EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MRS J LUCAS	**V**	**JOHN KYRLE HIGH SCHOOL AND 6TH FORM CENTRE**

HELD AT: BIRMINGHAM **ON:** **9-17 JULY 2020 & 27 JULY 2020 (IN CHAMBERS)**

EMPLOYMENT JUDGE: **MR M EMERY**
MEMBERS: **MR M TAJ**
MR K ROSE

REPRESENTATION:
FOR THE CLAIMANT **Mr A Faux (Counsel)**
FOR THE RESPONDENT **Mr D Bunting (Counsel)**

JUDGMENT

1. The claim of automatic unfair dismissal is well founded and succeeds.

2. All claims of direct disability discrimination (s.13 Equality Act 2010) fail and are dismissed.

3. All claims of discrimination arising from disability (s.15 EqA 2010) are well founded and succeed

4. All claims of a failure to make reasonable adjustments are well founded and succeed.

5. All claims of trade union detriment are well founded and succeed.

RESERVED REASONS

The Issues

1. The claimant was employed by the respondent as Director of Performance and Head of Drama on a full time contract 1 January 2015 to the date of her dismissal for gross misconduct, 31 March 2017.

2. The respondent argues it had a genuine belief in the claimant's gross misconduct following a reasonable disciplinary investigation undertaken by an independent HR professional, and fair disciplinary and appeal processes; it argues that it reasonably concluded that dismissal was an appropriate response to its findings, which were that the claimant had, in summary:

    (1) Wilfully neglected her duties by failing to prepare students adequately for Summer 2016 GCSE, AS and A2 level exams;

    (2) Intentionally and dishonestly misled the respondent in the grade predictions she provided for her students, meaning the respondent could not intervene appropriately to enable students to achieve their predicted grades;

    (3) Falsified data on a performance management review in an attempt to mislead the disciplinary investigating officer;

    (4) Whilst under investigation, committed a safeguarding offence

    (5) All of the above constituting a complete breakdown of trust and confidence

    The respondent also argues findings of misconduct were proven as her actions, and parental complaints, caused a potential loss of reputation to the school.

3. The claimant argues that the reasons for her dismissal were sham reasons, that the respondent did not genuinely believe she had committed acts of gross misconduct. She accepts that students' grades in Drama at GCSE, AS and A2 level were disappointing; she accepts that she did not teach the written Drama exam to the required standard and that this was reflected in at least some pupils' grades.

4. The claimant argues that the respondent was motivated to dismiss her out of an animus towards her trade union activities, also that she was subjected to a detriment prior to dismissal on grounds of her trade union activities. She argues

that her dismissal was automatically unfair, that she was dismissed because of her trade union activities.

5. The claimant also argues that the poor exam results amounted at best to a capability issue, because from June 2015 she was suffering from increasingly debilitating and initially undiagnosed medical condition which impacted on her ability to teach. She argues that her condition amounted to a disability. She considers the respondent was aware of the impact this condition was having on her, and its effect on her ability to manage her teaching and performance duties from September 2015 onwards. She says that she requested assistance with her duties, which was not provided. She alleges her treatment at work amounted to direct disability discrimination, discrimination for reasons arising from disability, and a failure to make reasonable adjustments.

6. The respondent accepts that the claimant suffered from a disability from January 2016 and that it had constructive and/or actual knowledge from this time. It says that it made reasonable adjustments, that in any event the issue was the claimant did not teach, rather than could not teach; also her disability does not account for the deliberate under-recording of progress or the decision to falsify documents, or the safeguarding issue. It says that it was unaware of the nature of her condition, or that her ability to teach was being impacted – an allegation only made the following academic year when the academic results were being put under scrutiny. In particular, it did not know the claimant needed additional support, and neither did the claimant. The claimant gave no indication she needed adjustments and in fact applied to take on additional responsibilities; that any further adjustments would not have been appropriate. It says that it did not discriminate against the claimant directly, that the treatment of the claimant did not arise from her disability; that in any event dismissal would be justified as a proportionate means of achieving its legitimate aim of maintaining professional standards.

7. <u>Unfair / Automatic Unfair Dismissal</u>

   (1) Did the respondent have a genuine belief following the disciplinary process that the claimant had committed acts of gross misconduct as alleged?

   (2) If it did not, was the sole or principal reason for the claimant's dismissal on the ground of her trade union activities?

   (3) If it did, did the respondent
      i. have reasonable grounds for believing that the claimant had committed the acts of misconduct as it alleged?
      ii. carry out as much investigation as was reasonable in all the circumstances of the case?
      iii. Was dismissal within the range of reasonable responses available to a similar type and resourced reasonable employer in the circumstances?

(4) If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being fairly dismissed at some point? (The *Polkey* issue).

(5) If the dismissal was unfair, did the claimant contribute to her dismissal by way of her conduct, and if so would it be just and equitable to reduce compensation by any extent? (The compensatory fault issue).

8. Trade Union Detriments

(1) The respondent accepts that the claimant took part in trade union activities as the school NUT rep.

(2) Was the claimant subjected to the following detriments for the sole or main purpose of penalising her because of her trade union activities:

i. From November 2015 onwards, being investigated for alleged conduct and performance issues
ii. From December 2015 onwards, being investigated for alleged falsification of PMRP 2015/16?
iii. In January 2016 and March 2016, initiating disciplinary proceedings

9. Disability – knowledge

The claimant contends she was disabled from September 2015 by reason of Sero-negative Arthritis and that the respondent knew of the impact of this condition (if not its name while it remained undiagnosed) from this date. The respondent accepts that it had constructive and/or actual knowledge of disability from January 2016.

(1) Did the respondent have actual or constructive knowledge of disability from anytime between September 2015 to January 2016?

10. Direct Disability Discrimination

(1) Was the claimant treated less favourably than a non-disabled person in the same or similar circumstances would have been treated by the respondent:

i. Instigating the investigatory processes
ii. Instigating the disciplinary process
iii. Dismissing her

(2) And if so was this because of her disability?

11. Discrimination Arising from Disability

(1) The respondent accepts that the claimant was subject to unfavourable treatment – instigating the investigation and the disciplinary processes and by dismissing her. The respondent does not accept that the claimant's failure to prepare students adequately, the provision of accurate data, her amendments of the PMRP 2015/16, or the other disciplinary allegations, arose as a direct consequence of her disability.

(2) Do the disciplinary allegations arise as a direct consequence of the claimant's disability?

(3) Was the claimant's dismissed because of matters arising from her disability?

(4) If any of the above arose as a direct consequence of her disability, was the respondent's investigation and disciplinary process and her dismissal a proportionate means of achieving the legitimate aim of maintaining professional standards?

12. Reasonable Adjustments

(1) The claimant contends the duty to make adjustments arose from September 2015, the start of the academic year, to the date of dismissal and beyond to appeal stage.

(2) Did the respondent apply a PCP that the claimant be required to teach students without adequate support?

(3) DID the PCP place the claimant at a substantial disadvantage, the investigation and disciplinary process?

(4) Did the respondent have knowledge that the PCP placed the claimant at a substantial disadvantage?

(5) Would an adjustment have minimised or mitigated the substantial disadvantage? The claimant relies on the following adjustments, which she says the respondent should have but failed to make:

i. Provision of teaching support;
ii. Taking account of the impact of her disability on her ability to undertake her role during the investigation and disciplinary process;
iii. Taking account of her the impact on her disability on her role in determining to dismiss her;
iv. Allowing her to adjust to the impact of her condition on her role, as an alternative to dismissal
v. Making changes to her role or appointing an additional drama teacher

(6) Can the respondent prove that the substantial disadvantage would have not have been eliminated or reduced by the proposed adjustments?

(7) Did the respondent fail to take such steps as were reasonable to avoid the substantial disadvantage caused by the application of the PCP? It says it did so by making and or/offering the following adjustments in the 2015/16 academic year

i. Time off the duty rota
ii. Removal of year 9 reading lessons lessons
iii. Offers to help with typing reports, (declined)
iv. Assistance to take down displays (declined)
v. OH referral (initially declined)
vi. Time off for appointments

13. Limitation – detriment claims

(1) The respondent argues that all allegations occurring prior to 27 March 2016 are out of time, and are not allegations arising over a period of time. It argues that it would neither be just and equitable to extend time in relation to her discrimination claims, nor that it was not reasonably practicable for the claimant to have brought detriment claims in time.

14. Wrongful dismissal

(1) The claimant alleges her dismissal should not have been without notice and was accordingly in breach of contract.

(2) The respondent argues that there is significant evidence the claimant committed gross misconduct and that it was entitled to dismiss the claimant without notice.

The Law

15. Equality Act 2010

6 Disability

(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.

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

15 Discrimination arising from disability

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

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

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

20 Duty to make adjustments

(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.

(2) ...

(3) 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.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

a. on a comparison for the purposes of section 13, the protected characteristic is disability;

123 Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of –

a. the period of 3 months starting with the date of the act to which the complaint relates, or
b. such other period as the employment tribunal thinks just and equitable.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

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

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

Schedule 8 – Duty to Make reasonable Adjustments; Part 3 Limitations on the Duty - *Lack of knowledge of disability, etc.*

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) …

(b) than an employee has a disability and is likely to be placed at the disadvantage…

16. Trade Union and Labour Relations (Consolidation) Act 1992

146 Detriment on grounds related to union membership or activities

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

a. preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so
b. preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him from doing so
c. …

147 Time limit for proceedings

(1) An employment tribunal shall not consider a complaint under section 146 unless it is presented—
   a. before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or
   b. where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

(2) For the purposes of subsection (1)
   a. where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;
   b. a failure to act shall be treated as done when it was decided on.

(3) For the purposes of subsection (2), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act-
   a. when he does an act inconsistent with doing the failed act, or
   b. if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

148 Consideration of complaint

(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.

(2) In determining any question whether the employer acted or failed to act, or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

152 Dismissal of employee on grounds related to union membership or activities

(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
   a. was, or proposed to become, a member of an independent trade union, . . .
   b. had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . .

17. Employment Rights Act 1996 – Dismissal

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer

98 General

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

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

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

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

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

b. relates to the conduct of the employee,

(3) In subsection (2)(a)

a. "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality …

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

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

b. shall be determined in accordance with equity and the substantial merits of the issue

Relevant case law

18. *Direct Discrimination*

(1) Has the claimant been treated less favourably than a hypothetical comparator would have been treated on the ground of her disability? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the disability (*Glasgow City Council v Zafar [1998] IRLR 36)*

(2) The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

(3) The tribunal has to determine the *"reason why"* the claimant was treated as she was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of*." (Chondol v Liverpool CC UKEAT/0298/08)*

(4) Was the claimant treated the way she was because of her disability? It is enough that her disability had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [her disability]? Or was it for some other reason..?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL*. "What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

19. <u>Discrimination arising from disability</u>

(1) There are two steps, *"both of which are causal, though the causative relationship is differently expressed in respect of each of them"*:

i. did A treat B unfavourably because of an (identified) something? and
ii. did that something arise in consequence of B's disability?

"The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence." (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305).

(2) If the employer knows (or has constructive knowledge) of disability, it need not to be aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (*City of York Council v Grosset [2018]*

EWCA Civ 1105). In this case a lack of judgment by a teacher was contributed to by stress, which was significantly contributed to by cystic fibrosis; the Court of Appeal found that it did not matter that the school was unaware that the lack of judgment had arisen in consequence of his disability when s.15(10(a) is applied. If the employer knows of the disability, it would *"be wise to look into the matter more carefully before taking the unfavourable treatment"*.

(3) There must be some connection between the "something" and the claimant's disability; the test is an objective test, and the connection could arise from a series of links (*iForce Ltd v Wood UKEAT/0167/18)* – but there must be some connection between the "something" and the claimant's disability.

(4) The test was refined in *Pnaiser v NHS England [2016] IRLR 170, EAT*:

i. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A, and there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

ii. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant.

iii. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. - it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

iv. "It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

(5) The fact that an employer has a mistaken belief in misconduct as a motivation for dismissal is not relevant in considering s.15 discrimination, in a case where the employer had a genuine but mistaken belief the claimant had been working elsewhere during sickness absence: it is sufficient for disability to be *'a significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the* unfavourable treatment'.' *(Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT)*.

(6) Justification: *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*: three elements of the test: *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?".* When assessing proportionality, an ET's judgment must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. *Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014]).* The test of justification is an objective one to be applied by the tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning. The test under s 15(1)(b) EqA is an objective one according to which the tribunal must make its own assessment" (*City of York Council v Grosset UKEAT/0015/16).* Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. *Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18:* this objective balancing exercise requires that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so.

20. <u>Reasonable adjustments</u>

(1) A failure to make reasonable adjustment involves considering:
   i. the provision, criteria or practice applied by or on behalf of an employer;
   ii. the identity of non-disabled comparators (where appropriate); and
   iii. the nature and extent of the substantial disadvantage suffered by the claimant.

Environment Agency v Rowan [2008] IRLR 20, *[2008] ICR 218*

"the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'. *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*.

(2) *Provision, criterion or practice:* It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported)*, 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'.

(3) Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council [2004] UKHL 32*, *[2004] IRLR 651*, *[2004] ICR 954*: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

(4) While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (Tarbuck v Sainsburys Supermarkets Ltd), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc [2018] IRLR 1015)*

(5) The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. *Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10*, *[2011] EqLR 1075:* when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'.

(6) The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar)*: it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

(7) *Employer's knowledge: Gallop v Newport City Council [2013] EWCA Civ 1583*, *[2014] IRLR 211* – a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*, *[2013] EqLR 326*,) Also, 'if a wrong label is attached to a mental impairment a later re-labelling of that condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name'. *Donelien v Liberata UK Ltd UKEAT/0297/14:* when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

21. Unfair dismissal

(1) S.98(4) requires the tribunal to be satisfied that the respondent has acted reasonably in all the circumstances in treating this reason for dismissal as sufficient. There is a neutral burden of proof, and the tribunal must make up its mind whether s 98(4) is satisfied in the light of all the information before it.

"It is not for the tribunal to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently"

(2) *Iceland Frozen Foods v Jones [1982] IRLR 439*:

(a) the starting point should always be the words of s 98(4) themselves;

(b) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair;

(c) in judging the reasonableness of the employer's conduct the tribunal must not substitute its decision of what is the right course to adopt for that of the employer;

(d) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(e) 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. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

(3) *Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235*, the relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did. The tribunal is not entitled to interfere simply on the grounds that it prefers one witness to another; it must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

(4) In *Morgan v Electrolux Ltd [1991] IRLR 89* the court of appeal considered that "serious allegations", at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by lay persons and not lawyers. The test is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where the allegations of misconduct, and the consequences to the employee if they are proven, are particularly serious: see *Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721*

(5) In considering whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in *British Leyland (UK) Ltd v Swift [1981] IRLR 91*

(6) On the question on the disciplinary process, the question to considering is:

a. had the employer reasonable grounds on which to sustain his belief;
b. had he carried out as much investigation as was reasonable; and
c. was dismissal a fair sanction to impose?

(7) The investigative process is important for three reasons in particular

a. it enables the employer to discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;
b. if properly conducted, it secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and
c. even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction.

(8) The ACAS Code emphasises the importance of an investigation to establish the facts**.** Paras 5 to 7 of the ACAS Code of Practice highlight the following

elements of disciplinary procedures which are relevant to investigations carried out by employers:

> "5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case…

(9) The EAT commented in *ILEA v Gravett [1988] IRLR 497*, the extent of the investigation depends upon the extent of the evidence available to the employers.

> "… at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required, is likely to increase'.

Witnesses

22. The Tribunal heard evidence from the claimant and the following witnesses on her behalf: Mr Paul Deneen an ex-teacher with the respondent and an NUT school rep; Mr David Chatwin, another ex-teacher with the respondent and the NUT school rep prior to the claimant; the claimant's husband; and a former student of the respondent.

23. For the respondent we heard from: Mr David Boyd the respondent's Operational Head Teacher; Mr Kristian Phillips, the claimant's Line Manager; Ms Julie Bridgewater an employee of the respondent's HR provider, Hoople Ltd who undertook the disciplinary investigation; Mr David Potter a Trustee of the respondent who chaired the claimant's disciplinary hearing; and Mr Neil Pascoe a Trustee of the respondent who chaired the appeal against dismissal.

24. We did not hear from the respondent's Head Teacher Mr Nigel Griffiths. The Tribunal was invited by the claimant to make adverse inferences by his failure to give evidence without reasons being given for this.

25. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

26. One factor has caused significant additional time being spent on the judgment: the volume of documentation (well over 3000 pages), the significant duplication of documentation, and the failure to put much of the documentation in chronological order.

27. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

Disability – chronology of symptoms

28. In May 2015 the claimant was bitten by a Blandford Fly. Her Disability Impact Statement (pages 48-58) describe her symptoms, which were not challenged by the respondent, and on which she gave consistent accounts in her evidence. The Tribunal accepted her statement and witness evidence on her symptoms as an accurate account.

