was keen to clear up.
>
> PQ: Did you go back to your line manager to clarify this?
>
> SK: He says that the infant school requested on 10 October, that all finance matters go through him.
>
> PQ: The letter of 24th November reminded you of the context of how you could communicate with the infant school. Did you understand the letter and what he was saying in the letter?
>
> SK: What he said in the 10th October letter was inconsistent with what the infant's understanding was, and was then relaxed in his 24th November letter, because we were then allowed to speak by phone. The instructions were clear from that point of view. It has to be taken in context. In one of the other letters he talks of putting cheques in envelopes and if he's not there giving it to Graeme, and if he's not there giving it to Alison, but then he changed his mind and said: "Well now you can take it downstairs" and from then I continued to hand over envelopes through the hatch. One has to have a bit of common sense. I was trying to interpret what was behind it and not follow every instruction literally just because it was a written instruction."

69. And in respect of the claimant working from home, the tribunal notes the following:

> "PQ: Were you ever instructed not to take finance documents home?
>
> SK: No. Not until 28th January.
>
> PQ: Were you ever instructed not to send financial emails to your home?
>
> SK: No.
>
> PQ: On 28th January 2015, your head teacher wrote to you stating that "forthwith NO work related data or documents are to be removed from the school and you do not work from home". Can you clarify, did you have work related data or documents at your home?

SK: At that point in time I am not sure. I was completely gutted at his attitude. It was all very friendly enquiry of "how long have you known about this" and I said on the inset day we started looking at it. I showed Linda the file while he was organising the training. I had done the calculations of what the back pay would be at home. I was working so hard in that week (5th-12/1). The reason things flew up in the end was because it was a close call getting it completed. Between 5th and 12th to achieve what we did was amazing. At various points in time I did have to work at home. And I made no attempt to cover my tracks when I was told get rid of it – if indeed that was what I was supposed to be doing. I just stopped doing it – because that's how I interpreted it.

…

PQ: The request was to destroy any work at home?

SK: Yes, I did as many check as I could. I did think he was only talking about at home.

PQ: Your head teacher wrote to you again on Friday 6th February 2015, again requesting confirmation in regard to his letter of 28 January. It confirms your email reply statement of 30 January where you state: "Personal confirmation salaries information could not be found at my home". The request was for anything at home to be destroyed. Did you confirm that you had done this request?

SK: I thought I had. In my replies I stated had got rid of staff salary stuff. I was trying to be careful in my response rather than admit guilt. There is compliance. Did you get a copy of the letter (GK) dated 29 January? That was the one I was working to and it was very clear it was off site.

PQ: Had you deleted information other than that pertinent to salaries?

SK: I took it as an overarching thing to do with salaries. Because I was desperately trying to stop all the letters I was getting in the autumn term I wrote several explanatory letters to GK. I value my integrity very highly and if I say something it is true. I have client emails from way back and haven't deleted them. Or salary information from the public domain as I don't think George was asking me to delete that – you always have to add a bit of common sense to instructions…"

70. The claimant has not challenged the product of the investigations.

71. In June 2015, Mr Quinn furnished his report which, inter alia, concluded:

"… that GK since September 2014 had given SK clear written instructions about her duties in regard to the management of confidential/financial information. GK had not given SK permission to work from home even when she had requested to do so; this was because he was concerned about the security of managing confidential information off site. SK admitted that she had been working from home and had not asked GK permission to do so. When GK became aware that she was working from home he instructed her to cease. GK stated: *she should delete them all (work documents held at home) as instructed and then have a debate about it afterwards. I have given her clarity twice. It is not a discussion document, it is a clear instruction*. SK admitted her failure to manage confidential information as instructed by her head teacher. SK stated; *Clearly that we're in the current situation shows I was wrong and I continued not to respond as*

> *expected. I think it's probably because I was working in isolation and had very little communication with anyone to contextualise the isolated instructions I was receiving. That meant I neither picked up on pertinent information nor interpreted that which I had accurately*. The report found that SK failed to act on clearly written instructions given to her by GK and had acted autonomously on how she viewed them which was often contrary to how she was instructed to manage confidential information…"

72. The report recommended that there was a case to answer, on the allegation that, the claimant "failed to follow instructions on the management of confidential information since her return to work in September 2014".

73. By correspondence of 22 June 2015, the claimant was invited to a disciplinary hearing in respect of the allegations. The hearing to take place on 14 July 2015.

