Case Number: 3201023/2014

YG

EMPLOYMENT TRIBUNALS

Claimant: **Mr H N Ikose**

Respondent: **London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre**

On: **7 – 9 & 14 – 15 March 2017**
In Chambers: **16 March 2017**

Before: **Employment Judge Brown**

Members: **Ms M Long**
Mr L O'Callaghan

Representation

Claimant: **In Person**

Respondent: **Ms R White (Counsel)**

RESERVED JUDGMENT

It is the unanimous judgment of the Employment Tribunal that:-

1. The Respondent dismissed the Claimant fairly.

2. The Respondent did not make unlawful deduction from the Claimant's wages.

3. The Respondent did not dismiss the Claimant wrongfully.

4. The Respondent did not subject the Claimant to detriments because he had made a protected disclosure.

5. The Respondent did not directly discriminate against the Claimant, either because of race or because of disability.

6. The Respondent did not harass the Claimant.

7. The Respondent did not subject the Claimant to discrimination arising from disability.

8. The Respondent did not fail to make reasonable adjustments.

9. The Respondent did not fail to pay the Claimant holiday pay.

REASONS

Preliminary

1. The Claimant brings complaints of unfair dismissal, unlawful deductions from wages, breach of contract, holiday pay, public interest disclosure detriment, direct discrimination because of disability, discrimination arising from disability, a failure to make reasonable adjustments, harassment relating to race and direct race discrimination against the Respondent, his former employer.

2. The issues in the case had already been agreed between the parties; they were very extensive. They are reproduced here in their entirety, as set out in the list of issues, including the punctuation and grammar used in the agreed list.

3. **Unfair dismissal**

3.1. The Respondent accepts that the Claimant has the necessary two years' employment and brought his unfair dismissal claim within 3 months of dismissal, so no jurisdictional points arise for this claim.

3.2. The parties agree that the Claimant was dismissed.

3.3. The Respondent contends that the Claimant was dismissed for gross misconduct, namely absence from work without authorisation or a valid GP note covering the period 13 November 2013 to 28 November 2013. They also say that, while he was absent from work, he failed to follow the school's procedure for requesting annual/special leave to travel to Cameroon.

3.4. The Claimant disputes that conduct was the reason or principle reason for his dismissal.

3.5. The Claimant contends that in December 2012, in a letter and in a meeting with his UNISON trade union representative he made protected disclosures pursuant to section 43B Employment Rights Act 1996 ("ERA"). He says that he stated that he was being racially discriminated against because a cleaner was opening the school when the Claimant's predecessor had opened the school; not being issued with an office chair; not being issued with a new computer when other staff members had been; delays in providing office boots; getting two verbal warnings without investigation; not getting increments; not having a permanent assistant; experiencing a lot of bullying and harassment and his

workload was increased.

3.6. The Respondent contends that the Claimant has not pleaded that the real reason for his dismissal was because he made a complaint to UNISON in December 2012 or that his dismissal was automatically unfair pursuant to Section 103A ERA. The Respondent opposes the Claimant's application to amend his claim form.

3.7. The Respondent disputes that the Claimant made protected disclosures.

3.8. The parties are in dispute as to whether the dismissal was fair within the meaning of Section 98(4) ERA.

3.9. The Claimant contends that the dismissal was procedurally unfair including because he could not attend the disciplinary hearing on 8 March 2014 because of post-traumatic stress disorder. The Respondent contends that the Claimant could have made representations in writing to the disciplinary hearing panel. The Respondent rejects the Claimant's assertion that he was too ill to make written representations. The Claimant also says that his dismissal was procedurally unfair by the Respondent failing to interview the Claimant prior to the disciplinary hearing.

3.10. The parties dispute whether the sanction of dismissal lay within the band of reasonable responses a reasonable employer might have adopted. The Claimant contends that his dismissal was an overreaction to a minor problem.

3.11. The Claimant also says that both his prior disciplinary warnings were unfair. He says that both warnings were unfair because of the involvement of Mr Musgrave. He also says that so far as the first warning was concerned that Mr Musgrave was a witness at the disciplinary hearing, although he did not actually see the alleged incident.

3.12. The Respondent says that the Claimant was on a final written warning which was in force at the time of the hearing at which he was dismissed. They contend that the dismissal was fair, lying within the band of reasonable responses a reasonable employer might have adopted.

3.13. The Claimant also contends that the dismissal was an act of disability discrimination, namely a failure to have postponed the disciplinary hearing scheduled for 8 May 2014 (as specified in the Claimant's disability discrimination reasonable adjustments claim).

3.14. If successful in his unfair dismissal claim the Claimant seeks compensation, not reinstatement or re-engagement with the Respondent.

3.15. If the Tribunal were to decide that the Claimant was unfairly dismissed,

the Respondent would contend that the Claimant would or might have been dismissed if a fair procedure has been followed. Additionally they would contend that the Claimant caused or contributed to his dismissal so that no, or reduced, compensation should be paid. The Claimant would dispute any such reduction in award.

3.16. **Claimant's addition – Did the respondent followed correct procedures of school disciplinary code and sickness protocol or considered the claimant suspension and sick leave as exceptional circumstances before dismissing him unfairly?** The Respondent says that the Claimant has not pleaded this issue in his claim form and the Respondent opposes any application to amend the Claim.

3.17. **Claimant's addition – Did the respondent made up a decision to dismiss the claimant even before the disciplinary processes due to protected disclosure to UNISON?** The Respondent says that the Claimant has not pleaded this issue in his claim form and the Respondent opposes any application to amend the Claim.

4. **Notice pay**

4.1. The Respondent contends, and the Claimant disputes, that he committed an act of gross misconduct so as to justify summary dismissal, namely a period of prolonged unauthorised absence. The Claimant says that he had been informed in a letter that he had potentially committed misconduct not gross misconduct.

5. **Other pay (unlawful deduction from wages) and breach of contract**

5.1. The Claimant makes the following claims:

5.1.1. The Respondent failed to pay salary increments due to him under his contract of employment from 6th July 2010 until his dismissal on 8 May 2014

5.1.2. The Claimant also claims sick pay for November 2013 which he says was deducted from his salary in 2014.

5.2. The Claimant accepts that (after intervention by his trade union) he was paid outstanding holiday pay, although he does not understand the calculations, so is unsure whether he has been paid the correct payments.

6. **Failure to make reasonable adjustments**

6.1. The Claimant contends that he was disabled at the relevant times within the meaning of Section 6 Equality Act 2010 ("EQA") by reason of lower back pain. He also contends that he had a mental health disability, namely post-traumatic stress and depression and delusional disorder (although he did not know at the time of his dismissal of his delusional disorder).

6.2. The Respondent disputes that the Claimant had such a physical disability; and also disputes that it had the necessary knowledge of any such disability.

6.3. Additionally, although the Respondent accepts that the Claimant was mentally unwell prior to and after his dismissal, it does not admit that at the time it amounted to a disability or that it had the necessary statutory knowledge of his disability.

The Claimant contends that the Respondent failed to make the following reasonable adjustments when it failed to:

6.3.1. Order a new suitable chair for the Claimant after authorisation by the head teacher on 15 December 2010.

6.3.2. Take any action to place the order for a new suitable chair after authorisation by the head teacher in 2011

6.3.3. Process the authorised order form that he submitted for a new suitable chair in December 2012

6.3.4. Postpone the disciplinary hearing scheduled for 8 May 2014.

6.4. The Respondent contends that the Claimant's claims as to physical adjustments to his chair are out of time. Additionally, it contends that it did not fail to make reasonable adjustments. It says that appropriate chairs were provided; and that it had already made sufficient reasonable adjustments through numerous postponements of the disciplinary processes against the Claimant.

7. **Public Interest Disclosure Claim/s**

7.1. The Claimant says that in a letter to his trade union official in December 2012 and in a meeting with his UNISON trade union official in February 2013 he stated that he was being racially discriminated against because a cleaner was opening the school when the Claimant's predecessor had opened the school; not being issued with an office chair; not being issued with a new computer when other staff members had been; delays in providing office boots; getting two verbal warnings without investigation; not getting increments; not having a permanent assistant; experiencing a lot of bullying and harassment and his workload was being increased.

7.2. In all or any of these, was information disclosed which the Claimant's reasonable belief tended to show one of the following?

7.2.1. A person, the Respondent, had failed to comply with a legal obligation

7.2.2. The health and safety of any individual had been put at risk

7.3. If so, was that disclosure made in good faith (pre 25 June 2013) in circumstances where:

7.3.1. It was made other than for personal gain and

7.3.2. The Claimant reasonably believed that the information disclosed and any allegation contained in it were substantially true and

7.3.3. It was reasonable for him/her to make the disclosure (having regard to the identity of the person to whom it was made, its seriousness, whether it was continuing, the action which had been or might have been expected to have been taken and any procedures authorised by the employer

7.3.4. And where:

7.3.5. It was likely that s/he would be subject to a detriment by the employer or

7.3.6. That evidence would be concealed by the employer if the disclosure was made to him, or

7.3.7. The employer had failed to respond appropriately to an earlier disclosure

7.4. **Claimant's addition – The Claimant says that it is factual that the real reason for his dismissal was because he made a complaint dated 27 December 2012 to UNISON. Therefore his dismissal was automatically unfair pursuant to Section 103A ERA.** The Respondent say the Claimant has not pleaded that the real reason for his dismissal was because he made a complaint to UNISON in December 2012; or that his dismissal was automatically unfair pursuant to Section 103A ERA. The Respondent opposes the Claimant's application to amend his claim form

8. **Protected Disclosure Detriment complaints/Protected Disclosure Unfair Dismissal complaints**

8.1. If protected disclosures are proved, was the Claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker (the Claimant says that after he complained to the Trade Union the treatment of him by the Respondent was much worse). He had not at the Preliminary Hearing identified whether this was because he made the protected disclosure or because he did a protected act. This is the same action he relies on for the purposes of his claim of victimisation within Section 27 Equality Act 2010.

8.1.1. The Claimant now clarifies the detriment suffered as follows:

8.1.2. **Claimant's addition – After complaining about my faulty**

work computer, verbally to Annette Rook (Head teacher and line manager) and John Musgrave, Deputy Head teacher from 2010 to 2013, I also complained in writing via emails to Head teacher on 19 May 2010, 22 May 2012 (note on faulty computer and stressful/inconvenience to do my work), 30 August 2012, 05 September 2012, 15 October 2012. After complained to Unison, I also complaint via emails to Head teacher; on 8 February 2013, 14 March 2013, 3 June 2013. I was experiencing on and off (intermittent) computer problems, stress at work due to inconvenience doing my challenging work with no assistant, internal pains and shock after all members of staff were given brand new computers to facilitate their work and I was still struggling with a faulty computer to do my health and safety job. It was very difficult for me as I feel traumatised, marginalized, victimized, taunted, bullied, harassed and discriminated by management. It was very shocking to read the Respondent reasons of not providing me a computer on paragraph 7 of the ET3 form; That I the Claimant did not need a computer to undertake a vast majority of the work required by his job description, but My line manager called Annette Rook and I exchanged 1679 emails between February 2009 and March 2016. The Head teacher was communicating with me using my Home email address. I also experienced increasing harassment via emails for not meeting deadlines and increased work pressure despite working with a faulty computers.

The Respondent says that events which predate the protected disclosure which the Claimant says he made on 27-12-12 to Unison cannot amount to a detriment suffered as a consequence of making a protected disclosure and further that similar events which post-date the 27-12-12 do not amount to a detriment if these events (or matters complained about) were already in issue before the alleged disclosure as the reason is not because the Claimant made a protected disclosure.

8.1.3. **I experienced a lot of lifting and carrying of resources and other school stuff from place to place around the building. I was lifting stuff for more than ten hours a week and rarely have any assistants from members of staff. I was having surprised harassment meetings organized by head teacher, she was bullying and harassing me with emails and letters about incidents of false allegations, increased workload I could not bear alone as well as stilly applying for biodiversity grants, and marginalizing me during investigations. I feel undermined by so many members of staff and no one was there to help me or assist me. I was always very stressful, depressed and feel very tired with pains on my back. I was over monitored at work as work pressure was unbearable since I was doing a lot of manual**

works, technical/handy works and work on my faulty computer. I was so unwell up to the extent that I did not realize I was unwell. It is now am realising my mental state at work and afterwards.

The Respondent says that events which predate the protected disclosure which the Claimant says he made on 27-12-12 to Unison cannot amount to a detriment suffered as a consequence of making a protected disclosure and further that similar events which post-date the 27-12-12 do not amount to a detriment if these events (or matters complained about) were already in issue before the alleged disclosure as the reason is not because the Claimant made a protected disclosure. The Claimant has not given any dates on which these alleged detriments occurred.

8.1.4. **All verbal requests and complaint for a suitable chair in 2010, 2011, 2012 and 2013 was neglected by the Head teacher and management staff called Yvonne Cameron. I was taunted by management as they provided three blue suitable chairs for reception staff including Yvonne Cameron and Assistant Head teacher called Ken Miller and provided another suitable black office chair to year 4M teacher. It was very stressful and affected my mental health at work, knowing I didn't have an appropriate chair myself while assembling these chairs for members of staff on 24 June 2013 (which is also reminding me of the day I started opening the school). It was very painful as my own order for a suitable chair was turn down by Yvonne Cameroon and the Head teacher who authorized me to fill the order forms did not seem to care I needed a suitable chair for my intermittent lower back pains which was caused by over lifting and carrying of stuff every day at work (my back and spinal cord was exhausted) and not because I could not lift or carry stuff properly. The management would have known that I have a lower back problem as I had sent certified sick notes based on lower back pains to Management.**

The Respondent says that events which predate the protected disclosure which the Claimant says he made on 27-12-12 to Unison cannot amount to a detriment suffered as a consequence of making a protected disclosure and further that similar events which post-date the 27-12-12 do not amount to a detriment if these events (or matters complained about) were already in issue before the alleged disclosure as the reason is not because the Claimant made a protected disclosure.

8.2. Was the making of any proven protected disclosure the principal reason for the dismissal?

8.2.1. The Claimant was continuously employed for 4 complete years at the effective date of termination on 9 May 2014. This is the

date he was informed of his dismissal. The issues are

8.2.2. Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?

8.2.3. Has the Respondent proven its reason for the dismissal, namely gross misconduct

8.3. If not, does the tribunal accept the reason put forward by the Claimant or does it decide that there was a different reason for the dismissal?

9. **Disability**

9.1. The Claimant say he has a physical impairment, namely lower back pain and a mental impairment namely post-traumatic stress disorder, depression and delusional disorder (although he did not know at the time of his dismissal of his delusional disorder)

9.2. If so did/does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

9.3. If so, is that effect long term? In particular when did it start and:

9.3.1. Has the impairment lasted for at least 12 months?

9.3.2. Is or was the impairment likely to last at least 12 months or the rest of the Claimant's life (if less than 12 months)?

NB in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

9.4. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

9.5. The relevant time for assessing whether the Claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is during his employment with the Respondent…

9.6. At the present time the Respondent disputes that the Claimant's back pain is a disability within the meaning of Section 6 of the Equality Act. It also disputes that it had the necessary knowledge of any such disability.

9.7. Additionally, although the Respondent accepts that the Claimant was mentally unwell prior to and after his dismissal it does not admit that at the time it amounted to a disability or that it had the necessary knowledge of his disability.

10. **Section 13: Direct discrimination because of disability**

10.1. The Claimant says the Respondent

10.1.1. Failed to postpone the disciplinary hearing scheduled for 8 May 2014

10.1.2. And because of this he was dismissed on 9 May 2014

10.2. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the following real comparators **{Please state if there are any other real comparators here}** – and/or hypothetical comparators.

10.3. If so, has the Claimant provide primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's disability?

10.4. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

11. **Section 15: Discrimination arising from disability (it is not clear that the Claimant is making the claim set out below but the statement he submitted for the purpose of the hearing today together with what he said in the hearing today suggests this is a claim he is pursuing)**

11.1. The Claimant says that his mental impairment made him unwell and subject to stress. Because of this he says

11.1.1. He failed to tell the Respondent he was going to the Cameroons to visit his sick father when he was suspended and on sick leave,

11.1.2. He failed to follow sickness protocol and

11.1.3. He failed to attend an occupational hearth appointment and because of these matters which arose because of his mental impairment

11.1.4. The Respondent took disciplinary action against him

11.1.5. The Respondent failed to postpone the disciplinary meeting on 1 May 2014 and

11.1.6. The Respondent dismissed him on 9 May 2025 after the Claimant failed to attend the disciplinary meeting

11.2. Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 10.1.4-10.1.6 above?

