EMPLOYMENT TRIBUNALS

Claimant: Mr A Edwards

Respondent: Lancashire County Council

Heard at: Manchester **On:** 13-17 January and in chambers 22 January 2020

Before: Employment Judge McDonald
Mrs D Radcliffe
Ms B Hillon

REPRESENTATION:

Claimant: In person
Respondent: Mr Mensah (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint that he was unfairly dismissed fails and is dismissed.

2. In relation to the claimant's complaints that Alleged Incidents A-N in the List of Issues were acts of discrimination in breach of the Equality Act 2010:

    a. The complaint that Alleged Incident B was an act of age-related harassment fails and is dismissed. Although it was an act of age-related harassment the claim was brought out of time and it is not just and equitable to allow it to be brought out of time.

    b. The complaint that Alleged Incident B was an act of sex-related harassment fails and is dismissed. Although it was an act of sex-related harassment the claim was brought out of time and it is not just and equitable to allow it to be brought out of time.

c. The complaints that Alleged Incidents A, C, D, E, F, G, H, J, L, M and N were acts of direct discrimination because of age or age-related harassment were dismissed on withdrawal

d. The complaints that Alleged Incidents F and G were acts of direct discrimination because of sex or sex-related harassment were dismissed on withdrawal.

e. The complaints that Alleged Incidents B, I, K were acts of direct discrimination because of age fail and are dismissed

f. The complaints that Alleged Incidents I, K were acts of age-related harassment fail and are dismissed

g. The complaints that Alleged Incidents A, B, C, D, E, H, I, J, K, L, M and N were acts of direct discrimination because of sex fail and are dismissed

h. The complaints that Alleged Incidents A, C, D, E, H, I, J, K, L, M and N were acts of sex-related harassment fail and are dismissed

3. The claimant's complaint that the respondent victimised him in breach of s.27 of the Equality Act 2010 is dismissed on withdrawal.

4. The claimant's complaint that the respondent failed to grant him paternity leave in breach of regulations 4 and 5 of the Paternity and Adoption Leave Regulations 2002 is dismissed on withdrawal.

5. The claimant's complaint that the respondent failed to grant him shared parental leave in breach of the Shared Parental Leave Regulations 2014, regulations 3(1), 4 and 5 is dismissed on withdrawal.

REASONS

1. The claimant's claim was that the respondent had discriminated against him because of age or sex or, alternatively, had subjected him to age related harassment or sex related harassment. He also claimed that he had been constructively unfairly dismissed. The claimant had included other complaints in his claim but they were withdrawn during the final hearing. We explain more about that in the part of this judgment headed "Complaints and Issues".

Preliminary matters

2. The hearing was due to start at 10.00am on Monday 13 January 2020 but was late due to the claimant's non- attendance until 11.00am. After brief preliminary discussions with the parties we retired to read the papers in the case. We started hearing evidence at 1.30pm on the first day of the hearing. We heard evidence up to and including the morning of the fifth day of the hearing. We then heard submissions from Mr Mensah and from the claimant. The Tribunal met on the 22 January in chambers to make its decision. The Employment Judge apologises to the parties for the delay in finalising and sending them this judgment due to his judicial commitments and absences from the Tribunal.

3. We noted that in his grievance appeal document in the bundle the claimant had referred to himself as having dyslexia. At the start of the evidence we asked the claimant whether there were any adjustments to the way that the hearing was conducted which we needed to make to accommodate this. He confirmed that he might need a bit of extra time to read documents he was referred to in cross examination. We allowed that when needed. With Mr Mensah's consent, we also dealt with the claimant's submissions by the Employment Judge asking the claimant questions to clarify those submissions rather than requiring him to make written or lengthy oral submissions. We are satisfied that the claimant was able to take a full part in proceedings and was not disadvantaged by the way the Tribunal proceedings were conducted.

4. The claimant confirmed he was not bringing a complaint that he was discriminated against because he was a disabled person.

Application to amend to include unfair dismissal

5. On the morning of the fifth day of the hearing, Friday 17 January 2020, we heard and granted an application to amend the claim to include a complaint of unfair dismissal. We gave oral reasons for that decision at the hearing and do not repeat them in full here.

6. In brief, the position was that the claimant had put in his claim form before he had been dismissed. He had ticked the box for unfair dismissal on that claim form but had not filed a further claim form after the dismissal. However, the respondent had always proceeded on the basis that the claimant was bringing a complaint of

unfair dismissal. That is apparent from paragraph 28 of the original Response Form filed by the respondent and from the list of issues agreed by at the preliminary hearing on 8 January 2019. The final hearing of the case proceeded throughout on the basis that the claimant was complaining of unfair dismissal, and Mr Mensah for the respondent conceded that there was no different evidence, either documentary or in terms of witness evidence, that would have been called if the amendment had been made earlier. Having considered all the relevant factors including applicable time limits and the balance of hardship we allowed the amendment application adding the unfair dismissal complaint to the claimant's claim.

7. Witness statements and evidential documents

8. We heard evidence from the claimant. For the respondent we heard evidence from Sandra Harvey, the claimant's line manager and an Operations Manager at the respondent ("Mrs Harvey"); Christina Gordon, Service Improvement Manager ("Ms Gordon"); Lucinda Ruddy, Contracts Manager and Mrs Harvey's manager ("Mrs Ruddy"); Diane Hunt, Contracts Manager; Jayne Wilkinson, Business Support Officer; Tim Rogers (chair of the grievance appeal hearing in relation to the claimant's second and third grievances); and Nigel Craine, Service Manager (who dealt with the disciplinary hearing in relation to the claimant).

9. There were written witness statements for each of the respondent's witnesses who were cross examined and answered questions from the Tribunal. References in this judgment to paragraph numbers are to the relevant paragraph in that witness's written statement.

10. The claimant had provided a one page witness statement with 11 short bullet points setting out his allegations. At our initial discussion the Employment Judge explained that a witness statement is usually far more detailed than that. It was agreed that the Tribunal would take the details at box 8 of the claimant's claim form (at page 7 of the bundle of documents for the Tribunal hearing) and the alleged incidents (A-N) in the List of Issues identified by Employment Judge Ross at the preliminary hearing on 8 January 2019 (pages 54-56 of the Tribunal bundle) as the claimant's evidence in chief. The claimant confirmed he was happy for us to take that approach. Mr Mensah confirmed that the respondent was also content with that approach. This meant most of the evidence we heard from the claimant was by way of cross examination evidence and his evidence in response to the Tribunal's questions. Because the claimant did not have a detailed witness statement and because of the potential impact of his dyslexia we took particular care to ensure that we clarified the claimant's case and evidence where it was not clear to us.

11. There was an agreed bundle of documents consisting of 529 pages. This included transcripts of two audio recordings the claimant had made of meetings with respondent managers on 6 November 2017 and 26 April 2018. Mr Mensah confirmed that those audio recordings were available to be heard by the Tribunal and in the event we did listen to extracts from both of them. if we considered it necessary. During the hearing further documents were added to that bundle. We have referred to those documents where relevant in the part of this judgment dealing with our findings of fact.

12. On the morning of the second day of the hearing an issue about a further audio recording arose. During his cross examination by Mr Mensah in relation to Alleged Incident K the claimant said that he had a recording of the meeting between him, Mrs Harvey and Mrs Ruddy on 14 May 2018. What was said at that meeting was potentially relevant to the factual dispute relating to that incident. There was no transcript of the recording in the bundle. We therefore took an extended lunch break to enable the claimant to find the recording and send it or share it with Mr Mensah so that he could take instructions on it. The parties each produced transcripts which were added to the bundle (pp. 371B-C and 371D-F).

Complaints and Issues

13. The complaints and issues had been identified by Employment Judge Ross at the preliminary hearing which took place on 8 January 2019. At para (8)(1) and (2)(i) to (xiii) of Employment Judge Ross's list of issues (p.54) she set out a number of alleged incidents. The claimant relied on those incidents both as acts of discrimination or harassment and as breaches of the implied term of trust and confidence entitling him to resign and claim constructive dismissal. Mr Mensah had helpfully prepared a list of issues ("the List of Issues") for the final hearing which included those alleged incidents as allegations A-N. In this judgment we have referred to the allegations at A-N in the List of Issues as "the Alleged Incidents". The List of Issues is attached as an annex at the end of this judgment

14. In her case management summary (p.53-58) Employment Judge Ross recorded that the claimant relied on all the Alleged Incidents as being breaches of the implied term of trust and confidence in his employment contract entitling him to resign and claim constructive dismissal. She recorded that he also relied on Alleged Incidents B-N (2(i) to (xiii) in her order) as giving rise to allegations of age or sex discrimination or age-related or sex-related harassment (paras 8 and 9 of her case management summary at p.54-56).

15. At the start of the hearing the claimant confirmed that he agreed that the List of Issues and the list of Alleged Incidents were accurate. During his evidence at the final hearing, however, he clarified his position, saying in relation to some of the Alleged Incidents that they were acts of direct sex discrimination/sex-related harassment but not direct age discrimination/age-related harassment and that some were not acts of discrimination but were acts relevant only to his unfair constructive dismissal claim. He also said in submissions that Alleged Incident A was an incident of sex discrimination/harassment though not identified as such in Employment Judge Ross's order.

16. We confirmed the position in relation to each Alleged Incident with the claimant when going through his submissions at the end of the hearing. We have set out the specific position when discussing each of the Alleged Incidents in the "Discussion and Conclusion" section below.

17. During the hearing the claimant confirmed that he was no longer pursuing his complaint that he was victimised by the respondent in breach of s.27 of the 2010 Act for raising a complaint of discrimination. In submissions he told us that he was saying that he was treated badly but accepted that was not because he complained

about discrimination. We therefore treated his victimisation complaint as withdrawn and dismiss it.

18. At the preliminary hearing, Employment Judge Ross said that the claimant was bringing complaints that the respondent failed to grant him paternity leave in breach of regulations 4 and 5 of the Paternity and Adoption Leave Regulations 2002 and s.80 of the Employment Rights Act 1996 and/or shared parental leave in breach of the Shared Parental Leave Regulations 2014, regulations 3(1), 4 and 5. However, during the hearing and in submissions the claimant confirmed that because his daughter was born during the school summer holidays, he had not needed to take paternity or shared parental leave. He confirmed in his submissions that he was saying that the failure to provide him with information about his paternity rights on three occasions (Alleged Incidents C, D and E) were acts of sex discrimination or sex-related harassment and acts relevant to his claim of unfair constructive dismissal. We therefore treated his complaints that the respondent failed to grant him his rights to paternity and/or shared parental leave as withdrawn and dismiss them.

19. In terms of protected characteristics, it was accepted that the claimant's sex was male and that in terms of age he was in the group of under 30s. His direct discrimination complaints were based on his having been treated less favourably than female employees (sex) or employees over 30 (age) in the same material circumstances.

Relevant Law

The Equality Act 2010 complaints

20. The complaints of age and sex discrimination, age-related and sex-related harassment were brought under the 2010 Act. Section 39(2)(d) prohibits discrimination against an employee by subjecting him to a detriment. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

Direct age or sex discrimination

21. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

"(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".

22. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

23. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic (in this case age or sex), the key question is the "reason why" the decision or action of the respondent was taken.

Harassment

24. The definition of harassment appears in section 26 of the 2010 Act which so far as material reads as follows:

"(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 sub-section (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."

25. In this judgment we refer to the purpose and effect defined in s.26(1)(b) as the "harassing purpose and "harassing effect".

26. The Equality and Human Rights Commission's Statutory Code of Practice on Discrimination in Employment ("the EHRC Code"") explains (at para 7.8) that "'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

27. The EHRC Code also gives more detail on the factors relevant in deciding whether conduct has a harassing effect at paragraph 7.18:

"7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

The Burden of Proof in cases under the 2010 Act

28. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

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

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

This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Remedies for claims under the 2010 Act

29. Where a claimant succeeds in a claim of discrimination, s.124 of the 2010 Act gives the Tribunal three options (though not mutually exclusive) when deciding on an appropriate remedy for a claimant:

- to make a declaration as to the rights of the complainant and the respondent (s.124(2)(a))
- to order the respondent to pay compensation to the complainant (s.124(2)(b)), and/or
- to make an appropriate recommendation (s.124(2)(c)).

30. Most commonly the Tribunal will award compensation, the amount of which corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (s.124(2)(b) and (6) combined with S.119(2) and (3) of the 2010 Act). This means that there is no upper limit on the amount of compensation that can be awarded for discrimination, unlike, for example, compensation for unfair dismissal. Compensation can include compensation for injury to feelings and personal injury in addition to compensation for financial loss.

Time limits in cases under the 2010 Act

31. A claim concerning work-related discrimination or harassment must usually be made to the Tribunal within the period of three months beginning with the date of the act complained of (S.123(1)(a) of the 2010 Act). However, The Tribunal may accept a claim outside that usual time limit if it is made within such other period as it considers just and equitable. The three month time limit is also extended in some circumstances to take into account compliance with the Early Conciliation procedure.

32. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

33. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

34. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly. It went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

35. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. Section 123(1)(a) of the 2010 Act says:

> **"(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

36. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding whether there was a continuing act:

> 'The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which officers … were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.

37. In considering whether separate incidents form part of a continuing act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents' **Aziz v FDA 2010 EWCA Civ 304, CA**.

38. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

The unfair dismissal complaint

39. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by his employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

40. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

41. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied."

Remedy for unfair dismissal

42. S.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and**

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”

43. The basic award is calculated based on a week’s pay, length of service and the age of the claimant.

44. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

45. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd** referred to above).

46. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

47. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Constructive dismissal

48. Section 95(1)(c) provides that “an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct”. This is known as “constructive dismissal”. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**.

49. The claimant says that Alleged Incidents A-N either separately or together amount to a breach of the implied term of trust and confidence. The existence of that implied term of mutual trust and confidence was approved by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**. It confirmed that the obligation on each party is that it will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

50. If the employer is found to have been guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

51. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there can be a final act or "last straw" before the resignation.

52. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that the final act (the so called "last straw") in a series of actions which cumulatively entitled an employee to repudiate his contract and claim constructive dismissal need not be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach

53. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55:**

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term?
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

54. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp1978 ICR 221, CA**, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

55. The leading case on the doctrine of affirmation as it applies where an employer is in fundamental breach of an employee's contract is **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443**. Mr Justice Browne-Wilkinson in his judgment said so far as it material:

> "13. … Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: **Allen v Robles [1969] 1 WLR 1193**. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract,

> he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation …"

56. In **Mari v Reuters Ltd EAT0539/13** the EAT concluded that there is no absolute rule that in deciding whether an employee has affirmed a contract after breach acceptance of sick pay is always neutral; rather, the significance to be afforded to the acceptance of sick pay will depend on the circumstances. At one extreme, an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay contributed to affirmation. At the other, an employee may continue to claim and accept sick pay when better and when seeking to exercise other contractual rights.

When notice of dismissal takes effect

57. In this case there is a dispute about whether the claimant received the letter from the respondent dismissing him. In **Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] I.R.L.R. 644** the Supreme Court by a majority confirmed that If an employee was dismissed on written notice posted to his home address, then in the absence of an express contractual term specifying when the notice period would begin to run there was an implied term that it would begin to run from the date when the letter was received by the employee and the employee had either read or had a reasonable opportunity to read it.

Findings of Fact

58. In this section of the judgment we set out our findings of fact relevant to the issues we need to decide. Those findings are based on the evidence we heard from the claimant and the respondent's witnesses and on the documents we read in the Tribunal bundle. Where the parties disagreed about what happened we have explained whose evidence we preferred and why.

59. This section of the judgment is divided into the following subsections:

- Background facts to the Alleged Incidents and dismissal
- Our findings of fact about each of the Alleged Incidents
- Our findings of fact relevant to the issue of time limits
- Our findings of fact about whether the claimant was dismissed

60. Although the claimant relies on the Alleged incidents as the basis for his claim we have made detailed findings of fact about the facts which form the background and context to those Alleged Incidents. We have done so because they are relevant

to placing the Alleged Incidents in context and relevant to other issues we need to decide such as whether the claimant affirmed any breach of contract by the respondent.

61. Before setting out our findings of facts we set out our findings on the relative credibility and reliability of the witnesses whose evidence we heard.

Credibility and reliability of the witnesses we heard from

62. Mr Mensah submitted (para 64 of his written submissions) that the claimant was not a credible witness. We did find aspects of the claimant's evidence unreliable. Both in his oral evidence to the Tribunal and in some of his written grievances in the bundle his recollection of dates and the order in which things happened was confused. We accept that may be an aspect of his dyslexia. We also found, however, that his sincerely held view that he had been treated unfairly led to him to interpret events to fit that view. At times we accept that that led him, as Mr Mensah submitted, to have to explain incidents that happened to him in implausible ways, e.g. by suggesting that Ms Currie had planted the dead frog in his kitchen or that the Head Teacher at his school had colluded to ensure he was held responsible for an unauthorised person having a key to the school kitchen. We find his evidence was not always reliable and at times contradicted the clear objective evidence from documents or independent witnesses, the prime example being in the context of the disciplinary proceedings which led to the respondent deciding to dismiss him in October 2018.

63. We make findings about the reliability of Mrs Harvey and Ms Gordon in relation to Alleged Incident B. In summary, we found that Mrs Harvey's reliability was damaged by the fact that she had in internal processes shortly afterwards denied making the "little boys" remark which she clearly did make. To her credit, however, she accepted in Tribunal evidence that she had made that remark and should not have done so and apologised for having made it.

64. When it comes to Ms Gordon, as we record in relation to Alleged Incident B, we did not find her a reliable witness.

65. Of the respondent's other witnesses, we did find them to be both credible and reliable. Mrs Ruddy in particular we found to be a straightforward and honest witness whose evidence was reliable.

<u>Background facts to the Alleged Incidents and dismissal</u>

The claimant's employment, the catering staff and management structure

66. The claimant was employed by the respondent as a General Kitchen Assistant on 24 April 2014. He worked in school kitchens, and his base during his employment was Staining Primary School, Fleetwood ("Staining). The claimant's evidence, which we accept, was that he had only been working for the respondent for about six months when the lady who was supervising him went off sick. He was asked and agreed to step up into the supervisory role, although he was not formally confirmed in post as Unit Catering Supervisor until April 2015.

67. Mrs Harvey's evidence (paragraph 2 of her witness statement) was that the claimant undertook a full induction and the respondent's bespoke HACCP (Hazard and Critical Control Analysis) training from 14 January 2015 to 15 July 2015. We accept that evidence but also accept the claimant's evidence that he had already been working in a supervisory capacity (from around October 2014) before he undertook that training. We find that prior to January 2015 the only training he had undertaken was Basic Food Hygiene Training on 28 August 2014 (p.220-221).

68. There was some confusion in Mrs Harvey and Ms Gordon's evidence about their relative roles and seniority. From their evidence we understood them to have equivalent but complementary roles. Mrs Ruddy, whose evidence we accept, clarified that as an Operations Manager, Mrs Harvey is solely responsible for the running of all the kitchens and is classed as Grade 9. Ms Gordon as a Service Improvement manger is classed as Grade 7. Any HR matters above a certain level of seriousness have to go to a Grade 9, e.g. the issuing of a management letter.