74. The correspondence further advised: *"I must inform you that if the allegation is proven it will constitute misconduct under the disciplinary code for schools. As you are already subject to a final written warning, if the allegation is proven you will be dismissed in the absence of any acceptable mitigation being present."*

75. The claimant was then advised of her right to be accompanied, and her entitlement to call evidence in support of her case. The claimant was furnished with a copy of the investigation report, witness statements and a copy of the school's disciplinary policy and procedure.

76. On the claimant's representative unable to attend the hearing on the scheduled date, the hearing was re-arranged for 3 September 2015, correspondence giving notice thereof being sent to the claimant on 9 July 2015.

77. The hearing was again re-arranged to 28 September 2015, the claimant receiving notice thereof on 15 September, in similar terms to the notice of 22 June.

78. The hearing duly took place on 28 September 2015, chaired by Mr Geoff Mattey, parent governor, together with Sue Midgley, community governor and Cathy Mosdell, chair of governors of Harrington School. The claimant attended accompanied by her union representative, Mr Ratcliffe. The respondent's case was presented by Mr Quinn. Notes of the disciplinary hearing are at R1 page 220.

79. At the outset of the hearing, it was confirmed that the claimant had received all documents, and she was further advised of the allegations against her.

80. On the claimant denying the allegations against her, the respondent's case was presented by Mr Quinn who was then asked questions, following which, the claimant presented her case by reading a prepared statement followed by a statement from her representative. The claimant was then asked questions.

81. The tribunal pauses here, to note the following from the claimant's representative's statement, that:

> "Communication was so poor that when Sue was asked to respond to emails she did so with such expanse by the way a letter was given to Sue to be responded to by the following day following day (sic) however it was given to Sue at the end of her working day so could only be worked on from home.
>
> Sue gave lengthy responses to George's letters, to avoid further instructions that caused more problems than they solved. Sue was looking at a bigger picture than a direct question because of her lengthy experience and anxious that George made informed decisions.
>
> To increase her remit from her work to increase her scope of work to which was previously in her remit because she did not want to be treated as a payments clerk. George was at fault by not consulting on the changes he wanted. There should have been a school policy or ICT usage policy, however Sue was never shown or trained in any ruling about ICT and confidentiality. The school's website shows that an e-safety policy was published on the school's website on the day that Sue was suspended.
>
> Re the cheque for the infant school, there are other factors involving other people therefore Sue is not totally to blame for this cheque situation, the system of paying the electricity has been changed and Sue was waiting for information and a format from a colleague.
>
> We agree with PQ that there has been a communication breakdown and clearly it is the head's responsibility that things are understood and that his staff are aware of policies and protocols, a dependence has been created that means Sue can only get information from the head and was not allowed to communicate to other colleagues adding to the isolation that Sue felt in the tower."

82. With regards the claimant presenting her case at hearing, the tribunal specifically notes the claimant's evidence to the tribunal that:

> "The panel requested printed copies of my presentation when I gave a copy to the note taker, to make her task easier. They suggested reading it only, but did not object when I wanted to read it aloud too. My notes included questions to ask the fact finding officer but these were curtailed by the chair. In particular he would not permit discussing the content of my unsent email, because it was not sent. Although sending it may have changed the course of events subsequently; … I felt this in effect was a constraint to raising relevant issues within the investigation, whether as a grievance or in mitigation, because of my working conditions."

83. In respect of the claimant following instructions, the tribunal further notes the claimant's evidence to the tribunal, at paragraph 202 of her written statement, that:

> "The letters imposed time, location and communication constraints… I have found the literal interpretation of the instruction in George Knox's letters caused solution based problems at odds with my past experience of tasks and responsibilities previously within my remit, that could limit or prohibit my ability to manage my time and respond flexibly to individual circumstances, and hence hinder efficiency/effectiveness in my job role. I shared practices trying to build a relationship but instead I received more letters with

> instructions giving more time, communication or priority constraints that taken literally and all the time, were counterproductive to efficient working. Although I would explain to him in person the particular circumstance that had led to a single incident and that the global instructions he put in place as a result were inappropriate a lot of the time, he then became very annoyed with me…"

84. The claimant further presented her case in defence on grounds that, the issues arising were ones of capability, to have been pursued under the capability process rather than the disciplinary process, arguing that changes to working practices since her re-instatement had not been sufficiently conveyed to her.