11.3. Did the Respondent treat the Claimant as aforesaid because of the *"something arising"* in consequence of the disability?

11.4. Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following:

11.4.1. As to the business aim or need sought to be achieved

11.4.2. As to the reasonable necessity for the treatment

11.4.3. As to proportionality

11.5. Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

12. **Reasonable adjustments: section 20 and section 21**

12.1. The Claimant says the Respondent applied the following provisions, criteria or practices to him. The PCP's have not been clarified today and were not clarified at Judge Goodrich's preliminary hearing and there was insufficient time to clarify them at today's hearing. **The Claimant is to identify here what are the PCPs the Respondent applied to him which did what is set out in 11.2 below. [incorrect number]**

12.1.1. Its disciplinary and sickness protocols?

Claimant's additions – One of the purposes of paragraph 2 of the school disciplinary code clearly states in 2.3 that the governing body is responsible for ensuring that fair, consistent and objective procedures exist to matter related to staff discipline and the Head teacher is responsible for the internal organization, control and management of the school.

Did the governing body failed to address fairness in subsequent disciplinary as my grievances were not addressed?

Were equality considerations on school disciplinary code fulfilled by respondent?

Did the Respondent comply with equal opportunity considerations (para.3) Disability Discrimination act (para. 4), Health & safety Obligations (para. 6) of the school sickness management procedure?

The Respondent says that the Claimant has not identified here any PCP which the Respondent has applied to the Claimant which has put him at a disadvantage

12.1.2. Provision of standard office equipment and furniture

Claimant's additions – Did the Head teacher failed to provide the claimant with a suitable office chair and computer? The head was aware of my lower back problems as the claimant submitted certified sick note for back pains and she was aware that my Job was very demanding with a lot of resources to carry from place to place in and out of a building with four stairs cases and four floors. Sitting on a suitable chair would have been better fro my lower back problems and reduce the pains. She authorized me to order an office chair on two occasions and the office Manager cancelled the orders.

The Respondent says that the Claimant has not identified here any PCP which the Respondent has applied to the Claimant which has put him at a disadvantage.

12.2. He says that this put him at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that

12.2.1. He could not comply

12.2.2. His back condition deteriorated

12.3. The Claimant contends that the Respondent failed to make the following reasonable adjustments when it failed:

12.3.1. Order a new suitable chair for the Claimant after authorisation by the head teacher on 15th December 2010

12.3.2. Take any action to place the order for a new suitable chair after authorisation by the head teacher in 2011

12.3.3. Process the authorised order form that he submitted for a new suitable chair in December 2012

12.3.4. Postpone the disciplinary hearing scheduled for 8 May 2014

12.3.5. **Claimant's addition – The Respondents also failed to provide a suitable computer which caused me further stress and deterioration in my mental health. The Respondent also failed to make reasonable adjustment on time of the order of the suitable work boots for manual handling to carry stuff up and down four stairs which was delayed by Yvonne Cameroon**.

12.4. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above? The Respondent says

12.4.1. The claims are out of time

12.4.2. It says it did not fail to make reasonable adjustments and

12.4.3. It did not know the Claimant was disabled

13. **Section 26: Harassment related to Race**

13.1. The Claimant is a Black African man. He says the Respondent engaged in unwanted conduct towards him as follows:

13.1.1. On 16 February 2010 he made a written compliant and continuing oral complaints until his return to work 24 June 2013 that the Head Teacher Annette Rook did not allow him to open the premises as his predecessor had done

13.1.2. By e-mail of 19 May ad on several occasions after that he made complaints about his computer not working which were not addressed by the Head Teacher Annette Rook

13.1.3. In October 2012 his computer was not replaced when other staff members computers were

13.1.4. In 2010, 2011 and 2012 his requests for a special chair were rejected by the Office Manager Yvonne Cameron. In November 2011 an order for work boots was not fulfilled

13.1.5. In 2012 Annette Rook **(Claimant's amendment)** increasing his workload by making him amongst other things, responsible for the gardener and assisting him with gardening including ordering plants, preparation of the ballet room before and after ballet, moving chairs to facilitate children's play on Mondays, responsible for lottery funding for repairs of Tower bell, apply for bio diversity grants.

13.1.6. In January 2012 Yvonne Cameron withheld orders for services repairs in connection with his job. In November 2012 she delayed an order for vegetables, delayed, was reluctant to and refused to give the Claimant keys to the water tank until he complained to the Head Teacher in May

13.1.7. The Claimant was refused an assistant **(Claimant's additions) and I was so traumatized and confused with two Job descriptions given to me on 05 January, 2010 given to me by management and 12 May 2012 given to by a trainer of Project Management course at work. Mr Mitchel had a one to one project Management training with me at work, and he added the amended Job description to copies of his course notes and gave it to me. I only realized the new Job description when reviewing the course notes at home. My**

predecessor had one Job description

13.1.8. In February 2013 following a toast burning fire incident while the Claimant was off sick, the office manager Yvonne Cameron refused to disclose to him the fire incident report on his return to work

13.1.9. On 28 February 2013 John Musgrave instigated a complaint being made against the Claimant by a cleaner which resulted in a disciplinary hearing and a warning for misconduct.

13.1.10. On 3 June 2013 the Claimant was sent a strong management advice letter.

13.1.11. On 24 June 2013 the Claimant was told on his return to work from sick leave he could open the premises but was given no advance notice so that people were kept waiting for access

13.1.12. On July 2013 Yvonne Cameron alleged the Claimant threatened her when he tried to explain to her an incident which had taken place that morning where three white boys on a scooter drove very fast towards him and he was shaken and distressed by the incident itself and because he felt the boys were waiting for him.

13.1.13. The Head teacher delaying until 9 July 2013 to raise the matter with the Claimant and not accepting what he said and suspending him on that date for

13.1.13.1. Serious of threatening abusive behaviour toward fellow employees

13.1.13.2. Serious breaches of the school's code of conduct

13.1.13.3. Failure to follow reasonable management instructions

13.1.14. During his absence due to sickness and through suspension and while visiting his sick father in the Cameroons the Respondent lifted his suspension and asked him to return to work and when he said he was sick required him to provide a sick note with an end date on which the doctor in the Cameroon declined saying this was for his GP to put in on his return to the UK and in December 2013 declined to pay him for his sickness absence between 13-28 November 2013 because he failed to submit a sick note.

13.1.15. On 11 February 2014 he was invited to an investigatory meeting into potential gross misconduct in regard to "reporting sickness and absence, special leave procedures and failure to attend an Occupational Health Appointment when he was still in the Cameroons

13.1.16. On 31 March 2014 the Claimant received a letter giving him a final written warning for the matters set out at 12.1.13 above following on from the disciplinary hearing on 21 March 2014 which he did attend

13.1.17. Failing at the disciplinary Hearing to address his grievances. The Respondent had specifically agreed to respond to his grievances at this hearing.

13.1.18. By letter of 14 April 2014 the Claimant was invited to a further disciplinary hearing in relation to the matters set out 12.1.15 to take place on May 1 2014.

13.1.19. The Hearing proceeded in the Claimants absence and without written submissions from him because he was too unwell to make any submissions and remained on certified sick leave.

13.1.20. Dismissing him with effect form 9 May 2014

13.1.21. Underpaid him during some or all of his period of suspension

13.1.22. Failed to give him an increment at any time during his employment

13.1.23. Throughout his employment the Head Teacher communicated with him using his home email address and not his work email address

13.2. Was the conduct related to the Claimant's protected characteristic?

13.3. He says the conduct had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

13.3.1. He says this is because the Respondent knew he had teaching qualifications and was belittling him because he was the premises manager.

13.4. If not, he says the conduct had the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

13.5. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perceptions, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

14. **Section 13 – Direct Discrimination because of race**

14.1. The Claimant is a Black African man. He says he has been subjected to less favourable treatment by the Respondent than his predecessor a white man and his colleagues who are white and of Anglo Saxon or who

are of Asian origin. The alleged acts of less favourable treatment are:

14.1.1. On 16 February 2010 he made a written compliant and continuing oral complaints until his return to work 24 June 2013 that the Head Teacher Annette Rook did not allow him to open the premises as his predecessor had done

14.1.2. By e-mail of 19 May and on several occasions after that he made complaints about his computer not working which were not addressed by the Head Teacher Annette Rook

14.1.3. In October 2012 his computer was not replaced when other staff members' computers were

14.1.4. In 2010, 2011 and 2012 his requests for a special chair were rejected by the Office Manager Yvonne Cameron. In November 2011 an order for work boots was not fulfilled

14.1.5. In 2012 Yvonne Cameron increasing his workload by making him amongst other things, responsible for the gardener and assisting him with gardening including ordering plants, preparation of the ballet room before and after ballet, moving chairs to facilitate children's place on Mondays, responsible for lottery funding for repairs of Tower bell, apply for bio diversity grants

14.1.6. In January 2012 Yvonne Cameron withheld orders for services repairs in connection with his job. In November 2012 she delayed an order for vegetables, delayed was reluctant to and refused to give the Claimant keys to the water tank until he complained to the Head Teacher in May

14.1.7. The Claimant was refused an assistant

14.1.8. In February 2013 following a toast burning fire incident while the Claimant was off sick the office manager Yvonne Cameron refused to disclose to him the fire incident report on his return to work

14.1.9. On 28 February 2013 John Musgrave instigated a complaint being made against the Claimant by a cleaner which resulted in a disciplinary hearing and a warning for misconduct.

14.1.10. On 3 June 2013 the Claimant was sent a strong management advice letter

14.1.11. On 24 June 2013 the Claimant was told on his return to work from sick leave he could open the premises but was given no advance notice so that people were kept waiting for access

14.1.12. On July 2013 Yvonne Cameron alleged the Claimant threatened

her when he tried to explain to her an incident which had taken place that morning where three white boys on a scooter drove very fast towards him and he was shaken and distressed by the incident itself and because he felt the boys were waiting for him.

14.1.13. The Head teacher delaying until 9 July 2013 to raise the matter with the Claimant and not accepting what he said and suspending him on that date for

14.1.13.1. Serious of threatening abusive behaviour toward fellow employees

14.1.13.2. Serious breaches of the schools code of conduct

14.1.13.3. Failure to follow reasonable management instructions

14.1.14. During his absence due to sickness and through suspension and while visiting his sick father in the Cameroons the Respondent lifted his suspension and asked him to return to work and when he said he was sick asked him to provide a sick note with an end date on which the doctor in the Cameroon declined saying this was for his GP to put in on his return to the UK and in December 2013 declined to pay him for his sickness absence between 13-28 November 2013 because he failed to submit a sick note

14.1.15. On 11 February 2014 he was invited to an investigatory meeting in to potential gross misconduct in regard to "reporting sickness and absence, special leave procedures and failure to attend an Occupational Health Appointment when he was still in the Cameroons

14.1.16. On 31 March 2014 the Claimant received a letter giving him a final written warning for the matters set out at 13.1.13 above following on from the disciplinary hearing on 21 March 2014 which he did attend

14.1.17. Failing at the disciplinary hearing to address his grievances. The Respondent had specifically agreed to respond to his grievances at this hearing.

14.1.18. By letter of 14 April 2014 the Claimant was invited to a further disciplinary hearing in relation to the matters set out 12.1.15 to take place on May 1 2014

14.1.19. The hearing proceeded in the Claimant's absence and without written submissions from him because he was too unwell to make any submissions and remained on certified sick leave.

14.1.20. Dismissing him with effect form 9 Mays 2014

14.1.21. Underpaid him during some or all of his period of suspension

14.1.22. Failed to give him an increment at any time during his employment

14.1.23. Throughout his employment the Head Teacher communicated with him using his home email address and not his work email address

14.2. Has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

14.3. If so, what is the Respondents explanation? The Respondent says

14.3.1. The Claimant ticked the box in the claim form but failed to provide any details in his claim of race discrimination

14.3.2. The amended particulars of claim submitted ahead of the first preliminary hearing on 24 November 2014 contains different allegations than the many more allegations made today.

14.3.3. The complaints are out of time

14.3.4. The Respondent is a multicultural local authority with a strong ethos of fairness of treatment of staff and residents

14.3.5. If the claims are to proceed the Respondent will wish to put in an amended response

15. **Unfair dismissal claim**

15.1. The parties agree that the Claimant was dismissed

15.2. The Respondent contends that the Claimant was dismissed for gross misconduct, namely absence from work without authorisation or a valid GP note covering the period 12 November 2013 to 28 November 2013. They also say that, whilst he was absent from work, he failed to follow the school's procedure for requesting annual/special leave to travel to Cameroon.

15.3. A reason related to conduct is a potentially fair reason for section 98(2) ERA. The Respondent must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

15.4. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

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

15.6. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

16. **Time/limitation issues**

16.1. The claim form was presented on 6 August 2014 following on from the effective date of dismissal on 9 May 2014. According and bearing in mind the effects of ACAS early conciliation, any act or omission which took place more than three months before the date of dismissal (i.e. before 10 February 2014) is potentially out of time so that the tribunal may not have jurisdiction

16.2. Does the Claimant prove that there was conduct extending over such a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

16.3. Was any complaint presented within such other period as the employment tribunal considers just and equitable?

17. **Unpaid Annual Leave – Working Time Regulations**

17.1. What was the Claimant's leave year? The Claimant knows he has received holiday pay since termination but does not know if he has received the full amount due

17.2. How much of the leave year had elapsed at the effective date of termination?

17.3. In consequence, how much leave had accrued for the year under regulations 13 and 13A?

17.4. How much paid leave had the Claimant taken in the year?

17.5. How many days remain unpaid?

17.6. What is the relevant net daily rate of pay?

17.7. How much pay is outstanding to be paid to the Claimant?

18. **Breach of contract**

18.1. It is not in dispute that that Respondent dismissed the Claimant without notice

18.2. Does the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct
NB This requires the Respondent to prove on the balance of probabilities that the Claimant actually committed the gross misconduct

18.3. To how much notice was the Claimant entitled?

19. **Other pay claims**

19.1. The Claimant makes the following claims:

19.1.1. The Respondent failed to pay salary increments due to him under his contract of employment from **05 January (Claimant amendment)** 2010 until his dismissal on 8 May 2014.

19.1.2. The Claimant also claims he was underpaid for part of the period he was suspended and/or on sick leave from 9 July 2013 to end November 2013 **(Claimant's additions) and underpayment continued until April 2013 before dismissal on 09 May 2013. The respondent did not disclose the claimant's suspension to payroll office of London Borough of Tower hamlets as he was told by Freda Terence, Payroll Officer in April 2014. The claimant was considered as on sick leave only which meant that his pay was less than it should have been on suspension. The Claimant therefore suffered a further detriment due to the respondent deliberate actions. The claimant is still feeling bad as his salary was deducted and was dismissed unfairly for not notifying the respondent that he was going to Cameroon despite the circumstances of his deteriorated mental health, overcrowded with judgments, can't think properly and it was an emergency as his dear father whom he has not seen for 11 years was fighting for his life in the hospital.**

20. **Remedies**

20.1. If the Claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy

20.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and or the award for interest.

21. The Tribunal heard evidence from the Claimant. It heard evidence from:

21.1. Annette Rook, head teacher of Lawdale Junior School;

21.2. John Musgrave Bolanos, deputy head teacher of Lawdale Junior School [Note from typist: apart from a few occasions, you have referred to Mr Bolanos as Mr Musgrave throughout these reasons, is this correct? (Also, Mr Musgrave is mentioned throughout the list of issues above instead of Mr Bolanos)];

21.3. Ken Millar, assistant head teacher of Lawdale Junior School; and

21.4. Luis Silva, governor at Lawdale Junior School.

22. There was a bundle of documents, to which the Tribunal added a number of documents, at the Claimant's request.

23. The Tribunal read the Claimant's witness statement and two other statements he had submitted to the Tribunal dated 4 September 2016 and 29 September 2016 and accepted those as his evidence in the case. It also accepted the Claimant's ET1 Claim Form as part of his evidence in the case. The Tribunal read the witness statement of Elizabeth Mellen Ikose. The Respondent indicated that it did not wish to cross-examine Ms Ikose and the Tribunal accepted that witness statement as evidence on behalf of the Claimant. The Claimant also gave the Tribunal a reading list of numbered documents from the bundle and the Tribunal read those documents.