29. A report written by her Consultant Rheumatologist on 22 December 2016, seen by the respondent, states *"We have been treating her for inflammatory arthritis which has only just been controlled… Prior to this her disease was not fully controlled and she also had side effects from some of the previous drugs we have tried… Inflammatory arthritis is often a difficult disease to diagnose and can have multiple effects on both joints but also on more wide-spread effects on a person's general health and wellbeing".*

30. In the period relevant to this claim – which is June 2015 to the date of dismissal – the claimant's symptoms and factors relevant to knowledge of disability were, in summary:

    a. June – August 2015: shoulder movement limited without discomfort; knee joints becoming swollen and stiff, affecting ability to move without discomfort; referral for an ultra-sound scan.

    b. September 2015 onwards: as well as the above, increasing stiff and distended fingers affecting ability to grip; increasing physical and mental fatigue requiring her to rest during breaks/lunch and sleep on her return home; self-medicating with over the counter painkillers and gel; physiotherapy referral, including need for occasional time off to attend physiotherapy sessions; referral for blood test for possible arthritis – not diagnosed because of the condition's sero-negative status.

    c. September 2015 – June 2016: In regular (weekly or more) discussions with Mr Phillips she described ongoing symptoms she was experiencing, her treatment, potential diagnoses, her medication and its effects on her.

    d. November 2015 onwards – increasingly worsening symptoms, including spasming joints and constant shooting pains; starting to adjust teaching style to adapt. Symptoms and treatment starting to become visible, wearing wrist splints and ankle supports at work. Night sweats and cramps, occasional blurred vision. Prescribed opiate prescription painkillers and anti-inflammatory medication, and suggested Pain Management Clinic. Increasing effect on both practical and classroom teaching.

e. December 2015: HRT prescribed because symptoms potentially menopausal tendonitis. Little reduction in physical symptoms; new symptoms of violent mood swings and increased feelings of stress.

f. January 2016 onwards: additional symptoms include not being able to sit on the floor with students or step onto staging blocks or move equipment in performance lessons; lack of muscle strength in hands; increasing fatigue, concentration and clarity of thought; not able to drive some days. The Drama school show in Spring term caused increasing workload including need to manufacture all costumes, cover for music rehearsals, causing increased joint and tendon pain, increasing stress exhaustion and fatigue.

g. February/March 2016: Discussion with Mr Phillips about a referral to Occupational Health. Claimant offered anti-anxiety medication (refused), prescribed a long course of antibiotics for possible Lyme's Disease, no alleviation of symptoms. Burst into tears in Mr Phillips office. Pain increasing, fingers *"becoming claw-like"*, unable to write for any length of time; fatigue and night-sweats, lack of sleep. Referred to radiology department.

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h. April 2016 onwards: diagnosed sero-negative Arthropathy. Informed employer early-May 2016. Commenced steroidal treatment and sulfasalazine as well as continuing prescription painkillers and anti-inflammatories. *"Trial and error"* drug regime to determine tolerance levels. Side effects of sulfasalazine caused significant allergic side effects including vomiting, swollen tongue, cramps. Claimant offered an amanuensis, she felt not viable. Claimant sought temporary reduction in hours for next academic year.

i. June 2016 two weeks sick leave. OH appointment booked.

j. September return to school. Prior to return agreed that external workshops would play part in practical Drama teaching. On return, left Departmental review meeting in tears. Referral to rheumatologist found that replacement steroid not working and condition returning. Signed off work for one month.

k. October 2016: On return, supply teacher in place, on the respondent's case to assist the claimant undertake her role, on the claimant's case as her likely replacement. Disciplinary process commenced, symptoms worsened increased symptoms of arthritis, fatigue and psychological issues.

l. December 2016: additional disciplinary allegations, suspended from work, thereafter signed off work.

The relevant facts

31. The claimant is an experienced Drama and Performance Teacher with an excellent prior working record. She is an external Drama examiner. In providing a reference, the Headteacher at her prior school described her *"huge experience",* that she had *"revitalised"* the Drama department, resulting in a strong uptake in GCSE and A level, her school productions were *"a magnificent triumph",* directed with *"vigour and enthusiasm",* and she brought *"the "knowledge and expertise"* of her examiner role to her job; it describes *"good and outstanding"* lesson observations and that her students *"are highly motivated and love learning."* (557)

32. On her employment by the respondent, the claimant was a Department of herself. As well as teaching year 10 and above, she taught drama year 7. Her job description describes one of the main purposes of her role to raise standards and achievement and to monitor and support student progress. Her line manager was Mr Kristian Phillips who she met regularly, who observed her lessons and with whom she described a very positive and friendly relationship throughout her employment, until the Summer 2016 exam results. In his evidence Mr Phillips corroborated their positive relationship. He records his positive observation of a Drama lesson in March 2015 (565).

33. By May 2015 the claimant was expressing to Mr Phillips that she would like to stand for election as NUT Rep, there being no school-based rep. She met with the last-but-one rep, Mr Paul Deneen, who described some of the issues that had arisen while he was rep, in general terms that it can be a difficult role and he clearly alluded to a difficult relationship with the Headteacher, Mr Nigel Griffiths. The claimant discussed the role with Mr Griffiths, whose subsequent email to her suggested a meeting with the Chair of Governors whose perspective would provide the *"comfort and confidence that the school wishes to move the relationship with the union forward"*, that her NUT role was *"most welcomed"* and with thanks for her *"positive and professional approach to all of this*". In her response the claimant referenced the *"animosity"* which had developed between him and Mr Deneen *"This places me in an invidious position… I do not want to be caught in the crossfire of something more personal than professional?"* (578). Mr Griffiths forwarded this email to the Chair of Governors, commenting *"the key issues we need from your discussion is her reassurance of our support and, as part of this new approach, agreement that we will deal with her and someone more senior .. someone untainted and unbiased. I predict very little, if any, formal work, as we manage our staff really well."* (579). The Chair of Governors also discussed with the claimant a *"fresh start"*, and discussed how the union/school relationship could be moved forward. The claimant decided to stand for and was elected as NUT school rep.

34. Mr Phillips informal feedback to the respondent's Headteacher on 12 June 2015 (nearly 6 months into the role and in the midst of exams) was that the claimant *"… has settled in well and is really enjoying being here … She always speaks highly of the students and enjoys teaching here. She is very passionate about Drama and will fight for her subject."* Two issues were raised; the claimant had

hugged a pupil in the corridor who was in distress, against school policy and regarded as a potential safeguarding issue, and the low Drama Performance A level grade of one pupil (575).

35. In June 2015 the claimant was bitten by a Blandford Fly, causing initial symptoms described above.

36. On 30 June 2015 in the context of assessing students' target grades, the claimant asked Mr Phillips *"…when target grades are set, which takes preference .. NFER or FFT[1]?".* His response was *"whichever is highest for the student :-) normally FFT"* (576). The Tribunal considered that this remark made in semi-jest was indicative of Mr Phillips view, and the claimant took it as such; that Mr Phillips was saying - assess the best grade you think the claimant can achieve – i.e. an aspirational mark. The importance of the issue of 'target', 'working towards' and 'working at' grades is relevant to the disciplinary allegation that in academic year 2015-16 the claimant deliberately manipulated working towards grades upwards during the academic year to hide what the respondent described her wilful underperformance.

37. The exam results for Drama in Summer 2015 were disappointing at GCSE, AS and A2 level. Some of the claimant's Performance Review was completed by Mr Phillips and the claimant together. Under the section *"Performance Management Review Progress"* all targets were marked as "*Complete"* with a *"Yes"* (the alternative being *"No"*). Under the headings *"Outstanding Leadership and Management"* the claimant is marked Complete/Yes against all of the *"Success Criteria"* including *"Pursues excellence, modelling professional standards in all their work; Monitoring and evaluation is robust, regular and effective…"* (561-564).

38. The next year's Performance Management Review Progress 2015/16 form (PMRP 15/16) was also started. Mr Phillips states that the claimant had *"… in the short time that she has been with us … whipped the Drama department into shape".* The report references *"overall drama results … were disappointing, Jo recognises this and has reflected on what can be learned in order to build on into this academic year. …the GCSE classes had numerous teacher changes and were affected by this"* (561-564).

39. Mr Phillips goes on to say that the claimant *"will set aspirational targets"* for her GCSE classes. The claimant was told that *"pushing towards the A and B grades at AS and A2 this year will be crucial to meet the Sixth Form target of 65% A*-B…"* (586). He says the claimant *"is highly organised and proficient in all that she does. She always meets deadlines and is often working ahead of deadlines … Her enthusiasm and exuberance for Drama and Performing is contagious …".* Mr Phillips considers that her areas for improvement included *"data tracking and monitoring understanding of school systems …; Pushing for the higher grades at KS5 and KS4; Developing new programmes of study for the*

[1] FFT - Fisher Family Trust
NFER - National Foundation for Educational Research

new GCSE and A level from 2016". In her comments, the claimant noted the disappointing results, she gave some explanations including change of teachers; also that the School production was a "*baptism by fire … this probably, in retrospect, had knock-ons in the teaching at Examination Level"* (585 – 87). The Tribunal again noted the *"aspirational targets"* requirement; again an issue of significant importance in the disciplinary process the following year.

40. Mr Phillips evidence described the different categories of grade – 'working at, 'working towards' and 'target' grades. The target grade - aspirational and it was unusual to change the target grade once set; working at – where they are now; working towards – based on teacher's opinion, a *"realistic"* grade at exam. The claimant's view was that working towards should also be aspirational – what they could get working hard, good teacher support, etc. The Tribunal noted that there were discussions throughout the 2015/6 year between Mr Phillips and the claimant about pupil attainment; as he put it in his evidence he looked at the data, and there were discussions between them about issues with particular students *"which children were on target and which needed work and discuss the shortfalls..".* Despite his knowledge of pupil progress, the Tribunal found that there was never any suggestion from Mr Phillips in 2015/6 that the claimant's data he was considering was over-optimistic. Again, this was an issue of significant importance in the disciplinary process.

41. The Tribunal noted that the claimant was expected to add to the PMRP 2015/16 throughout the year; the claimant had added extensive bullet points at different times, for example, *"Majority of costumes and set acquired, November" "costumes 2/3rds through making";* that the production was *"an overriding success but audience turn-outs were poor"*, etc. (589). Mr Phillips accepted that this was a *"Review Progress"* for the claimant to add to, as and when progress made/target achieved. This document and the claimant's comments was to be discussed as part of the final claimant's performance review meeting due to take place the following September. We accepted that the claimant added to the PMRP 15/16 on an ad-hoc basis and did not require permission to do so, and that Mr Phillips was aware she was doing so. This became an issue of critical importance in the disciplinary issues from October 2016 onwards.

42. At the beginning of the Autumn term 2015/16 a former student contacted the claimant saying she wished to train as a Drama Student and was studying PGCE and asking to undertake a Drama placement with her. The claimant asked Mr Phillips *"can we pursue it"* and was told that Mr Griffiths did not want to *"detract from anything in what would be an Ofsted year"* (581-2).

43. On 5 September Mr Chatwin resigned as NUT Rep, saying to the respondent *"I hope you will want to support [the claimant] in her role and that the change will allow you to re-establish a positive working relationship with the union".* This email was passed around internally, ccing Mr Griffiths, with comments such as: *"Wow", "blimey that's almost an apology, isn't it?", "Well it's certainly more gracious than I was expecting… Bit like he knows!!!!"* (583).

44. At the beginning of Autumn term 2015 it was clear that the Blandford Fly bite was continuing to cause the claimant continuing health issues. Her evidence at

Tribunal was that she going to school assuming that her health would get better, that she had *"no idea what was going to snowball".* The claimant was informing Mr Phillips that she was unwell, and describing her symptoms to him on a regular basis. The Tribunal accepted her evidence: *"we discussed lots of things and how others had dealt with medical issues, but we were in the dark…"* and that she expressed to Mr Phillips her worry *"about my physical wellbeing and knock on effects of this."*

45. One reference to the claimant's increasing symptoms arose when she was seen to be away from her designated duty station during a break on 1 October 2015; her email explanation was that she needed to get her painkillers, and referencing ultrasound treatment for her shoulder (602).

46. On 4 November 2015, the claimant emailed Mr Boyd *"NUT stuff"* – issues on which queries had been raised – bus duty, part-timers duties, when PPAs will be added to timetables, and other issues. This was forwarded to Mr Griffiths, who forwarded it to Mr Phillips asking, *"What do you think of this? Pop in and have a word tomorrow, please"* (604). As we did not hear from Mr Griffiths, we wondered what his reasoning was for forwarding this email to Mr Phillips, a relatively junior member of his management team who was the claimant's Line Manager, seeking *"a word"* about these activities. The Tribunal concluded having heard all the evidence on the trade union issue that Mr Griffiths was concerned that the claimant was raising work-related issues as the NUT rep, and he wanted to discuss the implications with Mr Phillips as the claimant's line manager.

47. By November 2015, the claimant's symptoms were increasing, and the Tribunal accepted that she was discussing her symptoms on regular occasions with Mr Phillips; on 16 November 2016 the claimant emails him saying: *"…ps Sorry about my week of medical stuff … Pain killers working but not a good long-term, solution"* (607). On 19 November the claimant was not able to work, an in an email titled *"Confessions of an opium eater"*, a literary reference to her opioid-based medication, she says: *"I upped my painkillers and they have left me quite dizzy…"* Further in the email she states: *"when I asked for a student teacher there was a real purpose and necessity in the request. An extra trained person to provide input in and out of school and take some pressure off. As you can see I am tired and feeling sorry for myself…"* (608-9).

48. By November 2015, the impact of the claimant's condition meant that her role was being affected. In her evidence, which the Tribunal accepted, she stated that *"… from November 2015 I could not stay late - this is crunch time for tactics and pulling together course work etc. The extra time to allow this was not possible, because of medication and fatigue. I could not sustain it, I was too tired and I would need to sit and shut the Drama door."* She described the effect of the opiate based painkiller she had been prescribed, *"… it increases dosage to be effective, and it has detriments, which you think mean you're your normal self, but you're not normal."* She described the increasing visibility of the still undiagnosed condition: "*I had hand splints, leg splints, tape on shoulders. And this is issues I have raised continuously."* It was put to her that she had *"physical limitations, not an issue with teaching"* and that she did not say to Mr Phillips

that this was causing problems with teaching: her answer, which the Tribunal accepted, was that they discussed her health, the impact that this was having on her, that Mr Phillips had accepted she was trying her best.

49. The Tribunal considered that it was from the 16 November 2015 email that the respondent knew that the claimant's condition was having a substantial impact on her day to day activities and in particular on her teaching activities in both practical and lesson-based Drama. Mr Phillips was aware through his regular meetings with the claimant that her symptoms had steadily increased in nature and severity from June 2015 to this date, that her condition was being investigated but remained undiagnosed, and that she was starting to take prescription medication as pain control; her condition was affecting her sleep and her mental health. The Tribunal concluded that by 16 November the respondent should reasonably have been aware that the claimant's condition was having a significant effect on her physical and mental health and on her ability to carry out significant aspects of her role. It was also aware that there was no likely end-date to this condition, that it was continuing to deteriorate while remaining undiagnosed, that at this date there was a significant likelihood that her condition would be a long-term condition – i.e. one likely to last a year or more, not least because of the need for continuing treatment to stabilise the condition both prior to and after diagnosis, whenever that would be.

50. It was at this stage, the claimant referred to the need for a student teacher – the *"real purpose and necessity"* of this request. The Tribunal concluded that it was from this date that the respondent was aware that the claimant was requesting teaching support because of her illness, to assist her in her teaching role.

51. On 8 December, the claimant emailed Mr Phillips saying the school production *"is making me quite weary"* (611). On 16 December she requested and was granted 2 literacy lessons removed and taken off the Wednesday duty team, *"to give me more hours in the day to sort out stage … run lunchtime rehearsals and support … the music rehearsals"* (612-3).

52. By early January 2016, the claimant was continuing to discuss in emails and meetings with Mr Phillips her continuing health issues, on 6 January writing *"…next year something is going to have to give and I think that it will have to be the production because it cannot be either my heath or my sanity"* (616); on 7 January *"Firstly apologies for becoming tearful … I appreciate the support you give me …."* There followed a list of outstanding work and issues including *"ill health".* She states *"When I asked for a student teacher one of the reasons .. .was the in house support that this gives … Ranting and raving finished. Physio followed by rehearsal…".* Mr Phillips response accepts the pressure she had been under, he was *"working on a solution, I am trying my best … It hasn't been easy what with all the challenges that you have faced".* (617-8).

53. The Tribunal noted that the claimant's apology for becoming tearful at a meeting. The Tribunal also accepted that the claimant was raising generally in meetings with Mr Phillips her health, her severe tiredness, her increasing physical limitations which were impacting on her abilities in the role. In her

evidence the claimant described going to his office *"…I could not get out of the chair - getting up and sitting down was not good, and we talked about and discussed symptoms. It was obvious prior to diagnosis… of course he was aware" … "he knew how exhausted I was".* In his evidence Mr Phillips accepted in his evidence that from January 2016 onwards she was *"… working hard on the production - she sewed all of costumes, and all of effort meant she was fatigued at that time. … and struggling with mobility and struggling to hold pen to sign return to work form after Easter."*

54. In her evidence the claimant described Mr Phillips making notes at each meeting in a notebook, which she said he stored when filled on a shelf in his office when each book was full. Mr Phillips stated that he did not always take notes, and he destroyed his desk diary which contained his notes at the end of the year. The Tribunal accepted the claimant's account. Mr Phillips was the claimant's line manager, she was describing in regular meetings with him issues of clear concern relating to her health and her ability to cope, he was aware of her increasing symptoms, and she was becoming tearful. We considered that given the issues she was describing, it would be unusual for a line manager not to take a note of such a meeting, and that Mr Phillips did so.

55. From January 2016 the claimant and Mr Phillips started discussing a referral to Occupational Health. The Tribunal did not know whether Mr Phillips sought advice on whether or not to make a referral, but both he and the claimant agreed that as she did not have a diagnosis, it was not a step to take at this time. As the claimant put it in her evidence, Mr Phillips *"…suggested OH, we talked through and wondered what I would get out of it, and a referral was agreed as pointless at this time. The school could have requested I go"*.

56. In her January 2016 pupil academic reports (2099-2123), a lot of comments were made about pupils written work and their mock performance in the GCSE Drama written exam. We accepted that these issues were discussed with Mr Phillips and he accepted that, for example, one pupil had a panic attack and only answered two questions, another had pastoral issues and another had time management issues. At this time, despite disappointing written mock exams, the Tribunal found that Mr Phillips accepted the explanations given by the claimant and did not consider further whether there was performance related concerns relating to her classroom teaching performance. He did not challenge her working towards grades. In her evidence, the claimant accepted that she had identified a need for students to improve written elements. It was put to her that she did not take steps to rectify the written element – her answer *"I did as much as I could".* It was also put to her that she was wilfully underplaying underachieving in the written exam. Her answer was no – she had discussed the student issues with Mr Phillips and that her working towards grades were written based on her belief that she was doing all she could to assist the students to achieve what were aspirational but still achievable grades. In her evidence she highlighted that she had *"lots of discussions about this"* with Mr Phillips, which we accepted. We also accepted the claimant's evidence that the working towards grades were her best estimates at this time – where she genuinely believed the students would get to if they worked hard and she was able to put real effort into assisting them achieve their grades.