69. We did not hear detailed evidence about the demographic make-up of the respondent's catering workforce. However, the parties were agreed that the workforce was overwhelmingly female. The claimant suggested 99% but the respondent suggested 95%. Mrs Harvey manages some 250 staff and at the relevant time 3 or 4 of them were men. When it comes to the age of the relevant workforce Mrs Ruddy's evidence was that on average the claimant was young.

70. We do find that the claimant was the exception to the usual employees managed by Mrs Harvey in that he was male and younger than her average line reports.

HACCP and Audits

71. It was not disputed that the Hazard Analysis and Critical Control Points approach system ("HACCP") was central to the respondent's approach to food safety. It is a preventative approach to food safety aimed to reduce the risk of contamination in the production processes that might cause the finished product to be unsafe. The respondent uses a series of HACCP Work Instructions to set out in detail the steps to be taken by its employees.

72. For example, HACCP Work Instruction 03 for School and Residential Care Catering (p.405-407) sets out the steps which need to be taken in relation to "Receipt of Goods" from suppliers. It says that the temperature of food delivered must be checked and recorded in the Kitchen Log Book; specifies what acceptable temperatures for chilled and fresh food are; requires that the goods delivered are checked against invoice/delivery note; requires that any goods which are damaged or whose "use by" or "best before" date is too soon after delivery to have enough "residual life" to be used are rejected.

73. Each of the HACCP Work Instructions in the Tribunal bundle (pp.405-425) ended with a section called "Corrective Action" (for example p.407). That makes it clear that corrective action would be taken where the monitoring process identified that any part of a Work Instruction was not being followed. Corrective actions could be refresher training or might be disciplinary action if there was a "further non conformance or serious risk to the safety and health of an employee, customer or

work colleague". The section finishes by saying that if there is any part of the Work Instruction the employee does not understand or if they are unsure how to deal with a non conformance it is important that they seek advice from their Line Manager.

74. In order to ensure compliance with required standards including those set out in the HACCP Work Instructions all school kitchens served by the respondent were audited. Each school kitchen receives one full kitchen audit per year; three lunch/critical audits per year; and ad hoc lunchtime checks which are not limited in number.

75. There was an example of a full audit carried out of the claimant's Staining kitchen on 14 June 2016 at p.191-207. The full audit form is a detailed checklist consisting of a Critical Check (Section A); an HACCP Audit (Section B); a Procedural Audit (Section C); a Lunch Time Audit (Section D); a Premises Audit (Section E) and a section on "Service and Dining Room Culture". Each of sections A-E consists of sub-sections with a series of numbered questions, e.g. B2.7 is "Are fridges and freezers clean including door seals". Against each of those there are "yes" and "no" tickboxes and a slot for comments. Any "no" answers are recorded as non conformances on the "scorecard" cover sheet for the audit.

76. A critical audit consists of Section A of the full audit only while a Critical/Lunch Audit consists of Sections A and D. The Critical audit consists of 13 questions and focusses both on cleanliness and procedural steps such as the Kitchen Log Book being completed correctly. The Lunch audit covers not only food quality, safety and presentation but "Customer Care" covering the way staff interact with the children and whether staff know the children/customers with allergens/special dietary requirements.

77. All forms of audit include a "Catering Audit Corrective Action Request" ("CAR") where the standard not met is recorded and the "action taken" to correct the non conformance. Each page of the audit and CAR form is signed by the relevant kitchen supervisor to acknowledge the content and confirm the action identified in the CAR will be taken by the timescale specified.

Relevant incidents up to beginning of October 2017

78. The copies of the audits of the claimant's kitchen at Staining carried out in the period 2015-2016 showed non-conformances with required standards. A Critical audit by Tina Gordon on 6 February 2017 identified 7 non-conformances, some of which were repeated from previous audits.

79. This led to a meeting between the claimant and Mrs Harvey on 10 February 2017. This was minuted on a "record of discussion" pro-forma at (pp.217-219). This notes that there were repetitive failures in relation to completing production sheets and in relation to changes to menus. The notes record the claimant being asked "are you happy in your job?" and "are you struggling to fulfil your role as a UCS? [i.e. Unit Catering Supervisor]". The claimant's response is recorded as "no, no problem". However, the claimant is recorded as raising (at page 218) "staffing problems" with only two staff being available on a certain date, whereas the ideal would be four staff. The issue of staff shortages was one of the issues which the

claimant also raised in the First. We discuss our findings in relation to the allegation of short staffing under "Alleged Incident G – short-staffing" at paras 219-223.

80. The discussion resulted in the claimant being issued with a "management letter" on 20 February 2017 (pages 220-221). This noted the repetitive non-conformances from audits dating back to 22 July 2015. It said that although "additional targeted support was not required", the claimant would continue to be monitored on a regular basis through critical audits and that if he did not continue to adhere fully to HACCP policies and Procedural Working Practices, a formal disciplinary investigation would take place.

81. We asked Mrs Ruddy in her evidence to clarify the status of the "record of discussion" and the "Management letter" issued to the claimant because the respondent's Capability Procedure (pages 118-122) does not refer to these. Mrs Ruddy explained that both were "pre-formal" steps involving the employee's line manager. It was only if there were repeated failures that the matter would be referred to an Operations Manager and then formal action would be taken under the Capability Procedure or the respondent's Disciplinary Procedure. One relevant consequence of this was that there was no way of appealing against the issue of a management letter (as there would be against the issue of a formal sanction under the Capability Procedure (p.121) or the Disciplinary Procedure (para 6.1 on p.112).

82. On 22 February 2017 the claimant sent Mrs Harvey a text message asking what steps he needed to take to dispute the management letter issued to him (page 226). This resulted in a meeting between the claimant and Mrs Harvey and Samantha Robinson (a manager then employed by the respondent) on 24 February 2017 (recorded in notes at pages 227-229). The notes of that meeting (which were not disputed by the claimant) record him as saying that he did not want the management letter on his personal file but that he "agreed he had done things wrong and not always right". Mrs Harvey's evidence was that at that meeting she offered the claimant further support and that he acknowledged that he was now happy and understood the policies and procedures. The notes do record him as saying that he was "happy and understood the policies and procedures". However, the issue of the management letter and the way the meeting on 24 February 2017 was conducted were included in the matters raised by the claimant in the First Grievance (see paras 94 onwards below).

83. Mrs Harvey's evidence (paragraph 16 of her witness statement) is that after the meeting she and Sam Robinson left the school via the kitchen and were shocked at what they saw. Her evidence was that the kitchen was in a "totally unacceptable condition". In the notes of the meeting there is a list of items found in the kitchen, including days old food debris under the counters, work counters with encrusted food, spillages on the edge and a thermal gel probe which was supposed to be inside a fridge lying on the floor.

84. We find that as a result of her concerns, Mrs Harvey raised her findings with Nigel Craine, the Project Manager, to see whether it was possible for contract cleaners to be arranged to attend the site to do a deep clean. Mr Craine did not authorise this but after discussion with Mrs Ruddy, Mrs Harvey arranged for a member of staff to be transferred from another kitchen for one hour each day for a

period of three weeks (27 February 2017 until 20 March 2017) to conduct a deep cleaning programme.

85. Mrs Harvey in unchallenged her evidence (paragraph 19) noted that further audits took place on 14 March 2017 and 23 March 2017 and there were repetitive non conformances apparent during those audits. Despite that, there is no record of her taken any action in relation to the claimant after the meeting on 24 February 2017 beyond providing additional resource to help keep the kitchen clean.

86. Given the extent of the debris and uncleanliness which Mrs Harvey said she found in the kitchen, we were surprised that the audit carried out by Ms Gordon on 6 February 2017 (pages 211-216) made no reference to problems with cleanliness. Question A1.8 in the "Critical Check" section of that audit report asks, "On initial inspection, does the kitchen look clean, tidy and organised?". The answer given in the audit carried out by Ms Gordon was "yes".

87. The claimant in his grievances suggested that Mrs Harvey had "gone to town" on him on 24 February 2017 by actively looking for fault with his kitchen. Mrs Harvey's response to our questions about this was the sort of dirt that she referred to in her evidence would not have been apparent on the kind of initial check referred to in A1.8. We accept her evidence on that point but find it inconsistent with her evidence that she noticed the dirt on passing through the kitchen after the meeting on 24 February 2017. We find on balance that Mrs Harvey had, after the meeting with the claimant in which he challenged the issuing of a management letter, gone looking for faults in the claimant's kitchen rather than simply noticing those faults as she passed through after the meeting. We find Mrs Harvey did not take kindly to the claimant challenging her authority.

88. At the start of the next school year in September 2017 the claimant completed basic food hygiene training. Then on Friday, 29 September 2017 the claimant alleges there was an incident in which Mrs Harvey told him that a pizza he had cooked was a "cremated piece of shit" (Alleged Incident F). We discuss the evidence relating to that incident at para 216-218. The claimant was absent from work for a month with Folliculitis from the following Monday, 2 October 2017.

October 2017 up to and including the return to work meeting on 6 November 2017

89. During the claimant's sickness absence due to Folliculitis in October 2017 Staining was covered by Rachel Currie, a Peripatetic Unit Supervisor. We did not hear evidence from Ms Currie. However, it is not disputed that she raised concerns with Ms Gordon and Mrs Harvey about the condition of the kitchen and the records kept by the claimant, e.g. about which pupils had allergies or special dietary requirements. We discuss those concerns and the circumstances in which they were raised under Alleged Incident L below (paras 261-272). In brief, the claimant alleged that Mrs Harvey had encouraged Ms Currie to look for evidence of non-conformances in his kitchen. We did not find that to be the case.

90. On the 27 October 2017 Ms Gordon rang the claimant to invite him to a return to work meeting with her and Mrs Harvey. The meeting took place on 6 November 2017 at Thornton Touch Down, i.e. away from the claimant's kitchen at Staining. By

the time the meeting took place, we find that Mrs Harvey had agreed with Mrs Ruddy that the claimant needed refresher training because of the concerns raised by Ms Currie.

91. We do find that prior to the meeting taking place the Mrs Harvey and Mrs Ruddy had agreed without prior consultation with the claimant to move him from his own kitchen in Staining to Stanah kitchen to be trained by a more experienced UCS. We find that Mrs Harvey and Mrs Ruddy had genuine concerns supported by evidence that from previous audits and the evidence provided by Ms Currie that the claimant was repeatedly not conforming to the HACCP and other standards required by the respondent. We find Mrs Harvey told the claimant about the concerns raised and the move at the meeting with the claimant on 6 November 2017.

92. The return to work meeting took place on 6 November 2017. It is now accepted that during the meeting Mrs Harvey made the "little boys" comment (Alleged Incident B at paras 182-192 below), something both Mrs Harvey and Ms Gordon had initially denied. The claimant had covertly recorded the meeting (transcript at pp.247-280). He told us that was because he had a bad feeling about the meeting. The claimant also alleged that at the meeting he was not allowed to comment on the allegations made against him (Alleged Incident M which we discuss at paras 273-285) and that he was not informed in advance of the meeting that those allegations would be raised with him (Alleged Incident N which we discuss at paras 286-290).

93. In summary, the meeting did not go well. The claimant had understood that meeting to be a return to work meeting after his prolonged absence and so felt "ambushed" when allegations about the state of his kitchen were raised. From Mrs Harvey's point of view, the meeting was an exasperating one. She felt the claimant was not accepting responsibility for his mistakes and was not co-operating when she was trying to help him get back on track while avoiding formal capability or disciplinary proceedings. We did find that at the meeting the claimant was not given a real chance to dispute the concerns raised by Ms Currie or to give his views about being re-trained or the move to Stanah.

7 November 2017 - December 2017: the claimant's First Grievance, Ms Gordon's complaint and the stage one sickness absence procedure

94. From 7 November 2017 the claimant attended at Stanah School for training with Melanie Tierney, a more experienced UCS. The Record of Discussion (p.245) states this would be from 7 until 21 November 2017 followed by a meeting to discuss progress. We find the claimant did not in fact return to his own kitchen at all during that school term. His first day back at Staining was 8 January 2018. Although the training records (pp.284-297) show that Ms Tierney "signed off" that the claimant had completed his trained support on 5 December 2017, Mrs Harvey's evidence was that it was not until the 18 December 2017 that there was a progress meeting at which it was confirmed that the claimant was ready to return to his own kitchen. We did not receive a satisfactory explanation from the respondent's witnesses about why he was kept on supported training at Stanah for the whole of that school term.

95. On the morning of the 7 November 2017, the day after the Return to Work meeting the claimant submitted a grievance to Mrs Ruddy ("the First Grievance")(page 282). In summary, the claimant complained that:

- the return to work meeting was not at his normal workplace;
- only 15 minutes of a 2 hour meeting was about return to work, the rest being about allegations raised by Ms Currie about the Staining kitchen;
- those allegations were unfair;
- he repeatedly asked for the meeting to be stopped;
- when he tried to defend himself he was undermined, told to "nip it in the bud" and called a "little boy";
- this was not the first time he had been unfairly criticised;
- he felt threatened and victimised by the way he was spoken to.

96. The grievance meeting in relation to the claimant's grievance was held on 20 November 2017. Although the claimant disagreed with the outcome of the First Grievance (he lodged a grievance appeal outcome), it was not part of his claim according to the List of Issues that the way any of his grievances were dealt was flawed or breached the implied term. We find each was investigated thoroughly and the claimant given an opportunity to state his case in relation to each and to appeal the outcome. We find that Mrs Ruddy held a meeting with the claimant on 20 November 2017. She was supported by Juliet Hunt, HR Business Partner. There were typed non-verbatim notes of the meeting taken by Mrs Wilkinson (pp.297-300). We find that although unaccompanied the claimant said he was happy for the meeting to go ahead. He did ask whether the meeting could be recorded but Ms Hunt explained that the respondent did not have facilities to record the meeting nor was it the respondent's standard practice to record meetings.

97. We find the claimant was given an opportunity to expand and clarify his grievances. We find that in addition to explaining the concerns in his grievance email (p.282) he told Mrs Ruddy at the meeting that:

- He was being bullied by Mrs Harvey, his examples being: the issuing of management letter in February 2017 and not being allowed appeal against it; Mrs Harvey pulling him out of his kitchen on the 25 February 2017 for a two hour meeting (this was a refence to the meeting on 24 February 2017); being constantly short-staffed (see Alleged incident B discussed at paras 182-192); being given no notice of that meeting on 24 February 2017; being told he needed re-training when he didn't; Mrs Harvey "going to town" on his kitchen (we find this to be a refence to the 24 February 2017).
- Mrs Harvey in September 2017 had pulled him up about a pizza he was serving, saying it was a burnt piece of shit (i.e. Alleged Incident F discussed at paras 216-218 below)
- Mrs Harvey ordered him to get down on his hands and knees in his own time and chisel out 50 years' worth of muck on the grout on the kitchen floor. (This was not one of the Alleged Incidents on which the claimant relied in his Tribunal claim).

98. On 29 November 2017 Mrs Ruddy wrote to the claimant setting out the outcome of his grievance (pp.301-309).

99. Mrs Ruddy summarised the grievance as being:

- The meeting with Mrs Harvey and Sam Robinson on 24 February 2017 with regard to the management letter dated 20 February 2017.
- The return to work meeting on 6 November 2017.
- Concerns with regard to the way that Mrs Harvey had spoken to the claimant on two occasions.

100. In brief, Mrs Ruddy dismissed the claimant's grievance except in relation to four points. The parts of the grievance which she upheld were:

- Mrs Harvey and Ms Gordon were late for the meeting on 6 November 2017 and should have contacted the claimant to inform him that they were running late;
- although Mrs Harvey was correct to say that there was no right of appeal against a management letter (because the respondent does not regard it as a formal capability/disciplinary sanction) she could have explained to the claimant that he could have raised a grievance about the management letter if he was unhappy;
- Ms Gordon was part of the meeting on 6 November 2017 so should have given the claimant an explanation when she left the room during the meeting; and
- Mrs Harvey did tell the claimant to "nip it in the bud" during that same meeting. She could have phrased things differently to make it clear that she was referring to the training the claimant was to undergo and the need to get on with it.

101. We find that Mrs Ruddy did take the claimant's grievance seriously and investigated it thoroughly including interviewing Mrs Harvey, Ms Gordon and Ms Currie about the issues he had raised. We find that where there was a dispute between Mrs Harvey and the claimant about what was said (e.g. the "little boy" comment at the meeting on 6 November 2017 or the burnt pizza comment) she preferred Mrs Harvey's version of events to the claimant's. We note that although the claimant had and could have produced the recording of the meeting on the 6 November 2017 which proved that Mrs Harvey made the "little boy" remark, he did not do so.

102. In summary, Mrs Ruddy's view was that there were genuine concerns about the claimant's kitchen and that as his manager, Mrs Harvey was entitled to raise those with him. Mrs Ruddy's view was that Mrs Harvey was also entitled to make spot checks inspections of the kitchen without giving the claimant advance notice that she was going to do so. As noted above, she did find that in some respects Mrs Harvey could have dealt with matters better.

103. Mrs Ruddy's grievance outcome letter told the claimant that he had a right to appeal against her decision and that any appeal should be directed to Nigel Craine,

then Head of Service School and Residential Care Catering. The claimant did appeal in January 2018.

104. In the meantime, the claimant was being investigated for a possible disciplinary offence. We find that there was a phone conversation between the claimant and Ms Gordon on the morning of 7 November 2017. The claimant had been sick that morning and the conversation was initially about whether he would be in work. However, Ms Gordon alleged that the claimant had then raised complaints about the return to work meeting the previous day saying it was illegal and that he should have had representation at the meeting and a letter about it. In an undated statement in support of her complaint (p.281) Ms Gordon went on to say that the claimant had said that the respondent was in breach of contract and should have written to him to tell him that they were changing his contract (i.e. as we understand it to relocate his place of work temporarily to Stanah). Ms Gordon said that she had told the claimant that this was something he should discuss with Mrs Harvey rather than herself and that the claimant "proceeded to tell me he had written up notes from the meeting and that he had £500,000 in the bank from stock trading and that he would use every penny to take me to the highest court in the land, and that Mrs Harvey and myself are a fucking joke". Ms Gordon had asked him to calm down and said that at that point the claimant was shouting at her, saying that he "isn't fucking stressed". At that point Ms Gordon said she told the claimant that she was ending the call because of his abusive language and hung up.

105. Ms Gordon reported the conversation to HR as a breach of the respondent's Code of Conduct. The claimant was initially interviewed about this complaint on 9 November 2017 by Karen Frost, one of the respondent's Service Improvement Managers (p.283). The claimant denied swearing or losing his temper during the telephone conversation and said Ms Gordon had put the phone down on him warning him it would not look good if he was to have more time off sick given his sickness record. On 6 December 2017 the claimant was invited to an investigation meeting on 15 December 2017 about Ms Gordon's complaint. He was informed that the investigating officers were Sharon Leatham and Linda Sharples.