85. It was the finding of the panel that, with regard to the claimant working from home, on the claimant giving assurances that all confidential school data had been deleted from her home PC, it was clear that information in the email sent by her on 9 February, had shown that she had continued to work on confidential information from home, despite a clear instruction from the head teacher on 28 January, and up until that email, the panel concluded that the claimant had not sought the appropriate permission to work from home but also felt that the school could have given more clarity on the matter.

86. In respect of the claimant's email to the junior school on 17 November 2014, the panel found that the claimant had divulged confidential information to a third party, when specifically instructed not to do so.

87. On the panel giving consideration to the claimant's mitigation, being aware of the steps taken by the school to try to ensure the claimant's successful re-integration back into the school on her return; to include occupational health reports and the report from the restorative justice practitioner, the panel determined that the appropriate sanction should be that of a written warning.

88. The panel concluded, stating: *"However, in this case, taking into consideration you have already been issued with a final written warning that was valid at the time of the allegation, the panel has concluded that the outcome of the hearing is that you be dismissed*".

89. The claimant was subsequently sent a letter confirming the decision on 1 October 2015, a copy of which is at R1 page 242. The claimant was thereon given a right of appeal which she exercised, presenting her appeal on 13 October 2015.

90. By the claimant's appeal, the claimant stated:

> "If GK had explained the school was in the process of putting together a long overdue e-safety policy and a government's audit was forthcoming and that my work at home contravened these, I would have understood the situation in the same way the panel did on 28/9/15 and I can understand their perspective as they were privy to the "whole picture" from the outset. But I was not – in fact I can even remember GK mumbling to himself "why does she need to know" as he walked away and it is this lack of communication from GK, together with the dependency that he had orchestrated, that I feel was entirely responsible for any differences between what the panel thought was an

> appropriate response, and mine. I applied the context and as GK's letter stated: "in regard to this" understood the paragraph that followed to be like bullet points, following on from the introductory "topic sentence". The panel did not think my interpretation appropriate, but possibly an appeal panel will not think my interpretation unreasonable after considering the grounds;"

91. The claimant then set out the grounds for her appeal, being as to; the severity of the disciplinary action; the finding of the disciplinary hearing on a point of fact; a failure to adhere to agreed procedure; and new evidence, the claimant concluding: *"Was it the school's intention to demote me in stealth and assimilate me to a highly reduced "payments clerk" position…"*

92. By correspondence of 5 November 2015, the claimant's appeal was acknowledged and an appeal hearing arranged for 24 November 2015. The claimant was advised that Mr Mattey would be presenting the school's case in response to her grounds of appeal, and that she had the right to representation. The correspondence then identified and attached the documentation to be considered at the appeal hearing and advised of her responsibility to provide a copy to her representative.

93. On 19 November 2015, the claimant furnished two files of attachments: appendix 5 and 6, additional to files already furnished, being appendix 1-4, the claimant stating that: "They included recent and old emails that may have been unfamiliar to school's HR that could have raised concerns."

94. On receipt of the additional documents, the clerk to the governors wrote to the claimant advising that, by the school's disciplinary procedures the documents received from the claimant on 13 October 2015 had constituted her case for appeal and that the policy did not provide further opportunity to submit additional information to that already submitted. The clerk to the governors advised that the documents would not be considered.

95. The claimant by correspondence of 23 November, raised concerns as to the additional documents not being accepted, raising issue whether it had been prompted by a deliberate attempt to cause her anxiety, stating*: "If so it was successful – last night I was so exhausted, for the first time this weekend I actually managed to get some sleep in spite of the upset caused by the letter (which added yet further pressure, to this could imply I am not arriving to open minds/aim for justice on Tuesday), as well as the pressures of the hearing itself. Quite apart from my incessant coughing,"* further submitting that the refusal was prompted by a desire to win and was an attempt to use "tactical" means to do so and that it was prompted by a wish not to investigate the additional information provided or that it had been prompted by legal advice."

96. The claimant concluded her correspondence stating: *"If as a result of your letter a postponement is proposed, please let me know asap. I would love to go back to bed and get better".*

97. The clerk to the governors responded later that day, adsiving:

> "As you can appreciate; an appeal hearing is not a re-hearing of the case. As such any grounds of appeal should be based on information available for consideration at that time and relevant to the allegation. Any new information will constitute that which was not known **at the time relating to the allegation** or the employee involved became aware of subsequent to submitting their appeal statement.
>
> The information you have submitted is information that will have known of [sic] and will have been available to you at the time of the disciplinary hearing and as such you had every opportunity to present it as part of your case at that time."