57. In his evidence, Mr Phillips accepted that if teacher ill-health issues intervened which affected the grade achieved, that *"this would be an excuse for poor assessment [of grade]…."* His evidence when he was asked *you "knew she was struggling and blindly obvious that she was struggling that she was unable to give full force of skills to students - you knew this"*, was that he *"did not know … this was a sporadic illness, and she was not consistently unwell and long periods when she was well."* The Tribunal accepted that, by December 2015 and into 2016, Mr Phillips would have seen that the claimant's health was evidently continuing to deteriorate from its inception in June 2015, the deterioration was manifest by November and continuing to worsen thereafter that this did not in fact present as a sporadic illness, but one which was consistently deteriorating, with different medication providing some limited and temporary respite along the way. The Tribunal considered that Mr Phillips was therefore aware that there was a real chance her condition would not improve, and may worsen, in the next few weeks and months, to the end of the academic year.

58. By February 2016 the claimant was finding it too difficult to write, and could not write comments on student essays. She started to provide verbal feedback to students. She stated in her evidence that in her view this was a disadvantage *"… students prefer written feedback as this give something tangible. If you write on an essay there is no leeway or lack of understanding."* She said, and we accepted, that she and Mr Phillips *"talked about this - how I was going to manage this…"* Mr Phillips evidence was that this period was "a particularly difficult time after the production", however he observed a lesson *"… and she was moving around and she fully participated…"*; that while he was aware that she could not hold a pen he *"… did not know this was impacting as the data was positive".* The Tribunal accepted that Mr Phillips was fully aware there was a significant impact on the claimant's physical mobility, she was in pain and her symptoms were worsening, this was having an effect on ability to teach generally, as well as her mental wellbeing. The Tribunal considered that Mr Phillips would have been aware at this time that the claimant's continuing ill-health may have been impacting on her ability to teach to the full.

59. On 11 March 2016 Mr Phillips observed a performance lesson and stated that he *"loved it!"* (632)

60. On 15 March 2016 Mr Phillips asked the claimant to add new estimated grades on the Spring 2016 'working towards report' for GCSE. We accepted the claimant's account that these grades were discussed with Mr Phillips, that both accepted that this was an estimate, given to Mr Phillips to indicate where she believed the students would get to in their summer exams.

61. During March 2016 the claimant's symptoms were worsening. She was also expressing concern about exam results. In an email on 21 March 2016 to Messrs Boyd and Phillips she raises concerns, including the impact of a lack of drama in lower years on GCSE results, students are losing lessons, the impact of sickness on group work, the lack of after-school sessions, that Drama was being *"squeezed"*. She added *"The stress of knowing that there will be a*

potential grilling in September following results in August makes this a bitter pill to swallow" (635). Mr Phillips response was that they should be *"…proactive about this solutions focussed … High quality teaching and learning in the classroom, which is what you already do, will be the answers, I'm sure".*

62. At this time, the Tribunal found, the claimant was raising concerns about results the forthcoming exams, and was being assured by her Line Manager that she was doing all she could do. Notwithstanding her continuing ill-health, no additional support was offered to the claimant at this time and no additional concern appears to have been raised about the claimant's ability to teach to a standard which would lead to higher summer exam grades than their Mock results suggested.

63. In April 2016 the claimant applied for an Associate Headteacher role – a one year post. She did not gain this post, however the fact of her making the application became a factor in her disciplinary process.

64. On 26 April 2016 the claimant fell off her chair while reaching for a pen on the floor and she found it difficult to get up. As the h&s report of the accident says *"my leg seized up with this 'arthritis' thing … Liz found me trying to get up and a bit tearful…"* 647. In an email the same day to Mr Phillips she explained, *"Just jarred everything, so the hurty bits just hurt a little more… Already on strong painkillers so you just plod on.."* (648). This incident and email did not trigger any concern about the claimant's ability to continue teaching to the required standard.

65. In April 2016 the claimant was diagnosed with Sero-Negative Arthritis by a Rheumatology specialist and she informed her employer of this diagnosis on 4 May 2016. She was required to have regular steroid injections and prescribed sulfasalazine, which she became allergic to and suffered the symptoms described above. Again, we found that the symptoms she was experiencing were discussed with Mr Phillips.

66. On 3 May 2016 the claimant put in a flexible working request for the following year, *"Predominantly the request is based on my current health situation or lack of it…"* (649). After some confusion about what the claimant was seeking (permanent or temporary reduction, to .8 or .9 fte), the request was accepted. As part of the correspondence on this issue, the claimant makes it clear that this was a request for *"in light of my current problems with ill-health namely sero-negative arthritis, which is taking time to be brought under control…"* (671).

67. Some of the claimant's students written work was assessed by Mr Phillips on 4th May 2016. There is a comment that the claimant *"finds it difficult to hold/grip a pen..".* Directly under this, Mr Phillips commented that not enough written feedback was being produced at year 10 *"… what is the point of doing written work if it is not marked and students do nothing with the feedback"*. The claimant's response was that *"something has to give"* and she says the students are given verbal feedback. She stated *"I have arthritis in every tendon, at present it manifests itself in my ability to grip, my ankle and my shoulder. It is systemic it moves around the body for no apparent reason. It also brings with*

it bouts of extreme lethargy and arthritic sweats…. It means that on some days it is all I can do to get out of bed." She discussed her medication, and that this is a *"A frustrating and extremely upsetting situation which I have no control over …"* 651). The Tribunal accepted that this was an accurate description of her symptoms at this time.

68. The respondent offered an amanuensis as an adjustment at this time. The claimant did not take it up. As she said in her evidence, some of the additional support offered at this time could only be taken up by her if the assistance could be provided after school hours, but the Teaching Assistant was not employed after hours – *"We joked I could not take a TA home with me…".* The failure of the client to accept the amanuensis and fail to make other suggestions for adjustments became significant issues at the subsequent disciplinary hearing.

69. On 20 May 2016, the claimant sent an email in her capacity as NUT rep to a member of the SMT, leading to the following pejorative exchange about the claimant: *"does Jo have an opinion on everything?? <sigh>";* Mr Phillips - *"Yes!!! I'm going to ask that you LM her next year…"* (652). The Tribunal considered that this was a becoming a common view being expressed about the claimant when pursuing her union activities. Mr Boyd described a *"culture of engagement"* with the Union, and that these emails were just *"light-hearted comments between colleagues … not a cause for concern … I don't like the word banter, but there was a commonality of discussion…"* . The Tribunal considered that the comments made, and Mr Boyd's lack of concern about the negative tenor of the comments which were union-related, taken with the other emails set out in this judgment regarding her union activities, are indicative of a significant and negative concern that the respondent's senior management team had with the claimant undertaking these union activities. The Tribunal found that the claimant's union activities countered Mr Griffiths settled view that staff relations were good, that there would be little if any formal work for her to do, as expressed to the Chair of Governors in May 2015.

70. On 23 May 2016 the claimant was informed that Mr Griffiths wanted to arrange regular meetings with her to discuss union related issues. Later the same day the claimant sent an email to staff refencing an NUT strike ballot. This was forwarded to Mr Griffiths by a union member of the SMT. Mr Griffiths account of the subsequent meeting with the claimant is, we considered, illustrative of his pejorative attitude towards the claimant's NUT role: *"So you are being asked to strike and take a pay cut and pension cut when the school … is adhering to all that is required. Why doesn't the union target those schools not adhering to its requirements. YOU COULDN'T MAKE THIS UP. I have told Jo this TODAY."* (654). Mr Boyd stated that the tone of this email was not anger, but *"incredulity"*. We accepted this may be the case, but we also noted that the target of Mr Griffiths incredulity was the claimant.

71. The claimant's first meeting with Mr Griffiths on union issues was on 6 June 2016, In her email which followed, she gave some thoughts on her role. "*…As I said I would much rather be working from the inside … Antagonism is not my goal…".* (662)

72. On 23 June 2016 the claimant's email to Mr Phillips, titled *"Pain…"* asked for an Occupational Health referral, that she was *"feeling lousy. May have to be officially signed off for a little while."* (674). A further email that day said her medication (sulfasalazine) was causing a potential allergic reaction and that she may have to be signed off work (675). She was subsequently signed off for two weeks sick leave.

73. On 4 July at 5.30, in her role as Union rep, the claimant sent an email to staff *"A final call for Strike Action",* in which she said *"thank you to all members who have told me of their intention to strike tomorrow; the support is very much appreciated. A particular thank you to members who were put under pressure to reveal their intentions today by the SLT. This should not have happened and I have spoken to the SLT members concerned. It is your legal right to strike…",* and she references a school-related issue, a TA taking a teaching role in a Core Subject *"… this could be the thin end of the wedge"* (676).

74. A few hours before, at 1.10pm, Mr Griffiths PA provided him with the claimant's Bradford Factor score along with the *"concern"* levels: the claimant's score of 1255.50 was sufficient *"for a manager to consider dismissal"* (677). There was significant evidence on whether there was a causal link between this request and the claimant's actions in the preceding days regarding the strike to take place the day after. The respondent says there is no link, that this was an entirely reasonable request for information. We did not hear from Mr Griffiths. We noted that this was not an expression of asking for background information on the claimant's ill-health – it was just a request for the data. The Tribunal considered it likely that Mr Griffiths had some understanding of the claimant's condition from Mr Phillips, and was aware of her recent absence and the reasons for it. Why seek the Bradford factor data, unless with the intention of using it for some purpose? There was, at this stage, no suggestion of a capability process being put in place: the Tribunal considered that the most likely explanation to seek this information when he did was connected to the strike action taking place and the claimant's role in organising this at the school.

75. On 5 July 2016 the NUT national strike led to 6 members of staff going on strike. On the same day, Mr Phillips forwarded the chain of emails between him and the claimant dated 7 January 2016 to Mr Griffiths PA (page 619); he could not recollect the reason for doing so in his evidence, that it was *"strange I did so",* but he said it was not connected to the strike. The Tribunal could see no other connection, but for the strike and the claimant's role in organising it, for Mr Griffiths seeking to collect this information, similarly with the Bradford Factor score.

76. The next day, 6 July 2016, the claimant sent an email to union members discussing the strike and its aftermath, and referring to pressure and intimidation of staff members, *"this is not legal"*. Mr Boyd, who had asked staff if they were going to strike, said in his evidence that he was *"extremely careful – I did not hound, pressure or intimidate … I am surprised if staff felt this way…".*

77. The OH request filled in by Mr Phillips and the claimant on 6 July 2016 seeks *"advice and guidance on how we can support Jo in her role … Even if the*

Arthritis gets under control, this may occur at a later date and the possibility of 'flare ups' in the future." The request refers to symptoms from August 215 onwards, and treatment tried and its effect on her. It references the January 2016 her physiotherapist's report that the issue was "systemic, *and not specific, i.e. it was something that was within the body. At this time it started to come out in both hands, knees, left ankle and left elbow… …. At this time good days and bad days … There has been a pattern of good days and bad days. Jo is often in pain whilst at work and can be very restricted in her movement – getting up off the chair, the floor, and even holding a pen can be difficult at times"* (678-82). In the section titled *"Support/adjustments offered by Management/HR to date"*, it references the temporary reduction in hours agreed for the following year, *"…to allow for rest and recuperation",* removal from the rota, disabled toilet and lift access, and *"A flexible and supportive approach and understating to having time off for health reasons."* (679).

78. On 8 July 2016 Mr Griffiths forwarded the claimant's 6 June NUT email to the respondent's legal advisers seeking advice on the issue, saying also that the claimant is *"trying very hard to canvass support"* for the strike and was raising the procedure for the ballot for Teacher Governor an issue of ballot privacy; Mr Griffiths asked *"What are your thoughts?"* (687-690). Again, we have no knowledge as to why Mr Griffiths felt concerned enough to seek legal advice on the claimant's trade union activities; we concluded that it was for the reasons set out in the letter - he was concerned at the level of the claimant's activities, her attempts to canvass support for the strike, her reference to the questions staff were asked about their intentions to strike, and raising the ballot issue.

79. On 11 July 2016 the claimant emailed her NUT regional rep, referencing staff feeling intimidated, hounded and scared, being taken out of lessons to be asked if they were striking, called to ask the same when off site. *"But I have to say I have not ever come across such blanket underhand tactics on this scale"* (695).

80. On 12 July 2016 Mr Griffiths wrote a letter to the claimant at her home address saying he was *"Disappointed to hear of anonymous allegations of intimidation and bullying being made…",* saying that this was criminal conduct and would not be tolerated. The letter says that his role includes wellbeing of all staff, including those *"against whom unsubstantiated, false or malicious allegations are made. Given the severe consequences of the criminal conduct recently complained of, I must be equally severe in my approach to such statements. These will be treated as gross misconduct and may require referral to relevant statutory authorities…"* (696-7). The claimant shared this email with the Union, and also discussed it with Mr Phillips, making it clear in a following email she believed her teaching and union roles were separate, that she would like to continue the positive relationship she had started with Mr Griffiths (706).

81. The Tribunal considered why Mr Griffiths sent this letter to the claimant. He is quite right that he owed a duty of care to all staff, and he was also right in concluding that false or malicious allegations could be treated as an act of gross misconduct. This is uncontroversial; make a false/malicious allegation and face the consequences, and it would not normally need to be told to an experienced teacher. The Tribunal was more concerned about the use of *"unsubstantiated"*

in what was a carefully worded letter, presumably written following the recently sought legal advice. What, if in an investigation, a teacher could not 'substantiate' that they had been threatened? This letter appeared to be suggesting that this could be considered gross misconduct. Mr Boyd's evidence was that the context of this letter was "*the hostile relationship between the previous reps and Head … an allegation had been investigated, but unsubstantiated … this was a toxic relationship and we wanted to make sure issues raised were not scurrilous and all out in the open."* Messrs Deneen, Chatwin and Boyd all accepted in their evidence that there had been a toxic history between Mr Griffiths, which all accepted was at least in part related to their union role, even if there was disagreement with the school as to what had occurred and why. The Tribunal concluded the aim of this letter was to ensure that no complaints would be made, because if they were *"unsubstantiated",* i.e. unproven, the complainer could face the sack. This wording was, we found, designed to intimidate the claimant in the performance of her trade union activities, in particular following-up on the concerns raised by staff on this issue and it was raised in the context of the previous hostile relationships between Mr Griffiths and prior union reps.

82. The claimant discussed this letter with Mr Phillips. He sent her a follow-up email, referencing their discussion, that she did not want him to be *"the go-between regarding union matters … You would prefer as the NUT rep to deal directly with the HT".* Mr Phillips shared this email with Mr Griffiths, who responded about who should have union-related meetings with the claimant and when. He then added: *"Don't show this bit. This is the comedy section: (I miss david chatwin ☺ Life was so much easier, He didn't care. Neither did I ☺! Happy days they were*) (708).

83. Given the issues which had clearly arisen with Mr Chatwin, alluded to in the response to his stepping down email in July 2015, and in the context of the previous *"toxic"* relationships evidenced by Mr Boyd, we considered that this email strongly indicated that Mr Griffiths was losing patience with the claimant's union activities, and that this was causing a significant deterioration in Mr Griffiths view of the claimant.

84. On 15 July 2 there was more. Mr Griffiths PA emailed the Chair of Governors and Mr Griffiths, stating that Mr Chatwin had *"unfairly questioned my integrity in the past"*, over voting methods, and the claimant was now raising the same issue of voting integrity. Mr Griffiths response is *"FIGJAM. And her file. Thanks."* (709).

85. FIGJAM stands for "F*ck I'm good, just ask me". We wondered why Mr Griffiths would write this to his PA, why this would be for the claimant's *"file"*. We noted the claimant's reference to the issue of voting in her email to NUT members, Mr Griffiths email to her, and his letter on his duty of care towards staff against *"unsubstantiated allegations"*. This email could, we found, now be treated as an unsubstantiated allegation of a lack of integrity raised by the claimant against the Headteacher's PA, and we concluded that Mr Griffiths was banking this as an issue to raise against the claimant.

86. On 18 July the claimant wrote to Mr Griffiths, her email titled "Positive Relations" thanking him for his *"constructive comments"* and expressing a wish for a *"mutually supportive"* relationship between the school and the NUT and requesting a meeting in September, which was agreed to (711-2).

87. The 2016 Drama exam results were poor at all levels. The claimant had predicted GCSE 100% A – C, only 26.7% achieved this standard and the average grade was D with some students were 2 grades lower than predicted. At AS level the claimant had predicted 100% of pupils would gain A* - B, in fact 0% did. At A level the claimant predicted 87.6% would achieve A*- B - only 25% did, again many were two grades below expectations. The results at all levels showed that students' attainment in Drama Performance were to expectations; it was the written exam element that was poor and below expectations for all students at all exam levels. There were several parental complaints, and some students decided not to enter the 6th form and some AS level students decided not to continue drama at A2 level.

88. Because of the results, Mr Phillips sought advice in a call with Ms Julie Davies of the respondent's HR adviser's Hoople Ltd. In an email on 30 August 2015 she made suggestions, including to seek re-marks to see if part of the syllabus had not been covered, if so *"then potentially this is a disciplinary matter"*; to meet with the claimant to understand her perspective; prepare statistical information and to prepare a capability process, that *"this is a serious case in which you can issue a final written warning".* Another suggested option was a protected conversation. It does not appear that the claimant's ill-health the year before was discussed in this call - certainly there is no mention in this email (719).

89. On 7 September the claimant attended a Drama Results meeting, and the claimant became upset and left the meeting after a few minutes. On the same day the respondent wrote a letter to the claimant detailing its account of the meeting, that she left *"visibly distressed, you said … you were going to get yourself signed off from work…"* (732).

90. That evening the claimant sent an email referring *"steroid withdrawal can leave you in a depressed, tearful and anxious state…"*. The next day she texted Mr Phillips saying that she was in *"a state of steroid withdrawal … depressed tearful, lack of concentration and overreaction followed by exhaustion as the body tries to re-balance.. the arthritis is moving in again…".* She also states that she is *"… not in the habit of letting the school or my students down, despite the deterioration of my health over the past few months"* (829). Ms Davies comments on this statement, saying that this *"would seem to suggest that this is the reason why her exam results were poor"* (738). Despite this statement, the Tribunal found that there was no evidence that this clearly potential issue – the effect of the claimant's illness on her performance at work – was adequately considered and dealt with thereafter by the respondent or its HR advisers.