24. The Tribunal also heard evidence from Annette Rook, head teacher; John Musgrave Bolanos, deputy head teacher; Ken Millar, assistant head teacher and investigating officer; Luis Silva, School Governor and disciplinary panel member, for the Respondent.

25. Both parties made written and oral submissions. The Claimant sent further written submissions to the Tribunal after the end of the hearing. The Respondent did not object to the Tribunal accepting those as further submissions and so the Tribunal did so.

26. The Claimant is a black African man. The Claimant contended that he was a disabled person by reason of depression, post-traumatic stress disorder and delusional disorder. He also contends that he was disabled by reason of a back condition. At the outset of the hearing, the Respondent indicated that it agreed that the Claimant had been disabled at all relevant times by reason of his delusional disorder. However, the Respondent said that it did not have knowledge of this and could not reasonably have been expected to have knowledge of it, or of its effects, at the relevant times. The Respondent did not concede that the Claimant was disabled by reason of any other condition at any of the relevant times.

Findings of Fact

27. The Claimant started work at Lawdale Junior School as a gardener, working on a temporary contract, in 2009. The Claimant applied for the post of temporary premises manager at the school later that year. John Musgrave Bolanos (deputy head teacher of Lawdale Junior School) gave the Claimant a good reference for his application for this position.

28. The Claimant was employed by the Respondent from 5 January 2010, initially as a temporary premises manager. Throughout his employment with the Respondent, he was employed as a premises manager at Lawdale Junior School. Throughout the period also, Annette Rook was head teacher of Lawdale Junior School. John Musgrave Bolanos became deputy head teacher of the school in May 2009, having been employed there since 1996. Ken Millar was appointed assistant head teacher in January 2011, having worked at Lawdale Junior School since 2007.

29. The Claimant was initially appointed to cover the long-term sickness absence of

the permanent premises manager. That permanent premises manager was white British. He had had responsibility for opening the school in the morning. There was a hiatus between the previous premises manager going off work on long-term sickness absence and the Claimant starting in the position of temporary premises manager. During that hiatus, a cleaner who was employed at the school, called Abdesalam, had taken on the task of opening the school in the morning, at 5.30am. It was convenient for Abdesalam to do this, because it allowed him to complete his cleaning duties before the start of the school day. When the Claimant came into post, that arrangement, whereby Abdesalam opened the school at 5.30am, continued.

30. The Claimant contended that Ms Rook (the head teacher) never told him that the cleaner would open the school, rather than the Claimant. Ms Rook told the Tribunal that she thought that this would have been obvious to the Claimant, because the school was, in fact, being opened. The Claimant sent an email to Ms Rook entitled "Trivial report" on 16 February 2010, in which he mentioned, amongst many other things, the fact that the cleaner had opened the school at 5.30am. The Tribunal finds, from the wording of that email, that the Claimant was not, at that time, complaining that the cleaner, rather than the Claimant, was opening the school (page 86). The Tribunal accepted Ms Rook's evidence that Abdesalam (the cleaner) continued opening the school at 5.30am, because it was convenient for him to do so to enable him to carry out his cleaning work.

31. On 15 May 2010 the Claimant emailed Ms Rook, saying that he had asked Yvonne Cameron (senior administrative officer) in the school office to give him the keys for the school water tanks on two occasions, but that Ms Cameron had been reluctant to do this (page 92). On 17 May 2010 Ms Rook replied saying that she did not believe that there were hot water tanks, but she would ask Ms Cameron for the keys and why she had not supplied them earlier. In evidence to the Tribunal, the Claimant confirmed that he did obtain the keys. He said that there was a bag of keys and that the Claimant found the keys in the bag. He said that when he had asked Ms Cameron about the keys she had first ignored him and then had said that she was busy.

32. On 19 May 2010 the Claimant emailed Ms Rook saying that Microsoft Word was not working properly on the school computers. The Claimant told the Tribunal that, throughout his employment, he had had numerous problems operating his own computer and that his computer had not been replaced. He told the Tribunal that computers for the entire staff of the school had been replaced, but his had not. Mr Musgrave (deputy head teacher, who had been in charge of ICT at the school before his appointment as deputy head) gave evidence about the computers and the Claimant's use of them. Ms Rook also gave evidence about this. Both said that every time the Claimant complained about a problem with his computer, the ICT technician had investigated and had either fixed the problem, or had shown the Claimant that it was the Claimant's use of the computer which was causing the problem. The Claimant told the Tribunal that his computer was comprised of a mismatching keyboard, monitor and hard drive. Both Ms Rook and Mr Musgrave told the Tribunal that the school's new premises manager, who had been appointed since the Claimant's dismissal and who was white British, used the same computer as the Claimant had done and had not made a single complaint about it, but used it daily.

33. Ms Rook told the Tribunal that there were four computers in the school's workroom and 30 in the school building. She said that these computers were on an

intranet, into which the Claimant could log. Her evidence was supported by documentary evidence. On 6 September 2012 Ms Rook emailed the Claimant, explaining that he could log in to the intranet system from any computer. She provided him with a password that supply staff used if, for some reason, the Claimant's password was not working (page 149A). Ms Rook had emailed the Claimant in similar terms on 30 August 2012 (page 138). Ms Rook told the Tribunal that not all members of staff had computers. She said that 15 teachers and 15 teaching assistants shared 4 computers in the school's workroom. Ms Rook said that a large percentage of the Claimant's work was not computer-based, but involved tasks such as sweeping the grounds, looking after the premises and walking around the buildings. Ms Rook said that, by contrast, administrative staff at the school were working at computers all day and that she and her deputy head teacher were engaged in office work most of the time. She said that she received 100 to 150 emails a day, but that the Claimant had only to add one to two lines to electronic job logs daily and that he sent a few emails. Ms Rook told the Tribunal that office-based staff were bought new computers when office computers broke down due to the large volumes of work done on them.

34. The Tribunal accepted Ms Rook and Mr Musgrave's evidence about the computers in the school, and their use, in its entirety. It accorded with common sense that reception, clerical staff and the head teacher and deputy head teacher used computers far more frequently than the Claimant, who was employed in a practical, hands-on, premises role. The Tribunal also accepted their evidence that the Claimant's computer did, in fact, work, apart from occasional faults which were rectified by the ICT technician.

35. The Tribunal found that the Respondent's witnesses' evidence on this subject was much more reliable and informed than the Claimant's. One example of this in evidence was the Claimant complaining that, on 30 August 2012, at the beginning of the school year, he once turned on a computer and received a strange message on the screen and could not access his documents. The Claimant complained that the fault had been mysteriously rectified when Mr Musgrave went to the computer server. Mr Musgrave, on the other hand, explained that sometimes, during school holidays, there were power cuts and the computer server then had to be rebooted. He explained that, if the server was turned off, a person who attempted to use a computer would receive a temporary profile message and would not be able to access their documents. He said that, once the server was turned on again, the documents could be accessed. The Tribunal found that Mr Musgrave gave a detailed and entirely innocent explanation, which rang true, for the Claimant's inability to use a computer on that occasion, even though the Claimant believed the matter to be suspicious.

36. Furthermore, there were numerous emails in the bundle from the Claimant complaining about IT problems and equally numerous emails from the head teacher or IT technician, immediately responding to the Claimant's complaints and resolving them, for example on 30 August 2012 (page 138), 6 September 2012 (page 149A), on 3 June 2013 (page 250-251) and 4 July 2013 (page 265).

37. On 15 December 2010 the Claimant emailed Ms Rook saying that the office chair he had been using had a fault which could not be repaired; he asked that the school order a new office chair. The Claimant did not mention that he had any back problem at this point. Ms Rook authorised the purchase the same day (page 108). It was agreed between the parties that the new chair was not, in the event, purchased. Ms

Rook said that the school realised that it had spare office swivel chairs which the Claimant could use. The Claimant agreed that he used a spare chair.

38. The Claimant injured his back while carrying materials around the school on 22 August 2012. He recorded that he had suffered back and neck pain as a result, in an accident report form (page 142).

39. The Claimant had an attendance review meeting on 11 December 2012. The record of the meeting, which the Claimant signed, recorded that his back pain had resolved (page 173-174). The Claimant was referred to occupational health for advice about safe lifting limits. On 1 February 2013, an occupational health physician, Dr Steven Sperber, reported that the Claimant was well and had no functional impairment. Dr Sperber said that the Claimant had no background back problem, or any other background health issue, and usually coped with manual handling requirements of his role. The doctor reported that the Claimant was very familiar with safe manual handling. The doctor said, *"No workplace adjustments are currently required and he can be considered as fit for work"* (page 183).

40. In 2012 Lawdale Junior School replaced chairs in its reception office area. The Claimant told the Tribunal that he helped to construct the new chairs and that he was not provided with a new chair, whereas the office staff were. Ms Rook told the Tribunal that the office was refurbished and matching chairs were ordered to improve the appearance of the reception area, which was where visitors were welcomed to the school. The head teacher told the Tribunal that she, herself, had been using the same chair since she was appointed in 2002. The Tribunal accepted Ms Rook's evidence about the reason that the office chairs were replaced in 2012. Ms Rook was clearly aware of the refurbishment process and the planning of it.

41. In June 2013 the Claimant emailed Ms Rook saying that he was filling in a second accident form regarding on and off lower back pain since the date he had had the accident at work (page 246). Ms Rook replied, asking if the Claimant wanted to be referred to occupational health about back pain. The Claimant replied, saying that he did not need to go to occupational health and that his back pain was on and off due to the lack of help with lifting at work (page 246). Around July 2013 the Claimant asked for a new chair and linked it to his back problems (page 264). On 3 July 2013, Ms Rook emailed him asking if he had chosen a chair. She said that, if the Claimant would like occupational health to advise, she would refer him to occupational health. The Claimant did not take up the offer of a referral to occupational health (page 264).

42. The Claimant contended to the Tribunal that he had complained to Ms Rook about suffering from back pain due to an inappropriate chair throughout the period of his employment from 2010 to 2013. He also said this in his grievance on 20 July 2013 (page 272). In evidence to the Tribunal, Ms Rook said that the Claimant did not request a chair *because of back pain* until July 2013. The Tribunal accepted Ms Rook's evidence. On the contemporaneous documents, the Claimant did not ask for a chair in 2010 because of back pain. In late 2012 and early 2013 he had said that his back pain, which had arisen in August 2012, had resolved. The Claimant wrote a considerable number of emails about perceived problems at the school during his employment, but did not say that he needed a chair because of back problems until July 2013.

43. In November 2011 the Claimant asked Yvonne Cameron (senior administrative officer at the school) to order some boots for him. The cheque was sent to the supplier, but without the order form attached, so the supplier returned the cheque to the school on 22 November 2011 (page 113-115). The Claimant also placed an order through the school office for vegetables to be delivered for planting in boxes at the school in November 2011. The Claimant contended that Yvonne Cameron was deliberately not placing orders for him and was not cooperating with him. Ms Rook told the Tribunal that Ms Rook's own orders were some times delayed, or mislaid, but that she did not take it as a personal slight. She pointed to pages in the bundle which showed that the order for vegetables was placed and a cheque raised in November 2011 and that Ms Cameron had made handwritten notes, chasing up the order (page 564-565). It was also clear that a cheque was sent for the boots the Claimant had wanted in November 2011; a photocopy of the original cheque was also in the Tribunal bundle (page 113-115). The Tribunal found that the documents showed that the school office did try to place orders both for boots and for vegetables, raising cheques and completing paperwork. The Tribunal concluded that, if the orders were not successful, then this was not because the office failed to place orders, but was likely to have been due to some clerical error, either at the school, or at the relevant suppliers.

44. The Claimant told the Tribunal that he consulted his trade union, UNISON, on 27 December 2012 and told the union officer that he was being discriminated against because of race by the Respondent, because the Claimant had a faulty computer, his chair was not suitable, Yvonne Cameron had cancelled an order for his chair and had failed to order work boots. He said that on 5 February 2013 he had had a further meeting with his union representative, Mary Burke-Larner, at the Respondent School. The Claimant said that he had complained to his union representative that his workload had increased: he was now responsible for the school gardener; he had been asked to move chairs and tables in a room to allow ballet lessons to take place; had been asked to apply for a grant for biodiversity; and had been asked to apply for lottery funding for repairs. The Claimant told the Tribunal that his union officer had promised to speak to management at the school and sort matters out. He said, however, that he never received an outcome to his complaint to UNISON.

45. Ms Rook, the head teacher, told the Tribunal that the Claimant's union officer had met her at the school. She said that the union officer did not raise the Claimant's complaints about faulty computers, an unsuitable chair, being given extra work and extra responsibilities and his orders not being processed. In evidence to the Tribunal, the Claimant agreed that he was not at the relevant meeting between the union officer and the head teacher and did not know what had been discussed.

46. Ms Rook told the Tribunal that there had been issues with the Claimant's conduct and performance before the union officer visited. The Claimant's workload was being monitored by Ms Rook and it appeared to her that the Claimant was doing less work. Ms Rook's evidence about the Claimant's conduct and performance was corroborated by the contemporaneous documents. The Claimant had had a number of warnings about his conduct before 2013, in the form of management advice and oral warnings. The Claimant was given an oral warning on 29 November 2010 about a number of occasions on which he had publicly criticised other staff. The Claimant was told, in the warning, that he needed to develop positive and flexible working relationships with colleagues at all times, to respond appropriately to mistakes made by colleagues in a polite and professional manner, to desist from demanding that staff know what is in the

Claimant's job description and desist from telling staff how the Claimant would like their performance to improve. The Claimant was warned to desist from accusing staff of trying to set the Claimant up, or get him into trouble (page 105). On 10, 11 and 17 January 2012 Ms Rook had had meetings with the Claimant about his performance and had set targets for improvement (page 123-125). On 19 December 2012 the Claimant was given another oral warning (page 176). The warning arose out of staff complaining that the Claimant had spoken to them in a rude and aggressive manner. The Claimant was warned that he needed to develop positive flexible working relationships with colleagues and to talk in a professional and appropriate manner to other staff.

47. The Claimant complained, at the Tribunal, that he was asked to supervise a gardener and said that this was not in his job description. In evidence, the Claimant was asked which job description he was referring to; he identified one in the bundle at pages 543-544. Clause 6 of that job description recorded the Claimant's duties as including, *"To ensure the proper cleaning of the outdoors of the premises and site by the proper allocation and management of staff including gardeners…"*. Ms Rook told the Tribunal that the Claimant's pay scale – APTC scale 6 – did include managing others, including contractors. In any event, Ms Rook told the Tribunal that the Claimant had previously undertaken gardening work in the school and so she felt that he was the appropriate member of staff to supervise the gardener. The Tribunal accepted her evidence. The Tribunal considered that it was not surprising that the premises manager would be asked to supervise a gardener. The premises manager would be the logical member of staff to undertake this role. In any event, the Tribunal noted that the gardener attended only one day a week (page 94) and so this task was not an onerous one.

48. The Claimant told the Tribunal that he was asked to apply for a biodiversity grant, which was not in his job description. It is correct that such a duty was not specified in the Claimant's job description. Ms Rook agreed that she had asked the Claimant to apply for this grant. She said that she considered that he was the best person to undertake the task, as he had gardening knowledge. The Tribunal considered that there was no reason to disbelieve Ms Rook's explanation for why the Claimant was selected to apply for this biodiversity grant from the council. The Claimant did have gardening experience and, therefore, was the member of staff who most obviously had the relevant knowledge required for an application.

49. The Claimant told the Tribunal that he was required to move chairs and tables for a ballet class. He did not dispute that such would be part of his job description, but said that it was a new task which was added to his workload.

50. The Claimant complained that he had been asked to apply for lottery funding for repairs. Ms Rook said, in evidence, that the Claimant had applied to study for an MSc in education (page 158) and that she considered that asking him to undertake this task was not beyond his capabilities and could be useful for his application, showing that he had a wide range of skills.

51. The Claimant contended that these duties all represented increases in the number of his tasks and that they followed the union officer's visit to the school. However, the Tribunal noted that the Claimant's witness statement seemed to suggest that the Claimant's increased workload was one of the reasons he asked his union to

speak to the head teacher.

52. In a letter dated 2 July 2013, Ms Rook told the Claimant that the only thing Ms Burke-Larner had discussed with her in the meeting on 5 February 2013 was a fund-raising task which Ms Rook confirmed that the Claimant was not required to undertake any longer (page 257-258).