98. On the morning of the hearing, at 06.40am, the claimant wrote to the clerk of governors, Mrs L James, with a copy to her representative, that: *"In the light of your letter I should like to request a postponement".*

99. The appeal panel met as arranged at 9am, chaired by Mr Paul Wray, chair of governors of the Lady Bankes Junior School, accompanied by Mr Alan Graham and Ms Jane Manley, governors of Lady Bankes Junior School. The panel was advised by Ms Meena Kanda, with Ms Denise Maloney as an independent note taker. Notes of the hearing are at R1 page 248-249.

100. On the appeal meeting convening at 9am, neither the claimant nor her representative, were in attendance. The claimant's representative, Mr Ratcliffe, arrived at approximately 9.10am.

101. On Mr Ratcliffe's arrival, he was not able to explain why the claimant was not present.

102. The chair of the panel, on the claimant not being present, determined to delay the start of proceedings until 9.30am, for the claimant's attendance.

103. At approximately 9.25am, Mr Ratcliffe received a message, via his office, of the claimant having left a voicemail advising that, the hearing had been cancelled.

104. At approximately 9.35am, the claimant made contact with her union representative, Mr Ratcliffe, for which Mr Ratcliffe advised the panel that, the claimant had advised him that she had a migraine and was unable to attend the hearing. The chair of the panel, Mr Wray, thereon gave Mr Ratcliffe time to call the claimant and give her an opportunity to attend; Mr Wray advising Mr Ratcliffe that, he had not been contacted by the claimant and therefore the hearing would proceed in the claimant's absence. Mr Ratcliffe was then given the opportunity to telephone the claimant to make her aware of the situation and give her an opportunity to attend.

105. It is the respondent's evidence that, on Mr Ratcliffe returning to the meeting he then did not express any concern about the hearing proceeding in the claimant's absence, reading out a statement which he stated, had been jointly prepared with the claimant.

106. It is the claimant's evidence that, on the morning of the hearing, she had tried to contact her union representative before the time scheduled for the appeal hearing, but on his phone being faulty, she had not been able to do so, the claimant stating that she had intended to inform him that she would not be attending. On Mr Ratcliffe subsequently phoning her, she states that he had offered to request a postponement on her behalf because she was too unwell to attend, the claimant stating that, he subsequently text'd her and phoned her, informing her that the appeal panel was going ahead regardless of whether she was there or not, the claimant informing the tribunal that: "With the best intentions, he said he would go and do what he could in my absence without paperwork… as it was going ahead anyway, he thought reading out his statement was better than nothing at all…"

107. With regard the statement read out by Mr Ratcliffe, it is the claimant's evidence that the statement was to augment the case she was to have presented at the appeal hearing, being supplemental thereto, the claimant stating:

> "He had accompanied me to the meetings with Peter Quinn and read a supportive statement at the disciplinary hearing, but at no point during the proceedings had he represented me alone. I read some of my case aloud to him and also helped him find quotations for his supplementary statement."

108. It was the claimant's evidence to the tribunal that, she had not instructed him to represent her at the appeal hearing and for which he was then ill prepared.

109. In further evidence to the tribunal, the claimant accepted that she had sent her grounds of appeal to Mr Ratcliffe for his reference before the appeal hearing, but she says she doesn't know if he read it.

110. On the evidence before the tribunal, the tribunal accepts the respondent's evidence that, Mr Ratcliffe had not sought a postponement on behalf of the claimant and that he had presented himself in the capacity of the claimant's representative, and in a position to present her case in her absence.

111. On the respondent's case then being put to the appeal panel by Mr Mattey, and on Mr Ratcliffe stating that he did not have the relevant documentations, Mr Ratcliffe was then furnished with copies, and afforded time to consider the same. On the meeting reconvening on Mr Ratcliffe having read the respondent's case documents, he was then afforded the opportunity to ask questions of Mr Mattey in respect thereof. On Mr Ratcliffe having no questions, the meeting was adjourned for the panel to consider its decision.

112. It was the findings of the appeal panel that; there had been a failure of the claimant to adhere to procedures; there was no new evidence to consider at the appeal; and there was no issue with points of fact. The panel decided unanimously to uphold the disciplinary findings, and upheld the decision to terminate the claimant's employment, which was deemed reasonable, in that the claimant had been reinstated previously, that she was subject to a live written warning and had resisted attempts to re-integrate into school life.