91. During her two week sickness absence the claimant kept Mr Phillips updated on work, set work for her pupils, give information on her health and on the progress of her ongoing treatment and its effect on her.

92. The claimant was invited to a meeting on her return to work, Mr Phillips characterised this was to be a *"return to work interview"* to *"fill in the return to work form check how things are and update you on work etc."* (746)

93. Before the Dept Review meeting and while still off work, a lengthy email from the claimant said *"… As one person cannot deliver the curriculum and extra-curricular to the standard that I or the school are happy with. I put this into emails at least twice last year and came up with solutions. They were never fully discussed. … I am an excellent practitioner but I am not a miracle worker… honestly. I am very well aware of what needed to be done but simply could not do it under the 'given circumstance'".* (751)

94. The claimant attended the Drama Department review meeting. Prior to this she added her analysis to the review documents and raised several issues, including a lack of essential skills being taught at KS3, that her request for a student teacher had been blocked, the impact of two school productions, and her ill health. She said, clearly alluding to her illness and request for a student teacher that "*Concerns were raised on at least two occasions that Examination Drama would not achieve its targets under the current set of circumstances. Alternative routes were given to help aid success…"* (767-769).

95. The Drama review meeting on 11 October 2016 was followed by a summary of the discussions. She refers to the impact of her ill-health. A large number of her points relate to the following: some of students' capabilities, others willingness to learn or to do the work required, a weak group of students at one level, that target grades at another level were *"excessively high"*. She also stated that students did not have enough preparation for the written exam: *"you had tried to get everything done and left the performances until after Easter. This meant there was not enough preparation time for the written exam… You said you 'did this mean that this [exam] suffered? I put up my hands and say yes, it did"* (770-772). In an email responding to the notes of this meeting her first comment is *"It needs to be noted that focus, concentration and sustained mental effort with arthropathy is an issue"*, that Mr Phillips *"… is fully aware of this situation regarding my health and has been from the outset … from August 2015"* (780).

96. For Mr Boyd, the results showed her performance had been poor. As he put it in his evidence, *"The written papers were catastrophically bad. The practical results were strong, the issue was with the written exam. … It was woeful performance in written papers that caused us concern."* One issue of significance for him was that the claimant referenced the individual performance of a large number of the students, and gave her reasons for their underperformance. This was, for Mr Boyd, an issue of concern, putting blame on the student, making excuses and not taking ownership *"… she's entitled to do so about individual students. It was the quantity, she sought to blame student after student. I was concerned about endemic underperformance in written papers."* Mr Boyd accepted that the claimant had, in considering *"ways forward"* after the results, put forward suggestions for improvement. Mr Boyd's view was that *"elements"* of what she had set out were appropriate *"… but our view was that this does not go far enough. There were fundamental flaws in*

*students preparation … what struck us was the high grades predicted throughout, so accuracy of focus. … She does not go far enough or understand the severity of failure to prepare for the written pape*r*…. She had mistimed course, and did not prepare students effectively for written paper."* He accepted that she had admitted she got it wrong and did not give enough time to prepare, but *"… this is the one sole admission of responsibility…"* For Mr Boyd, the *"inference"* was that she was admitting not preparing the students, her referred to page 771 – the claimant's justifications for the poor grades *"…In her experience, should not have put herself in this situation. The issue for us was the breathtaking, shocking way in which she sought to blame outcomes on students. The situation, the context, timing, lack of self-awareness and responsibility, led us to believe that she had breached Teacher Standards. … she did not do additional work, and failed to annotate essays. It is professional responsibility of teacher that students are well prepared…".* The Tribunal concluded that this view did not take into account what the claimant was saying about the effect of her health on her ability to properly prepare students, that instead the focus was on what the respondent characterised as the claimant's *"…fundamental flaws … did not prepare students effectively… mistimed…"*.

97. That day, 11 October 2016, Ms Davies gave advice to Messrs Griffiths, Boyd and Phillips following up from an earlier conversation. This advice records the following: *"Her admittance at today's meeting that she failed to prepare the pupils properly for their exams despite her assurances previously that the pupils were on track"*, and referencing poor performance, parental complaints, pupils not returning and reputational damage. The offer of a settlement was discussed, that if not a disciplinary investigation and capability proceedings can be run concurrently, and that *"… although failure to prepare pupils properly may be gross misconduct, you would need to be able to evidence that she deliberately failed to prepare the pupils for their exams rather than a capability (performance) issue."* (773).

98. In answer to the question – are you serious in your allegation that the claimant chose not to teach this cohort – Mr Boyd's answer was "*we were concerned about her performance to commission an external investigation. This made recommendations."* The Tribunal did not accept that this was an accurate account of the discussion on this issue between the respondent and Ms Davies, whose letter does not recommend this charge, it instead suggests that the respondent would need to find evidence of wilful failure to prepare students if this charge was to be pursued.

99. While Ms Davies was aware that the claimant had raised issues of ill-health previously – and had done so again at the Drama review meeting that day – this is not referenced at all in Ms Davies response. Mr Philips said in his evidence that there was a discussion about the claimant's health in this call, however *"we had been supporting her illness, there was no evidence of ill-health impacting on students anticipated grades, which were good, she was deceptive..."*. We accepted that the tenor of the call was about wilful underperformance, that although the claimant's health may have been mentioned in this call, it had not been discussed as a possible cause of her performance in exam preparation. The Tribunal considered that this can be explained by Ms Davies reference to

a *"deliberate failure"* to prepare, which, the Tribunal concluded, was the position the respondent wanted to take. Ms Davies had already made it clear that a capability process alone could not immediately lead to the claimant's dismissal.

100. The Tribunal concluded that Mr Griffiths was seeking a clear steer on how best to dismiss the claimant. Ms Davies was aware that the claimant was referring to a medical condition, and the Tribunal considered that reference to the claimant's ill-health must have been made in discussions with Ms Davies, plus her earlier comment that the claimant was suggesting ill-health was a factor in her poor performance in teaching the exam elements. However, the claimant's health was not referred to at all – instead a reference was made to the need to show deliberate failure by the claimant for a gross misconduct dismissal.

101. The Tribunal concluded that the respondent would have known that there were potentially complex reasons for exam under performance, a significant part of which may have related to the claimant's ill health and consequent inability to properly prepare students, she was saying she was not capable of performing to the standard required because of the symptoms she had been experiencing. The claimant had made repeated references in meetings and emails with Mr Phillips of the effect her condition was having on her. We assumed that Mr Phillips made Mr Griffiths aware of her health at different points in the year, that the basic information was known. The Tribunal considered it a wilful failure by the respondent to put into the picture the full detail of its knowledge during 2015/16 of the claimant's ill-health; we considered that the respondent was required to fully reference the information in its knowledge to its HR advisers, because the claimant was saying that this was a potential cause for her underperformance.

102. The following day, 12 October 2016, the claimant was asked by Mr Phillips if she wished to take part in a protected conversation, the claimant queried why the points she had raised the day before had not been taken into consideration; she was told, *"yes, that is why they are trying to have this conversation".* The claimant asked *"about her illness and the fact that she was chronically ill for a year and was diagnosed in April."* She was told *"the conversation was coming from poor drama results"*. His note states *"She wants to speak to her union first. … Not had the conversation as she didn't want to hear the message. Thinks now the time to go a capability and discipline."* (775).

103. The following day, 13 October 2016, the claimant's union rep asked Ms Davies that the respondent agree not to *"instigate any further action"* prior to the claimant's meeting with her rep the following week (776).

104. The claimant was still required to complete her PMRP 2015/16 and in an exchange of emails on 17 October Mr Phillips informed Mr Griffiths and others that one aim of the next line management meeting with the claimant is to *"Close down"* the PMRP 15/16 *"and go through each target ticking off what has been done and what has not – update progress notes…"* The email also refers to disciplinary and capability processes running concurrently (784a). On 18 October, the claimant emailed Mr Phillips saying that she had received union advice and that it would *"only muddy the waters"* to have a meeting to discuss

performance management, targets, OH referrals, and sickness retirement (787). In response the claimant was informed that this would *"miss the school deadline"* to complete the performance management review and that an OH referral also needed to discussed, and other LM updates. The claimant agreed to have a meeting later in the week querying only the timing of the OH referral (787-9).

105. Ms Bridgewater of Hoople Ltd had by this time been appointed as an investigator for the disciplinary investigation. On 20 October 2016 there was a further exchange between her and Mr Phillips and Ms Bridgewater on two draft letters – one requiring the claimant to attend a capability hearing, the other to attend a disciplinary investigatory meeting. In her comments on these drafts, Ms Bridgewater references a new disciplinary allegation, the *"provision of misleading and inaccurate data"* which she says is the *"key argument",* if proven, to support dismissal for some other substantial reason (799-801).

106. There was, the tribunal found, a genuine view within the respondent that the claimant's ill-health may have been a factor in the poor exam results, that capability was an issue. There was also, we found, an understanding that a capability process would not lead to the claimant's dismissal, (per Ms Davies earlier email referring to a final written warning). The Tribunal found that the respondent was trying to build a case for disciplinary by alleging a wilful failure to teach, and providing misleading data – which was, for Ms Bridgewater (the independent investigator) the *"key argument"* to the claimant's dismissal.

107. On 28 October a protected conversation process remained a prospect – the respondent made it clear to the claimant's union representative that *"we will be starting a disciplinary investigation and a capability process next week"* if settlement could not be secured (801a). A great deal of weight in the subsequent process and in the respondent's evidence in this case was that the NUT regional rep, says the respondent, accepted that the capability process should be put on hold while the disciplinary process should continue. In fact, in her email dated 28 October 2016, the NUT rep says, *"As I previously stated, to enable Jo to consider any options she needs to be able to fully understand what the school is proposing to do and why. … Once she is fully aware of all the school's concerns she can consider this and respond accordingly … Clearly we would want Jo to be given every opportunity to consider this before any formal processes are enacted … so 'without prejudice' the school set out their concerns so that she may consider this and respond accordingly…".* The response was that a without prejudice letter would be sent, that *"Mr Phillips has also agreed that they won't start the capability process but that given that this issue has been going on for a while, Jo will be given a letter … inviting her to a disciplinary investigation meeting"*. (801a-3). Accordingly, it was the respondent's decision to proceed down the disciplinary route and pause the capability decision and not, as suggested by Ms Bridgewater in her evidence, that *"the Union says not to do capability, so the Union has driven us down this route of disciplinary.*

108. On 1 November 2016 the claimant emailed Mr Phillips, referencing an agreed referral to OH, and *"…to recap what needs to be done for perspective and Dept*

Plan ..So that I could do it this afternoon." (804). On the same day the claimant logged onto the PMRP 2015/16 and amended all of the targets from *"no"* to *"yes"* and added comments including that she *"Survived to the summer… There is likely to be an effect on Examination Grade because of lack of support throughout the year as illness worsened. … Results not good… I put this down to the progressive nature of the illness. … I don't doubt there will be repercussions, not looking forward to review, bound to be a lack of understanding…"*. She also wrote, *"disappointing and unexpected GCSE results. … Major factor being illness of staff member …".* On the front page she wrote *"Not signed off"* and dated it Nov. 2016 (2713-19). The claimant's comments and when and why she wrote them became a very significant issue in the disciplinary process.

109. On 4 November 2016 the claimant emailed Mr Phillips saying *"Just wondering when we will complete the [PMRP] 2015/16?"*, Mr Phillips queried, because the previous union advice was not to do so, the claimant's response was *"I believe it should be fine now. I will double-check…",* and there was a provisional agreement undertake this review and the OH referral later that week at the Line Management meeting (823). Mr Phillips sought advice from Ms Davies who suggested that the performance management review is completed *"so that the cycle is completed"* (822). Mr Phillips accepted in his evidence that the claimant had filled in the form prior to asking for a meeting in her email of 4th November. He accepted that *"if we had had the meeting and discussed the review, it would not have been falsification… I did not pencil in meeting. … I looked at [the PMRP 2015/16] the claimant had provided, and there was some phraseology that led me to believe that it was done for a specific purpose. …"* A further issue for Mr Phillips was that the claimant had ticked a criteria as successfully complete when this was the job of the appraiser, but he accepted that this would not be dishonest if she made a *"genuine mistake"* in doing so.

110. A great deal of weight was placed in the course of the disciplinary hearing and in these proceedings that the Union had told her not to have a performance management review, that one was not therefore in contemplation for her or Mr Phillips thereafter. We considered that this was a misreading of the chronology, which was that the claimant had filled in the PMRP 2015/16 and had then requested the meeting to discuss.

111. Later on the same day, 4 November 2016, the claimant was handed an invitation to an investigation hearing letter, setting out the allegations of misconduct. The allegations in summary were that the claimant had:

    (1) failed to prepare students adequately for exams at GCSE, AS and A2 level,
    (2) provided misleading and inaccurate data resulting in students not achieving their predicted grades,
    (3) as a consequence there was potential reputational damage,
    (4) as a result of parental complaints there was potential reputational damage, and
    (5) all the above has impacted on the respondent's trust and confidence in her (814-5).

112. On 8 November the claimant and Mr Phillips completed an OH referral form; this summarised the claimant's symptoms from September 2015 to date. The performance management review was not discussed at the 8 November meeting as had been anticipated earlier in the week.

113. On 9 November 2016, Ms Bridgewater said that in a meeting with Mr Phillips she was told about the claimant's absences, and that she asked for and was given a copy of the claimant's absence record. She accepts that she was shown *"a number of emails"* between the claimant and Mr Phillips referencing her condition and its effect on her, that she was aware of her difficulties holding a pen, the ongoing medical investigations during the previous academic year. The Tribunal accepted that Ms Bridgewater was aware in general terms of the nature of the claimant's symptoms in 2015/16.

114. On 16 November 2016 Ms Bridgewater wrote to the claimant setting out the respondent's allegations and inviting her to a disciplinary meeting: as well as the investigation allegations of 4 November, another allegation was added - that the claimant had failed to uphold Teachers Standards, namely promote good progress and outcomes, plan and teach well-structured lessons, make accurate and productive use of assessment, and fulfil wider professional responsibilities (848-9).

115. On 25 November 2016 the claimant was interviewed by Ms Bridgewater, the transcript of interview running to 109 pages. She gave Ms Bridgewater the PMRP 2015/16 she had completed, with its handwritten comment *"not signed off"*. In her evidence, which we accepted, she says that she presented this as a self-review and she did not suggest that this had been completed by or with Mr Phillips. The Tribunal was not taken to any passage which suggested the claimant had inferred that this was a document which had been agreed with or okayed by Mr Phillips. It was put to the claimant that he had misled Ms Bridgewater by the way she presented this document; the claimant's evidence was that as far as she considered it was clear that this was a self-assessment that had not been signed-off. The claimant's health was also discussed at this meeting, including the issues that had arisen in the year, the potential diagnoses, and the claimant provided details of her medication, that the claimant was in pain.

116. By early December, the respondent was discussing a further issue with Ms Bridgewater, Mr Phillips referring to *"… the issue of [the claimant] wilfully falsifying the [PMRP 2015/16] document… would it be reasonable to suspend her based on the fact we have concerns it may happen again"* (868). Ms Bridgewater responded saying that *"if it is deemed that these amendments were made in direct response to the allegations that JL was made aware of 2 working days earlier then this may be regarded as gross misconduct as there is an attempt to provide misleading data to the investigating officer and falsify a school document … this is a new allegation amounting to gross misconduct for the falsification of a document which has then been provided for consideration as part of the investigation"*.. (870). The claimant was suspended from work on

13 December 2016 on the basis of this allegation. Prior to suspension she was not asked any questions about this issue.

117. This allegation came about because Ms Bridgewater compared two versions of the PMRP 2016/16 – one printed out by Mr Phillips in September and the one printed by the claimant on 1st November. In her evidence Ms Bridgewater said that she was *"aware"* that Union involvement was the reason for not completing the performance management cycle; her statement says that the claimant made no reference at the investigation meeting that she had made recent amendments, that this fact should have been disclosed to her. She says that she does not recall being told that employees could make entries on this document and she was *"genuinely surprised"* at the difference between the claimant's version and Mr Phillips version of this document. She accepted that the claimant had pointed out to her that this version was not signed off but that *"the subsequent points she made me believe that a discussion had taken place with LM"*; Ms Bridgewater said that not signed off can still mean it was *"completed"* and not signed-off didn't indicate that a conversation with Mr Phillips had not happened.

118. However, Ms Bridgewater was also aware of the emails between the claimant and Mr Phillips (4 November) about the performance management meeting. Ms Bridgwater asked Mr Phillips for clarification, and was told that he did not ask the claimant to complete her PMRP 2015/16, that she had been advised not to do so by her union, that she had then emailed asking to proceed with the PM *"We met on the 8th Nov but this meeting was spent looking at her OH referral…"* (880). In her evidence, Ms Bridgewater says she discussed this with Mr Phillips, who, she said, *"was of the view was this document would not be touched, no reason to go into it, so no reason to change"*. She said one of the main issues that made her think that this was an intent to deceive was that the claimant wrote about herself in the 3rd person as "'staff member' *… So all elements together made me thing that Mr Phillips had some input, but I was not made aware that the recent amendments were by the claimant."*

119. The Tribunal considered that the conclusion reached by Mr Phillips and Ms Bridgewater on this allegation – that the claimant had deliberately altered the PMRP 2015/16 in order to affect the investigation – was unsustainable on the facts known to them, which were that the form had been altered by the claimant who had then sought a meeting to discuss it. Instead, emphasis was given to the fact the claimant had not positively asserted the meeting had not gone ahead. The Tribunal concluded that again, the emphasis of the investigation was to find evidence to dismiss the claimant, rather than an even-handed review of the evidence. The claimant was not interviewed before this conclusion was reached and she was suspended before finding out her account as to why she had filled in the form this way. She was emailed to ask what the meeting was she was referring to, and she briefly replied that she thought the form was about the DIP meeting (and not the performance management meeting), but she would check. In fact, the DIP meeting had occurred before she had filled in the PMRP 2015/16, but before she double-checked she was suspended from work on 3 December 2015 and she lost her IT access.