53. On the evidence, the Tribunal did not find that there was any increase in the number, or level, of the Claimant's responsibilities after the Claimant's union officer visited the Respondent School in February 2013.

54. The Claimant told the Tribunal that the Respondent refused to provide him with an assistant. He said that all the Respondent's other employees had assistants. He said that the head teacher had a deputy and that teachers had teaching assistants and that the cleaners helped each other. The Tribunal finds that not all employees at the school had an assistant. Clearly that was nonsense. Teaching assistants did not themselves have assistants and cleaners did not have assistants, there were simply four of them.

55. Ms Rook told the Tribunal that the Claimant was always given help when he asked for it. She said that, typically, Abdesalam (the cleaner) was asked to assist and was always willing to work overtime to do so. Ms Rook said that there were documents in the bundle to show this. Ms Rook said that the previous premises manager and the current premises manager, both of whom are white British, did not have permanent assistants, but were helped, as and when they required it, by Abdesalam. The Tribunal accepted Ms Rook's evidence. There were documents which supported her assertion that the Claimant was given help when required, for example a record of a meeting on 10 April 2012, which recorded Ms Rook giving the Claimant permission to hire contractors to move heavy items if his back was causing problems (page 130). Further, the Tribunal found that it was unsurprising that a premises manager of a state primary school would not have a permanent assistant; but that teachers, who were teaching classes of young children, and that head teachers of primary schools, would have assistants to help them in their wide-ranging and responsible roles.

56. The Claimant complained that he was given two different job descriptions; one on 5 January 2010 and the other on 12 May 2012 by a trainer at a project management course. He said that his predecessor had the earlier version. There were two job descriptions in the bundle. The Claimant emailed Ms Rook on 19 June 2013, querying the two job descriptions. Ms Rook responded that the Claimant's job description had been given to him when he started and that that was the correct one (page 254 and 546-548).

57. In February 2013 the Claimant was off work sick. Yvonne Cameron burnt some toast, leading to the London Fire Brigade attending the school. On his return to work the Claimant noticed that the fire panel had been broken. He asked Yvonne Cameron about the broken fire panel and she failed to mention that she had burnt the toast and that the Fire Brigade had been called.

58. On 28 February 2013 the Claimant and a cleaner, Amina Serroukh, had a discussion about a broken fridge. The Claimant felt that Ms Serroukh had told him to dispose of the fridge; the Claimant felt that this was inappropriate. There was a dispute

of fact between the parties about whether the Claimant had shouted at Ms Serroukh. The Claimant denied the he had. He said that he had simply told Ms Serroukh to "respect herself". The Claimant complained that the deputy head teacher had spoken to Ms Serroukh after the incident, but not to the Claimant.

59. Mr Musgrave (the deputy head teacher) told the Tribunal that, on 28 February 2013, he had been sitting in his room with the door open. He said that he heard the Claimant shouting at the cleaner. He heard the Claimant shouting and not the cleaner. Mr Musgrave heard the Claimant and his tone and considered that it did not sound right. When Mr Musgrave approached, the Claimant went past Mr Musgrave very quickly towards the playground and Mr Musgrave found Amina Serroukh immediately visibly distressed and shaken, so he asked her what had happened. Mr Musgrave told the Tribunal that he had reported the matter because, if he had ignored the incident, he would be sending out the message that such behaviour was permissible. Mr Musgrave agreed that he did not speak to the Claimant, but reported the matter to the head teacher to investigate. Mr Musgrave was not the investigator. The Claimant contended that Mr Musgrave had fabricated his evidence in the Tribunal.

60. Ms Rook investigated the incident and prepared an investigatory report at the time (page 188). The Claimant was invited to a disciplinary meeting on 2 May 2013 (page 199). The Claimant gave evidence to the meeting. Witnesses:- Mr Musgrave; Amina Serroukh; and Yvonne Cameron; all gave evidence to the meeting and were asked questions by the Claimant. In the meeting, Mr Musgrave said that he had heard loud voices and the Claimant saying distinctly to Amina, *"you need to respect yourself"*. Yvonne Cameron told the hearing that the Claimant was shouting, Amina was saying *"no problem Henry, no problem"*, and the Claimant was waving his arms and saying, *"don't tell me what to do"* (page 212).

61. The disciplinary panel found that the Claimant had not treated another member of staff with the respect required, based on the evidence of three witnesses, who they found gave consistent evidence. On 7 May 2013 the panel gave the Claimant a written warning for 6 months from the date of issue. The panel said that the Claimant had behaved in an unacceptable manner towards a colleague and that this constituted misconduct (page 218). The letter told the Claimant of his right of appeal. The Claimant did not appeal.

62. The Claimant was absent from work with lower back pain from 4 March 2013 to 11 March 2013 and 23 May 2013 to 23 June 2013. He was absent from work with stress from 26 March 2013 to 8 April 2013 and 23 April 2013 to 2 May 2013. The Claimant was reviewed in occupational health by Dr Sperber on 31 May 2013. Dr Sperber said that the Claimant was disaffected at work and was alleging bullying. Dr Sperber advised that, *"From a medical perspective, he is not ill and he does not suffer with symptoms of psychological or physical ill health at present"*. Dr Sperber advised that the Claimant was fit for work with no restrictions. He advised, however, that if the Claimant's negative perception of the work environment did not change, it could have negative implications for his psychological wellbeing. He advised that the Claimant's concerns were investigated (page 233).

63. On 3 June 2013 Ms Rook issued the Claimant with a letter of strong management advice, confirming advice given to him in a meeting that day regarding a number of work issues. The issues were said to be: repeated failure to meet

reasonable deadlines; repeated failure to complete checklists; refusing to do jobs within the Claimant's job description; failing to send in sickness certificates on two occasions; and repeatedly arriving late for meetings. Ms Rook said that the issues should not recur, but if they did, disciplinary action could be taken. Ms Rook said that the Claimant had alleged, in their meeting, that he was being victimised. She enclosed a copy of the school's disciplinary procedure and grievance procedure and encouraged the Claimant to use the grievance procedure, so that his concerns could be addressed (page 235).

64. There were numerous emails in the bundle from Ms Rook to the Claimant, asking for completed checklists which had not been supplied. On 13 May 2013 Ms Rook wrote to the Claimant saying that it was his responsibility to hand in checklists every Friday, but that the last one she had received from him was dated 15 February 2013 (page 220). On 14 January and 28 January 2013 Ms Rook had emailed the Claimant asking for checklists and saying that she should not need to remind him of routine tasks on a weekly basis (page 178 and 181).

65. The Claimant had been absent from work between 23 May 2013 and 23 June 2013. He was invited to an absence review meeting on 17 May. He was sent a copy of the school's sickness absence policy with the invitation letter (page 227).

66. On 24 June 2013 the Claimant was due to return to school after a day off sick. He told the Tribunal that he was not told that he was required to open the school and, so, when he attended, he found cleaners outside the school, waiting. The Tribunal notes that the Claimant had been warned about lateness in the strong management advice letter on 3 June 2013 (page 234). He had also failed to attend the school on 28 May 2013 to open it for a ballet company, despite being scheduled to work on 28, 30 and 31 May 2013 (page 240). The Claimant had also failed to attend the school to open it for engineers on 30 May 2013 (page 237). The Tribunal did not accept the Claimant's evidence that he was not told that he was required to open the school on 24 June. There was clearly a pattern of the Claimant not attending school when he was supposed to be there.

67. On 1 July 2013 the Claimant and Ms Rook had an email exchange about the Claimant taking leave and special leave. Ms Rook told the Claimant that he was not permitted to take holiday during term time. She set out half-term and Christmas breaks when the Claimant could take holiday. She said that she had agreed one day's leave during term time as an exceptional circumstance (page 255-256). Ms Rook asked the Claimant to review the special leave policy (page 391M).

68. On Monday 1 July 2013 the Claimant was walking to school when three boys on a scooter drove very close to him. The Claimant felt shaken by this incident. When the Claimant arrived at school, he told the reception staff about it. The reception staff felt that the Claimant was ranting at Yvonne Cameron and accusing her of having been responsible, in some way, for the scooter incident. The Claimant said that he was going to consult his solicitor.

69. Ms Rook witnessed part of the exchange. She invited the Claimant to her office the following week, to discuss his behaviour on 1 July 2013. The Claimant felt that the delay was surprising, given that he had been at work since 1 July.

70. Ms Rook told the Tribunal that, during their meeting on 8 July, the Claimant stood up above her desk, banged her desk and was angry and shouted. At the Tribunal, the Claimant vehemently denied that he behaved in this way. However, the Tribunal found that Ms Rook was entirely reliable in the evidence that she gave. She was calm and dispassionate, but described the words the Claimant used and his behaviour. The Tribunal noted that a statement Ms Rook made at the time also described the Claimant becoming angry and saying, *"This is a lie,"* banging the table with his fingers and throwing his arms wide open and glaring at Ms Rook, despite Ms Rook asking the Claimant repeatedly to calm down and stop shouting. The Claimant's denial in evidence to the Tribunal and his repeated assertions that matters had been *"cooked up,"* to get rid of him, were not credible.

71. On 9 July 2013 Ms Rook suspended the Claimant at a meeting. She confirmed his suspension in writing the same day. Ms Rook told the Tribunal that she had made the decision to suspend because she did not think it was appropriate for the Claimant to be in school, given his behaviour. Ms Rook told the Claimant that she was appointing Mr Musgrave to investigate allegations of potential gross misconduct against the Claimant. The allegations were:

71.1. Serious threatening and abusive behaviour towards fellow employees;

71.2. Serious breaches of the school's code of conduct; and

71.3. A failure to follow reasonable management instructions.

72. The letter said:

> *"During your suspension you will receive your contractual pay in the normal way.*
>
> *Although you will not be attending work your other normal working arrangements will apply. For example, if you wish to book annual leave, this must be authorised in advance. In addition, you must report sickness absence in the normal way."*

73. The letter enclosed the Respondent's disciplinary procedure (page 267-268).

74. The Respondent's sickness absence procedure provided for payment of sick pay and contained a procedure for reporting sickness absence. This required, at paragraph 13.2, that if sickness absence continued for 8 days or more, staff must obtain a medical certificate from their doctor, which must be sent to their line manager by 10 days' absence. It also provided that staff must submit medical certificates to their manager at regular intervals covering their periods of sickness consecutively. The procedure stated:

> *"It is very important that staff comply with the procedures...If they do not, there is every possibility that any allowances to which they are entitled will be delayed. Additionally…absenteeism procedures could be considered under the Schools Disciplinary Code…"*

75. The procedure provided that:

> *"If an employee's illness continues for four weeks they will be automatically referred to the Occupational Health Physician for medical examination…It is a requirement of the Occupational Sick Pay Scheme that employees so requested shall attend a medical examination. Failure to do so without good reason could lead to the stopping of Occupational Sick Pay…and/or disciplinary action."* (Page 429-430.)

76. The Respondent's annual and special leave policy for staff in schools provided at paragraph 5.1:

> *"A Headteacher…may decide that a member of staff is absent from work without authorisation if the reason for absence cannot be evidenced afterwards.*
>
> *Any members of staff who take leave, which has not been previously approved, may be subject to disciplinary action.*
>
> *8.* ***SPECIAL LEAVE****…*
>
> *8.1. In special circumstances the school will consider granting additional leave (with or without pay), depending on the reasons and circumstances why the leave is requested…because of the wide range of situations which might occur, it is important that Headteachers:*
>
> *•consider each request for leave reasonably and sympathetically…*
>
> *8.2. Procedure*
>
> *All special leave is granted at the discretion of head teachers and is not an automatic entitlement. …"* Annual and Special Leave for Staff in Schools Lawdale Junior School April 2010 Bundle Appendix C

77. The procedure said that all requests were to be made on the Special Leave Form and presented to the head teacher for consideration as soon as possible. At paragraph 15.7 of the procedure it was provided that, as a general guideline, an employee would be allowed up to five days' special leave in any 12 month period as special dependants' leave. The policy provided for special leave to be given for emergency care for dependants' who were defined as family members who were normally reliant on the employee.

78. The Respondent's disciplinary procedure provided for disciplinary sanctions to be taken for misconduct. The procedure stated that warnings were progressive from first through to second, and final, followed by dismissal, except in cases of gross misconduct which could result in summary dismissal, or cases which were less serious than gross misconduct, but warranted a final written warning being issued regardless of prior formal warnings. The procedure contained examples of gross misconduct which were said to include:

> *"(i) Prolonged unauthorised absence from [school] (at least ten working days without contact)…*

> *(viii) Fighting or acts of violence at the work place, serious threatening or abusive behaviour towards members of the public, clients, fellow employees..."*

79. Examples of misconduct included:

> *"(ii) Regular failure to follow employment rules e.g. reporting absence…*
>
> *(ix) Abusive or threatening behaviour towards a member of the public, clients, fellow employees…"*

80. The procedure stated that the head teacher had power to suspend an employee and that suspension would normally occur where an act of gross misconduct was suspected or alleged. The procedure stated that a trade union representative should be asked to attend a suspension meeting where practicable (paragraph 11.4, page 417).

81. Ms Rook, the head teacher, confirmed in evidence that she suspended the Claimant, not because of his behaviour on 1 July, but because of his behaviour on 9 July. She said, in evidence, that she had never had an employee behave like that before. Ms Rook was sitting down. The Claimant was standing above her, banging the desk and shouting and then went to the open office space, still shouting.

82. The Claimant submitted a grievance on 20 July 2013. He said that Mr Musgrave and Yvonne Cameron had mistreated him from the start of his employment. He said that Abdesalam (the cleaner) created hazards deliberately for the Claimant and that the job was too much for the Claimant alone. The Claimant said that he had started experiencing bullying in the street by strangers and gangs and had realised that he was being bullied in the street to stop him saying things at school meetings. He said he had been discriminated against because of race, harassed and bullied. The Claimant complained that he had suffered from lower back pain since 2011, but that an appropriate chair had never been provided for him. The Claimant said that there had been no incident at school on 1 July 2013 and that he had had to argue with the head teacher on 9 July 2013 that it was not fair to allege, untruthfully, that there had been such an incident earlier that month. He said that it was unfair that Mr Musgrave, who had been previously unfair to him, had been appointed to investigate the allegations against him (pages 272-280).

83. The Claimant was signed off work sick with stress from 12 July 2013 to 12 September 2013. He was invited to attend a disciplinary investigation meeting on 18 July 2013, but did not attend due to ill health.

84. On 23 August 2013 Mr Musgrave wrote to the Claimant, saying that his investigation was continuing, but was on hold pending occupational health advice. Mr Musgrave said that he would keep the Claimant informed on the progress and that he aimed to complete his investigation as soon as possible. The Claimant replied on 23 August 2013, saying that he was off sick with stress due to victimisation. He said:

> *"Please dont bother me anymore with your information when I am suffering from stress caused by senior management. Dont expect any*

replies from me until I am fit for work. …" (Page 327.)

85. The Claimant submitted a further sick note from his GP covering the period 12 September 2013 to 12 November 2013. On 12 September the Claimant went to Cameroon. His father was acutely ill at the time. The Claimant did not tell anyone at the school that he was going to Cameroon, nor did he apply for holiday or other leave, in order to go there.

86. Ms Rook sought advice from occupational health. On 2 October 2013 Dr Sperber (occupational health physician) wrote to Ms Rook, saying that occupational health had arranged an appointment with an independent psychiatrist for the Claimant, but that the Claimant had so far declined to attend the appointment. Occupational health said that feedback from the Claimant's GP indicated that the Claimant had also resisted specialist referral through the NHS, because the Claimant was convinced that he was not unwell (page 283).

87. Mr Musgrave invited the Claimant to a disciplinary investigation to be held on 23 September 2013 (page 328). On 19 September 2013 the Claimant replied by email, saying that he was not feeling better and had sent in another sick note from his GP, which Mr Musgrave should have received. He said that he would notify Mr Musgrave when he was feeling better (page 328).

88. On 5 November 2013 Mr Musgrave invited the Claimant to a disciplinary interview to be held on 13 November 2013, as the Claimant's sick note was due to expire before then. The Claimant replied by email on 12 November 2013, saying that he was not feeling well and was unable to attend the hearing (pages 329-330). The Claimant was still in Cameroon, but did not tell the school. On 11 November 2013 Mr Musgrave sent the Claimant written questions for the Claimant to answer, so that Mr Musgrave could complete his investigation report. The Claimant did not provide answers to the questions.