106. At the same time the claimant was subject to stage one of the respondent's sickness absence process because of his level of sickness absences over the previous 12 months. On 5 December 2017 he was invited to a meeting with Mrs Harvey at Stanah Primary School to discuss his overall level of attendance. That meeting on 14 December was attended by the claimant, Mrs Harvey and Melanie Tierney. Based on the verbatim notes of the meeting (pp.313-316) we find that the meeting was a relatively short one at which Mrs Harvey explained the sickness absence procedure and that the claimant would be monitored for 12 weeks because of his accumulated sickness absence over the previous 12 months. The claimant indicated that he was happy with that. He asked how long the note would stay on the file: would it be for 12 weeks, and Mrs Harvey explained that the monitoring was for 12 weeks. She provided him with a copy of the Sickness Policy. Mrs Harvey subsequently confirmed that in a letter dated 14 December (pp.317-319).

107. It was agreed that because the claimant needed to get to Garstang for a meeting discussion of wider matters would be left for another day. From the verbatim notes it appears that that meeting was good humoured. It finished with Mrs

Harvey and the claimant agreeing that they would "meet on Monday" to discuss the remaining issues. By our calculation that must mean Monday 18 December 2017. Mrs Harvey said that they will "go through it", by which we understand her to be referring to the training record which Ms Tierney had completed with the claimant in relation to his supported training at Stanah. Mrs Harvey finishes by saying, "make sure you're happy with it and everything's tickety boo and I'll do an outcome letter", and the claimant responds with "that's absolutely brilliant, yeah, thank you". There is nothing in the notes of that meeting which suggests any kind of falling out during that meeting. To the contrary, we find that following the training by Ms Tierney, it looked like matters were getting back on track.

108. On the following day, 15 December 2017, the claimant had his disciplinary investigation meeting with Sharon Leatham and Linda Sharples about Ms Gordon's complaint. He repeated what he had told Ms Frost on 9 November 2017 except that he said that he had put the phone down on her rather than vice versa. He told the investigators that the complaint by Ms Gordon was "tit for tat" for his grievance and was not professional.

109. On 18 December 2017 the claimant's training was "signed off" which meant Ms Tierney and Mrs Harvey accepted he had completed the training he needed to be able to return to Staining kitchen as its UCS. It was agreed he would return to Staining after the school Christmas holidays.

January – February 2018: The mouldy turkey incident, the result of Ms Gordon's complaint and First Grievance appeal

110. On 6 January 2018 the claimant appealed to Mr Craine against the First Grievance outcome (page 324). Mr Craine acknowledged the appeal on 8 January 2018 and invited the claimant to a grievance appeal meeting on 18 January 2018 (p.324A).

111. On 8 January 2018 when the claimant returned to the kitchen in Staining he found that cooked turkey in gravy had been left in the bain marie over the Christmas break and was mouldy. He reported that and other matters he found including a failure to label foods and dirt and debris to Mrs Ruddy by an email on 15:21 that day (p.524E) headed "handover". This resulted in Ms Currie having a meeting with Ms Gordon on 9 January 2018 and being issued with a "Record of Discussion" (p.238A-C). We find the concerns raised by the claimant and covered by that Record of Discussion included failures to date label food and debris and dirt as well as the mouldy turkey. We find that the issues raised were equivalent in seriousness to the issues raised with the claimant at the meeting on 6 November 2017. We find that Ms Currie accepted her mistakes (p.238C).

112. On 30 January 2018 the claimant attended an "informal management meeting" with Mrs Ruddy about Ms Gordon's complaint. As a result of that meeting, Mrs Ruddy decided on the balance of probability that the claimant was likely to have used inappropriate language towards Ms Gordon on 7 November 2017. She issued him with a formal management letter warning that if there were further instances of this or any other misconduct disciplinary action might be taken (p.326-327). In answer to the Tribunal's question, Mrs Ruddy confirmed that a management letter

was not itself a disciplinary sanction. The issuing of that letter to the claimant was not one of the Alleged Incidents on which he relied in this case nor was it included in his Second or Third Grievance.

113. The grievance appeal meeting took place on 2 February 2018 (Jayne Wilkinson, who was due to take notes, was off sick on 18 January). Mr Craine heard the appeal, with HR support from Rachel Sykes (notes at pp.328-329). The claimant was interviewed and in essence repeated what he had told Mrs Ruddy in the First Grievance meeting. We find he did not produce any new evidence at the appeal. He did not produce the recording he had of the 6 November 2017 meeting. It was not part of the claimant's case that the grievance appeal process was not handled properly though it is clear from his evidence to the Tribunal that he disagreed with the grievance appeal outcome.

114. Mr Craine set out that outcome in his letter dated 8 February 2018 (pp.330-333). In summary, his conclusions were:

- when it came to the meeting on 24 February 2017, it was within the framework of management to visit operational areas unannounced;
- having examined Mrs Harvey's call log he was satisfied that Mrs Harvey had phoned the claimant in response to his text of 22 February 2017 to let him know that she was going to be visiting the kitchen on 24 February 2017;
- when it came to the meeting on 6 November 2017, it was normal, reasonable and time efficient practice to follow on from the return to work interview with a service review meeting to discuss any issues which had arisen in their absence.
- the dead frog had not been planted in the claimant's kitchen;
- the claimant had accepted at the First Grievance meeting that he had not followed correct procedure when it came to labelling food items;
- that Mrs Harvey had not referred to a pizza as a "burnt piece of shit";
- that (as Mrs Ruddy had also found) Mrs Harvey had asked the claimant to scrub the kitchen floor and told him to order kneepads to enable him to do so. The claimant understood how to place such orders. It was not the case that Mrs Harvey had said she would provide kneepads.

115. The management letter issued on 31 January 2018 and the grievance appeal outcome letter dated 8 February 2018 effectively brought to an end the grievance and disciplinary procedures to that point.

March to 17 May 2018 – Alleged Incidents C, H-K and the Second and Third Grievances

116. We find that despite seemingly finishing the previous year on a relatively positive footing, by March 2018 the claimant had formed the view that (as evidenced by his First Grievance and appeal) that Mrs Harvey was being overly critical of his capability to carry out his work and his performance as UCS and being personally disrespectful towards him.

117. The next two incidents of relevance to the case were the allegation by the claimant that Mrs Harvey refused his request on 4 March 2018 for a day off (Alleged Incident H discussed in paras 2240-230 below) and that the claimant on 16 March 2018 asked for information from Mrs Harvey about paternity leave, shared parental leave or flexible working and the refused to help him (Alleged Incident C discussed at paras 193-200 below).

118. On 26 April 2018 Mrs Harvey conducted a full audit of the claimant's kitchen. The claimant alleges that during their discussion after that audit Mrs Harvey said that the claimant should "stop fighting" her because she would win "like last time". We discuss our findings in relation to that Alleged Incident I at paras 231-239 below.

119. As a result of the fractious nature of the meeting with the claimant on 26 April 2018 Mrs Harvey cut it short. She told the claimant that she would discuss the matter with Mrs Ruddy.

120. She did so and this resulted in the claimant being invited by Mrs Ruddy to a performance review meeting on 10 May 2018. The invitation letter (pp.334-335) warned the claimant that the ongoing concerns about the claimant's performance at work (including those arising from the 26 April 2018 audit) meant the respondent was considering giving him further assistance under the respondent's Capability Procedure. The letter advised the claimant that he could be accompanied to the meeting and that at the meeting Mrs Ruddy would be seeking to agree a performance action plan with the claimant setting out targets to be achieved and standards of work that the claimant would be expected to meet. The letter did warn the claimant that failure to improve performance to the standard required within a reasonable period of time could lead to dismissal. A copy of the respondent's Capability Procedure was included with that letter.

121. What happened at the meeting on 10 May 2018 is the subject of Alleged Incident J which we discuss at paras 240-252 below. In brief, the meeting was cut short by Mrs Ruddy because the claimant was getting agitated but not before the Head Teacher had been invited in to discuss a complaint she had raised on 9 May 2018.

122. After the meeting on 10 May 2018 the claimant sent a grievance ("the Second Grievance") to Mr Craine (pages 336-337). It said Mrs Harvey had directly harassed and discriminated against him because of his age, sex and disability. He explained he had dyslexia. He questioned why support was not put in place six years earlier when he alleged he told his line managers he was dyslexic but was told he was capable to perform as a supervisor without the correct training. The grievance also referred to the complaint about potatoes being cooked too early raised by the Head Teacher on 9 May 2010 saying he was "rudely questioned" about his capability to do his job.

123. On the 11 May 2010 day, the claimant did not attend for work. As we explain when discussing Alleged Incident K (at paras 253-260 below) we find this was due to miscommunication between him and Mrs Harvey.

124. Mr Craine appointed Diane Hunt, Contracts Manager, to hear the Second Grievance and she wrote to the claimant on 11 May 2018 to invite him to a grievance meeting on 5 June (page 341).

125. The performance meeting was rescheduled for 7 June 2018. This is confirmed by a letter from Mrs Ruddy to the claimant dated 14 May 2018 (pages 342-343). Before either of those meetings took place, Mrs Ruddy arranged for the claimant to undergo further retraining. This was with the Skills and Standards Trainer, Anne Taylor. This was done by Ms Taylor working alongside the claimant in his kitchen at Staining. That training started on 14 May 2018. On that same day Mrs Ruddy and Mrs Harvey called in at the kitchen. We discuss what happened during that meeting in setting out our findings in relation to Alleged Incident K (at paras 253-260 below).

126. On 16 May 2018 Anne Taylor informed Mrs Harvey that she had concerns about the claimant's working practices. She said that he refused to follow correct procedures, refused to use the combination oven (claiming that he had been told by the maintenance contractor (Holgate's) that it would break down), and was increasingly uncooperative towards her. Mrs Harvey's evidence (paragraph 60 of her statement) was that Ms Taylor sounded stressed and frustrated and so Mrs Harvey decided to call into the kitchen because she was travelling in the area. We find that Mrs Harvey arrived during the break between the first and second lunch sittings and attempted to talk to the claimant about why he was not using the combination oven.

127. We find that claimant told her that Holgate's had told him that it would leak if used. Mrs Harvey then contacted the Premises Maintenance Officer at Head Office and was emailed the job sheets from Holgate's which confirmed they completed repairs to the oven on 19 March 2018. Mrs Harvey told the claimant there was no valid reason why the combination oven should not be used and that he must use it in future.

128. At that point we find the claimant became agitated, pacing up and down the kitchen and ignoring Mrs Harvey's attempts to speak to him. That was Mrs Harvey's evidence and it was corroborated in the subsequent grievance investigation by Anne Taylor. It is also consistent with the claimant's reaction when Mrs Harvey or Mrs Ruddy tried to raise matters with him which he was as critical of him (e.g. on 26 April 2018 or on 10 May 2018).

129. The claimant's evidence was that was that a little girl arrived late for her lunch and that he went to the counter to serve her. He said Mrs Harvey prevented him from serving the little girl and called him "ignorant" in front of her. We do not find it plausible Mrs Harvey would have done so. We prefer Mrs Harvey's evidence which is that she let the claimant serve the little girl and attempted to speak to the claimant again after he had done that.

130. We find the claimant then said that he needed to get out and left the kitchen. We find he returned a few minutes later but that he was still very agitated and said that he needed to get out of the kitchen so he left again to go to the toilet.

131. The claimant did not rely on this incident as one of the Alleged Incidents but for the avoidance of doubt we find that Mrs Harvey did not act in any way inappropriately on this occasion She was trying to talk to the claimant and he was refusing to engage with her and becoming agitated. We find that the claimant reacted badly because by this time he was convinced that Mrs Harvey was criticising him unfairly. Objectively ion this occasion Mrs Harvey did nothing wrong.

132. On 16 May 2018 Ms Taylor raised two specific issues of concern with Mrs Harvey. The claimant was not present when she did so. The first was that the morning bread delivery had been left on the kitchen doorstep. Mrs Harvey's evidence (paragraph 63) which we accept is this is a non-conformance with HACCP procedures which states that all doorstep deliveries can only be accepted if a suitable container in which to protect the food from potential contamination is in place. Ms Taylor told Mrs Harvey that when she had asked the claimant why the bread was left in that way his response was that the bakery always did that, a response which Ms Taylor found flippant considering the contamination risk involved. She said that the claimant appeared to excuse himself from any responsibility. We do find that the claimant had a tendency not to accept responsibility for non-conformances in his kitchen.

133. The second issue Ms Taylor raised with Mrs Harvey was more serious. She said that when she entered the kitchen at 7:45 that morning she had found a fresh and chilled food delivery placed on a countertop inside the kitchen. That was before the claimant arrived at 8.30am. When Ms Taylor asked him how the delivery had got there the claimant told her that the delivery driver had a key to the kitchen and let himself in. That was viewed as a serious breach of safety as no-one other than those specifically authorised by the school should have a key to the kitchen. That is because entry to a school kitchen potentially allows access to the school which in turn gives rise to serious child safeguarding risks.

134. Mrs Ruddy's evidence, which we accept, was that on 16 May 2018 Tim Christian, the Transport Manager at Livesey's (the fresh and chilled food suppliers) said that he received a telephone call from the claimant on 16 May, whom he described as "panicked". The claimant during that call told Mr Christian that one of his drivers had a key to his kitchen and that he needed it back the following day or he would face disciplinary action. Mr Christian confirmed his evidence in a letter to the respondent on 17 May 2018 (p.393). The claimant did not suggest there was any reason for Mr Christian to make up this evidence on this point.

135. At 8.59pm on 16 May 2018 the claimant lodged a further grievance ("the Third Grievance") against Mrs Harvey. He did so by way of an email to Jayne Wilkinson (pages 345-346). In the Third Grievance he said:

- he felt ignored in relation to his Second Grievance which he had asked to be dealt with within two weeks (we find the Second Grievance did not say this);

- he was still being harassed at his place of work – he referred to the meeting on 14 May 2018 which we discuss in relation to Alleged Incident K;

- he had a further complaint about the way Mrs Harvey had spoken to him on 16 May 2018. He alleged she had called him ”ignorant” in front of the little girl who was waiting to be served;

- the extra harassment he was dealing with was causing him to feel ill at work and that he would not stand for it. He said (of significance to the discussion relating to time limits below) that he had “spoken to ACAS again today” and that they had suggested that he ask the following two questions:

(1) Why is Sandra Harvey still harassing me?

(2) Why was my timescale not acknowledged on my grievance letter sent 10 May 2018 (i.e. the Second Grievance)?”.

136. On the following morning the claimant arrived at work to continue his supported training with Anne Taylor but complained of feeling unwell, went to the toilet and then said he was sick. He then went home. As discussed below in relation to home visits (Alleged Incident A at paras 164-181), the claimant filed sick notes starting from 17 May 2018 and never returned to work for the respondent.

June 2018 to the end of September 2018 – Second and Third Grievance outcomes and appeal

137. The scheduled performance meeting postponed from 10 May 2018 to 7 June 2018 was deferred for the duration of the claimant's sickness absence (letter from Mrs Ruddy to the claimant 23 May 2018 p.350).

138. On 5 June 2018 a grievance meeting was held in response to the Second and Third Grievances. It was chaired by Diane Hunt with Rachel Sykes providing HR support and Jayne Wilkinson taking notes. The claimant attended and was represented by his mother. The typed notes of the meeting are at pages 351-352 but we found the handwritten notes (p.352A-352H) more helpful. They are much fuller and easier to follow than the typed notes.

139. The claimant was asked to clarify and elaborate on his grievance of 10 May. We find that at that meeting the claimant:

- raised for the first time the allegation that Mrs Harvey failed to provide him with information about paternity rights (i.e. Alleged Incident C);

- said he had been refused a day off on 4 March 2018 even though his pregnant girlfriend was in hospital (i.e. Alleged Incident H)

- said he informed Sam Robinson and Tina Gordon at his job interview that he had dyslexia but received no support;

- that Mrs Harvey had been ripping him to pieces on the paperwork and was now challenging his cooking;

- that at the meeting on 10 May 2018 Mrs Ruddy and Mrs Harvey had got the Head Teacher to confront him and that he had had no notice of her complaint until the meeting;

- that at the meeting on 14 May 2018 Mrs Harvey had called him a liar (in relation to his not attending work on the 11 May 2018 (i.e. Alleged Incident K);

- repeated what he said in his Third Grievance about what happened on the 16 May 2018 and suggested Mrs Harvey's actions were harassment;

- explained it was ACAS who said there should be a response to a grievance within two weeks.

140. We find that at the end of that meeting Ms Hunt told the claimant that she needed to speak to other people about the issues and therefore would not be able to respond within five days as he hoped (or suggested by ACAS). We find Ms Hunt met with Mrs Ruddy on the same day (notes at p.352F-352H) and it was agreed Ms Hunt would check with Mrs Harvey about the paternity leave issue and about the claimant's allegation about being refused leave on 4 March. We find she did subsequently do so. We find she also (as requested by the claimant) spoke to the kitchen General Assistants at Staining who had witnessed the potatoes incident on 9 May 2018.

141. On 18 June 2018 Diane Hunt sent the claimant the outcome of his Second Grievance and Third Grievance (p.357-362). In summary, her conclusions on the matters raised in the Second and Third Grievances were as follows:

- The respondent was not aware of the claimant's dyslexia so he could not have been discriminated against because of it. Ms Hunt was satisfied that the claimant had not disclosed his dyslexia at interview; on his pre-employment health-check document; to his managers or any of the trainers on courses he had attended;

- The claimant had not provided any evidence to support the allegation that he had been discriminated against because of his age or sex. (The claimant had still not disclosed his recording of the 6 November 2017 meeting);

- Having interviewed the two General Assistants who were present on the 9 May 2018, Ms Hunt concluded that the claimant had placed uncovered potatoes on the service counter ten minutes prior to service; the claimant was not questioned about his capability in undertaking his role but was instead asked a reasonable question about this by the Head Teacher; there was no evidence to suggest the Head Teacher spoke to him in a rude manner but that there was evidence to suggest that he had responded in a defensive and argumentative manner;

- There was no request from the claimant for the issues raised in the Second Grievance to be dealt with within two weeks. The school half-term holiday and operational commitments dictated that the earliest date for the meeting to be scheduled was 15 June;

- As far as the claimant's complaint that Mrs Harvey frequently visited the kitchen mostly unannounced, it was quite in order for Operations Managers and Service Improvement Managers to visit staff without making prior arrangements. The frequency of such visits was dictated by many factors with the objective of ensuring that the standards required by the respondent are being met. She also noted that Mrs Harvey was based at Staining Primary School and also used that school as a base for holding briefings with mobile staff when necessary so her frequent presence there was understandable;

- Having spoken to Mrs Ruddy and Mrs Harvey she was satisfied that on 10 May 2018 there was a meeting called to discuss the claimant's capability. On the following day there was a communication issue between the claimant and Mrs Harvey as a result of which the claimant did not attend work. Rather than being suspended, the claimant was sent home on 10 May 2018 because he was agitated;

- The complaint that Mrs Harvey had acted unprofessionally on 16 May 2018 was not upheld: Ms Hunt said that she had spoken to Anne Taylor who had confirmed Mrs Harvey's version of events of what happened on 16 May 2018. Ms Hunt found no evidence to suggest that Mrs Harvey acted in an unprofessional manner when attempting to speak to the claimant on 16 May

142. The claimant appealed against Ms Hunt's decision on the Second and Third Grievances by an identical document which was both emailed to Jayne Wilkinson on 19 June 2018 (p.366-368) and sent by letter to Mr Rogers undated but marked as received on 28 June 2018 (p.369-371). In summary, the grounds of appeal were as follows:

- In relation to disability discrimination: he had not been advised of the need to disclose his dyslexia nor realised it was a disability when first employed;

- He had not received sufficient training when promoted to the UCS role and this caused him to have recurring issues;

- In relation to sex discrimination: he had mentioned paternity rights to Mrs Harvey and that she said she was unable to give any information on paternity rights because he is male and it would usually be a female that would ask for this (i.e. Alleged Incident C). He asked why it was irrelevant for that to be added into his grievance. We take that to mean that Ms Hunt had not dealt with this issue in her grievance outcome

letter (see our findings in relation to Alleged Incident D at paras 201-206 below);

- In relation to the complaint from the school (this referring to the 9 May potatoes incident): since he said that both his staff who were interviewed had admitted he was not rude to the Head Teacher he questioned what evidence Ms Hunt had received of the claimant being disrespectful to her. He submitted that "being told I'm not wanted in the place I have worked for the last five years is OBVIOUSLY going to be AGITATING". The claimant said that he was standing up for himself because the Head Teacher was incorrect to make any comments about his cooking.