120. The new allegation was *"falsification of data provided on the performance management review statement 2015/16"*, that after she had been aware of allegations of misconduct she had made an *"attempt to provide misleading data to the investigating officer which may be regarded as gross misconduct"* (872-3). Her IT access was also suspended.

121. It was not until 3 January 2017 that the claimant was interviewed about this allegation. She explained when she had filled in in the PMRP 2015/16 and why, that she was aware on her return to work that this and other records needed to be completed. She explained she had not had a chance to clarify she was referring in her email to the planned meeting on 8 November 2016 to discuss the PMRP 2015/16. Ms Bridgewater acknowledges that there was a meeting arranged to discuss the PMRP 2015/16; as she says to the claimant *"Yes, but then it did not happen because you talked about the occupational health instead?"* the claimant explained that *"…at the meeting we were going to have to then discuss it, … He would call it up on his screen. And we would talk though the bits and pieces …"*. The claimant described the PMRP 2015/16 as a self-review and that if there is disagreement Mr Phillips *"…changes that if he doesn't agree them"* (1942 – 1963).

122. On 5 January 2017 Mr Boyd spoke to the claimant's husband saying that the suspension was being lifted, *"…and that I wanted her back to work as soon as possible…"* (876)

123. The investigation into the other issues of misconduct continued, Ms Bridgewater interviewed 3 pupils who had decided not to attend the 6th form following their GCSEs: they all said they felt less prepared for the written exam, one pupil said that they assumed they had been taught what they needed to know; another said the claimant was at times unprofessional and the expectation was you always had to be upbeat and not upset; that the teacher was stressed at times, and sometimes said not very nice things, on one performance day being unpleasant to one pupil.

124. The summary of allegations of gross misconduct for the disciplinary hearing were as follows: the claimant had failed to prepare students adequately for the written exams at GCSE, AS and A2 levels; she had provided misleading and inaccurate data point at all levels; as a consequence the claimant had failed to uphold Teaching Standards of promoting good progress and outcomes, planning and teaching well-structured lessons, making accurate and productive use of assessment, and fulfilling wider professional responsibilities; that these issues caused potential reputational damage to the school; as had the fact of parental complaints; all amounting to a breach of trust and confidence; in addition the claimant had falsified data on her performance management plan.

125. The lengthy investigation report includes a section *"Extenuating Circumstances".* In it Ms Bridgewater says that the claimant *"claims that her progressive illness should be considered , however .. the school have offered support which was declined, offered an OH referral in February which was declined … they have supplied additional cover in class … a flexible working request has been considered and JL's timetable has more free periods than the*

contractual 10% PPA time…". She says that the claimant was able to use email regularly, student feedback *"could have been done in other ways.."*. The report recites some law on reasonable adjustments, concluding that there was no requirement to make reasonable adjustments where the employer does not know and could not reasonably be expected to know that the disabled person has a disability or that they were likely to be placed at a substantial disadvantage.

126. The Tribunal concluded that this section of the report did not properly address the issue that the claimant was making: one of her defences to the disciplinary allegations was that her condition did have an adverse effect on her ability to teach in 2015/16. We concluded that the report effectively misstated the issue that the disciplinary panel needed to determine at the disciplinary hearing. Ms Bridgewater's conclusion is that because the respondent did not know of the illness at the time, there's no duty to make reasonable adjustments. The Tribunal concluded that the question that the respondent was being asked to consider, but failed to do so at any stage in the process, was the following: did the claimant's condition have an effect on her ability to teach, if so to what extent, and was this at least a partial explanation for the exam results?

127. The claimant was at this point signed off work. She continued to provide email etc assistance to Mr Phillips. The claimant's rep, Mr Deneen, submitted papers, which included the following allegations: prejudice against the claimant as NUT rep; disability discrimination. In seeking advice from Hoople, the disciplinary chair Mr Potter stated that the union issue was *"an irrelevance",* but that the issue of discrimination needed to be considered *"carefully because it features strongly in the papers".* The advice received was that an open mind needed to be kept on all issues (908). On the basis of the evidence of the disciplinary hearing transcript dealt with in more detail below, the Tribunal did not consider that the disciplinary panel did keep an open mind.

128. Because of the claimant's ill health, the hearing set for 22 February 2017 was cancelled. Mr Potter was surprised by the cancellation – he considered that if the claimant was not fit to attend it could go ahead in her absence (917). A letter was set to the claimant asking for her consent to a medical report from her GP on 28 February 2017, on 3 March she was written to again asking her to attend a disciplinary hearing on 15 and 17 March 2017.

129. While off work, the claimant had been contacted by a 6th form pupil of the respondent, enquiring about her and asking a subject-related question. There followed an exchange of emails in which the claimant referenced her health and the disciplinary issue. The claimant also suggested they correspond off work email. This issue came to the respondent's attention, and her access to the School's IT systems were suspended on 10 March 2017 on grounds of an alleged safeguarding concern. The issue was referred to the Local Authority Designated Officer.

130. The claimant was informed of further disciplinary allegations by letter dated 13 March from Ms Bridgewater - the claimant had breached the school's ICT

acceptable use policy; breached the school's safeguarding policy and committed a breach of Teaching Standards (984-5).

131. Following a meeting between the LADO and school, the claimant was informed by the LADO by letter dated 20 March 2020 that the allegations were *"substantiated"* – she had communicated with the student about the disciplinary process and suggested they email outside the system *"… this is behaviour that I hope with reflection that you agree is not appropriate and is likely to undermine the student's confidence in the school"* which placed the student *"under unnecessary pressure".*

132. On 14 March the claimant via her rep sought a postponement on grounds of ill-health. On 15 March the claimant was advised that the panel had met and considered that it was *"imperative" that there were no further postponements, that "it was the panel's view that dealing with these matters would be beneficial to your state of health and the current period of stress…",* and that it would proceed in her absence on 17 and 21 March 2017 (995-6).

133. The claimant submitted a statement saying that *"two factors"* have arisen which are of *"critical importance"* – the state of her health and the altered role and increased workload and responsibilities. She states that *"neither has been given any meaningful consideration",* that they have been *"wilfully and intentionally"* ignored and discounted. She references the failure to recruit a student teacher, that her abilities were also affected by her medical condition, the history of her condition, that Mr Phillips was *"made aware of my condition and "Its changing nature throughout its vacillations and final diagnosis… this was obviously an impact on my teaching"* which she says was witnessed by others. She referenced difficulties with focus and concentration and that *"weariness and fatigue are inevitable…"*. She references the knock-on effects, that essays became impossible to mark. She said that the year 13 and 12 results were to be expected, in line with predictors and comparable to other subjects they took. She said that the GCSE results were very unexpected, *"… I believe the reasons were various but illness, loss of teaching time … all took their toll".* She states that the allegation of falsification of data was shocking, and *"that this charge was based on false and concocted evidence"* and had no merit. She also states that her NUT rep role had a bearing on the allegations.

134. The claimant did not attend the hearing on grounds of ill-health, and it went ahead without her attendance (or her union rep) over 3 days. The hearing generated over 200 pages of transcript. The following can be gleaned from these notes:

<u>Allegation - deliberate falsification of the 2015-16 performance management progress with the aim of misleading the disciplinary investigation:</u>

135. This was initially *"upheld"* as proven gross misconduct by the panel part-way through the evidence of the first witness' evidence to the panel, Mr Phillips. His evidence was that he would have expected the claimant to have added to this document, *"because it's an organic performance management it's up for discussion… performance management is the individuals responsibility so yes*

they should take ownership of this ….". He says that "…*throughout the year… these noted are amended and added into this document".* (1018) he also says that changing the 'no' to a 'yes' was within the staff member's remit - *"yes, they should take ownership of this…*".

136. Mr Phillips however does not reference the claimant's 4 November 2016 request for a meeting, or the provisional date for it. What he does reference is the claimant emailed *"…to say that she'd been recommended not to do anything with regards to performance management … so that would assume for me that means don't go touching performance management for last year… why would you then go away and put information in your performance management that you've been told or advised by your representative not to…"* (1021).

137. There is discussion as to whether the form has been completed retrospectively, including the wording added by the claimant that she was *"not looking forward"* to a meeting. Ms Bridgewater referenced the chronology – that the claimant had suggested that this referred to the departmental meeting she had attended, but would check, and she had not emailed back to say it was another meeting (e.g. the 8 November meeting). This, she concluded was evidence the claimant had deliberately amended the form after the departmental review meeting had occurred. *"So that then triggered the suspension … because it did appear that an amendment had been made and presented in a way to excuse …"* (1020). Ms Bridgewater does accept that the claimant informed her at the 3 January 2017 meeting *"…she said at that point that she thought she'd got it wrong and it was in relation to a different meeting"* (1020). Ms Bridgewater did allude to the fact that the claimant had raised a request for the performance review to take place, and she also quoted the claimant's interview comment that *"..'this is the [performance management review] that's not been signed off'"* and references the claimant saying it's not been signed off twice more in the interview. Ms Bridgewater also says *"At no time did she say to me but I've just made these amendments within the last few weeks or have not discussed them with Kristian."* (1015-6).

138. The panel concluded that there was *"very clear"* evidence that the PMRP 2015/16 had been *"falsified in order to affect this hearing";* one panel member states he could *"think of no reason why she would be making changes to the performance management review…"* or refer to a meeting which had happened *"as if it was the future… "* (1024), that this *"clearly established"* the form was changed to affect the disciplinary hearing (1026). On being told that the panel doesn't need to make the decision that day, there is agreement to delay the formal decision on this allegation.

139. The Tribunal concluded that there was only a very superficial assessment of the evidence; that Mr Phillips and Ms Bridgewater highlighted evidence which pointed to this document having been deliberately altered to mislead Ms Bridgwater, and did not highlight what was clearly exculpatory evidence, the 4 November email and anticipated performance review meeting. The evidence of the claimant at the disciplinary interview at least suggested that she believed the PMRP 2015/6 review was a work in progress, that it had not been signed off. Mr Phillips had accepted the document was a work in progress which the

claimant had the right to amend. The chronology suggested she had amended the document in advance of an anticipated performance review meeting. Mr Phillips had accepted that had the meeting taken place, there could be no question of this disciplinary allegation being put forward. Given the seriousness of this allegation, the Tribunal concluded that at the very least this issue needed to be further considered and the documentary evidence properly assessed. Nor was further consideration given to what was meant by the claimant repeatedly saying the document had *"not been signed off"*. Ms Bridgewater's conclusion was that the claimant had not said that this document was not agreed with Mr Phillips, and this is clear evidence of her fraud, and this conclusion was accepted without consideration of the contrary evidence.

Allegation: failing to teach the pupils at all levels to the required standard

140. Mr Potter summarised the points he considered the claimant was raising - being a one-person department, the issue of the student teacher and the issue of the supply teacher, *"…and that the school never took account of the additional pressures that that put on her."* There was an extensive discussion of these issues.

141. There is some reference in this allegation to the claimant's health, this also being considered as a separate issue on the 3rd day of the hearing. In discussions during this allegation, there are the following references to the claimant's ill health:

    (1) the claimant's unsuccessful application for the Associate Headteacher position in April 2016. Mr Potter says this application was *"In the throes of illness as well as at a time when she's feeling the pressure of the job … I don't get why someone who's feeling the pressure of a job … and growing uncertainty of her illness and growing disability as she describes it would apply … I don't think it aligns with what we were reading about burdens…"* (1032).

    (2) Student teacher request: Mr Potter says his experience is that student teachers *"add to your burdens"*, the *"huge workload"* that a student teacher would have brought to the claimant.

    (3) In a reference to amendments the claimant sought to the investigation notes of her meeting *"this is at a time when I believe Jo said her focus and tenacity were not good"* (1043). The Tribunal concluded that this was a comment of scepticism as to whether she was as affected as she suggested by her illness.

    (4) Ms Bridgwater states that the performance grades did not suffer, that while the claimant alleges that she was drained of energy as a result of the practicals, the data showed students met their performance grades, that while the claimant states that written revision was affected by *"an adverse reaction of medication and thus focus and tenacity was not good…"*, this was only a short period of time, and the claimant only had two days off in this period, the impact of her absence would be minimal,

and that this *"summary is only focussing on the period immediately prior to the exam whereas preparation for GCSE is obviously a 2 year course"* (1057). She references the OH report's reference to fatigue and being in pain at work, the claimant's reference to exhaustion, saying *"There is also evidence to say that written elements could have been impacted but I can't find any reference as to why the performance elements haven't been affected and the written elements have. I would have assumed that it might possibly be the other way around…"* (1058) She references the medication that the claimant was taking and had on occasion refused (Prozac), and concluding that *"the impact on GCSE group from medication was negligible because we are talking about over the counter painkiller. Jo's attendance at work was also consistent at this time…"*. She states that the OH report confirms there are no work related *"contributing factors to her illness. The grade outcomes would indicate that students were not adequately prepared…"* (1058-9).

142. The Tribunal concluded that this review of the available medical evidence was full of suppositions about the effect of the claimant's health on her performance. It was also inaccurate. For example the claimant commenced taking opiate prescription painkillers and anti-inflammatories from November 2015 onwards, as she had described to Ms Bridgewater. The claimant's chronology was saying that the work required by her to prepare the performance elements were exhausting her and adding to her symptoms; that this would potentially have a knock-on effect on the rest of her work. Given that the claimant had raised the effect of her health on her condition the Tribunal considered that Ms Bridgewater, by using words such as *"negligible"* when describing the effect of the claimant's condition was significantly downplaying the claimant's own account of the effect of her condition, without good cause to do so.

143. There is discussion of the claimant's explanations for the poor exam results, one of which was that targets were set too high. In discussions during the disciplinary hearing, the issue was characterised as follows: the students did not meet the targets the claimant was predicting – accordingly the students have massively underachieved (in Mr Boyd's opinion) (1046) and Mr Potter's view "*… I would say massive and pervasive underperformance [by the claimant because it's almost all students…".* For Ms Bridgewater the real issue is that the claimant had continued to input grades *"that were higher than the achieved grades throughout the year and that's really the issue … we are talking about the grades that were input…".* On the claimant's explanations for each students' underperformance, Ms Bridgewater's view is *"… it would seem unusual to me, that there is an explanation for every single person…"*, a point accepted by all the panel members (1047). There is consideration of the claimant's explanations of under-attendance of the students, and it was found, on the evidence, that there was little correlation between attendance and achievement. One issue raised - where the claimant's predicated grades have *"come from",* and significant reference to the extent of underperformance, against other subjects and against other schools. There is refences to the claimant's admission that there was not enough preparation time for the written exam, and the claimant's admission *"I put my hands up and say yes, it did"*. Mr Potter

characterises this as an admission from the claimant that she *"didn't prepare them fully enough".* (1051)

144. David Boyd's evidence at the disciplinary hearing dealt with the aspirational nature of targets, also realistic *"so we set ours at the top end",* "and how teachers use, for example, assessed written work to assess students. He said he was struck by *"the "overwhelming sense"* from the claimant that *"this was the students fault … there was a litany of excuses…."* He references the results review meeting in September 2016, that after the claimant left this meeting ill, he said *"all I have heard is excuses… in October, to our surprise, we got more of the same… how it was the kids' fault…"* (1067). In response to a question as to her capability, he says *"I think she was capable… we had no concerns.. not reason to think she wasn't; capable of doing this … I think that the lack of acceptance of responsibility, professional responsibility, this is what surprises me the most…something has gone seriously wrong in those kids' preparation … seriously wrong. When people make mistakes and you say I am sorry, that's gone badly wrong, I want to fix it. Ok we'll help you fix it..."*

145. Mr Philips' gave evidence on the setting of targets. He accepted that the claimant had said the targets set by her predecessor for the GCSE group had been set too high for that group – but that when they discussed the students' progress over the year, the claimant's *"data was always in line and sometimes, in some cases, better … [the claimant] provided evidence to suggest that the students are working at or towards those targets…."* (1069). With reference to the claimant's comment that the children did not *"cram"*, Mr Phillips said that this could only have been because the teacher *"…hadn't taught them effectively and they were trying to get the information into them prior to the exam… A panicked teacher…"* (1071).

146. For AS level, Ms Bridgewater summarised the evidence as follows: the claimant's evidence was that the group of students had decided collectively to work to achieve a B grade – and this is what she therefore entered this into the revised grade predictions; the panel agree that this *"…suggests that you are handing over responsibility"* (2075). Mr Philips view of the range of essay marks showed that the students did not know how to answer the questions properly.

147. For A level, Ms Bridgewater references the claimant showing most students were at their working towards grades, that the claimant's explanation in her scores was that the student were working hard, she is going to give students high marks in their learning profiles if they were working to their ability, even if they were not going to get a high mark; the results showed that a significant number of students underperformed in the written exam, with a *"mixed bag"* in terms of whether students performed better, the same, or worse in Drama than their other subjects. There is reference to the claimant's comment that some students did not work hard enough, that she had accepted she had not prepared the students well enough for the written paper but that the overall impression of the Drama results meeting was that the claimant *"found an excuse for every student … or the students were at fault… it was quite shocking to hear quite a dismissive way of dealing with it…"* (1080 & 1082).

148. There was, for all exam points, a detailed examination of what the results were, what targets had been set at different times of the year by the claimant, the consistent underperformance in the written exam versus the performance element, and some of the claimants explanation's. The Tribunal concluded that there was not, at this point, a proper consideration of what the claimant was saying about the impact of her health on the students' exam results.

Allegation - Providing misleading and/or inaccurate data

149. The panel reconvened on 21 March 2017. For GCSE, the claimant had added data suggesting 93.3% of students were on target for A*-C grades, which meant for Mr Phillips that *"the data supplied did not give any cause for concern.."* nearly all GCSE students were two grades lower than their target grade (1099-1100). There was focus on the claimant's comments to parents and pupils after the Mock exams – that the papers were disappointing but *"we will rectify",* that the message for the claimant should have been clear – focus on the written paper. However, the working at grade remained high/on target for each student, which, said Mr Potter, *"reassured [the school] that we're on track. It will be ok… there's plenty of time to deal with it and we will focus our time more on the written…"* (1101-2).