89. The Claimant's GP sick certificate expired on 12 November 2013.

90. Mr Musgrave investigated the allegations against the Claimant by interviewing Anita Vanjara, a year 6 teacher who was in the school office and witnessed the Claimant's behaviour on1 July 2013 (page 314). He interviewed Ms Rook (the head teacher) on 15 July 2013 (page 311). He also obtained a witness statement from Yvonne Cameron (page 315). In her interview with Mr Musgrave, Ms Rook said that, on 9 July 2013, the Claimant became agitated and angry, banging the table and shouting, "That is a lie." Anita Vanjara said that, on 1 July, the Claimant had come into the office, ranting and going on and on about people on scooters outside trying to knock him down on purpose. She said his tone of voice was very aggressive and he was directing his comments to Yvonne Cameron, as though it was her fault. Ms Vanjara said that the Claimant was very angry and came over to Yvonne Cameron, as though he was angry with her. She said that Yvonne Cameron gave the Claimant no response, but he kept going on at her as if it were all her fault. Ms Cameron said that the Claimant had come into the office and had said that two scooters had come on the pavement and were heading towards him. He said that he was writing it all down and he was going to tell his solicitor about her.

91. Mr Musgrave concluded that the allegations against the Claimant constituted

behaving in a threatening and abusive way towards members of staff on both 1 July and 9 July, and failing to follow reasonable management instructions regarding filing reports. He concluded that the allegations constituted repeated misconduct, rather than gross misconduct, and that the Claimant's suspension should therefore be lifted.

92. On 11 November 2013 Ms Rook wrote to the Claimant saying that, as a result of further findings of the disciplinary investigation into the allegations against the Claimant, the Claimant's suspension had been lifted with immediate effect and the Claimant could return to his post as premises manager. Ms Rook asked the Claimant to attend a meeting to discuss his return to work. She said that she was aware that the Claimant had told Mr Musgrave that he was still unfit to attend work and to attend the scheduled meeting with Mr Musgrave, but Ms Rook said that the Claimant had not provided a sick certificate and that his previous certificate had expired on 12 November. Ms Rook asked the Claimant to provide a sick certificate for the period 13 November to 22 November 2013. She said, *"Failure to do so may result in your sick pay being withheld and your absence being recorded as unauthorised" (page 284)*.

93. On 21 November 2013 Ms Rook wrote to the Claimant again. She said that the Claimant's suspension had been lifted with immediate effect and that the Claimant could return to his post. Ms Rook invited the Claimant to a meeting to be held on 27 November 2013, to discuss his return to school. She asked the Claimant to bring a fit to return to work note from his doctor if the Claimant was fit to return to work (page 285).

94. On 21 November 2013 the Claimant emailed Ms Rook, saying that he was unable to attend any meetings due to ill health. He said, *"Please, expect a sick note from my Doctor as soon as possible"* (pages 286-287). The Claimant told the Tribunal that his sister had sent this email on his instructions, because he was in a rural area in Cameroon and was not able to communicate by email.

95. On 25 November Ms Rook emailed the Claimant in an email entitled, *"Absence without a sick note"*. She said:

> *"It is imperative that you send in your sick note as soon as possible as failure to do so may result in loss of pay…*
> *In addition to this, you have still failed to provide a letter from your doctor specifically stating that you are too sick to attend meetings. Failure to provide this letter…could lead to further disciplinary action being taken against you as for all intents and purposes your absence is unauthorised as is your failure to attend meetings."*

96. Ms Rook said that, as part of the sickness procedure, a referral to occupational health would be made that week and that a failure to attend it could result in disciplinary action against the Claimant. Ms Rook attached the school's sickness procedure (page 286).

97. On 26 November 2013, Ken Millar (deputy head teacher) emailed the Claimant, saying that he was referring the Claimant to occupational health and asking that the Claimant check the referral forms for accuracy (page 289). On 27 November the Claimant replied to Mr Millar, saying that the Claimant was in Cameroon with his father who was in hospital. He said that he did not have the emotional resources to attend

meetings until he returned from the Cameroon (page 290).

98. On 29 November the Claimant obtained a medical certificate from a medical doctor in Cameroon. This certificate said that the Claimant was not fit for work because he was suffering from psychosocial stress (page 462). On 11 December 2013 the Claimant's GP wrote a letter to the head teacher, saying that the Claimant had contacted his GP by email, saying that he was in Cameroon and suffering from stress, sleeplessness, flashbacks and nightmares, and that the Claimant said that his stress was increased by his father's illness (page 292).

99. The Respondent did not pay the Claimant from 13 November 2013 to 28 November 2013.

100. Mr Musgrave completed his disciplinary investigation report (pages 293-332). He concluded that there was a case to answer in respect of the allegations against the Claimant of serious threatening or abusive behaviour towards fellow employees, serious breaches of the school's code of conduct and a failure to follow reasonable management instructions. Mr Musgrave said that a disciplinary hearing of school governors should be convened, to consider whether the allegations of misconduct breached the school's disciplinary policy and to decide on further action.

101. On 9 December 2013 Ms Rook wrote to the Claimant, saying that she had appointed Ken Millar (deputy head teacher) to investigate allegations of gross misconduct against the Claimant. The allegations were:

101.1. Absence from work without authorisation or a valid GP note covering the period 13 November 2013 to 28 November 2013 (12 working days); and

101.2. While absent from work the Claimant failed to follow the school's procedure for requesting annual or special leave to travel to Cameroon.

102. Ms Rook said that the Claimant could be liable to summary dismissal. She invited the Claimant to an investigation meeting on 16 December (page 333). The Claimant emailed, saying that he was too unwell to attend. Ms Rook replied that day, saying that the Claimant had not provided evidence that he was too unwell to attend meetings. She said that failure to attend meetings, including occupational health appointments, would be added to the gross misconduct allegations (page 335).

103. On 16 December 2013 the Claimant failed to attend a meeting with Mr Millar. Mr Millar wrote to the Claimant, saying that his failure to attend the occupational health appointment was a further allegation which would be added to the investigation. He said that, because the Claimant had not attended the meeting with Mr Millar, Mr Millar was sending questions that Mr Millar would have asked in the meeting, so that the Claimant could answer them in writing. Mr Millar asked the Claimant to do this by 8 January 2013.

104. The Claimant replied to Mr Millar's questions in about February 2014 (page 342). In answer to a question about whether the Claimant was aware of the school's special leave policy which had been provided to him on 1 July 2013, the Claimant answered that he was aware, but could not think properly as he was overcrowded with judgment.

He said his father was very sick and that the Claimant was very stressed due to the false allegations against him. The Claimant said that he had travelled to Cameroon on 12 September 2013 and had returned on 14 January 2014. In support of his assertion that he was ill, he referred to being signed off work for two months in September 2013 and to the Cameroonian doctor's notes. He said that on his return, his GP had signed him off work again and had assessed him as too ill to attend meetings. He said that the occupational health doctor had said that the Claimant was not fit for work on 4 February 2014.

105. The Claimant was signed off work sick by his GP on his return from Cameroon on 14 January 2014. On 27 2014 January Ms Rook wrote to the Claimant asking him to provide a GP note saying that he was not fit to attend meetings (page 346). On 31 January 2014 the Claimant's GP wrote, saying that the Claimant was not fit to attend meetings. On 4 February 2014, the Claimant's GP wrote saying that the Claimant felt that he could not attend meetings (page 354).

106. The Claimant attended an occupational health appointment on 4 February 2014. The resulting occupational health report said that the Claimant described symptoms of low mood triggered by disaffection at work and the stress of his father's illness. The report said that concerns about the Claimant's psychological health had been raised by management and that occupational health had previously advised the Claimant to undergo an independent psychiatric assessment, but that the Claimant continued to decline to attend such an assessment. Regarding the Claimant's low back pain, the report said that the Claimant had a vulnerability to recurrent episodes of muscular back pain, but that the Claimant admitted that he had failed to disclose the details of that at previous occupational health assessments. Dr Sperber, the occupational heal physician, advised that the Claimant was fit to attend meetings from 14 February 2014 under the Respondent's grievance and disciplinary procedures, in order to resolve outstanding matters. Dr Sperber, however, said that the Claimant was not fit to attend work at that time.

107. On 11 February 2014 Mr Millar wrote to the Claimant, inviting him to attend an investigatory meeting on 3 March 2014 regarding the allegations that the Claimant had been absent from school without leave and had failed to attend occupational health appointments (pages 360-361). The Claimant did not attend the investigatory meeting.

108. On 10 March 2014 the Claimant was invited to attend a disciplinary hearing to be held on 21 March 2014, in relation to allegations of misconduct of serious threatening and abusive behaviour towards fellow employees and a failure to follow reasonable management instructions (page 366). The Claimant was told that Mr Musgrave would be presenting the school's case on the allegations and would not call witnesses, but that, if the Claimant wished witnesses to be called, he should notify the school of the names by 17 March. The Claimant was told that the hearing would be both a grievance and a disciplinary hearing.

109. The Claimant attended the grievance and disciplinary hearing on 21 March 2014. He was represented by a UNISON representative. The disciplinary and grievance panel was comprised of three governors. The Claimant presented his grievance first, going over the matters in his written grievance, along with other matters, between 2.30pm and 4.30 pm. The disciplinary hearing took place between 4.10pm and 6pm.

110. Mr Musgrave referred to his report in the disciplinary hearing. He said that, on 1 July 2013, the Claimant had come to the school angry about events outside the school and had behaved unprofessionally. He said that, on 9 July, the Claimant had become angry, had banged the table and left the head teacher's room shouting when the head teacher had asked him about his behaviour. At the disciplinary hearing the Claimant said that he had worked very hard at the school and that management had failed to support him at difficult times. The Claimant's union representative asked that all the things that had happened to the Claimant at the school be considered as mitigating circumstances. The panel decided that the allegations of misconduct were proven on the balance of probability. The panel said that it recognised that the Claimant had some mitigation in terms of going through stress and his father's illness. It recommended that a final written warning be given for the Claimant's misconduct (page 384).

111. On 31 March 2014 Anne Ambrose (governor and chair of the disciplinary panel) wrote to the Claimant, giving him the outcome of the disciplinary hearing. She said that the panel, had found on a balance of probabilities, that the allegations of serious threatening and abusive behaviour towards fellow employees and a failure to follow reasonable management instructions were substantiated. She said that the Claimant had been given a final written warning for one year, effective from the date of the hearing. She said that any further acts of misconduct, or gross misconduct, in that time could result in dismissal. The Claimant was told of his right of appeal (page 390).

112. Mr Millar (assistant head teacher) concluded his investigation report into the Claimant's absence from school and failure to attend meetings without authorisation (page 391A-M). In relation to the first allegation, that the Claimant was absent from work without authorisation or a valid GP note from 13 – 28 November, Mr Millar said that the school's disciplinary policy listed unauthorised absence for a period or more than ten working days as gross misconduct. He said that the Claimant had stated in written answers that his father was seriously sick and that the Claimant was in a stressful state. Mr Millar said that the Claimant also said that the Claimant was aware of the school's sickness and special leave policy, but that his focus was on his father's illness and his own stress. Mr Millar said that the Claimant had not been authorised to be absent from work and had not submitted a valid medical certificate, despite requests from the school on 5, 18 and 25 November 2013, and despite being warned on 18 November 2013 that failure to supply a sick note would result in pay being withheld. Mr Millar said that the letter of suspension had specifically told the Claimant that sickness absence needed to be reported in the normal way. He also said that the Claimant had been told, in a strong management advice letter on 3 June 2013, that disciplinary action could be taken if the Claimant failed to send in sick certificates in a timely manner.

113. In relation to the allegation that the Claimant had failed to follow the school's procedure for requesting annual or special leave for travel to Cameroon, Mr Millar said that the Claimant had not sought, nor had he been given, special leave to travel to Cameroon. He said that the Claimant had been told to consult the procedure for requesting special leave and had been sent the annual and special leave procedure as an attachment to an email on 1 July 2013 (page 391J). Mr Millar said that the letter of suspension had said that normal working arrangements applied and that annual leave needed to be authorised in advance.

114. Regarding the allegation that the Claimant had failed to attend an occupational health appointment scheduled for 11 December 2013, Mr Millar said that the Claimant had not attended because he was in Cameroon. Mr Millar quoted the school's sickness management procedure, which stated that, when employees were absent for more than 4 weeks, they would be referred to occupational health and that failure to attend such an appointment without good reason could lead to sick pay being stopped and disciplinary action. Mr Millar said that there was a case to answer on all the allegations. He said that the Claimant had still not requested special leave. He recommended that the matter go to a disciplinary hearing (page 391L).

115. The Tribunal questioned Mr Millar about why the Claimant's actions were considered to be gross misconduct, when the Claimant did appear to be genuinely ill during and after his stay in Cameroon, as there had been GP sick notes covering much of the period during and after the Claimant's stay in Cameroon. Mr Millar told the Tribunal that the Respondent's policies allowed employees to apply for special leave. He said that the Claimant had left for Cameroon on the same day as he had submitted a GP note; showing that the Claimant was able to follow school policies. Mr Millar said that the Claimant had been reminded about the special leave policy on 1 July. He said that, in exchanges between the head teacher and the Claimant, the Claimant had not revealed that he was in Cameroon. Mr Millar told the Tribunal that the medical certificates the Claimant had provided did not show that the Claimant could not follow policies or procedures, or even provide courtesy calls to say that he was in Cameroon.

116. On 15 April 2014 Mr Millar invited the Claimant to a disciplinary hearing to be held on 1 May 2014, to consider allegations of potential gross misconduct. The Claimant said that he was unable to attend due to ill health (page 392). The Claimant was referred to occupational health and was seen on 29 April 2014. Dr Sperber (occupational health physician) reported on 29 April 2014. Dr Sperber said that the Claimant had ongoing symptoms of psychological distress, which the Claimant said were exacerbated due to having to attend meetings. Dr Sperber said that the Claimant was not fit to attend meetings at present and that the Claimant would have to undertake four sessions of counselling before this could be reassessed. Dr Sperber said:

> *"In the meantime, he is able to communicate in writing, and Management may therefore wish to explore other means to progressing any outstanding procedures accordingly."*

117. On 1 May 2014 the chair of the second disciplinary panel, Janis Fuller, wrote to the Claimant, telling him that the disciplinary hearing had been rescheduled to 8 May 2014. Ms Fuller said that, since the Claimant was unable to attend in person, the Claimant was invited to make written responses to the allegations in the investigation report and that the Claimant could send a trade union representative or workplace colleague to represent him at the hearing (page 396).

118. The disciplinary hearing proceeded on 8 May 2014 in front of a panel of governors, chaired by Janis Fuller. The Claimant did not attend and did not ask a trade union representative to attend on his behalf. He did not send in any written submissions.

119. On 9 May 2014 Ms Fuller wrote to the Claimant, telling him of the outcome of the

hearing: that the panel had recommended that the Claimant be dismissed summarily. Ms Fuller said that the panel had decided to proceed in the Claimant's absence because the original disciplinary meeting scheduled for 1 May 2014 had been postponed at the Claimant's request; the Claimant had had an opportunity to send written submissions and/or a representative to the hearing on 8 May; occupational health had advised on 29 April that the Claimant could communicate in writing; the Claimant had a history of non-attendance at meetings; and the panel had no confidence that, if the meeting was rescheduled, the Claimant would attend or send written submissions, or a representative.

120. Ms Fuller said that the panel had actively sought to find mitigation that they could consider. She said that the allegations that the Claimant had been absent from work without authorisation or a valid GP note between 13 and 28 November 2013 (12 working days) had been proven. She said that the school's disciplinary code described gross misconduct as including prolonged unauthorised absence from work, at least ten days without contact. Ms Fuller said that the allegation that the Claimant had failed to follow the school's procedure for requesting annual or special leave to travel to Cameroon when absent was proven and constituted gross misconduct. She said that the panel considered that it was clear that the Claimant was aware of the procedures for requesting annual and special leave and that the school had had discussions with the Claimant about them and had given the Claimant copies of these procedures. She said that the Claimant had not followed the procedures and it had only come to the school's attention that he had left the country without informing the school when it was trying to contact the Claimant on other issues. Ms Fuller said that the panel understood why the Claimant felt the need to make the visit, but that it was unacceptable that the Claimant had not informed the school, or had not even made one courtesy call.