- In relation to the 10 and 11 May 2018: his issue had been largely misunderstood. The claimant said that, "I was told because Mrs Harvey had lied to Mrs Ruddy about me contacting her, if I could not prove Mrs Harvey wrong I would not be paid…THIS IS BLACKMAIL AND HARASSMENT". The claimant said he had attached the voicemail message (transcribed at pp.371B-F).

- Mrs Harvey was continually being allowed to harass him. He said that as from 10 May when he raised the Second Grievance, Mrs Harvey should not have been allowed to "further IRRATATE [sic] ME BUT SHE DID. AND LANCASHIRE COUNTY COUNCIL have obviously ALLOWED THINGS TO GRADUALLY GET WORSE BY ALLOWING THIS MANAGER TO CONTINUE HARASSING ME AT WORK CAUSING ME TO FALL ILL on more than five occasions".

143. The use of capitals and the strong terminology ("blackmail") in his appeal reflected, we find, the agitation the claimant felt by now about what he saw as Mrs Harvey's harassing treatment of him. We find that by this point he was not capable of viewing Mrs Harvey's actions in anything approaching an objective way. On 4 July 2018 Mr Rogers wrote to the claimant acknowledging receipt of his grievance appeal (page 373). It set a grievance appeal meeting which was due to take place on 24 July 2018 at the Woodlands Centre in Chorley. However, that meeting was postponed at the claimant's request because his partner was at Blackpool Victoria Hospital for scans and monitoring because the midwife was concerned about her pregnancy.

144. While the grievance meetings and the sickness procedures (detailed under alleged incident A below) were ongoing, the respondent was also carrying out a disciplinary investigation into the allegation that the claimant had given a key to an outside delivery. In addition of the allegation of the breach of the respondent's safeguarding policy by supplying a key to an outside contractor, the disciplinary process was also investigating a failure to comply with HACCP procedures in relation to receipt of goods, stock control and records for HACCP procedures. In summary, this allegation was that because the claimant was not around to take delivery of the Livesey's chilled and fresh food delivery, he could not keep a log of items received and that the temperature of the items received from Livesey's could

not be accurately recorded because the claimant was not there to record it at delivery.

145. The claimant was interviewed about the disciplinary issues on 27 June 2018 (pages 399-401) and signed the notes of that meeting on 2 July 2018 to confirm that the statement was a true reflection of the contents of that meeting. In the statement the claimant confirmed that the delivery driver from Livesey's had a key and also confirmed that the driver would put the delivery away in the storage area. He claimed it had been Mrs Harvey's idea to give the driver a key and also said that it had been Mrs Harvey herself who gave the driver the key. He confirmed that on 16 May he had contacted Livesey's to ask for the key back. He said that he did so because he knew he was going to be in trouble and could see what was coming, i.e. that he would be blamed even though it was Mrs Harvey who gave the driver the key. He alleged that Anne Taylor was picking on everything that he was doing. That meeting concluded with the claimant confirming that he did not want anybody interviewed on his behalf.

146. A further disciplinary interview with the claimant on 23 July 2018 is recorded in the written note at page 402. The claimant has signed that but also made handwritten comments on it as we describe below. The typed note records that he repeated that Mrs Harvey had given Livesey's the key. When asked why he had telephoned Livesey's because he thought he would be in trouble for them having a key when it was not him who had given them the key, he said that as he was in charge of the kitchen "it would have been my fault". He repeated that Anne Taylor was "all over me and I walking on egg shells for three days". In essence, he was saying that he felt that the respondent would blame him for the issue of the key because they were trying to get at him. The claimant's handwritten addition to the typed note says that that he had also stated at the meeting that this was "tit for tat" and that both times he had complained about Mrs Harvey in his grievances he had been given management letters and now disciplinary action. We find that that is not an accurate picture of what had happened. Instead, it was the other way round, with grievance letters being sent in in response to management letters or in response to action being taken against him.

147. It was during the email conversation when he returned the note of that second interview on 23 July to Jayne Wilkinson on 9 August 2018 that the claimant asked her about paternity rights information (discussed in relation to Alleged Incident E at para 207-215 below).

148. In his email at 14:23 on the same day to Mrs Wilkinson the claimant asked whether a date had been set yet for the grievance appeal meeting so he could make arrangements for representatives. He also in that email asked, "could I possible ask if I was to constructive dismiss myself from my duties would I still be able to have my meeting in September?". Mrs Wilkinson's response at 14:57 was that she would have to make enquiries about the appeal meeting in September and check if it would still go ahead if he decided to dismiss himself. We note that there was a delay between the claimant putting in his grievance appeal and the meeting but this was due to the school summer holidays. Mrs Wilkinson, according to Mrs Ruddy's evidence, maintained a skeleton presence at the school during holidays to ensure that any communications were passed on.

149. On 31 August 2018 Mr Rogers sent a letter to the claimant (page 456) confirming that the rescheduled grievance appeal meeting would take place on Tuesday 11 September 2018 at Woodside at 2.30pm. On 3 September 2018 (page 457) the claimant emailed Mrs Wilkinson to say that he was "disappointed I've had no further correspondence with regard to me leaving on constructive dismissal". He said that, "this has caused me to be off work for longer length of time on sick now, I will have my wages reduced to 50%. This is absolutely terrible that an employee who has worked such a large length of time can be treated so badly overall and the decrease in my wage is going to help my circumstances?". He also requested that his appeal meeting should be held at a nearer location for his convenience. z

150. The response to the request to move the grievance appeal hearing was in the letter which Mrs Ruddy sent to the claimant about his sickness absence on 5 September 2018 (pages 459-460).

151. On 6 September 2018 at 16:53 the claimant sent Mrs Wilkinson and Mrs Ruddy a voice recording of the original return to work meeting on 6 November 2017. He said this was the "first patch [we assume that should have been batch] of evidence I'm going to provide to prove I was unfairly treated". He pointed out that at 1hr41 into the recording there was proof that Mrs Harvey had called him a "little boy" and said, "little boys can have his toys". He also said in the email that he was told in the recording that "I cannot do my job and if I wasn't to adhere to what Sandra said it was disciplinary action next". He asked permission from Mrs Harvey to use that recording as evidence if needed. He also asked how long was left in the investigation i.e. the disciplinary investigation being carried out by Susan Bamber and Glen Moody, as he "have yet to hear anything from this". Mrs Wilkinson replied on behalf of Mrs Ruddy on 7 September at 15:29. Mrs Wilkinson said that Mrs Ruddy acknowledged receipt of the email and that enquiries had been made with the ICT department who had in turn told them that they needed to contact the respondent's Information Governance Service to check their advice for "mandatory bureaucratic procedures prior to opening the attachment". Mrs Wilkinson said that Mrs Ruddy was currently awaiting a response and would contact him "thereafter". The claimant thanked Mrs Wilkinson for that update in an email on 10 September at 13:40. There was then a technical hitch with Mrs Wilkinson writing to the claimant on 10 September at 15:57 to say that they could not open the hyperlink of the recording that he had sent in his email. The claimant responded within some five minutes sending a copy to the email provided having opened the link for sharing.

152. On 14 September the claimant was invited to a disciplinary hearing on 4 October at 2.00pm. The letter of invitation (pp.469-470) confirmed the allegations to be considered were:

(1) Failure to comply with procedures concerning receipt and storage of food stock and to follow HACCP procedures concerning temperature control of receipted goods;

(2) Breach of the respondent's safeguarding policy by supplying a key to an outside contractor thereby allowing them unauthorised and unsupervised access to the school kitchen.

153. The letter (from Mrs Ruddy) confirmed that the officers present at the hearing would be Mr Craine (Senior Designated Officer concerning the case); Pauline Gleave, the HR Business Partner supporting Mr Craine; Mrs Ruddy herself as the officer presenting the case; Susan Bamber and Glen Moody, the investigating officers; and Paul O'Donnell, the Livesey's delivery driver. The letter warned the claimant that if substantiated the allegations against him would amount to gross misconduct and it would therefore be open to the Senior Designated Officer hearing the case to consider dismissing him. A copy of the disciplinary investigation report and copy of the County Council's disciplinary procedures were, it was said, to be forwarded to him in the next few days, and he was advised that if he failed to attend or be represented at the hearing and no reasonable explanation was forthcoming the matter might be considered in his absence.

154. That letter came two days after the grievance appeal hearing on 12 September. The outcome of that grievance meeting was sent to the claimant in a letter from Mr Rogers dated 17 September 2018 (pages 471-474). Summarising those conclusions:

- In relation to the claimant's dyslexia, Mr Rogers noted that while the claimant disagreed with what Mrs Harvey and Diane Hunt had said, the claimant was not able to provide any further evidence to support what he was saying.

- In respect of the request for details of the paternity rights procedure, Mr Rogers said he had checked with Mrs Harvey who had denied saying that he was not eligible for paternity leave because he was male. He reported that following the claimant's initial request for details of the procedure she was in the process of providing the information but that the claimant told her that he would not need to take any paternity leave because his daughter was due to be born during the summer holidays when he was off work. Mr Rogers also noted that the claimant had now been provided with a copy of the paternity procedure following a further request for those details. On that basis Mr Rogers did not uphold this element of his grievance due to a lack of "further corroborative evidence".

- With regard to the claimant's allegation that he was suspended on 10 May 2018 and unfairly criticised by the Head Teacher, Mr Rogers said that he had checked what the claimant alleged with Mrs Harvey and Diane Hunt and Mrs Ruddy. Mr Rogers noted that it was agreed by the witnesses that neither the Head Teacher nor the claimant were aggressive or rude. He noted that the claimant agreed that he was defensive and explained that this was because he felt he was being questioned about his competence. Mr Rogers noted that the schools are the customers and they have a right to raise legitimate concerns about the service they pay for in the right way, and managers also have the right to discuss such concerns. He noted and accepted Mrs Ruddy's evidence that rather than the claimant being told to go home and that he would not be paid, what happened was that the claimant had become agitated at the meeting and that Mrs Ruddy felt it better to ask him to go

home as a result. He also noted that the claimant had been paid for the days he did not attend work. On that basis he could find no evidence to support that this issue was not dealt with appropriately and he therefore did not uphold that part of the claimant's grievance.

- In relation to Mrs Harvey continuing to be his manager following raising the Second Grievance, he recorded that having spoken to Mrs Harvey and Ms Hunt a decision had been taken that alternative management arrangements did not need to be put in place and therefore Mrs Harvey remained his Operations Manager. Mr Rogers noted that all managers are required to visit all school service points so they can manage on a regular and frequent basis, and that they do not have to agree such visits with the Unit Catering Supervisor in advance. On that basis, he did not uphold the grievance about Mrs Harvey's behaviour.

- He found that Ms Taylor had been put in place to provide support and did not therefore uphold that part of the grievance.

- Finally, in relation to the incident when Mrs Harvey had, according to the claimant, prevented him from serving a Year 3 child, he accepted Mrs Harvey's evidence that the fact he had served the customer during the discussion was not a problem, rather it was that the claimant appeared unwilling to have or continue the discussion with Mrs Harvey either before or after serving the child. Again, Mr Rogers found no evidence to support that element of the grievance and dismissed it.

155. In summary, therefore, Mr Rogers dismissed all the claimant's appeal against the Second and Third Grievance outcome.

156. Mrs Ruddy emailed the claimant on 18 September 2018 and confirmed that she had listened to the recording of the meeting on 6 November 2017: she would be addressing the content of the recording with Mrs Harvey and "taking appropriate management action". That record of discussion was added to the bundle at page 476A. It recorded that on 28 September 2018 there was a discussion at which Mrs Harvey said that the claimant had been testing her patience to the limit and "I am only human". Mrs Harvey said that the claimant was argumentative and obstructive to what she was trying to achieve as a manager and that she had tried to support him but he still did not perform his job, putting children and staff at risk. Mrs Harvey said that the claimant was "reluctant to conform and participate, very rude and argumentative, testing me all the time. He doesn't listen, there is no rationale in what he says". The note complains about the recording of the meeting on 6 November and suggests that unbeknown to [Mrs Harvey and Ms Gordon] the claimant was "trying to goad me into reacting inappropriately".

The Disciplinary Hearing and resignation letters

157. On 29 September 2018 the claimant emailed Mrs Ruddy (page 478) to say that if Mrs Harvey was in attendance at the disciplinary hearing he would not be. He said he was "offended you feel this is fair on my behalf" and referred to having been "threatened by Mrs Harvey and do not feel comfortable being the same room as her". The claimant said that he had tried to call Mrs Ruddy on 29 September but did not

leave a message. Mrs Ruddy responded on 1 October (page 477) by email to confirm she had a missed call but that when she rang back there was no answer. She confirmed she had spoken to Mr Craine, Chair of the disciplinary hearing, and he was happy to speak to Mrs Harvey separately in a different room.

158. On 4 October 2018 the claimant sent his first notice of resignation. We discuss his three notices of resignation at paras 299-303 below when setting out our findings of fact about the claimant's dismissal.

159. In between the two notices of resignation, the disciplinary hearing had taken place. There are notes from that hearing at pages 484-487 of the bundle. Of most significance, perhaps is the written statement from the driver, Paul O'Donnell confirming that it was the claimant who had given him the key (p.397-398). In brief, the claimant initially took part in the hearing. The meeting started to hear evidence about the first allegation (about the kitchen key) but after Tim Christian (the Transport Manager at Livesey's) gave evidence, the claimant left the hearing. The evidence given by Mr Christian was that he was not previously aware that the driver had the key and it only came to light when the claimant asked for it back. He had confirmed to Mr Craine in the hearing that the drop at Staining was the driver's first drop and that it was dropped off at 6.00am and 6.30am, and confirmed that the temperature of the chilled goods would be likely to be approximately 3°C. The last but one entry in the notes from the claimant says that, "On the day I rang I was panicked. My Ops Manager said it was ok and it was based on trust. This manager put this operation in place. I was panicked because I knew she would put it on me and there would be a disciplinary".

160. The very final entry records the claimant as saying, "I know what you're trying to do, but I'm speaking to a lady who is being very helpful to me and it's coming. Ha Ha. Yes. Just wait, it's coming". The claimant then left the hearing. Mr Craine decided the appropriate course of action was to continue in his absence. He went on to decide that on the balance of probabilities the claimant was guilty of the two acts of misconduct alleged, that it was gross misconduct and that the appropriate sanction was instant dismissal.

161. On 9 October 2018 Mr Craine sent the disciplinary outcome letter to the claimant. This was at pages 507-514 in the bundle. It confirmed that he was dismissed with immediate effect.

162. On 11 October the claimant sent his further resignation letter which we discuss at paras 299-303 below. At point 2 of that letter, the claimant says, "When will I receive a letter of conclusion from my disciplinary hearing?".

163. Mrs Ruddy replied on 17 October 2018 (pages 516-517). She confirmed that the disciplinary outcome letter was sent by recorded delivery first class on 10 October 2018. She also confirmed that she accepted his resignation as per his revised notice of 4 October 2018 and that his last day of employment at the respondent was therefore 11 October 2018.

Our findings of fact about the Alleged Incidents

A. Not receiving home visits during his six-month absence from work

164. The respondent's Management of Sickness Absence Policy ("the Sickness Policy")(pp.93-107) has a section dealing with long term sickness absence (section 11 at pp.103-105). It sets out the procedure for dealing with long term sickness absences which it defines as absences exceeding 28 calendar days. In summary, it says that:

- Where a period of absence is likely to exceed three weeks, the line manager must arrange to meet the employee at home, at work or another suitable venue to discuss the employee's progress; discuss any occupational health report; identify areas for support; and consider any short or longer terms adjustments to facilitate a return to work.

- There should be a referral to the respondent's occupational health provider ("OH") after the first four weeks of absence or after any recognised recovery period.

- Where an employee's fit note says they are suffering from stress, anxiety or depression a referral to OH should be made immediately.

- The employee should be invited to a case review meeting where the absence exceeds eight weeks. That case review meeting is chaired by a senior manager and considers a report from the employee's line manager and medical evidence with the aim of exploring and reviewing any action which could facilitate a return to work. An employee is entitled to be accompanied to a case review meeting by a work colleague or trade union rep or official.

- Where absence exceeds 26 weeks the case is referred to an Attendance Hearing unless there are mitigating circumstances.

165. In his cross examination evidence the claimant said that this allegation related to the period when he was off sick for 6 months in one block. We find that this relates to the claimant's final period of absence from work. That started on the 17 May 2018 when he was certified as unfit for work because of stress at work (p.349). Subsequent fit notes confirmed the claimant was unfit to work due to stress at work until 29 July 2018 (p.355, p.363 and p.372) and it was not disputed that the claimant did not return to work before his employment ended. Although Mr Mensah correctly pointed out this absence was not for six months (because the claimant's employment ended less than six months later) we find that his absence from work from 17 May 2018 onwards would have counted as "long term sickness absence" under the Sickness Policy.

166. The respondent accepted that it did not carry out a home visit in relation to that sickness absence. However, there was evidence it did take steps under the Sickness Policy. The initial steps were summarised in a Case Management Record Sheet (p.348) and in Mrs Ruddy's witness statement (para 37).

167. We find that Mrs Ruddy appointed Karen Frost (Service Improvement Manager) and Christina Gordon to manage the claimant's absence. That was done to minimise contact between the claimant and Ms Harvey because of the ongoing issues between them. Ms Frost referred the claimant to OH because his absence was stress-related. We find that is in accordance with the Sickness Policy. This was done by the 29 May 2018.