150. Ms Bridgewater references the claimant's defence – that she did not consider the data was misleading or inaccurate, that she mentions her absences *"but only one of these absences were on a day when GCSE was being taught so I do question whether that was an impact…"* that her absences were *"odd days … the other days she has presented for work and I think there is an assumption that if you are presenting for work you are fit to carry out all those duties"* (1103).

151. At this point there is some consideration of the impact of her condition on her ability; Ms Bridgewater accepts that *"without doubt"* there would be some days better than others, Mr Potter accepts that while fatigue may affect performance *"physically having to move your arms about and move around stage … the focus is meant to be on written work … your ability to engage … may be relatively unimpaired…"* (1104). A view is expressed and accepted by the panel, that this would not affect the claimant's ability to predict results, also that she was given additional PPA time and was released from other duties.

152. There is a refence to medication the claimant was taking, offered and refused, and a brief summary of her symptoms. There is reference to the fact that the claimant applied for an Associate Head role in this period, that she engaged in a *"relentless"* rehearsal schedule outside school, reference to the claimant's comments on FFT, that she asked for a student-teacher, there is reference to the claimant being asked to provide new estimate grades by Mr Phillips, that while these were in most cases lower estimated grades but *"he had not been given any indication to worry about those ticks and these grades…"* (1113). Ms Bridgewater references the claimant saying that she was not able to mark essays and was not given support, which is contradicted by the fact an amanuensis was offered and rejected (1118).

153. Ms Bridgewater references that an employer is only required to make reasonable adjustments when it knows about the disability – *"and I would question whether it was reasonable for the employer to know that … we don't really know what it is… how can an employer reasonably know that there were adjustments that needed to be made?"*

154. The following remarks by panel members received general agreement from the panel and Ms Bridgewater: that even if the targets set by the previous teacher *"…are inflated, aspirational, etc. she is still predicting that they can be achieved";* the claimant failed at any time to suggest she was *"not confident in the grades that have been set, that it would have been quite within her remit to do so and to predict whatever grades she thought were appropriate for that cohort";* that while she says she was *"striving to support students with overinflated grades … these are the grades that …she has wilfully submitted to her line manager";* that *"… it is not unreasonable for the school to trust that … is accurate information based on your wealth of experience";* where there are *"no concerns over a capability issue";* who is *a "confident teacher applying for a promoted post.."*; that there is *"huge evidence that she is capable of making these decisions".* (1120-1123).

155. Ms Bridgewater confirms that the claimant's evidence to her was that *"I have no cause not to put in accurate data"*, this is *"her confirmation that she is standing by her results",* that the claimant stated the grades were accurate to the best of her knowledge – that were *"where I believe they were … Yes, absolutely … I'd have no cause not to make it accurate";* that the claimant had acknowledged that *"her performance grades are pretty much spot on and it's her written prediction that are out and then again, her defence is about this 6 hours taken off"* (1124). Ms Bridgewater acknowledges that the claimant states that *"one of the problems"* is the Drama mocks are prior to Christmas, that there is no further mock, unlike in some other subjects, *"and that's when the illness kicks in, from about February onwards… So that is her justification. And .. again we have got this 'crammed essays in' so we're talking about cramming again as a technique"* (1125); that when asked *"why"* the predicted and actual grades were so far apart *"And her response is 'Because of illness, lack of support really from the school, you can't operate at 100% so you have got that factor and the factor of the Easter School'…";* that she said she had informed Mr Phillips about some of her concerns *"…'we would have talked about that and we would have covered lots of things…'…"* (1126).

156. Ms Bridgwater further summarises her position on the claimant's disability: *"I have asked 'Do you believe it could be seen as misleading?' … And she said 'No I don't think in light of the fact that … from the year before I have been given a diagnosis … which severely impacts on and had impacted on my teaching'. But I would say that she has been given the diagnosis in April, but … there doesn't seem to be a clear indication of where this is going between the September and at least the February. So I am not saying there weren't issues there were issues, but she was presenting for work".*

157. The responses of the panel, which are not contradicted, is that the illness has not impacted on the practical grade assessment, or on her ability to make grade

predictions, that the claimant has not said *"the gap's too big"* between her grade predictions and their actual performance, that in fact she is saying her grade prediction judgments were sound, accordingly the school were not informed of any concerns, that Mr Phillips *"feels very strongly that he was misled."* (1128-30).

158. On being called again to give evidence, Mr Phillips states that *"…there was no point that Jo ever said to me that the students were at risk of not achieving any target grades. There were points in the year where individual students were mentioned …. But that's just individuals, not as far as a cohort…"* He references receiving the moderated performance results for GCSE practical - 86% A*-C – and *"she said 'It might drop a couple of percent but not considerably.' So she was happy and she was convincing me that it was going to be well above 70%."* He confirms that he *"definitely"* felt misled by the data the claimant presented.

159. In relation to A level grades, Ms Bridgewater states that *"Jo disputes that the data provided was misleading and it was input in good faith at the time as accurate to the best of her knowledge."* She references the claimant stating that her arthritis would have impacted, she could not write on their papers. Mr Potter's comment was *"I don't quite see how her disability impinges on her ability to help a group improve their writing…"*, another panel member said the pupils *"can do the writing and she can observe, check, assess…";* Ms Bridgwater observes that the claimant had not said *"I am struggling a bit more now, it's getting worse or something, it's not being resolved… can I take you up [on an amanuensis]?"* (1151).

160. Mr Potter makes the point that *"she is saying she believed the data to be accurate … and the [first] reason for it not transpiring … she puts down … is illness"*; that it was not the case that the workload or timetable were excessive, that the school had assisted to reduce workload, contrary to what the claimant was saying.

161. Ms Bridgwater concludes that the school reports comments do not suggest this was a weak group or that there were issues which could not be overcome, that the comments suggest a *"positive picture of potential outcomes"*. One panel member suggests, without being contradicted that there is *"a whole set of paradoxes in how the performance of this group and their progress is being relayed"* referencing the claimant's view that students were absent, didn't work, special needs *"at the same time they are all working to a B, they are all profiled as 1 or 2, … they are on target to achieve their target grades… so I am just seeing whole set of paradox's which for me completely end up misleading the school, the parent, the student… ok."* (1135-6)

162. Again, the Tribunal concluded that in its assessment of this charge, the Panel displayed a dismissive attitude towards the claimant's evidence of her ill-health, effectively it did not accept the claimant's overall point, that she did not teach to standard, particularly from November 2015 onwards, that this was a potentially disability-related reason for her poor performance and hence poor results against the data she was inputting during the year. The Tribunal also considered that Mr Phillips did not outline his involvement in meetings with the

claimant about the Mock results when concerns were expressed about pupils' performance; nor did he outline to the panel his view he expressed to the claimant at the time, that the claimant should carry on with what she was doing to achieve the required results.

Allegation - Potential Reputational damage to the School as a result of the above issues

163. Ms Bridgewater outlined it was a wider potential damage, given the opportunities to publicly view the grade outcomes, her popularity and contacts within the community, the impact on school applications, that some students did not return, the parental complaints. Reference was made by the panel to the potential impact of the results within the community.

Allegation – as a result of Parental complaints and concerns there is reputational damage to the school

164. Reference was made to students saying why they did not want to return, as above.

The claimant's sickness record, how it may impact on her work and the support the school offered her

165. Towards the end of the hearing, specific consideration was given to this issue. Mr Phillips was asked about how her illness impacted on her work, her absences, and what support was offered. He stated it started October 2015 onwards. *"it was a little bit of a patchy scenario through the year…";* he describes the possible diagnoses she had been given, from menopause, or inflamed *shoulder, "…so there was nothing specific … that I knew was wrong with Jo. It just seemed to be a few niggly things going throughout the year… she was saying she didn't really know what was going on and she was back and forth to the doctor, because she was trying to get to the bottom of it… so there's a lot of different bits and pieces going on… There wasn't any point where she said to me 'I can't do my job because I am unwell … even at the points, when the arthritis in her had [meant] that she couldn't hold a pen … she was assuring me that she was fine to be in work… But all the time she was in work and I was saying to her 'are you ok? Is everything alright?' she was saying that she was ok to carry on, carry on in work."* (1175). He references the claimant falling off her chair in front of students, her flexible working request. Mr Phillips was asked whether there was any evidence from the claimant *"as to why the written elements might have been impacted more so that the practical elements because of her illness at that time … saying 'well I am really struggling with the practical side of things, I am finding it really tiring …?"* The Tribunal noted that the claimant had in fact made comments to this effect, including in emails and discussions from November 2015 onwards with Mr Phillips. However, Mr Phillips did not acknowledge this, instead he said he would see her delivering practical lessons, that *"… she never once said to me that the practical means that she wasn't delivering the written paper properly … that never happened. There wasn't any time that she said that, because she was unwell that she wasn't able to deliver the written paper…"* With reference to her inability to write,

he said *"…she could have typed feedback… she didn't say to me at any point that she wasn't able to mark those books or mark the paper or not deliver that written paper because she was unwell"* (1179). In fact, the Tribunal noted that the claimant had said to Mr Phillips, including in writing, that she could not mark books and that she was providing verbal feedback, and that Mr Phillips had in fact commented on her lack of written comments in May 2016.

166. One panel member states that because Occupational Health say that adjustments have been agreed *"that's kind of recognition on both sides that adjustments have been made that were appropriate … so the school has done everything it can possibly can before even… the diagnosis has happened and Occupational Health are happy that everything has been done …*" (1179-80). The Tribunal noted that this did not deal with the retrospective issue – the impact of the claimant's health on her work during 2015/16. The Tribunal noted that this question was never asked by the respondent at any stage of the disciplinary process.

167. When asked about additional support the school could have given, it was accepted by the panel that the claimant had not asked for anything which had been turned down other than a student teacher: Mr Phillips made the following comment, that *"… in my opinion the student teacher wasn't as a result of her illness"*. (1180). The Tribunal considered that this remark downplayed the claimant's request, and in particular it was made very clear by the claimant's email of 9 January 2016 that its necessity and purpose was related to her health. The Tribunal concluded that it was incumbent on Mr Phillips to faithfully state to the panel the claimant's reasons for this request.

168. Ms Bridgewater said that a *"general thread"* was that the claimant *"didn't want to make a big deal of it…".* Mr Phillips agreed, *"No she didn't. She was presenting that, yes she was unwell but she was trooping and she was fine to be in work…. I'm not going to sit here and say that she wasn't unwell, she was unwell and she didn't know what she was dealing with … It was not until her diagnosis in April … I would say that she got progressively worse after her diagnosis, but by that time …we're coming to an end… she did find it difficult to get off a chair and she did find it difficult to hold a pen but, when she was up and she was moving she was fine. And she was saying she was fine."* (1182-3)

169. The Tribunal concluded that Mr Phillips failed to provide a wholly accurate account of the claimant's symptoms, their effect on her and the reasons for her request for assistance. It was not *"just a few niggly things.."* she was complaining about; the symptoms did significantly worsen because of an adverse medication effect in April but we concluded that he was aware that it was an increasingly debilitating condition from November 2015 onwards. Mr Phillips does not reference the claimant's comments on the condition's effect on her, for example her email of 6 January 2016. We concluded that the effect of Mr Phillips account was to significantly downplay the adverse effect of the claimant's condition.

<u>Allegation - Failure to uphold Teacher's Standards</u>

170. The issues outlined included that the claimant had no scheme of work, had not properly assessed the students, had not kept a mark book. It was accepted, said Ms Bridgewater that the claimant had known there was a problem with the written element, *"but it appears this is not built into the lessons…"* (1190); that the claimant had not fulfilled her wider professional responsibilities in the results that had been achieved.

Allegation - Breach of trust and confidence

171. Ms Bridgewater said that *"there appears to be a continual thread"* through the other allegations that there appears to be a fundamental impact on trust and confidence. Mr Phillips had stated he would find it hard to trust the claimant's data, that the results had been a shock based on the data he had been given *"…and it has put him in a difficult position."* Trust had also been impacted by the claimant's amendments to the performance management document; in discussion about this, and the claimant's clarification on 3 January 2016, Ms Bridgewater stated that *"…it was not clear to see which comments were old or made by Kristian or ones which were new and made by Jo"* (1193-4). She references the claimant's statement, that it could only be loss of trust and confidence *"if the school fails to consider her illness during all of this."* In response to which Ms Bridgewater refences her *"fairly good"* attendance, *"…it would be reasonable to plan any written work and marking around what could or would work for her … do it a bit then, do a little bit at lunchtime…".* The additional teacher – the cost of which *"could be a factor for not making reasonable adjustments…"* She says there is no way the school could have known it was a long standing illness, she had good attendance and presented herself as fit for work: "*Whilst Jo's commitment is commendable there is a reasonable assumption that .. they are fit to fulfil the duties for which they are employed."* (1194)

Allegation – breach of safeguarding and ICT policies

172. This was dealt with on the third day of the hearing on 24 March. Prior to this the claimant had made a written submission, stating this was a gathering of evidence to support a predestined outcome. Ms Bridgewater told the panel that the claimant had been told not to email students, and had been made aware of ICT policy, but she had done so, and in doing so *"seeks the sympathy"* of student, (1217). There is reference to the LADO meeting that the complaint had been substantiated by LADO.

The NUT rep issue

173. On the issues raised by the claimant, one was that she had been targeted as an NUT rep. The panel concluded that all the evidence was on the issue of relations between prior reps and the Head; that the evidence presented by the claimant showed a positive relationship between herself and Mr Griffiths. The Tribunal noted that no reference was made to the pejorative emails about the claimant's union activities, also the emails from Mr Griffiths which appeared to correlate to these activities (for example the request for her Bradford Factor

score, FIGJAM) pointing to a further negative connection with her union activities. The "legal action" letter – Ms Bridgewater says that *"that there has been a misunderstanding on the interpretation of that letter…"* (1204-5); Mr Potter says that the claimant's interpretation is *"almost a perverse interpretation"*. (1205). The panel accepted Ms Bridgewater's explanation that there is no evidence that the claimant's treatment was due to her trade union activities.

174. The claimant was dismissed by letter dated 31 March 2017 without notice. All allegations were upheld, the majority as gross misconduct, the counts of potential reputational damage amounted to misconduct. The letter states that the panel had *"specifically considered"* ill health *"but found no evidence of any impact…"* on the issues, noting that the claimant had applied for a more senior role, with greatly increased workload, that OH could not assist without a diagnosis, but that *"notwithstanding this you continued to have support…"*. The letter noted the claimant's *"apparent absence of any sense of responsibility or accountability…"* for the students' attainment. The letter stated that presenting falsified data *"you will have known, and intended, that this would 'point the finger' of failure at the individual students and away from you"* (1250).

Appeal

175. The claimant appealed, pointing to amongst other reasons, the *"excessive additional workload"* as director of performance and HoD and *"there was a failure of duty of care … in relation to the debilitating effect of the, initially undiagnosed, chronic medical condition … Both workload and illness were beyond my control"* (1253). The claimant did not attend the appeal hearing, again on grounds of ill-health, the management case was presented by Mr Potter, who reiterated the findings made, and *"the key evidence"* which caused them to be upheld (1292) - the issues around illness and trade union membership were not dismissed or wilfully ignored as she alleges. Of her view that this should have been a capability process, account was taken of her experience and that she had *"consistently blamed the school and the students for those results… at no point does she take any accountability"*. He says that from the beginning of the claimant's interviews, the *"… disability/illness has grown. It starts off as a minor element of her argument. It ends up now as very very major … does this make you falsify your performance management results…?* (1294). On the issue of disability, Ms Bridgewater states that there is no evidence that the respondent knew about her illness, hence there was no duty to make adjustments. She stated *"I also think it's reasonable as an employer that you would expect the symptoms to be alleviated by the treatment Jo was trying. She was trying several different treatments… I think it's reasonable to expect that … medical issues would be likely to be resolved. I don't think that anyone would really expect it to be something that is going to be life debilitating…".* A panel member makes the point that having symptoms *"does not make you"* predict written results. *"So I think that disability was considered".* (1301). She references the amanuensis, and that fact a student teacher would mean more work, not less, and Mr Potter references some of the adjustments that had been made *"and we decided that the school had done anything it reasonably could to assist…"* (1304). Ms Bridgewater concludes that

the claimant was coming into work, and it's not unreasonable for the school to conclude she was capable to work - *"I mean what more could a reasonable employer do at that point?"* (1304). Mr Phillips reiterated that he knew that the claimant was unwell, *"but the illness seemed to change as the year went along…"* and referenced some of the different potential diagnoses that had been made during the year, that adjustments had made been made during the year. He repeated his evidence to the disciplinary panel.

176. The appeal outcome was that the dismissal was upheld. The appeal letter noted that the claimant had been offered reasonable adjustments – an amanuensis, a reduction in hours, more free spaces, support with the school production, access to facilities, and support from OH. The letter stated that the claimant's absences were few, but in any event should have triggered the claimant to amend student progress data; that this had not been accurately recorded meaning the school could not put in place remedial measures; that the heath issues had not affected the claimant's judgment, or her ability to follow reasonable management instructions. The letter stated that while her condition may amount to a disability, *"…adjustments were discussed with you agreed, and implemented … It remains unclear how you feel that your workload or your condition may have impacted on … allegations raised against you…"* (1285-1289).

177. Again, the Tribunal considered that the issue of the claimant's health was inaccurately addressed by the panel. Some of the measures, including school production assistance, reduction in hours, access to facilities, had only been put in place in the new academic year, i.e. after the time-line of these allegations. Given the claimant was raising that her performance was at least in part attributable to her ill-health, we considered that it was a requirement for the employer to properly record and take account of those adjustments which had been made during this relevant period, rather than those made afterwards. As stated above, the Tribunal considered that Mr Phillips did not accurately record the claimant's symptoms as she was describing them to him in meetings and emails. In advancing the respondent's case, Ms Bridgewater failed to properly set out the legal requirement: her position throughout was that the respondent was not aware it was a disability, therefore there were no adjustments (apart from those made) which could reasonably be made.