121. Ms Fuller said that the Claimant had not attended occupational health appointments, but that the panel considered that this did not amount to misconduct. She said that the panel's findings showed that the Claimant had repeatedly failed to comply with the school's procedures and that the Claimant was not fulfilling his obligations as an employee to keep the school informed. Ms Fuller said that the panel accepted that the Claimant was going through a difficult time, personally, but that that was not sufficient to mitigate the act of gross misconduct.

122. Mr Luis Silva (governor) was a member of the panel and gave evidence to the Tribunal. The Tribunal asked Mr Silva why the panel had decided to recommend dismissal. Mr Silva said that the Claimant had not replied to the school and had indicated that he did not care about his obligations. Mr Silva said that the panel had looked for mitigation, but was also aware that the Claimant was on a final written warning.

123. In her letter to the Claimant on 9 May, Ms Fuller advised the Claimant that, if the local authority accepted the panel's recommendation, the Claimant's employment would be terminated with immediate effect. The Claimant was told of his right to appeal. The Claimant did not appeal.

124. On 21 May 2014 Robert McCulloch-Graham (the Respondent's Corporate Director) wrote to the Claimant, saying that he agreed that the Claimant should be summarily dismissed, as recommended by the disciplinary panel. He said that the

Claimant was summarily dismissed from 8 May 2014.

125. The Claimant told the Tribunal that he did not appeal against the final written warning, or against his dismissal, because he was too ill to do so. The Claimant also told the Tribunal that he did not supply sick notes covering his absence in November 2013 because he was ill and was looking after his sick father in Cameroon in a rural area. He said that he was very ill and could not face letters being sent by the school. The Claimant said that he felt bombarded by letters from Mr Musgrave and that he wanted to distract himself from anything to do with the school. The Claimant told the Tribunal that he had post-traumatic stress disorder, caused by his treatment at the school.

126. There was a medical report dated 19 January 2015 from Dr Luke Mearns (Consultant Psychiatrist) in the Tribunal bundle. The report addressed the Claimant's mental illness. Dr Mearns said that the Claimant had been assessed by Professor Kam Bhui on 26 September 2014. Dr Mearns said that the Claimant believed that the Claimant suffered from post-traumatic stress disorder brought on by events at the school. Dr Mearns said that there was little evidence of post-traumatic stress disorder when Dr Mearns saw the Claimant on 12 January 2015 and from the Claimant's medical notes. Dr Mearns said that Professor Bhui (editor of the British Journal of Psychiatry), who assessed the Claimant on 26 September 2014, was not of the view that the Claimant's symptoms should be ascribed to post-traumatic stress. Dr Mearns said that the Claimant suffered from a psychotic disorder, a persecutory delusional disorder, characterised by persistent delusional beliefs which interfered with his functioning. Dr Mearns said that the Claimant's medical notes suggested that the Claimant had potentially been unwell for five years.

127. The Claimant's ex-wife, Elizabeth Mellen Ikose, wrote a witness statement which was not challenged by the Respondent. In it, she said that she would bump into Annette Rook (the head teacher), who was a fellow parent at the Claimant's children's school. Ms Ikose said that Annette Rook had told Ms Ikose that she feared that the Claimant was suffering from a serious mental illness, as she recognised the symptoms, due to the fact that a family member of hers was suffering from a schizoid condition and had been hospitalised. Ms Ikose said that Ms Rook had commented, at some point in the summer term of 2013, that Ms Rook would allow the Claimant a year off school, if it would help him to recover, and that Ms Ikose reported this to the Claimant but that he was too pent up to act on it.

128. The Claimant contended at the Tribunal that he was not paid correctly when he was employed by the Respondent. On the evidence, the Tribunal finds that the Claimant was paid from 5 January 2010 at NJCSC6.26; from 5 July 2010, he was paid at NJCSC.27, which represented a six month increment; from 1 April 2011, the Claimant was paid at NJCSC.28, which represented an annual increment. From 1 April 2011 the Claimant was paid at the top of the pay scale for his role and he did not receive any other incremental points (page 585). The Claimant was entitled to be paid full sick pay for certified sickness absence from 10 July 2013 to 19 October 2013. He was entitled to be paid half sick pay for certified sickness absence from 19 October 2013 to 11 April 2014. He was overpaid for a period during his sick leave and the overpayment was clawed back from his April 2014 salary (page 613). The Respondent did not pay the Claimant for the period 13 November to 28 November 2013 because the Claimant did not provide a doctor's certificate covering that period of absence

(page 387).

129. On 26 March 2014 Ms Rook wrote to the Claimant telling him that, if he was off sick while he was suspended, he was treated as being sick, rather than being suspended on full pay (page 386). On 18 December 2013 Ms Rook had written to the Claimant saying that he would not be paid sick pay from 13 to 28 November 2013, because the Claimant had not provided a valid medical certificate for that period (page 340).

130. The Respondent did not give the Claimant an outcome to his grievance.

131. On numerous occasions when the Claimant was employed at Lawdale Junior School, Ms Rook had sent the Claimant emails to his personal email address, rather than to his school email address. Likewise, on numerous occasions, the Claimant emailed Ms Rook from his personal email address, rather than from his school email address. The Claimant started email chains to Ms Rook from his personal email address on many dates, for example 15 May 2010 (page 92), 15 October 2012 (page 166), 13 May 2013 (page 221), 24 May 2013 (page 240), 21 May 2013 (page 229) and 6 June 2013 (page 247). Ms Rook told the Tribunal that she replied to the Claimant at the email address that he used and that the Claimant never complained about the head teacher using his personal email address. The Tribunal accepted her evidence on this. There was no evidence of the Claimant ever having complained about it.

132. The Claimant was signed off work sick from 12 July 2013 to 12 September 2013 on account of *"stress at work"*. He was signed off work by his GP from 12 September 2013 to 12 November 2013, also for stress at work. He was signed off by the Cameroonian doctor from 29 November 2013 for psychosocial stress. He was signed off work with low mood from 15 January 2014 to 14 February 2014 by his GP, and again by his GP from 13 February 2014 to 28 March 2014 for stress. The Claimant was then signed off work for post-traumatic stress disorder from 31 March 2014 to 28 May 2014 (pages 460-465).

133. The Tribunal did not hear evidence about the Claimant's holiday pay and whether the Respondent had failed to pay him holiday pay.

Relevant Law
Equality Act 2010

134. Two of the protected characteristics under the *Equality Act 2010* are disability and race, *s4 EqA 2010*.

Disability

135. By *s6 Equality Act 2010*, a person (P) has a disability if
- 135.1. P has a physical or mental impairment, and
- 135.2. The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

136. The burden of proof is on the Claimant to show that he or she satisfies this definition.

137. Sch 1 para 12 EqA 2010 provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is *Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011).*

138. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

139. *Goodwin v Post Office* [1999] ICR 302 established that the words of the *s1 DDA 1995*, which reflect the words of *s6 EqA*, require the ET to look at the evidence regarding disability by reference to 4 different conditions:

139.1. Did the Claimant have a mental or physical impairment (the impairment condition)?
139.2. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)
139.3. Was the adverse effect substantial? (the substantial condition)
139.4. Was the adverse effect long term? (the long term condition).

140. Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011) paragraph D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

141. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

142. The Tribunal should focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she is able to do – *Guidance* para B9. In *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

Substantial

143. A substantial effect is one which is more than minor or trivial, *s 212(1) EqA 2010*. Section B of the Guidance addresses "substantial" adverse effect.

144. Para B7 states that account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day to day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability.

Long Term

145. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

Unlawful Acts

146. By *s39(2)(b)(c)&(d) EqA 2010*, an employer must not discriminate against an employee in the way the employer affords the employee access, or by not affording the employee access for receiving any benefit, facility or service, or by dismissing him or subjecting him to any other detriment.

147. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010. In approaching the evidence in a discrimination case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

Direct Discrimination

148. Direct discrimination is defined in s13(1) EqA 2010:

"(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."

149. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010*.

150. Accordingly, for a Claimant to succeed in a direct race or disability discrimination complaint , it must be found that:

150.1. A Respondent has treated the Claimant less favourably than a comparator in the same relevant circumstances;

150.2. The less favourable treatment was because of race or disability - causation;

150.3. The treatment in question constitutes an unlawful act, such as dismissal or detriment.

151. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?" Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77].

152. 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 had a significant influence, per Lord Nicholls in

Nagarajan v London Regional Transport [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

153. In *Madarassy v Nomura International Plc [2007] IRLR 246* Lord Justice Mummery said that, in discrimination cases, the burden of proof does not shift from the Claimant to the Respondent where the Claimant has proved only the bare facts of a difference in status and a difference in treatment. He said that a difference in protected status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities a Respondent had committed an unlawful act of discrimination, paragraph 56 of that Judgment.

Harassment

154. *s26 Eq A* provides

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

(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and

(*b*) the conduct has the purpose or effect of—

(*i*) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—

(*a*) the perception of B;

(*b*) the other circumstances of the case;

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

155. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of *s.3A RRA 1976*: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race (or ethnic or national origins).

156. It will be a healthy discipline for a tribunal in any case brought under this section specifically to address in its reasons each of the three elements in order to establish whether any issue arises in relation to that element and to ensure that clear factual findings are made on each element in relation to which an issue arises.

157. Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences.

158. This guidance is instructive in respect of harassment claims under *s26 EqA,* albeit under the EqA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race or other protected characteristic.

159. In the Dhaliwal case, the EAT said that, in determining whether any "unwanted conduct" had the proscribed effect, a Tribunal applies both a subjective and an objective test. The Tribunal must first consider if the employee has actually felt, or perceived, his dignity to have been violated or an adverse environment to have been created. If this has been established, the Tribunal should go on to consider if it was reasonable for the employee to have perceived this. In approaching this issue, it is important to have regard to all the relevant circumstances, including the context of the conduct. A relevant question may be whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence: the same remark may have a different weight if evidently innocently intended, than if evidently intended to hurt (paragraph [15]).

160. The EAT also commented that "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers and tribunals are sensitive to the hurt that can be caused by offensive comments or conduct (which are related to protected characteristics), ".. it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase paragraph [22]."

161. In *Land Registry v Grant* [2011] IRLR 748 at [47] Elias LJ said that words of the statutory definition of harassment , ".. are an important control to prevent trivial acts causing minor upsets being caught by the definition of harassment." In *GMBU v Henderson* [2015] 451 at [99], Simler J said, "..although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so."

Discrimination Arising from Disability

162. *s 15 EqA 2010* provides:

"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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

163. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, Langstaff P said that there were two issues regarding causation under s15:

163.1. What was the cause of the treatment complained of ("because of something" – what was the "something"?)

163.2. Did that something arise in consequence of the disability?

164. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

Reasonable Adjustments

165. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

166. *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.

167. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

168. The test of 'reasonableness' in a reasonable adjustment complaint imports an objective standard. Per Maurice Kay LJ in Smith v Churchills Stairlifts plc [2005] EWCA 1220, [2006] ICR 524, Collins v Royal National Theatre Board Ltd 2004 EWCA Civ 144, 2004 IRLR 395 per Sedley LJ para 20.

169. The *Equality Act 2010* does not specify any particular factors which are to be taken into account in deciding whether an adjustment is reasonable. The Code of Practice on Employment 2011 provides examples of some of the factors which might be taken into account in determining whether a particular step is reasonable for an employer to have to take include;

169.1. whether taking any particular steps would be effective in preventing the substantial disadvantage;
169.2. the practicability of the step;
169.3. The financial and other costs of the step and the extent of any disruption caused;
169.4. The extent of the employer's financial and other resources;

169.5. The availability to the employer of financial and other assistance;
169.6. The type and size of the employer.

Knowledge

170. In *Secretary of State for the Department of Work and Pensions v Alam* [2010] IRLR 283, [2010] ICR 665, [2009] All ER (D) 174 (Nov) the EAT held that the correct statutory construction the knowledge defence in a reasonable adjustment complaint involved asking two questions;
(1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in (s20 EqA)? If the answer to that question is: 'no' then there is a second question, namely,
(2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in (s 20 EqA)?

171. What the employer knew or should reasonably have known is one for factual assessment of the Tribunal, *Wilcox v Birmingham Cab Services Limited*, para 34.

172. Code of Practice on Employment 2011, provides at para 6.19, "What if the employer does not know the worker is disabled? 6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.. Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

173. 6.21 provides, "If an employer's agent or employee… knows, in that capacity, of a worker's .. disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment..".

Protected Disclosure Detriment

174. In respect of protected disclosures made before 25 June 2013, *s47B Employment Rights Act 1996* provides, "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure".
175. Such a protected disclosure must satisfy three conditions:
175.1. It must be a disclosure of information;
175.2. It must be a qualifying disclosure – ie one which, in the reasonable belief of the worker making it, tends to show that one or more of six "relevant failures" has occurred or is likely to occur;

175.3. It must be made in accordance with a specified method of disclosure in any of ss 43C-43G ERA 1996.

176. S43B(1) Employment Rights Act 1996 defines qualifying disclosure. The relevant parts of s43B ERA 1996 provide ".. a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –
(b) that a person has failed, or is failing, or is likely to fail to comply with any legal obligation to which he is subject..
(d) that the health and safety of any individual has been, is being, or is likely to be endangered."

177. If there is a qualifying disclosure, it must still be made in accordance with one of the specified methods of disclosure in *ss43C-43G ERA 1996*. Where disclosures are made to an employer in accordance with *s43C ERA 1996*, "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith – to his employer, .."

178. Where an employee complains of detrimental treatment, "On such a complaint, it is for the employer to show the ground upon which any act, or deliberate failure to act, was done, " *s48(2) ERA 1996*.

179. Once the Claimant has shown that there was a protected disclosure followed by detrimental treatment, the burden passes to the Respondent to show that the treatment was not done on the ground of the disclosure.

180. In *Fecitt v NHS Manchester* [2011] EWCA 1190 [2012] IRLR 64 the Court of Appeal considered the causal link between making a protected disclosure and suffering detriment. In its judgment*, s.47B* will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. The burden of proof on the Respondent therefore requires the Respondent to show that the protected disclosure did not materially influence the Respondent's treatment of the whistleblower. The Court of Appeal indicated that, where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.

Unfair Dismissal

181. *S94 Employment Rights Act 1996* states that an employee has the right not to be unfairly dismissed by his employer. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason or principal for a dismissal and that such a reason is a potentially fair reason under s 98(2) ERA. Conduct is a potentially fair reason for dismissal.

182. By *s103A ERA 1996* an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) is that the employee made a protected disclosure.

183. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

184. In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

185. Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

186. The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

187. In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR .

188. The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

189. It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

Notice Pay

190. Employers are only entitled to dismiss empoyees without notice where the employee's breach of contract was repudiatory: whether it was sufficiently serious to justify dismissal. That depends on the circumstances eg *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, [1959] 1 WLR 698, CA; *Wilson v Racher* [1974] IRLR 114,

Discussion and Decision

Protected Disclosure

191. The Tribunal found that the Claimant agreed, in evidence to the Tribunal, that his alleged disclosures were made to his union official and not to his employer. He did not attend the meeting between the head teacher and his union official in February 2013 and the Claimant agreed, first, that he did not know what was said during the meeting and, second, that his union official did not report back to him from the meeting.

192. Ms Rook denied, in evidence, that the union officer had raised a complaint with her that the Claimant was being racially discriminated against because he was not allowed to open the school, was not being issued with an office chair, was not being issued with a new computer, when his orders for office boots had been delayed, when he was given verbal warnings, was not receiving increments and did not have a permanent assistant, and when his workload was increased.

193. In a letter to the Claimant on 2 July 2013 (page 257), Ms Rook told the Claimant that the only matter discussed with her in a meeting with the union officer on 5 February 2013 was a fundraising task which Ms Rook confirmed the Claimant was not required to undertake.

194. The Tribunal found that the union officer did not pass on the Claimant's complaints that he was being racially discriminated against because he was not being provided with a chair or a computer, or that his work duties had been increased, or that his orders were not being processed, or that he was not being provided with an assistant. The Tribunal found that the union officer asked the head teacher only about the Claimant being requested to undertake a fundraising task.

195. The Tribunal did not find that, in doing so, the officer disclosed information which, in the reasonable belief of the Claimant, tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject, or that the health and safety of any individual had been, was being, or was likely to be endangered. The information about the Claimant being asked to undertake a task was information about a small, single matter, which was trivial, and which, on any reasonable view, could not show that a person was breaching, or likely to breach, a legal obligation, or that the health and safety of any individual was being put at risk.