168. The unchallenged evidence from Mrs Ruddy (corroborated by the Case Management Record) is that Ms Frost spoke to the claimant on 1 June 2018 to advise him of the benefits of a referral to OH. That was because the claimant had been unwilling to cooperate with OH when they contacted him on the 29 May 2018. We find the claimant then agreed to a telephone interview with OH on 5 June 2018 but that did not take place because the claimant did not answer his phone. Ms Frost then spoke to the claimant again on the 6 June 2018 to inform him that the appointment with OH had been re-scheduled for the 7 June 2018. That appointment did take place and resulted in an OH Report dated 7 June 2018 (p.353-354).

169. Based on that OH report, on 12 June 2018 the claimant was invited to a Case Review Meeting on the 26 June 2018 because his sickness absence was "likely to exceed 8 weeks duration" (p.356). We find holding a Case Review Meeting is consistent with the Sickness Policy. We note that the Policy says such a meeting should be held after the absence has exceeded 8 weeks (rather than if it is "likely to") but the claimant did not in his claim raise any issue about this.

170. The Case Review Meeting between the claimant and Mrs Ruddy took place on the 26 June 2018. The outcome of the meeting was recorded in Mrs Ruddy's letter to the claimant dated 27 June 2018 (p.364-365). We accept Mrs Ruddy's evidence (para 38 of her witness statement and corroborated by that letter) that at that meeting the claimant confirmed that he was under the care of his GP and was attending a resilience and mediation course but not being prescribed medication. Mrs Ruddy offered him the services of LCC Counselling. The claimant did not take up that offer because he was already attending the resilience and meditation course. He confirmed ACAS had advised he should not return to work until his workplace issues had been resolved. Mrs Ruddy then suggested that to enable him to return to work she would temporarily move him to another school, Fleetwood High School, under a different management structure. The claimant explained that would not be possible because he had been permanently excluded from that school so Mrs Ruddy offered Millfield High School as an alternative. The claimant confirmed that at present he did not want to return to work. Mrs Ruddy said she would re-refer him to OH in August 2018 and would then hold a further case review meeting "with a view to moving forward".

171. The claimant was signed off sick for a further month with stress at work on 29 June 2018 (p.372). On 30 July 2018 Jayne Wilkinson emailed the claimant to ask whether he would be submitting another sick note (p.375). That was because his previous sick note expired on the 29 July 2018. He emailed the following day to say that his GP had advised that they did not think he need another sick note during the summer holidays as he was not under any work related stress. He said he was hoping to return to his job role in September "if resolution is made" (p.375). This

refers to the fact that at this point the claimant had appealed against the outcome of the Second Grievance and was undergoing a disciplinary investigation.

172. On 31 July 2018 Mrs Ruddy wrote to the claimant to say that as he was not submitting a further sick note her offer of alternative work at Millfield High School would come into effect. He was told to report to the kitchen at that school when it re-opened on 4 September 2018 after the school holidays (pp.376-377).

173. The claimant responded to Mrs Ruddy in writing (p.378). The letter is undated but must have been received by 2 August 2018 when Mrs Ruddy wrote in response to it. The claimant said he found it "very disappointing" that Mrs Ruddy was proposing that he worked in a busier environment when "you are currently implementing that I need to be on a capability procedure because I am told I am under performing in my current job role". He expressed disappointment that "after short staffing me and my team for such a large amount of time" he had never received an apology for any of the stress and difficulties caused in the time he worked for the respondent. He said that he had no reason to put in a sick note for stress while he was off for the summer and that "until my grievance is herd officially and I receive a reasonable outcome I will be off work with stress and harassment and discrimination in the work place."

174. On 2 August 2018 Mrs Ruddy wrote in response. She explained that the claimant was being relocated to another school pending the outcome of the disciplinary investigation. She set out the respondent's policy when an employee was subject to disciplinary proceedings and that due to the seriousness of the allegations against the claimant she felt it necessary to transfer him to another unit under a different management structure for the duration of the investigation. She clarified that he would not be undertaking a supervisory role at the new school. She also explained that when a sick note expires and no further sick note is received continuing that period of sickness absence the employee is treated as having declared themselves fit for work. She ended that letter by wishing the claimant best wishes on his successful return to work (i.e. in September 2018) (pp.446-447).

175. The claimant did not directly respond to that letter. However, on 9 August 2018 in an email conversation with Mrs Wilkinson he said that he would be sending another sick note (p.449). However, he did not send another sick note and on 28 August 2018 Mrs Ruddy wrote to him asking him to confirm that his sickness absence ended on 29 July 2018 and that he intended to return to work at Millfield School when it re-opened on 4 September 2018 (p.455). She also explained that if a period of sickness absence had ended and a fresh sick note submitted that would be treated as a separate absence and might trigger the respondent's Repeated Absence Procedure (a point already made in her letter of 2 August 2018).

176. On 3 September 2018 the claimant wrote to Mrs Wilkinson confirming he had sent a further fit note confirming he was unfit to work due to stress at work (p.457). That fit note covered the period 29 July 2018 to 29 September 2018 (p.458). Mrs Ruddy wrote in response on the 5 September 2018 confirming that in light of the claimant's continued sickness absence she would be re-referring the claimant to OH and on receipt of the OH report would then hold another case management review (pp.459-460). Mrs Ruddy's letter deals with various other matters including the

location of the claimant's pending grievance appeal meeting. In terms of matters relevant to this Alleged Incident A, Mrs Ruddy said that it was always the respondent's aim to encourage employees back in to the workplace and that the decision to temporarily re-locate the claimant to an alternative school kitchen was a "sincere attempt to secure a successful and supported return to work whilst a disciplinary investigation takes place".

177. It appears there was a delay in that final sick note being received by the respondent. Mrs Wilkinson chases it in an email to the claimant on the 6 September 2018 (p.463A) and he confirms that he has sent it. The Case Management Record Sheet (pp.520-522) records it as having been received on the 17 September 2018. In the meantime Karen Frost rang the claimant on the 10 September 2018 to confirm there would be a re-referral to OH. The Case Management Record Sheet says the claimant questioned why this was necessary. Ms Frost made the re-referral to OH on 12 September 2018 (p.522) and the appointment was due to take place on 1 October 2018. It did not take place and there is an email from the OH provider to Ms Harvey on that day suggesting this was due to the claimant's non-attendance (p.479). It appears from the Case Management Record Sheet, however, that this may have been because the practitioner had understood the appointment to have been for a face to face meeting whereas it was supposed to be by telephone (entry for 1/1018 on p.522). No further steps were taken because the claimant's employment ended shortly afterwards.

178. We have made detailed findings about the steps taken by the respondent in relation to the claimant's sickness absence from 17 May 2018 because we wanted to ensure that our finding that no home visit took place was placed in context. We have also done so because both in his cross-examination and in answer to the Employment Judge's questions to him about his submissions the claimant confirmed that his complaint was really that the respondent had never really touched base with him during his prolonged absence nor checked whether he was ok.

179. However, when pressed in cross examination by Mr Mensah the claimant accepted that the respondent had shown an interest in him when he was off sick. He also accepted that a home visit might not have been something he would have welcomed given that during that absence his resilience was at its lowest. He also accepted that he never requested a home visit. His explanation for this was that he did not at that point know that that is what the Sickness Policy required. It was only after he received a copy of the Sickness Policy after being absent for nearly six months that he realised that it referred to a home visit.

180. We find that although no home visit took place, the respondent did proactively engage with the claimant during that period of absence and there was no detriment to him. We find that the claimant would not really have wanted a home visit. We find that the respondent did follow the Sickness Policy by referring the claimant to OH, holding a case management review and taking steps to find alternative non-supervisory roles for the claimant to enable him to return to work. We accept that the claimant did not feel able to take up those suggested roles for the reasons he set out in his letter to Mrs Ruddy dated 31 July 2018 (p.373). However, we also find that at no point did the claimant raise a grievance about this issue nor does the claimant

refer to it when giving his reasons for resignation in the letters dated 4 October 2018 (pp.480-481 and p.482-483).

181. The claimant in submissions confirmed that he was alleging that the lack of a home visit was an act of sex (but not age) discrimination or harassment. He asserted in submissions that female employees had been given home visits. However, we did not hear any evidence about what happened in cases similar to his involving female staff. There was no evidence on which we could base a finding that such female staff had received home visits or that the respondent had been more proactive in keeping in touch with them than it was with the claimant.

B. "Little boys" comment

On 6th November 2017, Sandra Harvey causing him stress and to be off sick by calling the Claimant a "little boy" and telling him "this little boy can have his toys" after the Claimant requested some personal information.

182. Mr Mensah confirmed at the start of the hearing that although the respondent now accepted that Mrs Harvey had made a remark referring to "little boys" having their toys, it was not accepted that this was an act of age or sex related harassment or age or sex discrimination.

183. The transcript records the remark as being made at 1hour 44 minutes into the meeting (pp.278-279). In addition to reading the transcript we listened to the relevant extract from the recording of that meeting. We find that the claimant had asked for copies of the 6 photos taken by Ms Currie (pp.232-237). For convenience we set out the relevant extract:

> Claimant: I did have it all you just took it back off me.
>
> Ms Gordon: We've done it by mistake we're not taking things off you.
>
> Mrs Harvey: Little boys will have their toys.
>
> Claimant: Little? I am a little boy now as well am I?
>
> Mrs Harvey: Little boys can have his toys. I'm just making sure I've got everything.
>
> [Mrs Harvey checking she has all [the claimant's] paperwork
>
> Claimant: There's 8 pictures altogether wasn't there?
>
> Mrs Harvey: no, 6

184. The discussion then turns to a discussion of the photo showing jars of pickled beetroot with Mrs Harvey questioning why the claimant had so many jars. The meeting continued for a further few minutes with a brief discussion of the dead frog photo.

185. Based on that transcript and the recording we find that Mrs Harvey used the phrase “little boys will have their toys” twice, the second time after the claimant challenged her about it. The claimant in the First Grievance meeting on 20 November 2017 (notes at p.300) said that he was called “Little boy” 3 times but that is clearly wrong-the remark was made twice not three times.

186. In terms of the context of the remark, we find that it was said by Mrs Harvey at the end of a long and difficult meeting. We have recorded our findings about how the meeting was conducted under Alleged Incident M (paras 273-285 below). Mrs Harvey in cross examination evidence accepted it was not a remark she should have made and apologised for making it. Her explanation was that she was exhausted at the end of a long meeting with the claimant which she had found very frustrating because she knew the claimant could do the job and wanted to support him. We find that her perception was that the claimant was resisting her attempts to help him and refusing to accept he was at fault. We do not, however, accept the submission made by Mr Mensah and in evidence by Mrs Harvey that the claimant “goaded” her into making the remark in order to record it. The transcript does not support that submission. In addition, if that had been the claimant’s aim it seems to us strange that he did not immediately use the recording. We prefer his evidence that he made the recording as a defensive step rather than as a way of seeking to entrap Mrs Harvey.

187. In terms of the impact of the remark on the claimant, he told the First Grievance meeting that he “didn’t react to that” (p.300). We find that although the claimant challenged Mrs Harvey, he did continue with the meeting after the remark was made the second time. His evidence in cross examination was that he felt humiliated by that the remark but had chosen not to react or retaliate in the meeting itself. We accept that evidence. We also accept that the claimant was physically sick and then off sick as a result of the meeting. His sickness record (p.519) confirms that was the case. The impact of the comment on the claimant is also evidenced by his raising it as part of his First Grievance. Mr Mensah submitted that if he was that badly affected by the incident, the claimant would surely have disclosed the recording of the meeting to back up his case. We accept the claimant’s evidence that he thought he would be in trouble if he disclosed he had recorded a meeting because Mrs Ruddy had made it clear at the start of the First Grievance meeting that it was not the respondent’s policy to record meetings (notes at p.297).

188. The claimant accepted in cross examination that being called a little boy was a one-off incident, but said there were a number of other incidents of bullying by MRs Harvey.

189. We also made findings related to this incident about the reliability of Mrs Harvey and Ms Gordon as witnesses. As we have said, it is clear that Mrs Harvey made the remark on the 6 November 2017. However, when questioned about this by Mrs Ruddy as part of the claimant’s First Grievance, both disagreed that the remark was made or even that it was something Mrs Harvey would say. That is recorded in Mrs Ruddy’s outcome letter relating to the First Grievance (p.308). That letter was sent to the claimant on the 29 November 2017 so Mrs Ruddy must have asked Mrs Harvey about making the remark no later than three weeks and a day after the meeting. On balance, we find that Mrs Harvey did remember making the remark but

did not disclose it to Mrs Ruddy because she realised she was in the wrong. We found that Mrs Harvey's denial of making the remark did damage her credibility as a witness and the reliability of her evidence in relation to other incidents.

190. When it comes to Ms Gordon, she told us in her evidence in chief that she was not in the meeting when Mrs Harvey made the comment. Her evidence was that she had left the room to photocopy the 6 photos Ms Currie had taken. However, that is clearly inconsistent with the transcript of the meeting. We find that at the time the remark was made, Ms Gordon had returned to the meeting with the copies. That is evident both from the fact the remark was made by Mrs Harvey when discussing the copies and from the fact that Ms Gordon speaks to the claimant immediately before the remark is made for the first time. Ms Gordon in response to the Tribunal's question accepted that she was in the meeting at the relevant time. The inconsistency of that evidence with her evidence in chief did damage her credibility as a witness and the reliability of her evidence in relation to other incidents.

191. The claimant did not provide evidence of an actual comparator treated differently to the way he was. We did not hear evidence of Mrs Harvey making similar remarks to other employees who were female or of a different age group than the claimant.

192. Finally in relation to this incident, we find that when the respondent was sent the recording of the meeting by the claimant in September 2018 it did take action against Mrs Harvey. Mrs Ruddy issued a "Record of Discussion" which affirmed the need to comply with the respondent's Code of Conduct.

C. Information about paternity rights

When his girlfriend was 15 weeks pregnant the Claimant asked for information about paternity rights from Sandra Harvey. The Claimant also asked for information about flexible working and shared leave with his partner. Sandra Harvey told him that it was usually a woman who would ask and she could not help him and did not know but would find out. She failed to do so.

193. It was agreed that this happened on 16 March 2018. It was agreed that the claimant asked Mrs Harvey about paternity rights. It was also accepted that Mrs Harvey did not provide that information. What was in dispute was what Mrs Harvey said in response to the claimant's request and why she did not provide the information.

194. Mrs Harvey's evidence was that she said she was unfamiliar with the process for paternity leave because she had only dealt with women not men. Her evidence was that she said she would get back to him but shortly afterwards the claimant advised her that his baby would be born during the school summer holidays so he wouldn't require that information.

195. The claimant was asked about this incident in cross examination. He confirmed it was the incident referred to at para 12 of the ET3 (p.23) and at para 46 of Mrs Harvey's statement. He confirmed it was a one-off incident and that in fact he had not needed to take paternity leave because his daughter was born in the school holidays.

196. The claimant did not raise this incident in his Second Grievance or his Third Grievance but did raise it at the Second Grievance meeting on 5 June 2018. In the typed version of the notes (at p.251) the claimant is recorded as saying that "[Mrs Harvey] said they were for females not males". However, the handwritten notes of that meeting (which are much fuller) record him as saying unable to give me advice about paternity rights as was not female - female needed to asked": (p.352A).

197. On balance, we prefer Mrs Harvey's evidence about the conversation on the 16 March 2018. Given the overwhelmingly female catering workforce we find it plausible that she had not had a request to deal with paternity rights before. We find that she may well have said that it was usually the mother who applied for leave. We do not accept that she said she could not help the claimant. As we have recorded in our overall findings of fact, by March 2018, the relationship between the claimant and Mrs Harvey had deteriorated and he was forming the view that she was out to get him and/or bullying him. We find it plausible that the claimant misunderstood Mrs Harvey's comments about women usually asking for leave as a refusal to help rather than as her saying she wouldn't be able to help until she had checked the position.

198. We accept that Mrs Harvey told him she would have to get back to him. On balance, we also accept her evidence that before she did so the claimant told her he no longer needed the information because his daughter would be born in August during the school holidays. That seems to us consistent with the fact that the claimant's own evidence was that this was a one-off incident. Had the claimant still needed the information it seems to us likely he would have raised the matter again with Mrs Harvey. Instead we find that the claimant did not pursue the issue with her and did not raise it again until the Second Grievance meeting on 5 June 2018. We find that supports Mrs Harvey's version of events.

199. We did not hear any evidence about how any actual comparators who asked for information about family rights were treated. It seems to us that to be in the same material circumstances a comparator would have to be someone asking for information which Mrs Harvey did not know off the top of her head, e.g. for rights other than maternity leave. We heard no evidence about any female staff or older staff in a comparable situation being treated any differently to the claimant. We think it plausible that if an employee in that situation asked about family rights but then didn't follow up, Mrs Harvey might well not have got back to them, especially if (as in the claimant's case) it turned out they did not actually need to exercise those rights.

200. In terms of the impact of the alleged incident on the claimant, his evidence in cross examination was that he felt humiliated by it. However, we note that the claimant did not pursue the matter again until the grievance meeting on 5 June 2018 nearly 3 months later. He did not include it in his Second or Third grievances. We find that if he had felt humiliated by it he would have included it one of those

grievances. We do not accept the claimant's evidence that the conversation with Mrs Harvey on 16 March 2018 had a humiliating impact on him.

D. Information about paternity leave

The Claimant asked again about paternity leave in a meeting which was grievance appeal meeting with Diane Hunt on 24 July 2018. He asked for the information about the leave he was entitled to take and referred to flexible working or sharing leave with his partner. Ms Hunt promised to supply the information but the Claimant did not receive it from her.

201. We find that the claimant is wrong about the date of the meeting referred to in this allegation. The grievance meeting chaired by Diane Hunt was on 5 June 2018 rather than 24 July 2018. It is clear from the typed (pp.351-352) and handwritten notes (pp.352A-352H) that this issue was raised by the claimant at that meeting. He was asked to clarify and explain what his grievances were and said that Mrs Harvey had been unable to give advice about paternity rights when he asked her and said that that was because he was not a female and that it was the female who needed to ask. As we recorded above, we found Mrs Harvey did not say that.

202. The handwritten notes also refer to the claimant as saying that he was still waiting for paternity leave information. The handwritten notes (p.352E) record Ms Hunt telling the claimant that she needed to speak to other people about the issues and therefore would not be able to respond within five days as the claimant hoped. There is nothing in the notes suggesting the claimant referred to flexible working and sharing leave with his partner. There is also nothing in the notes recording Ms Hunt as promising to provide that. It is accepted that Ms Hunt did not supply the information.

203. We find that Ms Hunt did not promise to provide the claimant with information about paternity or other family leave related rights. We accept her evidence that her role was to hear the grievance raised by the claimant about Mrs Harvey not doing so and so she asked Mrs Harvey about the allegation but concluded that the claimant had not provided evidence to support the allegation that he had been discriminated against because of his sex.