178. The claimant was referred by the respondent for professional misconduct to the NCTL; in a letter to Mr Griffiths NCTL state that a formal investigation will be conducted by an external legal firm to consider whether the claimant should be prohibited from the profession on grounds of unacceptable professional conduct or conduct that may bring the profession into disrepute (1382-3). Following investigation, a decision was taken to *"close this matter without further action"*. In doing so, the letter stated that consideration had been given to the claimant's submissions, including what she said about the impact of her illness on her ability to teach. It refers to the contact with student, saying the claimant *"appreciates that this was contrary to the School's policies and ill-thought"*. It states that while *"not condoning*" the claimant's actions they are *"not of sufficient seriousness or occurrence to reach the level required … there is not a realistic prospect of a prohibition order being imposed…"* (1416-1418).

Submissions

179. Mr Bunting for the respondent provided a written submission and expanded on it. He said that the claimant's evidence changed during her case, *"a recurring theme"* in the claimant's evidence; for example it was positive for students to stay on to AS and A level, but negative when they do not. It is clear that in Summer 2015 the claimant was granted a "bye"; her and Mr Phillips when through the 14/15 review and discussed and all relevant boxes were ticked as complete.

180. The respondent accepts that from January 2016 the claimant was disabled. However, the respondent was unaware of the condition; the claimant said 'no thanks' to an OH referral, which is *"Indicative of the fact she was not struggling with work or did not perceive she was."* Despite the claimant being aware of issues with student work from January onwards at this time she did not seek help and continued to predict good things. She failed to take up the offer of an amanuensis, she applied for an assistant head teacher role, and in all of her discussions with Mr Phillips she never suggested any issues of problems with the students, she had open discussions with Mr Phillips and never suggested any issues or problems with students.

181. When she was off work in June 2016 it was reasonable to request her Bradford Factor score, and in fact nothing happens even through it is a high score. And nothing happened after the NUT strike. And even if Mr Griffiths is annoyed by the claimant's incorrect assertions of intimidation, this does not mean he sought to dismiss for this, or is evidence he sought to dismiss.

182. The letter from Mr Griffiths to the claimant on 12 July 2016: while this letter might suggest that Mr Griffiths was frustrated, in fact his letter references unfounded allegations, and at 2477 he describes his intent, which was to *"support the claimant and the NUT"* but the complainant remained anonymous and it was necessary to set out the school's position on malicious and unfounded allegations.

183. The August exam results. The historical results at 784 are significant as they show that the significance of these is that the respondent reacted to very bad results in context of this history, and the context of written versus performance and any objective analysis of results; and this is in the context of the working towards targets at 2235 – 2238, 2241 and 2234. Everyone is at least one grade below their working towards grade at GCSE, AS 1-3 grades below – *"abysmal results"*. The A2 results show that the students were hard working – all with positive learning profiles of 1. The claimant did not put in a considered, thoughtful attempt at a predicted grade. After the results advice was sought, *"when Mr Phillips considered he had been deceived"*. The respondent sought advice, as it should have done. At the Drama results meeting the claimant made *"lots of excuses",* the claimant knew the results were bad, however there was no discussion about the claimant's health. She blames the students, but she has been inputting 'working towards' – so either they're all strugglers, or they are all doing ok – this makes no sense.

184. The claimant's document prepared for the Departmental Review meeting, does not blame disability – while she says that this was because Mr Phillips already knew about this, *"this does not make sense"*. The claimant has not taken responsibility (apart from 'holding her hands up'), there was a big problem with the results and a big problem with her answers. It is only by 14 October that the claimant talks about health problems and says this has impacted on her. Also, the 18 October 2016 emails make clear that the union has asked for the capability process to be paused, everyone knows the performance management meeting was not happening then. In any event, while the advice was to go down capability, conduct and a s.111A conversation, it was not surprising the conduct route was followed – the claimant was alleged to have committed a dereliction of duty and had failed to bring this to the respondent's attention to assist pupils. The claimant knows that the respondent is results driven, *"she chooses not to flag these things"*.

185. The claimant then amends her PMRP 2015/16. Her position is that this is part of her DIP – but this is not as stated at 823. She says she was told to – but she wasn't. She said that this is the way it had been done the year before - no it was done at a meeting with Mr Phillips. Even if this was the reason she did this, she is really saying that she did it one way this year because I did it a different way last year.

186. On the issue of the 4 November 2016 email to Mr Phillips requesting her PMRP 2015/16 meeting – how does this tie to a deliberate act - to deceive? Mr Bunting stated that the respondent's position was that this email was her *"checking if she can keep this document doctored without Mr Phillips knowing about it"*.

187. Mr Bunting argued that the next matter of consequence is on 25 November – when the claimant does understand (1916-7) that the respondent is taking about her grade predictions – now in her statement the claimant says she does not understand.

188. On the claimant's ill-health, she tells Ms Bridgwater about her illness, and this is considered (page 1711); the tribunal was asked to *"consider carefully"* this report when when deliberating.

189. The claimant clearly misled Ms Bridgewater – e.g. page 1886 / 2719 – the PMRP 2015/16; the claimant has presented this as completed with LM feedback and is using it to support her position. She must have thought this was of significance, but she did not say the nature of her amendments to this document. The document is written in 1st & 3rd person – including talking about dreading a meeting that has already occurred. *"This looks suspicious"*. However the claimant is not suspended for four days – *"Not a knee-jerk reaction. The respondent is very concerned"*. It is taking appropriate action. At the investigatory interview on 3 January the claimant does not mention the current reason she is giving for why/how completed. The claimant never addressed the allegations head-on.

190. Ms Bridgewater provided a fair summary of the case to the disciplinary chair and, argued Mr Bunting, her integrity should not be called into question. The disciplinary process was fair. The further disciplinary charge - safeguarding – again the respondent acts reasonably, is cautious and considers before making it a disciplinary allegation. The panel reconvenes, it deals with health issues and the outstanding allegations appropriately and the issues are presented fairly and in a balanced manner at the disciplinary hearing. At no time did the claimant engage with the allegations.

191. The NCTL outcome is, argued Mr Bunting, immaterial as the matter for the respondent is what it reasonably believed, the NCTL being a different test of prohibition on practice.

192. On the legal issues – disability and reasonable adjustments – the claimants shortcomings were not due to her illness; she did not seek help and it is only when under scrutiny that she says this is a disability. On the question of whether now the claimant is saying at the disciplinary hearing that ill-health is an issue, Mr Bunting stated that the 2015/16 adjustments that were needed were provided. The respondent was not obliged to get a medical report, and the claimant did not ask for one.

193. Mr Faux for the claimant raised issues arising from Mr Bunting's closing including the following: Ms Bridgewater only considered the following issue on disability – whether the respondent was on notice of disability during 2015/16, she considered that it was not on notice of disability *"and left it there"*. Mr Faux argued that it was *"clear what happened"*. Mr Griffiths dies not enjoy interactions with the claimant on union issues; the *"sneery tone"*; this *"annoyance becomes rage … an overheated reaction"* when the school went not strike. His *"response was not rational"*, his emails showed *"an underlying petulance"*, which was consistent as he had *"ruled the roost locally with impunity for years"*. An issue in the evidence – the resignation of a Governor – gives *"a careful and damming"* account, and asks for her concerns to be investigated; they were not.

194. The claimant had engaged in lawful union activity by way of her email after the strike; everything in this email amounts to protected act. The claimant cannot suffer a detriment for carrying out her role as union rep. The email is leaked to Mr Griffiths, there is nothing in the letter which requires legal advice but unacceptably he seeks it. He would have been told that the email constituted lawful activity, that there is nothing wrong with what the union has done *"But he instead wrote a ridiculous, petulant, arrogant and whining letter to stop the clamant"* (696). This is not supportive as alleged by the respondent – the only reasonable conclusion is that it is a *"cease and desist letter aimed at preventing proper union activity in the school*".

195. Mr Griffiths *"is not here to answer"*, the respondent having been advised that the claimant would seek adverse inferences from his absence, as he along with Mr Boyd were the *"prime movers in the push to dismiss"* the claimant.

196. The FIGJAM email also shows there is an underlying issue with union activity; by 14 July Mr Griffiths is no longer prepared to meet her. Factually, Mr Faux argued that the Tribunal *"must conclude"* that by July 2016 Mr Griffiths had fixed on the claimant as a *"union activist whose presence will not be tolerated."* He goes *"shopping for information"* - her Bradford Factor, her file request following the voting issue. And he is asking for emails regarding the claimant from managers - see Mr Phillips forwarding emails. Then his PA brings the allegation regarding the claimant over the voting issue – *"FIGJAM. File please"*. This is the context – the claimant must be dismissed.

197. While Mr Phillips states in his statement (paragraph 38) that dismissal was being considered after the September Departmental review meeting, in fact Mr Phillips is seeing advice much closer to the results. The GCSE results *"gives the opportunity"*. But in fact disclosure shows that Mr Phillips is seeking advice before the end of August 2016 and a capability warning and protected conversation is being suggested – page 719. At this stage Mr Phillips is asking how to dismiss, but he also knows from interactions with the claimant that she has had a very difficult year medically.

198. Mr Faux argued that the claimant has been criticised throughout by not cooperating with Occupational Health earlier; but the fact is that the claimant *"believed that she was coping until she found out she wasn't, and the results showed this because she did not have energy level to prepare students properly".* The claimant also appreciated that she had got the balance wrong and needed to do more drilling. Mr Phillips knows that the claimant was a good teacher, he's observed lesson observations, he knows she's been ill and has discussed and seen this throughout the year. *"But he does not tell HR this. It was not on his agenda to do so".* The 30 August email *"showed what Mr Phillips was looking for".* Had Mr Phillips provided full disclosure he could have said that the results were worse than expected, but her lessons were good, there is an unresolved medical issue which needs to be understood. *"But he does not do so as he is following an agenda already set."*

199. Mr Faux argued that the Departmental review, is, after the 30 August email, *"an attempt to garner evidence which ends in disarray".* By October she is in a catch-22 situation: if she tries to explain why the students perform badly, she's guilty; if she says she got her teaching wrong, she's guilty and her evidence is taken as evidence for failing to take responsibility for teaching. And when she says that she got the balance wrong, this is not treated as a proper admission, instead evidence of misconduct. If this had been a genuine performance review meeting, this would have potentially led to a capability process, but not misconduct. Instead, they talk immediately about trust and confidence – which makes it *"impossible not to do anything but dismiss"*.

200. The goal of the respondent was a quick exit and settlement. Ms Bridgewater's contention that it was the union who said do not go down capability "*the emails do no support"* what she says. Instead, a new conduct allegation is made that *"because the results were awful, the data must be deliberately false"*. While Mr Phillips says that the 'working towards' was deliberately entered wrongly, he also accepted in questioning that working towards is a matter of professional

judgment and a teacher is entitled to take into account progress on an assumption *"that the teacher will be able to reach with enthusiasm and passion"*.

201. The motive *"must"* therefore, argued Mr Faux, be a bad motive – because of her trade union activity. It is "r*are to uncover so much deception, this is not a normal case with misunderstandings".*

202. In November 2016, Mr Phillips alleged that the PMRP 2015/16 is different, "*he could have said, 'that's ok its draft.' He chose not to as he can see the investigating officer is finding a route to dismissal … Mr Phillips does not explain the truth".* Even if the respondent is right and the claimant was confused about whether 'yes' means completed, or met, "*it makes no sense to create a false document and then attempt to get a meeting to discuss a false document."*

203. On the safeguarding issue, the claimant communicates with a student who is in distress about her teaching, and she replies about the curriculum. She accepts that this is improper conduct, but *"it does not merit dismissal".* And it would not have happened but for the respondent's actions, and this was *"seized on"*, but DfES guidance suggests the claimant was offering comfort to a student – *"This was not a serious safeguarding issue, very minor."*

204. Mr Faux argues that the investigator was not independent, it is part of an organisation providing HR services to the respondent – it's not a requirement to be independent *"but do not characterise as such - this is a fig-leaf for the school's agenda"* and this can be seen in the *"contorted analysis of the claimant's conduct"*

205. Mr Faux argued that it is a *"factually proven case that Union activism is the reason for her dismissal".* A competency process would have led to her illness being considered and her employment continuing. *"Performance management was not pursued as the respondent hoodwinked the investigator."* If the claimant had not been engaged in union activities, the respondent would have considered the impact of illness; at worst a PDP or competency plan and *"a developing understanding of illness."*

Conclusions on the evidence and law

206. The Tribunal concluded that the reason why there was initial consideration of a formal process was because of the poor exam results, there was a genuine shock within the respondent that the Drama results were as bad as they were. We concluded that the respondent was justified in enquiring into the poor results, and it also had to deal with student and parental disappointment because of them and the actual and potential impact on the students, also the withdrawal of students from entering 6th form. The poor Drama results also, we accepted, did have a potential impact on the school's reputation. This was undoubtedly an issue of significant concern which the respondent needed to enquire into.

207. We considered the allegations as follows: the 'core' allegations – wilful failure to teach, provision of misleading data, deliberate falsification; the 'secondary' allegations' – i.e. those that flow from the core allegations – breach of trust and confidence, breach of teacher standards, potential damage to reputation; thirdly the 'safeguarding' allegation.

Trade Union detriment

208. At an early stage there was clear consideration given to the prospect of a capability process, and Ms Davies advice was that this would not necessarily lead to dismissal. She said that a disciplinary process leading to dismissal could only be the result of deliberate misconduct by the claimant and that evidence was required to sustain such an allegation. We concluded that Mr Boyd misrepresented the position when he said that a disciplinary allegation of this kind was recommended by Hoople.

209. The Tribunal concluded that at this early stage, when the respondent was considering whether to go down a capability route or a disciplinary route, there was a lack of proper consideration of the claimant's medical issues known to the respondent. It is hardly referenced by Ms Davies in her emails. Instead, a decision was made between 11 and 20 October that a *"key argument"* for dismissal was the claimant had provided misleading data; this decision forms the basis of the initial disciplinary charges. The Tribunal considered why this was the case – why was the medical information minimised and failings by the claimant maximised – the core allegations of wilful failure and providing misleading data? The Tribunal concluded that the respondent knew at this time that if it properly considered the claimant's medical history and the available medical evidence, this would point towards a capability process: as Mr Phillips accepted in his evidence, it is possible to have a genuine view on student progress, achievement of which is then affected by teacher illness, and that this would not amount to a disciplinary issue. The Tribunal concluded that the respondent believed that if it pursued a capability process, the claimant would potentially remain in post at the end of it.

210. The Tribunal concluded that the motivating factor at this time was a desire to dismiss the claimant, and that it considered it could only do so by maximising the allegations against her as ones of serious conduct issues – the core allegations of wilful failure to teach, misleading data entry and falsification. The Tribunal considered that the secondary allegations automatically fell into place once the core allegations were formulated – they were inextricably linked, as Ms Bridgewater acknowledged when saying that trust and confidence was the thread running through all the earlier allegations the panel had considered. Without the core allegations, the secondary allegations would not have been made, certainly if an appropriate consideration of the medical issues had also been undertaken.

211. The Tribunal asked why was this the case? We considered whether it could simply be genuine anger, and the claimant's refusal to accept any culpability as characterised by Mr Boyd; that there was a genuine belief by the respondent that these were issues of deliberate misconduct - a wilful failure to teach,

deceptive data-entry, deliberate falsification. We concluded not, because the evidence could not, we considered, lead to a conclusion that the claimant's conduct was wilful, deceptive, deliberate, in the ways alleged. An analysis of the available evidence clearly shows that a significant issue was the claimant's ill-health, and there was no direct evidence of deliberate misconduct bar the bald facts of the exam results and the data entries. All the evidence pointed to the claimant being an enthusiastic and dedicated teacher who suffered significant ill-health and who had pointed out the need for assistance, particularly with the performance and production element of her teaching, because of her ill-health. To reach the conclusion that her conduct was deliberate as alleged, the evidence of her enthusiasm for her role needed to be discounted, her medical evidence needed to be minimised, her holding her hands up needed to be minimised; her explanations for individual exam results discounted without proper consideration – particularly given she had discussed disappointing student Mock results with Mr Phillips – as to their merit. And this, we found, is what the respondent did in deciding to accuse the claimant of deliberately providing false working towards grades and wilfully not teaching. Also, it did not provide full disclosure of documents or information to Ms Bridgewater, and during the investigation interviews and disciplinary panel meetings the effects of the claimant's ill-health on her as seen by Mr Phillips was minimised. We concluded that Ms Bridgewater was also aligning herself with the respondent's clearly preferred position – dismissal.

212. We also noted that the disciplinary allegation of falsifying the PMRP 2015/16 was made on the flimsiest and unsustainable evidence, which effectively ignored (for example) the claimant's 4th November 2016 email request for a meeting; the investigation conclusion that the form had been deliberately doctored to hoodwink the investigator was an unsustainable conclusion on any fair assessment of the evidence. The claimant was further investigated and suspended from work prior to their being a proper preliminary investigation, and Mr Phillips failed to provide a wholly accurate timeline of events. For the reasons set out above, we concluded that this was a further attempt by the respondent to maximise the conduct issues against the claimant: while Ms Bridgewater was, we found, initially genuinely puzzled by the two versions of this document, the issue was seized upon and became an allegation which, once the chronology of events became clearer (the 4th November email, the proposed meeting thereafter), was unsustainable on its facts.

213. The Tribunal was invited to draw an adverse inference from the pejorative emails sent regarding the claimant referencing her trade union activities, the letter threatening disciplinary action for making unsustainable (etc.) allegations, the Bradford Factor request, FIGJAM, the request for emails about the claimant around strike-day. We were also asked to draw an adverse inference from Mr Griffiths non-attendance as a witness to explain these issues. We did draw an adverse inference from Mr Griffiths failure to attend. We concluded that the driving force behind the decision to proceed down the disciplinary route was Mr Griffiths. We considered that there were questions about his email correspondence which needed answering, instead this was delegated to Mr Boyd. The claimant had drawn an early link between her trade union activity and her treatment at the disciplinary stage, and this was dismissed without

investigation by the disciplinary panel. The respondent did not refer at all to these pejorative emails during the disciplinary process, they were not given to the disciplinary panel. The respondent's attitude towards the claimant's union activities was, we considered, exemplified by Mr Boyd who saw no wrong in two colleagues emailing pejorative comments about the claimant, linked to her activities as a trade union rep. The Tribunal concluded that the claimant had raised issues as a staff rep and had enthusiastically promoted the national strike and had then criticised the respondent's approach to the strike, that all of these activities had from the outset very significantly annoyed Mr Griffiths, on the respondent's own case he was incredulous, and that her union activity was counter to Mr Griffiths settled view that there was no issues within the school which required active union involvement.