113. The claimant was notified of the decision not to uphold her appeal by correspondence of 26 November 2015. Minutes of the appeal hearing were furnished therewith.

114. [By correspondence of 27 November the claimant challenged the decision of the panel as to the hearing not having been postponed and of her having attempted to contact the school and her union representative in respect of her being ill, further challenging that, the act alleged against her did not amount to acts of misconduct, further submitting that as her grounds of appeal as submitted on 13 October 2015 had not been discussed at the hearing, the meeting as took place did not then constitute an appeal, asking that the hearing be re-scheduled on grounds of sickness. The claimant thereon further set out her grounds of appeal.

115. The claimant also raised issue with her union representative as to his having done the best he could, challenging whether it was now the best course of action to have pursued.

116. The tribunal has not been furnished with any correspondence in reply thereto.

117. The claimant presented her complaint to the tribunal on 16 February 2016.

Submissions

118. The tribunal received written submissions on behalf of the respondent which were then augmented by oral submissions. The claimant with reference to a chronology furnished, made oral submissions to the tribunal. The submissions have been duly considered.

The law

119. In an unfair dismissal claim the burden is initially on the employer to identify a potentially fair reason for dismissal so as to satisfy section 98(1) and (2) of the employment rights act 1996

120. It then falls to be determined whether or not the dismissal was fair. The determination 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 the reason as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case, pursuant to S98(4) of the employment rights act 1996.

121. The tribunal must consider whether the employer's conduct fell within the range of reasonable responses of the reasonable employer in all the circumstances of the case, without substituting its own decision as to what was the right course to adopt for that of the employer (see, Iceland frozen foods V Jones 1982 IRLR 439 EAT per Browne-Wilkinson J). The burden is neutral at this stage; the tribunal must make its decision based upon the

claimant's and the respondent's assertions with neither having the burden of proving reasonableness

122. The tribunal has to decide whether the employer who discharged the employee on the grounds of the conduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee, of that conduct, at that time. This involves three elements: I) the employer must establish the fact of that belief; II) it must be shown that the employer had reasonable grounds upon which to sustain that belief; and III) the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case (see British Home Stores Ltd V Birchell 1978 IRLR 379)

123. The employer does not have to prove beyond a reasonable doubt that the employee was guilty of the misconduct, but merely that they (the employer) acted reasonably in treating the misconduct as sufficient for dismissing the employee in the circumstances known to them at the time. It is not necessary that the tribunal itself would have shared the same view in those circumstances. Furthermore, it does not matter if the employer's view, if reasonable at the time, is subsequently found to have been mistaken.

124. The tribunal must remind itself that the Birchell test does not mean that an employer who fails in one or more of the three limbs is without more, guilty of unfair dismissal, (see Boys and Girls Welfare Society V McDonald [1996] IRLR EAT)

125. Any procedural defect must always be sufficiently serious to render the dismissal unfair, see Fuller v Lloyds bank plc [1991] IRLR 336. The tribunal is mindful that the ACAS code is only a guide and is not a mandate to; failure to comply with every detail does not render a dismissal unfair. In considering compliance with the ACAS code the employer's size and resources are to be taken into account.

126. The tribunal was further referred to the authorities of Bandara v British Broadcasting Corporation UKEAT/0335/15/JO 9 June 2016; Way v Spectrum Property Care Ltd [2015] EWCA Civ 381; Patricia Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135; and Wincanton Group plc v Stone & Gregory UKEAT/0011/12/LA 11 October 2012, that a disciplinary panel deciding on a sanction is entitled to place reliance on a live final written warning so long as; it was issued in good faith, there were prima facie grounds for imposing it, and it was not manifestly inappropriate to issue it, it not being the function of the tribunal to re-open the final written warning but to consider whether a reasonable employer could reasonably take it into account in deciding to dismiss for subsequent misconduct, and that it is not appropriate for the tribunal to consider whether it would have been appropriate to issue a lesser sanction instead of the final written warning, and that where there is a final written warning, the usual approach will be to regard any further misconduct as resulting in dismissal, per Mr Justice Langstaff (President), in Wincanton Group plc v Stone & Gregory, at paragraph 37, that:

> "37. We can summarise our view of the law as it stands, for the benefit of tribunals who may later have to consider relevance of an earlier warning. The tribunal must always begin by remembering that it is considering a question of dismissal to which s.98, and in particular s.94(4) applies, thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:
>
> 1. The tribunal should take into account the fact of that warning.
> 2. The tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal…
> 3. It will be going beyond a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the tribunal is satisfied as to the invalidity of the warning.
> 4. It is not to go behind a warning to take into account the factual circumstances giving rise to the warning… There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore tribunal, should be alert to give proper value to all those matters…
> 6. A tribunal must always remember that it is the employer's act that is to be considered in the light of s.98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal. And it is likely to be by way of exception that that will not occur."