204. She recorded this conclusion in the grievance outcome letter dated 18 June 2018 (specifically on p.359). That letter does not specifically explain that the claimant had raised the failure to provide paternity rights information as an allegation of sex discrimination nor give specific reasons why that allegation was rejected. The claimant raised the failure to add that allegation to his Third Grievance in his appeal against that grievance outcome (p.360-371). With hindsight it is easy to say that it would have been better if Ms Hunt had set out in the letter why she rejected the specific allegation. In fairness to her, however, the allegation was not included in either the Second and Third Grievances and by the time the claimant was raising it, it was clear his daughter was going to be born in the school holidays so he would not need to exercise his right to paternity leave. We find the failure to specifically refer to it in the grievance outcome letter was a genuine oversight on Ms Hunt's part.

205. We find, therefore, that Ms Hunt did not promise to provide the claimant with information about paternity or other family-related rights.

206. We heard no evidence about how any relevant female comparator would have been treated in the same circumstances.

E. Information about paternity leave

The Claimant emailed Jayne Wilkinson, Business Support Officer in or around July or August 2018 asking for information on paternity leave and/or shared leave and flexible working. He received the information when his daughter was eight days old (she was born on 5 August 2018). By that time the Claimant felt it was too late.

207. We find this allegation refers to an email exchange with Jayne Wilkinson on 9 August 2018 the claimant asked, "why I still have had no help or support i.e. with paternity rights, why was I refused this information off Sandra Harvey because of my gender and also I asked for yourself and Juliet Hunt for this information and I'm still waiting".

208. The claimant had raised that issue in his email at 13:25 in response to an email from Jayne Wilkinson at 13:22 asking "are you a daddy yet?". In the email at 13:25 the claimant confirmed "yes I am, thank you". We find that the claimant's request to Mrs Wilkinson was not made until after his daughter was born.

209. At 13:48 Jayne Wilkinson emailed back to the claimant saying, "I've looked on [the respondent's] intranet, printed off everything I can see regarding paternity leave. I'm putting in the post for you today". We find that Mrs Wilkinson therefore provided the information within 25 minutes of the claimant requesting it.

210. The claimant's response at 13:52 was to say he had already spoken to ACAS regarding this and "fortunately they have helped me with a few things, I would like to know what it has taken until now and why I was refused this information based on my gender".

211. Mrs Wilkinson's response at 13:58 was to say that she could not answer that as she was only the office admin and she "suggest[ed] you take this matter up with your current line manager or write to HR with your concerns". She then apologised for being unable to help. The claimant thanked her for her response at 14:23 and said he would "save my questions for the grievance appeal meeting".

212. The only meeting in which Juliet Hunt had been involved was the meeting in relation to the claimant's First Grievance on 20 November 2017. There is no reference in the notes of that meeting to paternity. We find that the reference to "Juliet Hunt" in the claimant's email was a mistaken reference to Diane Hunt who conducted the grievance meeting on the 5 June 2018.

213. We have already found in relation to Alleged Incident D that Diane Hunt had not promised to provide the claimant with information about parental rights. There was also no evidence about an earlier request for information from the claimant to Mrs Wilkinson. It is true that she was present at the meeting on the 5 June 2018 but that was purely as a note taker and there was no suggestion in the notes of the meeting nor any other evidence that she was asked or offered to provide information to the claimant. We accepted Mrs Wilkinson's evidence that the email in August 2018 was the only time the claimant had asked her for information about paternity rights.

214. We find that there was no delay on Mrs Wilkinson's part in responding to the claimant's request for information on paternity rights. We find there was no refusal to provide him with that information.

215. In cross examination about this incident the claimant accepted that the delay in getting the information to him was not due to his age.

F. Pizza

On Friday 29th September 2017 Sandra Harvey informed the Claimant, "this pizza is a cremated piece of shit".

216. There was no dispute that there was an incident on 29 September 2017 when Mrs Harvey raised concerns about a pizza cooked by the claimant for the school lunch being burnt.

217. The incident was referred to during the meeting on 6 November 2017. In the transcript of that meeting (pp.247-280) there is a discussion about the pizzas being cooked two hours before they were due to be served and being burnt (pp.249-251). The claimant's evidence both during that meeting and at the Tribunal was that the pizzas were not burnt and that if they looked as though they were that was because he had had to use cheddar cheese instead of mozzarella because the mozzarella provided by the suppliers was mouldy. He argued that the children would not have eaten the pizza if it had been burnt and said that Sam Robinson had said it was ok to cook food 2 hours in advance and keep it in the hot cupboards.

218. Ms Gordon in her evidence (para 9) said that Mrs Harvey did not use the phrase "burnt piece of shit". However, as we have made clear in relation to Alleged Incident B, we do not find Ms Gordon to be a reliable witness. Our findings in relation to that incident also cast doubt on Mrs Harvey's reliability as a witness. In relation to this incident we prefer the evidence of the claimant. Although he was not certain of the date when the incident occurred when cross examined by Mr Mensah he was clear about what happened and what was said. His evidence is corroborated by his reference to the phrase "burnt piece of shit" in the meeting on 6 November 2017 (p.263). We find that Mrs Harvey did use the phrase "burnt piece of shit" to refer to a pizza cooked by the claimant.

G. Short-staffing

During the course of his employment with the Respondent the Claimant was continually short-staffed in the kitchen. There should have been three members of staff on duty including the Claimant, or ideally four, but on repeated occasions throughout his employment there were only two members of staff including the Claimant on duty.

219. The claimant alleged that his kitchen was consistently short staffed. He said this was a particular issue in 2016-2017 when, in addition to providing food for Staining, his kitchen was supplying food for another school, Weeton, which did not have its own kitchen.

220. Mrs Harvey's evidence, which we found convincing and accept, is that staffing at the respondent's kitchens is worked out by hours not headcount. If, for example, a staff member is off sick, their hours for that day can be used by the staff present to fulfil their tasks. The claimant made the point that even where that is the case, this could cause problems because what was needed was enough people in the kitchen at the same time to serve etc. We heard no evidence to suggest that the approach taken to the claimant's kitchen was in any way different to the approach taken to the respondent's other kitchens.

221. The claimant said in submissions that the issue of short-staffing persisted throughout his employment. We accept Mrs Harvey's evidence that from 1 January 2017, Weeton got its own kitchen, which meant there was no longer a need for Staining to cook its meals and transport them to the Weeton site. That meant the demands on the claimant's kitchen reduced as from January 2017. The claimant had provided copies of diary entries in which he had detailed the staff shortages (pp.523-524). We note that most of the entries date from 2016 with the last entry in February 2017. We find that the issue of short staffing did not persist after February 2017.

222. The claimant was asked about staff shortages at his grievance meeting on 20 November 2017. The notes of the meeting (at p.298) record that the the claimant "confirmed he had not been short-staffed this year [i.e. 2017]". Mrs Ruddy confirmed this in the grievance outcome letter (at p.303). She also recorded that the claimant said he had been told to use extra hours to cover short staffing and had done so on occasion but only rarely. The claimant did not appeal that finding nor did he raise short staffing in his Second and Third Grievances.

223. We find that the claimant genuinely thought that his kitchen was short staffed. However, we also accept Mrs Harvey's evidence that the Staining kitchen had always been staffed by 3 rather than 4 staff even before the claimant took it over. We accept that on occasion due to staff sickness the staffing in the kitchen might reduce to 2 but find (based on what the claimant said to Mrs Ruddy at the November grievance meeting) that the claimant had extra hours available to him but rarely had to use them. We also find that the claimant's kitchen was not dealt with any differently than any of the respondent's other kitchens when it came to allocation of staff hours.

H. Refusal of day off

When the Claimant's girlfriend was approximately 15 weeks' pregnant she was bleeding heavily and had to go into hospital in A & E. She was kept in hospital for a week. The Claimant telephoned Sandra Harvey on a Sunday to ask if she would cover for him the following day so that he could accompany his partner to A & E.

Sandra Harvey refused him a day off and required him to work despite the serious nature of his partners condition.

224. Some aspects of this incident were not in dispute. The claimant and Mrs Harvey agreed that a conversation had taken place on Sunday 4 March 2018. It was accepted that Ms Gordon would usually deal with staffing issues but her calls were being re-directed to Mrs Harvey because Ms Gordon was not at work due to a family bereavement. Mrs Harvey agreed that the claimant had rung because his partner was in the hospital due to bleeding. The claimant in turn agreed that (as per para 44 of Mrs Harvey's statement) Mrs Harvey had told him not to worry because bleeding can happen in the early stages pregnancy and his partner was in the best hands in hospital. The claimant did not agree that (as per para 44 of her statement) Mrs Harvey was "very sympathetic". However, he also accepted in cross examination that on her next visit to the Staining kitchen she had asked him how his partner was. It was agreed that the claimant had worked on Monday 5 March 2018.

225. The fundamental dispute, however, was whether Mrs Harvey had refused to allow the claimant to take Monday 5 March 2018 as a day's leave so he could be with his partner. That is what the claimant said happened. Mrs Harvey said she had not refused leave but left it that the claimant would speak to his partner to check whether or not she wanted him to stay with him at the hospital. She said that she had told the claimant to call her back if he was not going to be in on Monday so she could arrange cover (para 45).

226. We note that the claimant accepted in cross examination that Mrs Harvey had told him not to worry and that his partner was in the best hands and that she asked about his partner when she was next in his kitchen. Although the claimant did not agree that Mrs Harvey was sympathetic we find that in relation to this incident she was.

227. We also find that Mrs Harvey's version of the conversation in her witness statement was consistent with the oral evidence we heard at the Tribunal. The claimant in cross examination accepted that (as per the final sentence of para 44 of Mrs Harvey's statement) he told Mrs Harvey that his partner's mum was on holiday or she would have stayed with his partner and the claimant also said "it was [his partner's] say so not his". That seems to us consistent with Mrs Harvey's evidence that she left it with the claimant to check with his partner whether she did want him to stay with her and then get back to Mrs Harvey if he did want the Monday off.

228. We are also supported in our conclusion by the fact that the claimant did not raise a grievance about this incident in his Second or Third Grievances. We accept he referred to it at the grievance meeting on 5 June 2018 but he did not pursue it in his subsequent grievance appeal or refer to it at the grievance appeal hearing on 11 September 2018 (pp.465-466). If the incident had happened as he described we are surprised that he did not do so.

229. We noted in relation to Alleged Incident B that we had some concerns about Mrs Harvey's reliability as a witness. However, as we noted in relation to Alleged Incident C, we also found that by March 2018 the claimant had formed a view that Mrs Harvey was "against him" and that this coloured his understanding and interpretation of conversations between them. In this case we find he misunderstood her suggestion he double check what his girlfriend wanted to do and saw it as a point blank refusal to allow him time off. In relation to this incident, we prefer the evidence of Mrs Harvey and find she did not refuse the claimant's request for leave. She did not require him to work on Monday 5 March 2018 but left it with him to get back to her if he needed to take the day off after checking with his partner. We find he did not get back to her to ask for the day off.

230. The claimant asserted that if he had been female he would have been allowed to take the day off. We did not hear any evidence to support that assertion.

I. Fighting comment

Sandra Harvey, line manager, told the Claimant he was fighting with her and she would win "like last time". She made this remark after his first grievance and appeal.

231. We find that on 26 April 2018 Mrs Harvey conducted a full audit of the claimant's kitchen. That audit found a total of 19 non-conformances with the HACCP standards. We find that Mrs Harvey attempted to discuss those findings and the corrective actions needed with the claimant. Mrs Harvey's evidence was that when she attempted to discuss the corrective actions with the claimant he immediately became confrontational, disputed the findings and was not willing to listen to her (para 49). We find she aborted the meeting and told the claimant that she would need to raise the matter with Mrs Ruddy.

232. It was during this meeting that the claimant alleged that Mrs Harvey told him to "stop fighting her" because "she would win". We had the advantage of a transcript of that part of their conversation (p.524D) and also listened to the audio recording of that extract. We find that the transcript is accurate.

233. We find that (as per that transcript) Mrs Harvey did say to the claimant "Stop fighting me Ash and that's doesn't work and that's been proven before and that's why..". We find the claimant responded by saying "…stop fighting you and it's all been proven before?" and Mrs Harvey then said "Yes. I'm going now Ash". After Mrs

Harvey confirmed she would speak to Mrs Ruddy the claimant said "Right, just letting you know I wouldn't fight because fighting is very very low…".

234. In cross examination the claimant accepted that Mrs Harvey did not say "I will win" but said even if he had not remembered the exact words it was clear that was the sense of what Mrs Harvey said. He said he felt he was being laughed at by Mrs Harvey because his First Grievance against her had not been upheld. When Mrs Harvey referred to it being "proven before" the claimant said this was her referring to the outcome of that grievance proving that the claiming would lose if he took her on. He said that coming from his Operations Manager he found that intimidating.

235. In cross examination, Mrs Harvey said the reference to things having been "proven before" was a reference to the problem of non-conformance with required standards in the claimant's kitchen having been proven before, i.e. by previous audits and the issuing of the management letter in February 2017. That does not seem to us consistent with the transcript. The reference to it "being proven" come after "that doesn't work". The phrase "it doesn't work" can, it seems to us, only refer back to "stop fighting me". We find therefore that Mrs Harvey was referring to the fact that the claimant had previously tried to challenge Mrs Harvey and that his grievance had not been upheld.

236. Having heard the audio recording we do not, however, accept the suggestion by the claimant that Mrs Harvey was in some way threatening him or laughing at him by making that comment. Instead we find that (as she said in her witness statement) she was exasperated by the claimant behaviour's which she found "disrespectful and petulant" (para 49). We find that there was a basis for her frustration in that it is clear from the audio extract we heard that the claimant was carrying on doing other things rather than really listening to her.

237. We find, therefore, that Mrs Harvey did tell the claimant to stop fighting her. We find that she did so out of frustration with the claimant being disrespectful towards her by not listening to her feedback from the audit. We find that her purpose in making the remark was to try and get him to listen to and co-operate with her in dealing with the outcome of the audit she had just carried out.

238. In terms of the impact on the claimant, he told us that he was intimidated by the comment. As we've noted, he also said he felt he was being laughed at. We accept that was his genuine perception of Mrs Harvey's remarks. We note, however, that the claimant did not refer to this incident in his Second or Third Grievances, nor did he raise it at the grievance meeting on the 5 June 2018. If there was an impact on the claimant, we find it was not significant enough for him to raise a grievance about it at the time nor to include it in the Second and Third Grievances which he raised some 2-3 weeks after this incident.

239. The claimant did not provide evidence of how an actual female or older comparator was treated. However, he said that if he was female or older he would not have been spoken to it in that way by Mrs Harvey.

J. Suspension incident

There was an incident in the kitchen where the Head Teacher was concerned about the potatoes. Sandra Harvey and Lucinda Ruddy called a meeting with the Claimant and the Head Teacher in the office. Subsequently both Sandra Harvey and Lucinda Ruddy said the Claimant was rude to the Head Teacher. (The Claimant accepts he was defensive but denies he was rude). Ms Harvey and Mrs Ruddy suspended the Claimant and sent him home and told him they would be in touch.

240. This incident took place at the performance review meeting on the 10 May 2018. Mrs Ruddy's and Mrs Harvey's evidence (which the claimant did not dispute) was that when Mrs Ruddy attempted to start the performance review meeting the claimant expressed his unhappiness about going ahead with it. He had told Mrs Ruddy that he wanted representation at the meeting. He had first suggested that he wanted his mother to attend to represent him but then when Mrs Ruddy said she would wait if he wanted to get her, the claimant had said that she had been in hospital so would not be able to attend. We find the claimant continued to say he was unhappy to continue with the meeting and therefore Mrs Ruddy agreed to defer it.

241. However, we find that she did then raise with the claimant the fact that she wanted to speak to him regarding a complaint which the Head Teacher at Staining, Jennifer Shoulders, had made to Mrs Harvey on the 9 May 2018. It was accepted that the Head Teacher had raised concerns with the claimant that potatoes for lunch service had been cooked 10 minutes in advance. She was concerned that they would have cooled by the time they were served. There were concerns about the way the claimant had spoken to the Head Teacher in response to her raising the concern.

242. We find that on the 10 May 2018 Mrs Ruddy invited the Head Teacher into the meeting with the claimant to discuss that complaint. Mrs Ruddy accepted that the Head Teacher stated that although the claimant had not been rude to her, she was unhappy because the claimant was argumentative and disrespectful towards her. Mrs Ruddy's and Mrs Harvey's evidence was that at this point the claimant again became hostile and uncooperative saying that he had nothing to answer for. The claimant in cross examination said he felt he was being treated unfairly because other kitchens cooked food in advance and left it in the bain marie. He also said he felt the Head Teacher criticised him unfairly and rudely questioned his competence to do his job. He said that when the Head Teacher walked in to the dining room on the 9 May 2018 he was about to put the lid on the potatoes to keep them warm.

243. When asked about this meeting by Diane Hunt as part of the Second and Third Grievance Process, Mrs Ruddy's evidence (p.352G) was that in the meeting the claimant was adamant he had not done anything wrong. There was a discussion about the conversation with the Head Teacher and Mrs Ruddy confirmed to Ms Hunt that the claimant had apologised to the Head Teacher The Head Teacher had said that the claimant was not rude to her on the 9 May 2018 but was just not listening to her. Mrs Ruddy said the Head Teacher could not have been nicer to the claimant.

244. We do find that the claimant genuinely believed by 10 May 2018 that he was being treated unfairly and singled out for criticism. He did accept in cross examination, however, that if a Head Teacher complained to Mrs Harvey, she was duty bound to address that complaint. There was no doubt in this case that the Head Teacher had raised a complaint and so it had to be dealt with.

245. Mrs Ruddy's evidence to the Tribunal was that by the end of the meeting the claimant was getting more and more agitated. Her evidence was that he was unwilling to accept that he had anything to answer to the Head Teacher or had done anything wrong. She said that at that point she told the claimant go home for the rest of the day and that he would be paid for the full day (para 57).

246. The claimant alleged that what Mrs Ruddy did was to suspend him. In support of his claim he noted that on his personnel record (Oracle) his absence is recorded as a suspension with full pay. We find that is correct. Mrs Harvey's evidence, which we accept, is that because the claimant was not sick his absence could not be recorded as sickness on Oracle. It was therefore recorded as a suspension so that he could be fully paid for that day. In light of that, we do not regard his absence being marked as suspension on Oracle as significant.

247. We did have a transcript of a conversation between the claimant, Mrs Ruddy and Mrs Harvey on the 14 May 2018 which had been recorded on the claimant's voicemail when Mrs Harvey accidentally called him during that meeting. The parties each produced a transcript (pp.371B-C for the respondent and 371 D-F for the claimant). It is more relevant to Alleged Incident K which we discuss at paras 253-260 but there is a brief reference to the claimant being "sent" home on the 10 May 2018.