196. The Tribunal, therefore, concluded that the union officer did not make a protected disclosure to the Claimant's employer on his behalf, and the disclosure therefore did not fall within *Ss 43A, 43B and 43C of the Employment Rights Act 1996*. The Tribunal noted, in any event, that on the Claimant's witness statement, he contended that many of the matters of detriment which he relied on in the claim were actually the things which he complained about to the union, and the Tribunal found that logically, therefore, they could not be detriments because of a protected disclosure because they predated any alleged protected disclosure.

Harassment Related to Race and Direct Discrimination because of Race

197. In making its findings, the Tribunal has considered the evidence as a whole, although for clarity, the Tribunal has stated its reasons separately in respect of individual issues.

197.1. **The Claimant not being permitted to open the premises as his predecessor had done**:

The Tribunal found that the only reason that the Claimant was not permitted to open the school premises in the mornings was that there was a pre-existing arrangement with a cleaner, that the cleaner would open the premises which facilitated the cleaning of the school before the start of the school day. This was not related to race in any way. It was

a practical arrangement.

197.2. **The Claimant complaining that his computer was not working, but Ms Rook not addressing his complaints**:

On the Tribunal's findings of fact, Ms Rook and/or Ms Musgrave, either themselves or through the IT technician, addressed the Claimant's computer complaints when they arose. There are numerous emails in the bundle showing the Claimant raising complaints and Ms Rook addressing them promptly.

197.3. **In October 2012, the Claimant's computer not being replaced when other computers were**:

The Tribunal was satisfied, on the facts, that the Claimant's computer was working at all times during his employment and still is. It was not correct that *all* staff computers were replaced in 2012. Administrative staff and senior leadership team computers were replaced, because those individuals use computers as essential tools for their administrative and educational jobs. The failure to replace the Claimant's computer was not related to race in any way. It was solely because the Claimant's computer worked and his job required limited computer use, so that its replacement was not necessary.

197.4. **The Claimant's request for a special chair in 2010, 2011 and 2012 being rejected**:

The Tribunal found that, in 2010, the Claimant was provided with a swivel chair, to replace his broken one. The replacement chair was not new, but was a spare one already held in the school. The school preferred not to spend unnecessary money. The failure to give the Claimant a new chair was not related to race in any way, but was simply because there was a replacement chair available to him from school stocks. In 2012, chairs in the office area were replaced with chairs which were matching when that area was refurbished. This was to improve the appearance of the reception area, which was the first area visitors to the school would see. The Claimant did not work in the reception area. The failure to replace his chair at the time was not related to race. In November 2011, an order for work boots was processed for the Claimant, but the order form became detached from the cheque, in what was plainly a clerical error and which was not related to race in any way.

197.5. **Ms Rook increasing the Claimant's workload by making him responsible for the gardener, assisting with gardening, preparing ballet rooms and applying for funding**:

The Tribunal decided that Ms Rook asked the Claimant to undertake duties which were related to his job duties and his areas of knowledge and expertise. The Claimant had experience of gardening and was responsible for the upkeep of premises. Some of the duties which Ms

Rook asked the Claimant to take on were not specifically listed in his job description, but were closely aligned to his responsibilities and the Claimant was the logical employee in the school to do these jobs. The Tribunal finds that those were the reasons that the Claimant was asked to do these jobs; it was nothing to do with race.

197.6. **Yvonne Cameron delaying the Claimant's order for vegetables, refusing to give him keys to the water tanks and withholding orders for services**:

The Tribunal has found, on the facts, that the school's office did process the Claimant's orders and, if the supplies were not delivered to him, this was due to clerical errors on the part of, either the school office, or the supplier. It was nothing to do with race. There was no doubt that the Claimant did obtain the keys to the water tanks, as Ms Rook said. Sometimes other employees were busy with other things. The Tribunal did not find on the evidence that the office staff failed to cooperate with the Claimant. On the evidence which was available, the office staff did cooperate, but the Claimant misinterpreted delay as deliberate. The Tribunal found that members of the school office, including Ms Cameron, cooperated with the Claimant and assisted him, and their behaviour towards him was nothing to do with race.

197.7. The Claimant being refused an assistant:

The Tribunal has found that the Claimant was given assistance whenever he needed assistance. Failure to employ a permanent assistant for him was not related to race in any way. Neither the Claimant's predecessor, nor his successor in the premises manager job, both of whom were white British, were given a permanent assistant. The Claimant was not given a permanent assistant because he did not need one for his job; whereas the head teacher of a whole primary school and teachers of classes of primary school children did need assistants, because of their much more wide-ranging and onerous educational responsibilities.

197.8. **Giving the Claimant two job descriptions**:

The Claimant was given two job descriptions; one was slightly different to the other. The Claimant was given one at the outset of his employment and one by a trainer on a project management course. There was absolutely no evidence that this was related to race in any way.

197.9. **Yvonne Cameron did not tell the Claimant that she had burnt some toast and that the Fire Brigade had attended the school while the Claimant was off sick when the Claimant later noticed that the fire panel was broken**:

The Tribunal found that this was a trivial incident and that there was nothing to link Ms Cameron's failure to admit that she had burnt some

toast while the Claimant was off sick to the Claimant's race, or to anyone else's.

197.10. **On 28 February 2013, Mr Musgrave initiated a complaint against the Claimant in relation to his behaviour towards a cleaner, which resulted in a disciplinary hearing and a warning**:

The Tribunal accepted Mr Musgrave's evidence that he overheard the Claimant shouting and distinctly saying to a cleaner that she needed to "respect herself". The Tribunal accepted Mr Musgrave's evidence that he found the cleaner in tears and had reported the matter because, if he had failed to do so, it would have indicated that he condoned the Claimant's behaviour. The Tribunal found that there was a disciplinary hearing, in which three witnesses gave evidence about the Claimant shouting, and that the disciplinary panel believed the three witnesses, who corroborated each other. The disciplinary panel decided that the Claimant had behaved inappropriately towards the cleaner. The Tribunals found that it was the Claimant's behaviour, in shouting at the cleaner and distressing her, which led to Mr Musgrave reporting the matter and to the Claimant being given a warning. None of these things were to do with race, they were entirely to do with the Claimant's inappropriate behaviour towards a fellow employee.

197.11. **On 3 June 2013, the Claimant being sent a strong management advice letter**:

The Tribunal concluded that there was ample evidence in the bundle of the Claimant having repeatedly failed to comply with deadlines, being late, or not attending the school, before this strong management advice was given. The reason that the strong management advice was given was entirely because the Claimant had failed to carry out his job duties regularly, which had led to wide-ranging management concerns about his performance and which had previously been drawn to his attention. It was in no way related to the Claimant's race.

197.12. **On 24 June 2013, the Claimant not being given advance notice that he was required to open the school premises**:

The Tribunal decided on the facts that, on the balance of probabilities, the Claimant had been told to open the school on 24 June 2013, because there was evidence that the Claimant had failed to attend school on a number of previous occasions when he had been required to do so. The Tribunals found that this was another example of his failure to attend when required to do so. This allegation failed on its facts.

197.13. **In July 2013, Yvonne Cameron alleging that the Claimant threatened her when he tried to explain an incident outside the school where three white boys had driven very fast at him on a scooter**:

The Tribunal found that, not only Yvonne Cameron, but another witness, considered that the Claimant was ranting about an incident to Yvonne Cameron and was speaking in a threatening way to her, so that Yvonne Cameron and the witness genuinely considered that the Claimant was threatening Ms Cameron. The Tribunal found that the Claimant said to Ms Cameron that he would tell his solicitor, while talking in an accusatory way towards her, and that Ms Cameron genuinely considered that he was threatening her with legal action in relation to an incident which was entirely unrelated to her. Ms Cameron's allegation that the Claimant threatened her was nothing to do with race and everything to do with the Claimant's aggressive behaviour towards her.

197.14. **The head teacher delaying until 9 July 2013 to raise the matter with the Claimant, and not accepting what he said, suspending him on that date and subjecting him to allegations of serious threatening abusive behaviour towards fellow employees, serious breach of the school's code of conduct and a failure to follow reasonable management instruction:**

The Tribunal found that the head teacher interviewed the Claimant about the 1 July 20113 incident because members of staff in the office were concerned about it. The head teacher is a busy person and a delay of one week was not particularly lengthy. The head teacher was not intending to suspend the Claimant, but did so when the Claimant behaved in an aggressive way towards her on 9 July; shouting, banging the table, refusing to calm down, despite being asked to do so. The head teacher suspended the Claimant because of this behaviour, which she considered to be potential gross misconduct.

The Tribunal found that the head teacher spoke to the Claimant on 9 July because of his behaviour on 1 July, and did not accept his explanation and that she suspended him and brought disciplinary action against him because of the Claimant's aggressive and threatening behaviour towards her, shouting at her, in her room and continuing to do so in the public reception area, which potentially fell within the definition of gross misconduct in the Respondent's disciplinary code. Suspension was therefore, open, to the head teacher under the code of conduct. None of her actions were anything to do with the Claimant's race. The head teacher's actions were entirely caused by the Claimant's aggressive behaviour which potentially came within the definition of gross misconduct.

197.15. **During the Claimant's sickness absence and while the Claimant was visiting her father in Cameroon, the Respondent lifting his suspension and asking him to provide a sick note and not paying him when he failed to do so**:

The Tribunal found that Mr Musgrave lifted the Claimant's suspension because, when considering his investigation report, he decided that the allegations against the Claimant were properly characterised, not as gross misconduct, but as misconduct. The Respondent was not aware

that the Claimant was in Cameroon when the Claimant's suspension was lifted, because the Claimant never informed the Respondent that he was, despite being in regular email contact with the school. The school required sick notes from the Claimant because both the school's sickness policy and the Claimant's suspension letter were clear that the Claimant's sickness absence, while on suspension, was required to be authorised. The Respondent did not pay the Claimant sick pay from 13 November 2011 to 28 November because he failed to provide a valid sick note for that period, as required under the school's policies. None of these actions by the Respondent were related to the Claimant's race in any way.

197.16. **On 11 February 2014, the Claimant being invited to an investigatory meeting in relation to potential gross misconduct with regard to reporting sickness and absence, special leave procedures and a failure to attend an occupational health appointment when he was still in Cameroon**:

The Tribunal concluded that the reason that the Claimant was invited to a disciplinary hearing about those matters was that he did fail to comply with procedures. The Claimant had been told, in his suspension letter, that he was required to comply with procedures and the terms of his employment but he failed to do this. He had been warned by the head teacher on 18 and 25 November that he needed to provide certification for his sick leave, otherwise his leave would be unauthorised. The school's disciplinary policy listed unauthorised absence from the school for ten days as gross misconduct. The school's sick pay policy warned that failure to comply with it could lead to unauthorised absence being considered as a disciplinary matter. The Respondent treated the Claimant in accordance with its disciplinary and absence policies. The Claimant being invited to a disciplinary hearing for failure to comply with the policies was nothing to do with race.

197.17. **The Claimant receiving a final written warning following a disciplinary hearing on 21 March 2014**:

The Tribunal decided that the Claimant received a final written warning because of the Claimant's aggressive and threatening behaviour towards Yvonne Cameron and the head teacher on 1 July and 9 July 2013. It was not in any way related to his race.

197.18. **The disciplinary hearing failing to address the Claimant's grievance when the Respondent had agreed to respond to his grievance in the hearing**:

The Tribunal found that the hearing did hear the Claimant's grievance for an hour and a half of the hearing time. However, the outcome letter did not address the grievance, or make specific findings about it. The grievance hearing did listen to the grievance and ask questions about it and the Claimant was represented at the hearing and was able to air his grievances fully. The Tribunals found that, if the hearing outcome letter

had addressed the grievance, it would have rejected it. The Claimant's complaints had no substance on the facts that this Tribunal has heard. The Tribunal considered that an outcome letter would have been the expected conclusion from any grievance and that the ACAS Code of Practice 1 on disciplinary and grievance procedures at paragraph 40 requires that decisions on grievances should be communicated to an employee in writing. However, in this case, the Tribunal found that there was no evidence that an employee in the same circumstances as the Claimant, who had brought an unmeritorious grievance and who was facing legitimate misconduct allegations, would have been a grievance outcome if they were of a different race. The Tribunal did not find that the burden of proof had shifted to the Respondent to show that race was not part of the reason that a grievance outcome letter was not sent. The Tribunal further found that this was not harassment related to race; there was no evidence from which the Tribunal could conclude that the failure to send a grievance outcome letter was related to race.

197.19. **By letter of 14 April 2014, the Claimant being invited to a further disciplinary hearing in relation to failures to follow absence and sickness procedures**:

The Tribunal determined that the Claimant was invited to this hearing because the disciplinary investigation had been completed and Mr Millar had concluded that there was evidence to support findings of gross misconduct against the Claimant, so that the matter should go to a disciplinary hearing. The invitation to the hearing was nothing to do with race and was the logical outcome of Mr Millar's findings about the Claimant's misconduct.

197.20. **The disciplinary hearing proceeding in the Claimant's absence in May 2014 and without written submissions when the Claimant was too unwell to make written submissions and remained on sick leave**:

The Tribunals found that the hearing proceeded for the reasons as set out in the outcome letter: that the meeting had previously been postponed; that occupational health had advised that the Claimant was well enough to make written representations; that the Claimant had been given the opportunity to make written representations and to send a representative; and that the panel did not consider that it was likely that the Claimant would attend on any further date. Those reasons were not related to the Claimant's race in any way.

197.21. **Dismissing the Claimant by a decision letter of 9 May 2014**:

The Tribunal concluded that the disciplinary panel made a recommendation that the Claimant should be dismissed on 9 May 2014 and that Mr McCulloch-Graham had accepted the recommendation and confirmed this to the Claimant on 21 May. The reason the panel made the recommendation to dismiss was that it found two allegations proven against the Claimant: the Claimant being absent from work without

authorisation or a valid GP note covering 13 November to 28 November; and that, while absent from work, the Claimant failed to follow the school's procedure for requesting annual or special leave to travel to Cameroon. The panel found those allegations proven because there was ample evidence upon which the panel could find them proven, from Mr Millar's detailed and comprehensive investigation report. The Tribunal accepted Mr Silva's evidence that the reason the panel considered that the matters constituted gross misconduct and worthy of dismissal was that the Claimant had not replied or responded to the school and had indicated that he did not care about his obligations. None of these matters were anything to do with race. The Claimant had done matters of misconduct and the panel considered that the Claimant demonstrated a disregard for his obligations to the school.

197.22. **Under paying the Claimant for suspension**:

The Tribunal decided that the Claimant was not underpaid. He was paid sick leave when he was off work on authorised sick absence. The only period for which he was not paid was when he failed to provide the required certification. The Respondent's procedure allowed the Respondent to deduct sick pay for a period when an employee did not provide the certification required. This allegation failed on its facts.

197.23. **Failing to give the Claimant an increment**:

The Respondent did given the Claimant incremental pay increases on 5 July 2010 and 1 April 2011. At the latter date, he reached the maximum increment point for his grade. The Tribunal found that the Respondent did pay the Claimant according to the National Joint Committee terms and conditions and that the allegation therefore failed on its facts.

197.24. **Throughout the Claimant's employment, the head teacher using the Claimant's home email address and not his work email address**:

The Tribunal concluded that the Claimant used his home email address for work correspondence and that this was why the head teacher acted in kind. It was nothing to do with the Claimant's race.

In summary, none of the Respondent's acts were because of race or were related to race. As such, they could not amount to either direct race discrimination or race harassment. The Claimant's direct race discrimination and race harassment claims fail.

Disability

Low back pain

198. The Tribunal found that the Claimant did have intermittent back pain from about

2012. In August 2012, he suffered back pain after undertaking heavy lifting. This back pain, however, resolved completely by December 2012, when the Claimant signed the notes of an attendance review meeting, in which had had confirmed that the pain had resolved. In February 2013, an occupational health physician advised that the Claimant was pain free and had no underlying back condition. The Claimant had two further absences due to back pain in 2013. Later, on 4 February 2014, the occupational health physician advised that the Claimant had a vulnerability to recurrent mechanical muscular back pain. The Claimant did not relate his requests for a chair in work to his back until about June 2013.

199. The Tribunal concluded that the Claimant had had occasional periods of back pain from about 2012 to February 2014. By 4 February 2014, the Claimant was described by an independent occupational health practitioner as having a vulnerability to recurrent periods of muscular back pain. However, in February 2013, an independent occupational health doctor advised that the Claimant had no background back problem and normally coped with manual handling. At that point, the Tribunal finds the Claimant had no physical impairment; alternatively, even if he did have a physical impairment, it had not had, and was not likely to have, any long term adverse effect on his ability to carry out normal day to day activities at that date. His back pain, for which he had been signed off work briefly in August 2012, had not lasted for anything like 12 months and was not considered likely to recur at that point. The Claimant was not disabled by reason of back pain in February 2013.