Conclusions

127. The tribunal is satisfied that the reason for dismissal was conduct, on allegations that, the claimant had failed to follow reasonable management instructions on the management of confidential information, and is a ground that can found a fair dismissal pursuant to s.98(2) of Employment Rights Act 1996.

128. On the claimant having furnished her correspondence to the head teacher on 9 February 2015, following the claimant's confirmation as to personal confidential salaries information not being at her home, the tribunal finds that there were grounds to suggest that the claimant retained, and was working on, confidential information from her home in disregard to the instruction from the head teacher, and for which the tribunal finds that it was reasonable for the respondent to have the matter investigated.

129. The tribunal is satisfied that a full investigation was thereon carried out by Mr Quinn, who pursued all reasonable lines of enquiry and from which his recommendation that there was a case to answer was a recommendation reasonably based on his enquiries.

130. The tribunal finds that following Mr Quinn's recommendations, the claimant was thereafter fully apprised of the allegations against her; the acts of which

if proven amounted to misconduct, and was further then advised of the gravity of the circumstance that, on her being subject to a final written warning, if the allegation of misconduct was then approved it could result in dismissal.

131. The tribunal finds that the claimant was thereon furnished with all the evidence against her and on which the respondent sought to rely, and afforded the right to representation which she exercised, such that she was then in the position to fully know the case she was to meet and present her defence thereto.

132. The tribunal finds that the claimant was afforded a full opportunity to present her case at the disciplinary hearing before Mr Mattey, parent governor, Ms Midgley, community governor and Ms Mosdell, chair of governors of Harrington School, an independent body, and represented by her union representative.

133. On the evidence presented to the disciplinary panel, the tribunal is satisfied that the panel's findings were findings supported by the evidence, and one that this tribunal could not say a reasonable employer could not have reached, amounting to misconduct.

134. On the claimant being subject to a live final written warning, on the claimant having challenged the issuance thereof, the tribunal has found no evidence upon which to suggest that that warning had been issued in bad faith, or otherwise manifestly inappropriate to warrant a re-opening thereof, for which this tribunal cannot then say that, the claimant, subject to an extent final written warning, on a finding of further misconduct, dismissal was not a sanction within the reasonable bands of sanctions then open to the respondent.

135. With consideration to the appeal hearing, on the claimant's representative Mr Ratcliffe having presented himself as the claimant's representative and appeared to present the claimant's appeal in her absence, in circumstances where the respondent at the material time had no grounds before it to think otherwise than that Mr Ratcliffe was acting on the claimant's instructions, having afforded Mr Ratcliffe the opportunity to speak with the claimant on her non-attendance, on notice that they intended to proceed in her absence, giving the claimant an opportunity to attend, and where there was then no objection from the claimant's representative as to the hearing proceeding in her absence, the tribunal finds that the appeal hearing in the claimant's absence was not unreasonable.

136. On the claimant's representative, Mr Ratcliffe, having been fully familiar with the claimant's case, having represented the claimant at the disciplinary hearing and having discussed the claimant's appeal in preparation of the appeal hearing, and on the claimant having assisted in drafting Mr Ratcliffe's statement as presented at the appeal hearing, and on Mr Ratcliffe being furnished with all evidence in respect of the appeal and afforded such time to consider the same, the tribunal is satisfied that the appeal hearing as conducted by Mr Ratcliffe, on the claimant's behalf, was reasonable.

137. In giving consideration to the claimant's length of service and the claimant's employment record, the tribunal does not find that the sanction of dismissal in all the circumstances of the case, was a sanction that a reasonable employer would not have imposed.

138. The tribunal finds that in all the circumstances of this case the claimant was not unfairly dismissed when her employment was terminated on 31 December 2015, for misconduct.

139. The claimant's claims are accordingly dismissed.

_____
Employment Judge Henry

Date: 18 June 2018

Sent to the parties on: .....

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For the Tribunal Office