214. The Tribunal concluded on the basis of all of the evidence we heard that the main purpose for proceeding down a misconduct process – with allegations of wilful, deliberate, falsify conduct, and allegations of breach of trust – instead of a capability process which would consider the medical issues in more detail, was because of the significant animus that the respondent, and in particular Mr Griffiths, had towards the claimant. We concluded that this animus was expressed in emails and in his requests for evidence which coincided with the claimant's trade union activities. We concluded that this animus was inextricably linked to the claimant's trade union activities. It was this factor, we concluded, which triggered the disciplinary process instead of a capability process, and it was this which led inevitably to the allegations of gross misconduct.

215. We concluded that the disciplinary panel did not have actual knowledge of the decision taken by the respondent to proceed down the gross misconduct route. However, the panel was on notice that this was an allegation by the claimant – her union activity – and it displayed no interest in considering this as an issue. We concluded that the panel was resolute in deciding to agree with the respondent's case, no matter what issues the claimant raised, and that it effectively acted as the respondent's proxy in the decision to dismiss.

216. The Tribunal concluded that the decision to proceed down a disciplinary route on charges of gross misconduct and the claimant's dismissal was because of her trade union activities. We saw this as all part of the same continuing act – the decision to institute a disciplinary investigation process onwards and that this process ceased only at the date of dismissal. Thus, this trade union detriment (i.e. not dismissal) was a continuing detriment to the date of dismissal. We concluded that the automatic dismissal claim and the trade union detriment claims were all brought within the relevant time limit and that there was therefore no issue of any of the acts of detriment being brought outside of the 3 months limitation period.

217. What of the safeguarding issue? The Tribunal concluded that this was a serious issue. We did not conclude that this allegation was made because of the claimant's trade union activities, it was made because the claimant had committed an act of very poor judgment which amounted to a potentially significant safeguarding issue. We address this allegation in more detail below.

Disability – knowledge

218. The Tribunal concluded that the respondent's knowledge of disability was from 17 November 2015. We considered that it was at this date that the respondent should reasonably have considered that the claimant was a disabled employee under the Equality Act provisions. Her condition had lasted 6 months at this date, was clearly having a substantial (i.e. more than minor, trivial) effect on her and this was visible in her day to day interactions at work. Her condition was not steadily worsening, was undiagnosed despite tests; the claimant was discussing this with Mr Phillips. We considered that the respondent, despite not knowing the name of the impairment, *knew that the claimant was suffering from a substantial impairment which was very likely to be long-term – i.e. it needed to be diagnosed, then treated and stabilised, and there was a potential for a long-term course of medical treatment thereafter. The Tribunal concluded that the respondent did know - and if not certainly would reasonably be expected to have known - by 17 November 2015 that this was a condition which would last longer than one year.*

Direct disability discrimination

219. We noted the legal test: how would a hypothetical comparator, who was not disabled but who had engaged in substantially the same trade union activities and whose students had achieved the same marks have been treated? We concluded on the evidence that such a hypothetical comparator would have been treated in exactly the same way, being subjected to the same disciplinary allegations, and for this reason the claim of direct discrimination fails.

Discrimination arising from disability

220. We noted that the respondent accepts that the claimant was treated unfavourably - she was subjected to the disciplinary process, and she was dismissed. However the respondent does not accept that there is a link between her medical condition and the disciplinary allegations and dismissal – that these did not arise in consequence of her disability.

221. The Tribunal concluded that the clear reason why the claimant was subject to unfavourable treatment was because of the poor exam results, the relevant "something". Without the poor exam results there would have been no disciplinary action or dismissal. Did the poor exam results arise in consequence of the claimant's disability? The Tribunal concluded that a significant factor leading to the poor exam results was the claimant's ill-health. We considered that the overwhelming evidence showed that the claimant was struggling to teach, was increasingly ill and exhausted; that this played a significant part in the poor written exam results, that this would have also impacted on the claimant's forward-thinking assessment of students' working towards grades. We concluded therefore that the unfavourable treatment - the disciplinary process and the claimant's dismissal - arose in consequence of the claimant's disability. We noted that it was not necessary for the school to have known that the poor exam results arose in consequence of the claimant's disability, (City of

York v Grosset), although we find as a fact that the respondent's SMT did in fact know that the claimant's ill-health was at least potentially a significant reason for the poor exam results.

222. We also considered the rationale of the respondent for determining to proceed to a disciplinary process with these disciplinary charges. We noted that the respondent was aware of the claimant's health-related issues from November 2016 onwards, that the claimant was raising this as a factor for poor performance; yet this information was downplayed when deciding to proceed to a disciplinary investigation and further downplayed during the disciplinary process by both the witnesses, Ms Bridgewater and by the disciplinary and appeal panels. We concluded that the evidence from 2015/16 set out above showed that the claimant was, prior to the disciplinary investigation commencing, asserting a positive case that her disability had affected her performance. We concluded that one of the rationales for proceeding with allegations of deliberate misconduct (wilful, deceit etc.) was to minimise the claimant's account of ill-health as a factor for poor performance, and instead maximise allegations of deliberate misconduct. We concluded that this emphasis on deliberate misconduct therefore arose in consequence of the claimant's disability – it was connected to the fact that the claimant was asserting health as an explanation for poor results. We concluded that the issue of the claimant's health as a possible factor for poor performance was a significant issue on the mind of the respondent's team when the disciplinary allegations were being formulated.

223. **We next considered whether the respondent was justified in treating the claimant in the way it did in the investigation and disciplinary and appeal process and by dismissing the claimant. We accepted that the respondent had a legitimate aim of ensuring high standards of teaching. We considered that the respondent had strong concerns about the Drama exam results and that it was accordingly proportionate to undertake an investigation into what had occurred and why, to both ensure the prospects of this occurring again did not happen, and also to assess the culpability of the claimant for these results.**

224. **The Tribunal concluded that the manner of this investigation, in which the claimant's health was downplayed and deliberate misconduct issues maximised, was not an appropriate or a** reasonably necessary – it was not a rational means (*R (Elias) v SoS Defence)* - of achieving its legitimate aim. We considered that the means chosen were not even-handed as they were designed to maximise the prospect of the claimant's dismissal rather than being a measured and evidence-based response to the issue. On the evidence, a lesser measure which would have would met the respondent's legitimate aim was an even-handed investigation process. Such a fair process would have considered the medical issues the claimant was presenting, and would have considered the emails she had sent during the year about her health – the reason why she was making this request. Mr Phillips would have fully set out the concerns she had been raising which were related to her health. The Tribunal noted that If there was a dispute on any health issue, this should have been subject to necessary evidence, for example via a medical report and not

by way of assumptions made by during the investigation and disciplinary process.

Reasonable adjustments

225. The claimant argues that the duty to make reasonable adjustments arose from September 2015, the respondent from January 2016. As set out above, we concluded that the respondent had knowledge of the claimant's worsening and undiagnosed condition on 16 November 2015 and that its duty to make adjustments arose from this date.

226. We next considered the provision, criterion or practice that the respondent applied: claimant says that the respondent applied a provision that the claimant was required to reach students to a good standard without additional support. The respondent's position is that the claimant was required to teach to a good standard but that adequate support was provided (respondent's Closing 2.1). The Tribunal noted the emails from November 2015 onwards – the claimant seeking assistance, and Mr Phillips' responses, which made clear that there was no student teacher provision because it was an Ofsted year, to telling her to carry on doing what she was in the classroom. We also noted the comments made by the disciplinary panel, that a student teacher increases a teacher's workload. We also noted the respondent's emphasis on high standards and good exam results. We concluded from this evidence that the "practice" of the respondent during this academic year was that a subject teacher teach the class to a good standard with no additional teaching (whether classroom or activity-based) support.

227. What was the consequence of this practice for the claimant? The Tribunal concluded that it clearly placed her at a substantial disadvantage in comparison to other staff employed by the respondent who were not disabled and who were able to undertake their role to the appropriate standard; who were therefore less likely to have poor exam results and therefore not liable to face a gross misconduct process and dismissal (*Archibald v Fife Council)*.

228. The Tribunal also concluded that the respondent had knowledge that this practice placed the claimant at a substantial disadvantage. The claimant had asked for assistance on several occasions and she had been explicit in her reasoning from November 2015 onwards, because of her health issues. She had been told that Mr Phillips was doing all he could to assist, that she should keep on doing what she was doing. While we accepted *(Tarbuck v Sainsburys)* that there is no need for a formal assessment, we concluded that it was wise to do so in this case, and to do so would have given some clarity on the issues facing the claimant and their impact on her role, and adjustments which could at this time have been made.

229. Would the adjustments now alleged by the claimant have minimised or mitigated the substantial disadvantage?

(1) Provision of teaching support: The Tribunal concluded that this adjustment could have minimised the significant disadvantage: the

respondent was on notice from the claimant from November 2015 that she believed teaching support was needed. We noted that the following year (September 2016 onwards) teaching support was provided for the Drama Department. Had the respondent taken full account of what the claimant was asking for and why, bearing in mind its high and aspirational standards for all its pupils, the view from the claimant that her condition was worsening and she was not coping, we consider that further teaching support including support for the school production and practical drama lessons would have been provided. With such support, we considered that the claimant would have been able to provide far more support to students for classroom Drama, and that this would have been of great advantage to the Drama students. It would have met the operational objective of the respondent – of providing excellent teaching and support to its students.

(2) Taking account of the impact of her disability on her ability to undertake her role in the investigation and disciplinary process: this is what the claimant asked the disciplinary panel to consider. The Tribunal concluded that the respondent's summary of the claimant's ill-health as provided to the disciplinary panel downplayed her symptoms, and the panel displayed a sceptical attitude as to the effect of her symptoms on her ability to work to the required standard. We also concluded that Ms Bridgewater's summary of the law on reasonable adjustments was wrong. Her view was that as the respondent did not know about the condition at the time, it was under no obligation to make adjustments. This ignores the fact that the claimant was saying that it was now possible to see with hindsight the effect of her condition on her ability to teach, and that this should be taken into account. We agreed that this would have been a reasonable adjustment; in fact it was as much as issue of fairness and properly and reasonably considering the evidence, including the evidence of ill-health as it was a reasonable adjustment to make.

(3) Taking account of the impact on her disability on her role in determining to dismiss her: We agreed, for the reasons set out at (2) above.

(4) Allowing her to adjust to the impact of her condition on her role, as an alternative to dismissal: we heard little evidence on this adjustment – in what way she could have adjusted to the role, what changes would have been necessary to her teaching practice, whether to practical or lesson-based Drama. We also considered that this adjustment was in effect the same as (5) and so we did not make separate findings on this issue.

(5) Making changes to her role or appointing an additional drama teacher: We noted that a temporary Drama teacher was appointed in September 2017; while this was in part to cover sickness absence, it continued when she was back at work. We concluded that this would have been a reasonable adjustment, either in the 2015/16 year (as (1) above) – or as additional support in 2016/17 while her treatment plan was

stabilising her condition. Whether this would have entailed changes to her role would have depended on the issues in (4) above – what changes would have been required, what adjustments may have been required once medication had stabilised the condition.

230. Can the respondent prove that the substantial disadvantage would have not have been eliminated or reduced by the proposed adjustments? We concluded that the substantial disadvantage would have been reduced by any of these proposed adjustments: during the 2015/16 year we concluded that the provision of teaching support would have assisted her with practical drama lessons, the significant additional work required for the school Drama production and with the issues she found difficult – marking, writing on essays – the additional intensive work teachers are required to put in to assist pupils achieve their very best. Clearly, properly taking into account the effect of her condition, when formulating its decision on which process to go down and during the disciplinary process would have significantly reduced the substantial disadvantage to the claimant.

231. Did the respondent fail to take such steps as were reasonable to avoid the substantial disadvantage caused by the application of the provision? It says it did so by making and or/offering the following adjustments in the 2015/16 academic year: Time off the duty rota; Removal of year 9 reading lessons; Offers to help with typing reports, (declined; Assistance to take down displays (declined OH referral (initially declined); time off for appointments. We concluded that these adjustments were too little and in most cases too late or impracticable. From the claimant's point of view, the amanuensis offer would not help as all marking was done after hours when this support was not available. We noted that the claimant's position is that the respondent should have insisted on an OH referral at this time. We agreed that it would have been a wise step for the respondent to take, based on the information it had of an undiagnosed condition with worsening symptoms from June 2015 onwards, if only because it could have focussed on adjustments to her role because of the symptoms she was experiencing. We concluded that the respondent failed to take the reasonable steps to avoid the substantial disadvantage based on the knowledge it had available to it in January 2016.

Time

232. Were all claims of discrimination brought within time? Most were related to the disciplinary process and dismissal, all of which were in time as the detriments clearly continued to the date of dismissal. The only allegation brought outside of the primary limitation period was the issue of reasonable adjustments, the provision of adequate teaching support in 2015/16. This was, we considered, an omission which took effect in January 2016, after the claimant had requested this adjustment on 3 occasions, and on 3 occasions it was turned down. Time therefore started when this decision was made by the respondent not to provide this adjustment, and this was well over a year before the claim was submitted. We concluded that it would be just and equitable to extend time in relation to this claim, for the following reasons.

(1) We considered that the context of this issue – the failure to make adjustments in 2015/16 and when it was raised by the claimant: she was raising it as a defence to the respondent's allegations that she had been wilful and dishonest in the 2015/16 academic year; her defence was in essence that she needed a reasonable adjustment, she had asked for a reasonable adjustment, and she then asked for this to be taken into account in the investigation process. But the respondent then downplayed her evidence on this point and effectively ignored it as a defence to the allegations. The issue of reasonable adjustments in 2015/16 was therefore a live issue throughout the whole of her employment. We concluded that extending time in relation to this claim contained no prejudice to the respondent, as it was also the claimant's defence to the disciplinary allegations against her that this is an adjustment which should have been made, and so it would have been evidence in the claim in any event.

(2) This claim forms part of a claim for personal injury brought by the claimant; there would be an absence of any other remedy for the claimant if the claim is not allowed to proceed;

(3) We concluded that the respondent's wilful failure to consider the issue of disability and instead proceed with issues of misconduct was an issue of unreasonable conduct by the respondent which meant it was just and equitable to extend time in relation to this allegation;

(4) Finally, we considered that the practical effect of this adjustment, had it been made, would have been to provide appropriate support to the claimant, which in turn would have assisted her achieve the respondent's core aim – through excellent teaching to enable its students to achieve the best possible exam results. The Tribunal considered the importance of the issue: the fact that because there was a failure to make reasonable adjustments, there was an adverse consequence to students; that there must be recognition on the need to consider adjustments at as early a stage as possible, and we considered that it was not in the interests of justice for this issue to be discounted on an issue of time.

Unfair dismissal

233. For the reasons set out above we do not consider that the respondent had a genuine belief when it outlined the disciplinary allegations that the claimant had committed the core allegations of gross misconduct or the secondary allegations that flowed. It follows that the claimant succeeds in her claim of unfair dismissal.

234. If in fact the respondent had proven its reason for dismissal – gross misconduct – we concluded that the investigation was unfair for the reasons set out above – it minimised the ill-health, it maximised allegations of wilful failings etc. without evidence in support. It's investigation was not even handed and both panels were incurious and acted as proxy for the respondent.

235. In so concluding we bore in mind the need to separate out the conclusion on the issues of discrimination, where the tribunal's role is one of fact finding, from that of the conduct test on unfair dismissal: Burchell and the requirement not to substitute our own opinion for that of the reasonable employer; the range of reasonable responses test. We concluded that the process was wholly outside the range of reasonable responses, and it follows that we would have concluded that the respondent unfairly dismissed the claimant.

The Safeguarding issue

236. We considered this issue in relation to our finding on discrimination and unfair dismissal. We concluded firstly that there would have been no question of this issue arising had the claimant been fairly treated and a capability process with full assessment of her medical condition undertaken. Secondly, there was significant mitigating information, not least the high degree of stress the claimant was under at this time having been suspended from work and feeling, in our view, quite rightly wronged by her employer. She accepted she had done the wrong thing. The student and their family were very supportive of the claimant. However, the claimant was found to have committed a safeguarding breach by LADO, and we accepted that this did amount to misconduct, and the respondent had a belief that it did amount to misconduct. The Tribunal concluded that the surrounding circumstances of what we concluded was an act of significant legal detriment and the great pressure she was under amounted to circumstances where this allegation could not be disassociated from the overall unfairness of all of the prior allegations. We concluded that it could not be separated as a stand-alone allegation. In any event, even it could be separated and a finding made we concluded that the claimant's culpability in relation to this action would not have led a reasonable employer to dismiss her for this issue which was misguided. We noted the language of the LADO letter, that the claimant should reflect on her actions. In the circumstances the claimant found herself in, and bearing in mind the requirement not to substitute our view, we concluded that no reasonable employer would reasonably dismiss for this breach; it would at its highest have merited a verbal or written warning.

Polkey

237. The Tribunal concluded that the respondent could not show that the claimant would have been dismissed on a fair process – on its own evidence a capability process alone would not have led to a dismissal, and we concluded that any reasonable assessment of the evidence would have led to a capability rather than a disciplinary process. We did not consider there was any real prospect of the claimant being fairly dismissed.

Contributory fault

238. We concluded that the claimant's ill health was the main factor for poor exam results, that this was not in her control, and that her conduct did not contribute to her dismissal.

Wrongful dismissal

239. In light of the above findings, we also concluded that the claimant was wrongfully dismissed, as dismissal should have been on notice.

Remedy

240. The parties are asked to write to the Tribunal within 14 days providing their dates of availability for a one hour telephone Preliminary (Case Management) Hearing. It would be preferable if this hearing could take place in November or December 2020.

Signed by: EMPLOYMENT JUDGE M EMERY
Signed on: 29 October 2020