200. The Tribunal, therefore, considered whether the Claimant had become disabled at any point before July 2013 when he was suspended and after which he did not return to work. The Claimant had two further absences from work related to back pain between February and July 2013.

201. The Claimant told the Tribunal that, since 2010, he had suffered from pain in his lower back; sometimes he could not sit down, sleep well, and that he had had to stop cycling in April 2013 because of pain. He said that he could not sit down for more than 30 minutes during this period and had had to take strong painkillers since 2010 to relieve this pain.

202. The Tribunal rejected the Claimant's evidence. In December 2012, the Claimant told an attendance management meeting that his pain had resolved. He never linked his requests for a chair to back pain until June 2013. He told the occupational health doctor in February 2013 that he had no underlying condition and normally coped with lifting work. The Claimant's evidence to the Tribunal, therefore, about his symptoms between 2010 and 2013 was not reliable.

203. The Tribunal concluded that the only reliable evidence was therefore the evidence of the medical reports and of the Claimant's absence. Even though the Claimant had two further periods of absence due to back pain in March and May 2013, any adverse effects on the Claimant's ability to carry out normal day to day activities, insofar as it was demonstrated by absence from work, had not lasted for 12 months by July 2013.

204. The Tribunal concluded, in the absence of reliable evidence from the Claimant, that there was no evidence that this pain was likely to recur, or was likely to last long term. The Tribunal concluded that by July 2013 there was no evidence that the

Claimant's back pain was anything other than a reaction to unusual heavy lifting work, leading to intermittent pain as a result. The Tribunal concluded that, even if the Claimant had a physical impairment, that physical impairment had not had, and was not likely to have, a long term adverse effect on the Claimant's ability to carry out normal day to day activities; as opposed to rare, occasional pain, prompted by unusual, heavy and prolonged lifting, rather than normal lifting activities. The Tribunal concluded, therefore, that, at no time when the Claimant was working at the Respondent's school, was the Claimant disabled by reason of back pain.

Post-traumatic Stress Disorder

205. On the medical evidence seen by the Tribunal, the Claimant did not have the condition of post-traumatic stress disorder. Dr Luke Mearns' (Consultant Psychiatrist) report dated 19 January 2015 addressed the Claimant's mental illness. Dr Mearns said that the Claimant had been assessed by Professor Kam Bhui on 26 September 2014. Dr Mearns said that the Claimant believed that the Claimant suffered from post-traumatic stress disorder, brought on by events at the school. Dr Mearns said that there was little evidence of post-traumatic stress disorder when Dr Mearns saw the Claimant on 12 January 2015 and from the Claimant's medical notes. Dr Mearns said that Professor Bhui (editor of the British Journal of Psychiatry), who assessed the Claimant on 26 September 2014, was not of the view that the Claimant's symptoms should be ascribed to post-traumatic stress. Dr Mearns said that the Claimant suffered from a psychotic disorder, a persecutory delusional disorder, characterised by persistent delusional beliefs which interfered with his functioning. Dr Mearns said that it seemed that the Claimant had had symptoms of this psychotic disorder for about 5 years.

206. The Tribunal accepted Dr Mearns' expert opinion that the Claimant did not have post traumatic stress disorder but had a psychotic disorder at the relevant times for the purposes of this claim.

Depression

207. The Claimant was signed off work from July 2013 with a condition, variously described as, "work related stress" and "low mood" and "psychosocial stress". In February 2014, an independent occupational health advisor advised that the Claimant had symptoms of low mood related to the disaffection from work and that the Claimant was not fit to attend work, even if outstanding issues were resolved. An occupational health report dated 29 April 2014 said that the Claimant had symptoms of psychological distress and said that the Claimant was still not fit to attend work, nor was he fit to attend meetings. The occupational health advisor said that the Claimant's ability to attend meetings would be subject to review after four weeks; there was no guarantee that the Claimant would thereafter be able to attend meetings and there was certainly no indication that he would be fit to attend work at any proximate date.

208. The Tribunal concluded, on this evidence, that the Claimant did have symptoms of low mood and psychological distress, variously described, from July 2013 and continuing to May 2014 and that there was no sign, at that point, that there was likely to be a resolution, or that he would be able to work in the near future. The Claimant was unable to work at all throughout that period. The Tribunal considered that the Claimant did have a mental impairment related to low mood and stress, incorrectly labelled post-

traumatic stress disorder for a period by his GP. The Tribunal found that that psychological condition did have a substantial adverse effect on the Claimant's ability to work, which is a normal day to day activity, throughout that period. It also found that this substantial adverse effect on the normal day to day activity of work was likely to continue for 12 months at 29 April 2013 and that he was therefore disabled at that point.

209. However, the Tribunal found that the Claimant was not disabled by reason of low mood or depression in July 2013, or for about six months thereafter. The Claimant had been able to work, save for some periods off sick, until July 2013. There was no indication in July 2013, or towards the end of 2013, that the Claimant's inability to work and symptoms of low mood were likely to last for 12 months. They certainly had not lasted for 12 months at any point in 2013.

210. The Tribunal found that the Claimant was a disabled person on 29 April 2014 by reason of stress, or low mood, a psychological condition which had a substantial adverse effect on his ability to work. It also found that the Respondent knew, or ought to have known, that the Claimant was disabled by reason of low mood and stress by 29 April 2014, because it had seen GP notes and occupational health reports, repeatedly stating such psychological symptoms from 2013. Occupational health reports confirmed the existence of psychological symptoms and a resulting inability to work on 4 February 2014 and 29 April 2014.

211. The Tribunal also found that the Respondent knew that the Claimant was unable to attend meetings by reason of his psychological condition on 29 April 2014, because the Respondent was told this by their occupational health adviser in his report.

212. The Respondent has conceded that the Claimant was disabled by reason of delusional disorder at all relevant times, but denied that it knew, or reasonably ought to have known, that the Claimant was disabled, or that he was likely to be put at any substantial disadvantage by reason of that condition.

213. The Claimant was not diagnosed with the condition until after he was dismissed. It appears that he was assessed on 26 September 2014 by Professor Bhui, who considered that the Claimant had delusions, with features of mixed anxiety and depression, as well as a paranoid personality. Dr Mearns concluded on 19 January 2015 that the Claimant suffered from a psychotic disorder, a persecutory delusional disorder characterised by persistent delusional beliefs that interfered with his functioning.

214. It is correct that the Respondent did think that the Claimant was mentally ill and referred the Claimant to occupational health in respect of mental illness. The Claimant declined to attend a psychiatric assessment while he was employed by the Respondent, as stated in occupational health reports of 2 October 2013 (page 283) and 4 February 2014 (page 356). The Respondent was thereby prevented from knowing that the Claimant suffered from any particular illness, or that the illness had any particular effect on him. The Respondent did notice unusual and unacceptable behaviour and sought advice as to whether the Claimant was mentally ill. Nevertheless, the Tribunal has concluded that the Respondent could not reasonably have known that the Claimant was mentally ill when the Claimant was not complying with a psychiatric referral and, indeed, the Claimant was insisting to his GP that he was

well. The Tribunal has decided that it would not have been reasonable for the Respondent to make assumptions about the Claimant's mental wellbeing without receiving medical advice from a suitably qualified medical practitioner.

215. In summary, the Tribunal has decided that the Claimant was disabled by reason of stress, or low mood, or depression, by 29 April 2014 and that the Respondent had knowledge of this. It has found that the Claimant was disabled by reason of delusional disorder throughout 2013 and 2014, but the Respondent did not know this and could not reasonably have known it.

216. The Tribunal concluded that the Claimant was not disabled by reason of a back condition at any time before July 2013, when he was suspended from school. The Tribunal found that the Claimant was not disabled by reason of post-traumatic stress disorder.

Direct Disability Discrimination

217. The Claimant contended that the Respondent discriminated against him because of disability when it failed to postpone a disciplinary hearing on 8 May 2014. The Tribunal has found that the reasons for the panel not postponing were set out in its letter of 9 May 2014. It has concluded that these reasons were not the Claimant's disability. The Tribunal has found that the panel would have proceeded with the hearing in the case of an employee in the Claimant's circumstances, whether or not they were disabled.

218. The Claimant contended that the Respondent dismissed the Claimant because of disability. The Tribunal decided that the Claimant was dismissed for his failure to comply with procedures and failure to provide medical certificates to authorise his sick leave. He was not dismissed because of disability. The Respondent would have dismissed anyone who behaved as the Claimant did, whether or not they were disabled.

Discrimination Arising from Disability

219. The Claimant contended that he failed to tell the Respondent that he was going to Cameroon to visit his sick father when suspended on sick leave, failed to follow the Respondent's sickness protocol and failed to attend an occupational health appointment, all because of something arising in consequence of his disability. The Claimant said that he could not think about the school because it made him stressed and this arose from his disability.

220. The Tribunal found that the Claimant's failure to follow procedures and to tell the Respondent he was in Cameroon, and his failure to attend an occupational health appointment, did not arise out of, and was not caused by, the Claimant's existing disability at that time (his delusional disorder).

221. The Claimant was able to follow the school's procedures at the time. He obtained GP certificates in July and September 2013 and submitted a sick certificate to the school on 12 September 2013 (the day he went to Cameroon). He was able to email the school saying that he was sick and unable to come to meetings – he simply omitted to say, in those emails, that he was in Cameroon or to ask for leave. The

Tribunal concluded that the Claimant was plainly able to engage with the school, but chose not to follow procedures. This was not something arising in consequence of his disability.

222. The Claimant contended that the Respondent took disciplinary action against him and this was because of something arising on consequence of his disability. It is correct that the Respondent took disciplinary action against the Claimant because of his behaviour towards Amina (the cleaner) on 28 February 2013, his behaviour towards Yvonne Cameron on 1 July 2013, and towards the head teacher on 8 July 2013, and because of his failure to follow school procedures. The Tribunal accepted that the Claimant's behaviour towards Amina (the cleaner), and towards Yvonne Cameron, and the head teacher may have arisen out of his delusional disorder.

223. The Tribunal has found that the Claimant was not disabled by reason of his low mood or depression until 2014 and, therefore, the disciplinary action could not have been because of something arising from that condition.

224. Insofar as the Claimant's misconduct arose out of delusional disorder, however, the Tribunal has found that the Respondent did not know that the Claimant was disabled by reason of delusional disorder and could not reasonably have been expected to know that, because the Claimant actively prevented such knowledge.

225. The Claimant contended that the Respondent subjected him to discrimination arising from disability when it failed to postpone the disciplinary hearing. The Respondent's reasons for failing to postpone the disciplinary hearing did not arise in consequence of the Claimant's disability. They were practical reasons which arose independently of any disability.

226. The Tribunal concluded that this allegation was, in reality, an allegation of a failure to make a reasonable adjustment, rather than an allegation of discrimination arising from disability and considered it under that heading, below.

227. The Claimant contended that the Respondent dismissed the Claimant because of something arising in consequence of his disability. The Tribunal concluded that the Respondent dismissed the Claimant because of his failure to comply with school procedures and it has found that this did not arise in consequence of the Claimant's disability. The Claimant was capable of complying with procedures and simply failed to comply with them.

Failure to Make Reasonable Adjustments

228. The Respondent did not fail to make a reasonable adjustment when it did not provide the Claimant with a chair. The Claimant was not disabled by reason of a back condition at any relevant time.

229. The Claimant contended that the Respondent failed to make a reasonable adjustment when it did not postpone the disciplinary hearing scheduled for 8 May 2014.

230. The Respondent's disciplinary procedure required that disciplinary hearings were held within 4 weeks of completion of a disciplinary investigation (as paragraph 7.1 at page 415). In requiring meetings to be held within a short period of the completion of a

disciplinary investigation, the Respondent did apply a PCP to the Claimant. The Tribunal accepted that that PCP could put disabled people at a disadvantage because they could be more likely to be off sick and unable to attend meetings in consequence of their disability. The Tribunal accepted that the Claimant was put at such a disadvantage, because he was off sick and unable to attend the relevant meeting.

231. The Tribunal then went on to consider whether the Respondent failed to make a reasonable adjustment when it did not postpone the meeting on 8 May. The Tribunal concluded that the Respondent did not fail to make a reasonable adjustment. It had already postponed the hearing once and it did make adjustments to allow the Claimant to participate, by inviting him to send written submissions and/or by sending a representative on his behalf. In particular, there was only a possibility that the Claimant's future ability to attend could be reviewed after four counselling sessions. It was not even the case that, on the balance of probabilities, the Claimant would be able attend a disciplinary hearing at a later date, after engaging in counselling sessions. A postponement would not, on the balance of probabilities, have been effective in preventing the substantial disadvantage. In addition, it would inevitably have caused further delay and disruption to the primary school in which the Claimant was employed, which understandably wanted to have a decision made regarding the Claimant's alleged misconduct.

232. In the Claimant's addition to the list of issues, he contended that the Respondent failed to make a reasonable adjustment when it failed to supply him with a suitable computer. This claim failed on its facts because the Tribunal has found that, at all times, the Respondent provided the Claimant with a working computer, IT support, and passwords for general computers in the school. The Respondent provided the Claimant with all computer facilities required for his job.

Unfair Dismissal

233. The Tribunal concluded that the Respondent has shown that the reason for dismissal was the Claimant's conduct and no other reason. The dismissal was not automatically unfair because of a protected disclosure.

234. The Tribunal found that the dismissal was procedurally fair. It was within the broad band of reasonable responses for the Respondent to proceed with the hearing on 8 May and not to postpone it further.

235. The Tribunal concluded that the sanction of dismissal was within the broad band of reasonable responses. The panel acted reasonably in concluding that the Claimant had shown that he did not care about his obligations to the school. In any event, even if the Claimant had mitigation because he was stressed and his father was ill, the Claimant was already on a final written warning and dismissal was well within the band of reasonable responses for further misconduct.

236. The Claimant contended that the previous warnings had not been fair. The Tribunal concluded that Mr Musgrave did act fairly when he reported the Claimant's behaviour with regard to the cleaner. It was also within the broad band of reasonable responses for Mr Musgrave to investigate the Claimant's later alleged misconduct in relation to the head teacher and Yvonne Cameron. The fact that a manager had been involved in a previous disciplinary matter did not make it unfair for him to investigate a

later, unrelated, disciplinary allegation. It was appropriate for a senior manager to investigate the allegations. Ms Rook was a witness to the Claimant's alleged misconduct on 8 July 2013 and therefore could not investigate it. Mr Musgrave and Mr Millar were therefore the possible investigators. In the event, they investigated separate allegations of misconduct against the Claimant, ensuring independence of those separate investigations. The Tribunal concluded that Respondent's school acted fairly and reasonably in its allocation of senior managers to investigate the Claimant's misconduct.

237. The Tribunal found that the disciplinary panel did not prejudge the Claimant's dismissal. It held a hearing and came to a reasoned conclusion when it decided to dismiss the Claimant. The Tribunal noted that the panel rejected one of the allegations against the Claimant, indicating that it had an open mind on the allegations.

238. The Tribunal concluded that the Respondent conducted the disciplinary procedure in accordance with the school's disciplinary policy and other policies. The policies warned the Claimant that failure to attend school or to comply with procedures could result in disciplinary action. Unauthorised absence from school for 10 days was described as gross misconduct in the disciplinary policy.

239. The Respondent dismissed the Claimant fairly.

Notice Pay

240. The Tribunal found that the Claimant indicated that he would not be bound by his obligations to comply with reporting sickness absence and requesting leave and that it was appropriate to dismiss him without notice.

241. As a result the Claimant, therefore, was not entitled to notice pay.

Unlawful deductions from wages

242. On the Tribunal's findings of fact, the Claimant was paid at the appropriate pay point throughout his employment. He was paid sick pay when he was entitled to be paid sick pay.

243. He was not paid when he did not comply with the requirements to provide sick notes for a period. The Respondent did not make unauthorised deductions from wages when it failed to pay him for that period.

Holiday Pay

244. The Tribunal heard no evidence which suggested that the Respondent had failed to pay the Claimant the holiday pay he was owed.

245. The Claimant's claims fail.

Employment Judge Brown

28 April 2017