248. We have already noted that by Spring 2018 the relationship between the claimant and Mrs Harvey had broken down. We find that by the meeting on 10 May 2018 he was interpreting events from a particular point of view, i.e. that he felt he was being persecuted and unfairly singled out for criticism by the respondent and particularly by Mrs Harvey. Against that background we find the claimant might well have interpreted his being sent home on 10 May as a form of suspension. That is certainly how he referred to it in the Third Grievance a few days later (p. 345). On balance, however, we prefer what Mrs Ruddy's version of events. We found her to be a straightforward and reliable witness. In contrast, by the end of the meeting on the 10 May 2018 we find the claimant was in an agitated state and that may well have affected his recollection of what was said. We find that Mrs Ruddy did not suspend the claimant but instead sent him home because she was concerned about his well-being.

249. In his evidence and submissions it seemed to us that that the claimant was raising two separate issues in relation to this incident. The first was the allegation that he had been suspended. The second was that he had been treated more harshly than female staff would have been for pre-cooking items and leaving items in the bain marie. In fairness to the claimant, who was representing himself at the hearing, we have made findings in relation to that second issue as well as the suspension issue. We find that the respondent had received a complaint from a Head Teacher about practices in a school kitchen. We find that the respondent was

bound to follow up such a complaint. We also find that given Head Teachers are effectively the respondent's customers, Mrs Ruddy would have followed up and taken seriously any complaint that an employee of the respondent's had been rude to a Head Teacher.

250. The claimant suggested that criticism of what he did was unfair because in other schools "the bain marie would sit for hours". We accept Mr Mensah's submission (para 96 of his submissions) that there was no evidence to substantiate that. Given the emphasis the respondent put on HACCP it seems to us implausible that would be the case. What we do accept is that the claimant felt very strongly that he was in the right when it came to the potatoes issue and felt that he had not been rude to the Head Teacher but she had been rude to him.

251. Although the claimant said that female staff would not have been criticised in the way he was, there was nor evidence to substantiate that. As the claimant accepted in cross examination, it was his word against the respondent's witnesses.

252. The claimant said he felt humiliated by the meeting. We find he felt sufficiently strongly about what happened at the meeting to raise it in his Third Grievance on 16 May 2010.

K. Allegation of Claimant being AWOL

The following day Ms Harvey asked the Claimant why he was not at work. The Claimant agrees he had not returned to work because he understood he was suspended. Ms Harvey told the Claimant that he was absent without leave. (Eventually the Claimant was paid for both shifts).

253. The claimant's allegation about this incident became clearer during his evidence. It's accepted that the claimant did not attend work on 11 May 2018 which was the day after Mrs Ruddy sent him home (Alleged incident J). The claimant's evidence was that he did not know whether he was supposed to go in to work or not. His position is that he was waiting to be told what to do.

254. Mrs Ruddy and Mrs Harvey both gave evidence that the claimant's failure to attend was due to a miscommunication. It was not disputed that the claimant was paid in full for the 11 May 2018. The claimant's complaint as we understood it (and as set out in his Third Grievance) was that he was "basically called a liar to my face by Sandra Harvey and told I wouldn't be paid for the Friday because I didn't turn into work". His allegation was that this had happened a meeting between himself, Mrs Harvey and Mrs Ruddy on the 14 May 2018.

255. As we have mentioned above, there was a recording of part of that conversation. It was not very good quality and is hard to follow even in the two transcripts the parties created (pp.371B-F). That is because it is a recording on the claimant's voicemail created by Mrs Harvey accidentally ringing the claimant during the conversation. The claimant's responses to what Mrs Harvey's is saying are very indistinct according to the transcript, presumably because what was happening was

that she was inadvertently dialling him and he was therefore further from her phone's microphone.

256. Based on those transcripts and the evidence we heard, we find that there was a discussion about why the claimant had not attended work on the 11 May 2018. We find that there was discussion between Mrs Harvey and the claimant as to whether he had texted her or left messages for her. Mrs Harvey does at points seem to say that on 11 May she had phoned the claimant but her call log did not show any calls in from him. However, we also find that there was an acceptance from Mrs Harvey that the claimant may have texted her but she didn't know who the text was.

257. Mrs Ruddy is then recorded as saying, "we're not getting anywhere with this" and stopping that discussion. We do find that that transcript suggests that at that meeting on 14 May Mrs Harvey was saying that the claimant had not called her while he maintained that he had. Having seen the claimant give evidence, we accept that he may have perceived this as Mrs Harvey calling him a liar. However, there is nothing in the transcript to suggest that she actually used that explicit word or directly accused him of lying. Instead we found that she accepted he had texted her. We do accept however that the meeting was a tense one (That was Mrs Ruddy's evidence (para 31) and that during it Mrs Harvey did criticise the claimant for not making more efforts to get in touch and to find out where he was expected to be on the 11 May.

258. There is nothing in the transcripts to suggest that the claimant was regarded as being AWOL or that he would not be paid. At most there is a suggestion from Mrs Harvey that the claimant should have thought of contacting her on the 10 May to find out where she wanted him on the 11 May 2018.

259. We do not accept that the claimant was told that he was absent without leave. We find there was a misunderstanding between him and Mrs Harvey as to what was supposed to happen on 11 May and then a dispute between them arising from a series of missed calls and text messages. We find that the meeting was a tense one because relations between the claimant and Mrs Harvey had broken down by that time.

260. We did not hear any evidence about how any female or older comparators were or might have been treated.

L. Request to look for things that were wrong

When the Claimant was absent from work on sick leave in or around October 2017 Sandra Harvey asked for information from the relief cooks. In particular she asked the cook to look around the Claimant's kitchen and to find things that were wrong.

261. As we've said, Rachel Currie supervised the kitchen in Staining while the claimant was absent on sick leave through October 2017. We find that she raised concerns with Ms Gordon and Mrs Harvey about some things she found in the

claimant's kitchen. She raised 9 specific concerns in an email to Mrs Harvey on 12 October 2017 (p.231). These included items in the fridge and freezer which did not have a date sticker on them; 2 pots of bouillon marked October 2017 but "date underneath clearly rubbed away"; a dead frog in the veg store; incomplete paperwork including no documentation of 4 children in school who were vegetarian and one who had a dairy allergy. With her email Ms Currie sent 6 photographs (pp.233-237). There were 2 of the dead frog (one in the veg store and one taken outside); photos of the Bouillon pots and a photo of 4 jars of picked beetroot.

262. The claimant's allegation was that Ms Currie had been actively encouraged by Mrs Harvey to look for fault in his kitchen. He also suggested in cross examination evidence that the frog had been planted. He said that it was suspicious that there were two photos of the frog, only one of which was inside the veg store. These were allegations he also made in his First Grievance.

263. The respondent's explanation of the sequence of events which led to Ms Currie sending the email to Mrs Harvey on 12 October 2017 was not entirely satisfactory. Ms Currie's email is a series of bullet points but her first sentence is "I am not sure which of this is relevant, but it is all there for you to choose what you need" (p.231). That clearly suggests some prior communication between Mrs Harvey and Ms Currie.

264. Ms Gordon's evidence (para10) was that Ms Currie had rung her on the 3 October 2017 to raise concerns about the kitchen including the dead frog. Ms Gordon did not suggest she raised the matter with Mrs Harvey, however.

265. Mrs Harvey's evidence was that Ms Currie had rung her on the 12 October to raise concerns. Mrs Harvey was driving at the time and she asked Mr Currie to put any concerns in an email. Sending photos to support concerns raised was something we accept from evidence we heard was standard practice for the respondent's managers carrying out audits.

266. There were two issues which puzzled us about the photographs. The first was that there were nine issues raised in Ms Currie's email but only photographs of three of them. Mrs Harvey's explanation was that some of the items raised (e.g. the failure to record allergy information and the failure to complete the C20 meal number form) were not items where photographic evidence was needed. However, that was not the case for the other items in the email for which there were no photos, e.g. diced potatoes in the freezer not being date stickered. The second issue was that when we were provided with the date stamped copies of the photos at p.232-237 it was apparent the latest was taken on the 6 October 2017. We were puzzled why it had taken a week for Ms Currie to raise the issues with Mrs Harvey. We accept October 7-8 was a weekend but she still waited four working days before contacting Mrs Harvey (6 working days from the first photo taken on 4 October 2017 and 7 working days after she had raised concerns to Ms Gordon).

267. We were also puzzled why, if all the items highlighted by Ms Currie were breaches of HACCP or other of the respondent's standards, she said "I'm not sure which of this is relevant" or why Mrs Harvey would "choose" what she "need[ed]". We

could see how on one reading that wording suggested that Mrs Harvey was looking for evidence against the claimant.

268. We have considered those points carefully. We have taken into account Mr Mensah's submission that all Ms Currie did was to raise legitimate concerns to Mrs Harvey that standards in the kitchen were not being maintained as required (para 101 of his submissions). Mr Mensah also submitted that even if Mrs Harvey had asked for information, that would be a reasonable request to ensure HACCP procedures were being followed and standards maintained (para 100 of his submissions).

269. We have also taken into account other less direct evidence. We note that in Mrs Ruddy's outcome letter for the claimant's First Grievance dated 29 November 2017 (pp.301-309) she reports having spoken to Ms Currie who confirmed Mrs Harvey's version of events. We note that in his grievance meeting on 20 November 2017 (notes at pp.297-300) the claimant accepted some of the issues raised by Ms Currie, e.g. of not always using a date sticker on items (but instead using a marker pen to write on the date) and of not recording allergy and special dietary information (because he said the school did not provide that information). We also find the explanation given by the respondent for there being two photos of the dead frog (i.e. the need to show it against a clearer background) to be more plausible than the claimant's allegation that the respondent would plant a dead frog in one of its own kitchens.

270. Taking all the evidence in the round we find that Mrs Harvey did not encourage Ms Currie to look round the kitchen to find things that were wrong. Instead we find that Ms Currie found things which she brought first to Ms Gordon's and then to Mrs Harvey's attention and was then asked to put the issues in writing by Mrs Harvey. We find it would be reading too much into the email from Ms Currie to interpret as meaning that Mrs Harvey needed Ms Currie to collect evidence for a case she was building against the claimant. Rather, she needed evidence so she could back up the allegations she would need to put the claimant in due course when he was back off sick leave. What we do find (of relevance to the next Alleged Incident) is that Mrs Harvey was willing to accept the allegations raised by Ms Currie against the claimant without hearing his version of events or investigating further. She did not, for example, order a full audit of the Staining kitchen to establish the extent of the issues there.

271. We did not hear evidence about any direct comparators when it came to this Alleged Incident. The claimant said in cross examination that if the respondent spotted problems with the kitchens of female staff, none of them would be targeted in the same way as he was. However, when it was put to him by Mr Mensah that it was not an act of sex discrimination for an employee to send photos of a matter of concern to a manager, the claimant agreed that was the case.

272. He also accepted that if such photos were sent in relation to a female kitchen supervisor, Mrs Harvey would have taken action. We find that is what happened in fact to Ms Currie in relation to the mouldy turkey incident. The claimant did point out that Ms Currie only received a record of discussion in relation to that incident whereas he was sent for retraining. However, we accept Mr Mensah's submission

that the claimant and Ms Currie were not in the same circumstances when it came to deciding what action to take. The claimant had already been issued with a management letter in relation to repeated non-conformances whereas there was no evidence Ms Currie had. It was appropriate therefore for different steps to be taken in response to their otherwise similar non-conformances.

M. Not allowing the Claimant to comment

In a return to work meeting on or around 6 November 2017 Sandra Harvey showed the Claimant pictures of matters she said were wrong in the kitchen. She did not allow the Claimant to comment and when he tried to do so she told him he could be subject to disciplinary action and it would be like court.

273. When it comes to the meeting on 6 November 2017 we had the advantage of the transcript of the full meeting recorded by the claimant. We find that the meeting was dominated by Mrs Harvey and Ms Gordon. The respondent's case was that Ms Gordon did not play an active part in the meeting but was, in effect, "around" when it took place. We do not accept that evidence. The transcript shows Ms Gordon frequently take in an active part in the meeting (e.g. pp.263-265). We accept the claimant's evidence that in the meeting it was frequently a case of 2 against 1.

274. We do accept that the transcript shows that the claimant was allowed to speak in the meeting. However, we also accept the claimant's evidence that he was not really allowed to argue his case. Everything he said was dismissed.

275. When it comes to the comments about being subject to disciplinary action and being like a court, we find this refers to around 1hour 32 minutes into the meeting (p.273-274 of the transcript). By that point in the meeting the claimant has been told that he is not going to be returning to his own kitchen but will instead be going to Stanah for training. At the bottom of p.273 the claimant says "I feel very competent". Mrs Harvey's response is to say "that is not reflected in the file, Ash, it's not reflected at all. If you wanted to take that to a court of law and give them that I don't think they'll say.." She then refers to the management letter from February 2017.

276. The claimant's response is "I didn't agree with that at all and I told you nothing ever came of it…"

277. Mrs Harvey asks "What do you mean nothing ever came of it" the claimant says he "wanted to dispute it at the time."

278. Mrs Harvey's response stretches to 9 lines in the transcript, the gist of which is summed up in the following: "If you want to go to a disciplinary, if you want me to take this into a disciplinary investigation then I will do it. I could say to you I am, right. I'm saying to you I'm not, I'm trying to help and support you again for the third time." She says a disciplinary is a serious matter and then asks the claimant whether he wants her to go down a disciplinary route."

279. The claimant's response is "I don't even want have this conversation". Mrs Harvey responds with "Well don't, don't speak to me like that then. Don't say that to me because I am trying to help."

280. The claimant then suggests that every time he says anything he is threatened with disciplinary proceedings and Mrs Harvey denies that is the case, repeating that the meeting is informal.

281. We accept that by this point in the meeting Mrs Harvey was very exasperated. We can see that her initial attitude was to try and help the claimant. We accept that with the track record of non-conformances by the claimant and the matters raised by the relief supervisor she had to do something.

282. Having observed the claimant giving evidence, we can understand that in as long a meeting as this was, he could be challenging to deal with because of his unwillingness to accept that he was in the wrong. In fairness to him, however, (as we find in relation to Alleged Incident N below) he had not been given warning that these serious criticisms were going to be discussed at what he though was a return to work meeting. By the time this part of the meeting happened he was also being told that he would not be allowed to return to "his kitchen" in Staining but was instead being sent for training to Stanah. It seems to us he was feeling "ambushed". In those circumstances, his attitude was that he was going to fight his corner and that is what he did.

283. We find that as a result Mrs Harvey took the view that the claimant was being disrespectful towards her. We found in relation to events in February 2017 that Mrs Harvey did not take kindly to her authority being challenged. We think that played a part in what she said at p.273-274. We accept it would have been perfectly in order for her to point out to the claimant that if he was not happy to proceed on an informal basis they would have to proceed by way of formal disciplinary process. We find, however, that her exasperation got the better of her and she did this in a way which the claimant could easily perceive as a threat. We do not think the reference to a court of law is part of that but do find that the comments at the top of p.274 were in effect a warning that unless the claimant worked with Mrs Harvey to resolve the (we accept genuine) issues which had arisen the alternative could be disciplinary proceedings.

284. We find therefore that this incident did occur and that the claimant was prevented from making comments during the meeting on 6 November 2017 and was told that unless he cooperated he could be subject to disciplinary action.

285. In term of comparators, the claimant suggested in cross examination that Rachel Currie was not subject to similar treatment in relation to the mouldy turkey incident. We accept that is the case but as we found in relation to Alleged incident L, the claimant and Ms Currie were not in the same circumstances The claimant had already been issued with a management letter in relation to repeated non-conformances whereas there was no evidence Ms Currie had. In addition we find that there was nothing in the Record of Discussion with Ms Currie which suggested she had refused to accept responsibility for the non-conformances found to be her fault. We find that had she reacted to criticism in the same way as the claimant, Mrs Harvey would also have become exasperated and treated her in a similar way.

N. Raising concerns at "return to work meeting"

In the meeting on 6th November 2017, the Claimant was not informed that it was anything other than a return to work meeting and was unaware that concerns were going to be raised with him at that meeting. He was not invited to be accompanied

286. The claimant was invited to the meeting on 6 November 2017 by Ms Gordon. The respondent accepted that the claimant was not given advance notice of the allegations against him nor was he given the opportunity to be accompanied to the meeting.

287. As we have already said, Mrs Ruddy's evidence was that the respondent used informal "record of discussion" meetings to deal with capability or disciplinary matters. Such meetings were used as pre-formal steps instead of moving immediately to the first stage of formal capability or disciplinary procedures. Mr Craine gave evidence that the way the 6 November meeting was conducted was in line with the respondent's standard approach to such "informal" meetings.

288. We can understand that the claimant may have felt "ambushed" by not being given any advance notice of the concerns raised by Rachel Currie. That's particularly the case given that the respondent had decided the concerns were serious enough to warrant sending the claimant for refresher training at another kitchen rather than allowing him to return to his "home kitchen at Staining after his sickness absence. However, we find that it was the respondent's standard practice to approach matters in that way.

289. We also accept the respondent's evidence that as informal meetings, there was no right to be accompanied to such meetings.

290. The claimant said that a female employee would not have been treated in the same way. He did not provide evidence about any actual female comparator who was treated differently on her return to work from a sickness absence. The nearest actual comparator was Ms Currie, who was herself subject to a "record of discussion" meeting on 9 January 2018 in relation to the "mouldy turkey" incident (p.238A-C). She was called to that meeting the day after the allegations against her were made and there was no evidence that she was given the right to be accompanied to that meeting. Her position is not the same as the claimant because she was not returning from sickness leave when the record of discussion meeting happened. However, there was no evidence from the way she was treated to support the claimant's assertion that a woman would have been treated differently than he was in terms of being told in advance of the allegations or in terms of being given a right to be accompanied.

<u>Our findings of fact relevant to the issue of time limits</u>

291. The claimant filed his claim form on 1 October 2018. A number of the Alleged Incidents happened a significant time before then and are potentially outside the three-month time limit for bringing a discrimination complaint (even allowing for the

extension of that time limit for Early Conciliation purposes). We heard evidence from the claimant about why he did not bring a claim sooner.

292. The claimant told us that he was on a very steep learning curve and did not know about the Tribunal rules about bringing cases and, in particular, the relevant time limits. That had led to the delay in bringing his claim.

293. We accept the claimant's evidence that at the start of the events with which we are concerned he did not know about his rights and the Tribunal's processes. However, his evidence in cross examination was that he had spoken to ACAS at least 20 times during the course of the events with which we are concerned. Specifically, the claimant confirmed that he was in touch with ACAS when he submitted his Second and Third Grievances. We find that is reflected in the Second and Third Grievances. The Second Grievance lodged on 10 May 2018 refers to the Equality Act 2010 and to employers' duties to make reasonable adjustments. The Third Grievances dated 16 May 2018 specifically says "I have spoken to ACAS again today". We find that the claimant in touch with ACAS by the latest by 10 May 2018.

294. We find that the claimant continued to be in touch with ACAS. He specifically refers to ACAS in the grievance meeting on 5 June 2018. In his email exchange with Jayne Wilkinson on 9 August 2018 the claimant at 13:52 says he had already spoken to ACAS regarding this and "fortunately they have helped me with a few things, I would like to know why it has taken until now and why I was refused this information [about paternity rights] based on my gender".

295. The claimant in cross examination confirmed that the idea of bringing a Tribunal claim had been mentioned by ACAS in the period November 2017-May 2018. He initially denied, however, that he had been told about the relevant Tribunal time limit. When Mr Mensah suggested to him that it was implausible that ACAS would not have told him about something as fundamental as time limits for bringing claims he wavered and said he might not have remembered it being mentioned. He then said that the position was that he had definitely not been told about time limits.

296. It is clear from the Second and Third Grievances and that the claimant had been given fairly specific information by ACAS about his claim. At the very least, it is clear to us that by May 2018 he had received information about the issue of harassment under the 2010 Act from them. We do not find it plausible that ACAS would have failed to mention the time limits for bringing a discrimination claim in any of the numerous conversations the claimant had with them.

297. We also find that by May 2018 the claimant was researching online rights under the 2010 Act. In cross examination he confirmed that it was during online research that he had found the quote from that Act about reasonable adjustments which is included in his Second Grievance.

298. Taking the above evidence into account we find that by 10 May 2018 at the latest the claimant was aware of the possibility of bringing a claim to the Tribunal for breach of the 2010 Act and of the three-month time limit for doing so.

<u>Our findings of fact about whether the claimant was dismissed</u>

299. The claimant resigned three times in writing. The first two notices of resignation were sent on the same day, 4 October 2018. At 13:44 on that day the claimant emailed Mrs Ruddy and Jayne Wilkinson saying, "Please find attached my resignation notice". The attachment is referred to in the email heading as "constrictive resignation notice". The notice (at page 481) says that the claimant "regrets to inform you I am writing to give you my resignation notice and I'm leaving under constructive dismissal for the following reasons". He then sets out those reasons in the form of brief bullet points:

- Have allowed people to bully and harass me at work.
- Did not make sure my workplace was safe.
- Made unreasonable changes to my working environment.
- Refused me paternity rights.
- Took away benefits my contract stated I have e.g. my kitchen and my responsibilities.
- Did not give me the correct support to do my job role.
- Made false allegations against me.
- Made me ill for a long period of time.

300. The letter concluded with, "Thank you for reading and thank you for all the good opportunities I was offered whilst working for [the respondent]".

301. At 16:29 on that same day, the claimant sent another email saying, "Here is my updated resignation notice" (page 492). That updated notice (page 483) is identical to the previous notice except that the claimant adds "I want my employment to end on 1 November 2018 (four weeks)". Mrs Ruddy in her unchallenged evidence (para 53) explained that the first resignation notice was received just before the disciplinary hearing involving the claimant was due to start. She was just going to tell Mr Craine that the hearing would not be going ahead because the claimant had resigned when she saw the claimant and his partner waiting for the hearing to begin. The claimant confirmed he wanted the hearing to go ahead. The claimant was asked by HR to submit an updated resignation notice making clear what his intended notice period was. That is why the second notice was sent.

302. The third resignation notice was by an undated letter which we find the claimant hand-delivered to the respondent's Head Office at Chorley on 11 October 2018 (albeit it was received on 12 October 2018). This document was at page 515 of the bundle. It was unaddressed and undated but begins "Dear Lucinda", which is reference to Lucinda Ruddy. There are five numbered points, some of which related to the disciplinary hearing. Of relevance to the issue of resignation is point 4 where the claimant says, "I would like to make changes to my notice and I would like you to take this letter as a second part to my resignation. I am starting a new job, so I would like my employment to end today as of immediate effect to this letter". Again, the claimant confirmed that he was leaving on the grounds of constructive dismissal.

303. It was not disputed that on 9 October 2018 the respondent (in the person of Mr Craine) sent a letter to the claimant informing him that the outcome of the disciplinary proceedings against him was to dismiss him with immediate effect because his actions amounted to gross misconduct (pp.507-514). The claimant accepted that the letter was sent to the correct address but said that he had never received it. He said (and Mr Craine's statement confirmed) that the Royal Mail had confirmed that the letter had never been signed for. On the basis of that we find that the respondent's letter of dismissal was not received and read by the claimant.

Discussion and conclusions

304. Below we apply the law to our findings of fact. First, we discuss each of the Alleged Incidents and say whether we found them to be acts of unlawful discrimination in breach of the 2010 Act. Next we set out our discussion and conclusions on any relevant time limit issues. Finally then set out our discussion and conclusions about whether the claimant was dismissed and, if so, whether he was unfairly dismissed.

305. We have set out in relation to each Alleged Incident alleged to be in breach of the 2010 whether there was evidence of actual or hypothetical female or older comparators. We said earlier in this judgment that the relevant workforce in this case was overwhelmingly female and on average older than the claimant. Although we have borne that in mind, we did not find that a sufficient primary fact by itself to pass the burden to the respondent under the burden of proof provisions.

A. Not receiving home visits during his six-month absence from work

306. In closing submissions, the claimant said that this was an incident of sex (but not age) discrimination or harassment. Employment Judge Ross's order suggested it was relied on as part of the claimant's constructive dismissal claim and not as an act of discrimination. Since the claimant raised it as an act of discrimination or harassment in his submissions we have dealt with it on that basis and set out our conclusions on it.

307. Although we found that no home visit took place, we also found that the respondent did proactively engage with the claimant during his final period of absence. We found that the respondent followed its Sickness Policy in cases of stress absences by referring (and re-referring) the claimant to OH, holding a case management review and taking steps to find alternative non-supervisory roles for the claimant to enable him to return to work.

308. The fact that the overwhelming majority of the respondent's school kitchen staff are female does not seem to us to be enough in itself to pass the burden of proof to the respondent. As we have recorded above, there was no evidence on which we could base a finding that female staff had received home visits or that the respondent had been more proactive in keeping in touch with them than it was with the claimant. We have taken into account our findings in relation to Alleged Incident B in reaching our conclusion. We bear in mind that Ms Harvey (the perpetrator of that incident) was not involved in the decisions made about handling the claimant's

final sickness absence. We have decided that there was no evidence from which we could conclude that the claimant was treated less favourably than female staff by not receiving home visits or otherwise in the way he was treated while off sick from 17 May 2018. The complaint that this was an act of direct sex discrimination fails.

309. We have also considered whether a failure to grant a home visit was an act of sex-related harassment. We have concluded it was not. Even if the absence of a home visit or more proactive contact was "unwanted conduct", we do not find it had the purpose or effect set out in s.26(1)(b)(i) or (ii) of the 2010 Act. Although unhappy at the suggestion that he be temporarily re-located to another school while disciplinary proceedings were ongoing the claimant did not suggest he saw this as "intimidating, hostile, degrading, humiliating or offensive environment". Had he held that perception we would have found that it was not reasonable for him to have done so. The respondent, specifically Mrs Ruddy was we find, simply following its Sickness Policy albeit against a complicated background involving not only a disciplinary process but an ongoing grievance appeal. The complaint that Alleged Incident A was an act of sex-related harassment fails.

B. "Little boys" comment

On 6th November 2017, Sandra Harvey causing him stress and to be off sick by calling the Claimant a "little boy" and telling him "this little boy can have his toys" after the Claimant requested some personal information.

310. It is accepted this comment was made twice. If the comment is harassment under s.26 of the 2010 Act, s.212(1) says it cannot also be a detriment for the purposes of direct discrimination under s.13 of the 2010 Act. It seems to us this incident falls more naturally within the concept of harassment and we consider it from that point of view first.

311. We find it was unwanted conduct and that it was explicitly related to the claimant's sex ("boys") and his age ("little"). We also find that it had the purpose of creating an offensive and humiliating environment for the claimant. In reaching that conclusion we have taken into account the fact that Mrs Harvey made the remark twice. It was not a slip of the tongue which she corrected when challenged – instead she repeated it when the claimant challenged her. We also took into account the fact that there was no other apparent purpose for her making the remark other than to be create an offensive and humiliating environment for the claimant. We are very conscious that it is important not to trivialise the concept of "harassment" by applying it to every incident which someone finds offensive. However, in this instance we are satisfied that the threshold required is met.

312. If we are wrong that the comment was made with a harassing purpose, we would have found that it had a harassing effect. We accepted the claimant's evidence that he found the remark humiliating. The remark was made by an older female manager to a younger, male colleague in the context of a long meeting during which the manager had widely criticised his competence. We find it would have been reasonable for that conduct to have that effect-it was not a case of the claimant being hypersensitive.

313. In his submissions (para 71) Mr Mensah said that Mrs Harvey had now apologised for the comment and accepted it was a comment that shouldn't have been made. The submissions state that "that is the adequate explanation" advanced by the respondent. We understand that to be in relation to the burden of proof provisions. We have not needed to rely on the burden of proof in reaching our conclusion in relation to this incident. Out of courtesy to Mr Mensah's submission, however, we record that on the primary facts as proven we would have found the burden passed to the respondent to show that Alleged Incident B was in no way because of a protected characteristic. We would have found that the respondent failed to discharge that burden. The explanation that the remark was an off the cuff made out of exasperation does not seem to us to diminish the discriminatory nature of the remark then made. It may be the explanation why the harassing remark occurred, but does not persuade us the remark itself was not a contravention of the 2010 Act.

314. We find, therefore, that the "little boys" remark was an act of both sex-related and age-related harassment. It was made, however, nearly 11 months before the claimant submitted his claim to the Tribunal. As Mr Mensah submitted, for his complaint to succeed, we would have to decide it was brought in time. We discuss that under "Our conclusions on the issue of time limits" (paras 360-365 below).

315. Because we have found the incident was harassment, it cannot also be a detriment for the purposes of the direct age or sex discrimination complaints so those claims fail and are dismissed.

C. Information about paternity rights

When his girlfriend was 15 weeks pregnant the Claimant asked for information about paternity rights from Sandra Harvey. The Claimant also asked for information about flexible working and shared leave with his partner. Sandra Harvey told him that it was usually a woman who would ask and she could not help him and did not know but would find out. She failed to do so.

316. The claimant confirmed in submissions that he was not saying that this was an act of direct age discrimination or age-related harassment. He was saying that this was an act of direct sex discrimination or sex-related harassment.

317. We found that Mrs Harvey did not say she could not help the claimant. She said she would have to find out the information he needed. We also found that she did not provide the information because the claimant told her he no longer needed it because his daughter would be born in the school holidays. We have decided that does not amount to subjecting the claimant to a detriment.

318. If we are wrong about that, we find the claimant was not treated less favourably than a woman in the same circumstances would have been. There was no evidence of an actual comparator. We do accept that Mrs Harvey was more used

to dealing with requests relating to maternity leave because the workforce she managed was overwhelmingly female. We have considered whether the fact that the claimant was asking about paternity rights necessarily means that a failure to provide the information immediately means the claimant was treated less favourably than a woman would have been. We found that a request for paternity leave information was unusual because of the overwhelmingly female make up of the catering workforce. We find the appropriate comparator would be a female employee asking for information about rights other than maternity leave, for example in relation to adoption leave, i.e. rights not claimed as often by members of the respondent's workforce managed by Mrs Harvey. We find that Mrs Harvey would have also had to seek information about that rather than being able to provide it immediately. On that basis we find the claimant was not treated less favourably than a woman in the same circumstances would have been.

319. If we are wrong about that, we find that any less favourable treatment was not "because of sex". If the fact that the claimant was asking about paternity rights is enough to pass the burden of proof to the respondent, we find that there is an adequate explanation for the treatment. That adequate explanation is that the rights being asked about were not rights Mrs Harvey knew about off the top of her head. That would be equally true of other rights not exclusive to men, e.g. adoption rights. We therefore find that even if the claimant was treated less favourably than a woman would have been (because Mrs Harvey would have been able to provide information about maternity rights without having to check it) that less favourable treatment was not because of sex. The complaint of direct sex discrimination in relation to this incident therefore fails.

320. We also find that the complaint of sex related harassment fails. Although arguably unwanted conduct, we find the failure to provide paternity rights information immediately did not have a harassing purpose nor a harassing effect. We did not accept the claimant's evidence that the failure to provide the information had a "humiliating" impact on him. There was also no evidence to support the allegation that Mrs Harvey's action on this occasion had the purpose of harassing the claimant. The complaint that this incident was sex-related harassment therefore fails.

D. Information about paternity leave

The Claimant asked again about paternity leave in a meeting which was grievance appeal meeting with Diane Hunt on 24 July 2018. He asked for the information about the leave he was entitled to take and referred to flexible working or sharing leave with his partner. Ms Hunt promised to supply the information but the Claimant did not receive it from her.

321. The claimant confirmed in submissions that he was not saying that this was an act of direct age discrimination or age-related harassment. He was saying that this was an act of direct sex discrimination or sex-related harassment.

322. We found that Ms Hunt did not promise to provide the claimant with information about paternity or other family-related rights. The claimant was not

treated less favourably or subjected to unwanted conduct as alleged in this incident. We therefore reject the complaints of direct sex discrimination and sex-related harassment relating to this incident.

E. Information about paternity leave

The Claimant emailed Jayne Wilkinson, Business Support Officer in or around July or August 2018 asking for information on paternity leave and/or shared leave and flexible working. He received the information when his daughter was eight days old (she was born on 5 August 2018). By that time the Claimant felt it was too late.

323. The claimant confirmed in submissions that he was not saying that this was an act of direct age discrimination or age-related harassment. He was saying that this was an act of direct sex discrimination or sex-related harassment.

324. We found that Mrs Wilkinson responded promptly to the claimant's request for information. We do not find any refusal to provide information. We also find that the claimant did not email Mrs Wilkinson about this until after his daughter was born.

325. The claimant was not treated less favourably or subjected to unwanted conduct as alleged in this incident. We therefore reject the complaints of direct sex discrimination and sex-related harassment relating to this incident.

F. Pizza

On Friday 29th September 2017 Sandra Harvey informed the Claimant, "this pizza is a cremated piece of shit".

326. We found this incident did take place although Mrs Harvey referred to the pizza as "burnt piece of shit" rather than a "cremated piece of shit". In his evidence and submissions, the claimant confirmed he was no longer saying that this was an incident of sex or age discrimination. Instead, it was an incident of bullying. We therefore discuss it in relation to the claim of unfair constructive dismissal.

G. Short-staffing

During the course of his employment with the Respondent the Claimant was continually short-staffed in the kitchen. There should have been three members of staff on duty including the Claimant, or ideally four, but on repeated occasions throughout his employment there were only two members of staff including the Claimant on duty.

327. The claimant in submissions confirmed that he was no longer alleging that this incident was an act of discrimination or harassment.

328. We find that the claimant's kitchen was not short staffed compared to other kitchens. We do accept that he genuinely believed it was. If it ever had been, the situation was rectified at the latest by February 2017.

H. Refusal of day off

When the Claimant's girlfriend was approximately 15 weeks' pregnant she was bleeding heavily and had to go into hospital in A & E. She was kept in hospital for a week. The Claimant telephoned Sandra Harvey on a Sunday to ask if she would cover for him the following day so that he could accompany his partner to A & E.
Sandra Harvey refused him a day off and required him to work despite the serious nature of his partners condition.

329. The claimant confirmed in submissions that he was not saying that this was an act of direct age discrimination or age-related harassment. He was saying that this was an act of direct sex discrimination or sex-related harassment.

330. We found that Mrs Harvey did not refuse the claimant a day off and did not require him to work. The complaints of direct sex discrimination or sex related harassment relating to this incident therefore fail and are dismissed.

I. Fighting comment

Sandra Harvey, line manager, told the Claimant he was fighting with her and she would win "like last time". She made this remark after his first grievance and appeal.

331. The claimant confirmed in cross-examination evidence that he was not saying that this was an act of direct age discrimination or age-related harassment. He was saying that this was an act of direct sex discrimination or sex-related harassment. We note, however, that he did not confirm this in submissions. Out of courtesy to him and for the avoidance of doubt we have considered this allegation both as both age and sex discrimination or harassment.

332. We found that Mrs Harvey did on 26 April 2018 say to the claimant that he should stop fighting her. We also found that she did say it had been "proven" that "didn't work" and that that was a refence to the claimant's First Grievance having been unsuccessful.

333. We did not hear any evidence to support the claimant's assertion that this was less favourable treatment than a woman or older person in the same circumstances would have been subjected to. When it comes to the relevant comparator, we find that the remark was made when Mrs Harvey was exasperated at the claimant because he was not listening to her when she was trying to feed back about non-conformances identified in an audit. Taking into account our findings in relation to other incidents (and especially Alleged incident B) we find that Mrs Harvey would have acted in the same exasperated way to any employee (even if female or older) in the same circumstances as the claimant, i.e. who had repeated non-conformances; had had training and support; had unsuccessfully taken a grievance out against her; and who was unwilling to listen to her when she tried to discuss the findings of an audit and necessary corrective steps with them. We therefore find the incident did not amount to less favourbale treatment because of sex or age and the complaints of direct age discrimination and direct sex discrimination fail and are dismissed.

334. When it comes to the complaints of age-related or sex-related harassment, we find the remarks by Mrs Harvey were "unwanted conduct". We do not find they were made with the purpose of harassing the claimant. Instead, as we recorded above, we find that her purpose was to try and get the claimant to listen to and co-operate with her. We do not accept the claimant's suggestion that the purpose was to intimidate him.

335. We also do not accept that the conduct had a harassing effect. Even if we accept the claimant's evidence that he felt intimidated by Mrs Harvey's remark we do not think it was reasonable for it to have that effect.

336. If we are wrong and the conduct had a harassing purpose of effect we would have found that the claim of harassment failed because there was no evidence that the conduct was related to sex or to age. We have taken into account our finding that Mrs Harvey did in another meeting harass the claimant (Alleged Incident B). We find that the comment on this occasion did not have the obviously sex and age specific connotations as the "Little boys" remark. The claimant in cross examination also accepted that the "Little boys" remark was a "one off incident". In those circumstances we do not find it assists the claimant in relation to proving that this comment by Mrs Harvey was sex ore age-related harassment.

337. The complaints that the comment by Mrs Harvey was an act of age-related harassment or sex-related harassment fail and are dismissed.

J. Suspension incident

There was an incident in the kitchen where the Head Teacher was concerned about the potatoes. Sandra Harvey and Lucinda Ruddy called a meeting with the Claimant and the Head Teacher in the office. Subsequently both Sandra Harvey and Lucinda Ruddy said the Claimant was rude to the Head Teacher. (The Claimant accepts he was defensive but denies he

was rude). Ms Harvey and Mrs Ruddy suspended the Claimant and sent him home and told him they would be in touch.

338. The claimant confirmed in cross-examination evidence that he was not saying that this was an act of direct age discrimination or age-related harassment. He was saying that this was an act of direct sex discrimination or sex-related harassment.

339. We found that Mrs Ruddy did not suspend the claimant on 10 May 2018 but instead sent him home for his well-being because he was becoming more and more agitated. He was not suspended because he was rude to the Head Teacher.

340. In fairness to the claimant we have also considered whether being sent home (even if not technically a "suspension") could amount to less favourable treatment or harassment. We have decided that it does not. We have found that Mrs Ruddy sent the claimant home because he was getting agitated. We conclude she would have treated a female employee who was getting equally agitated in the same way. There was no evidence to suggest that Mrs Ruddy would have acted differently towards a female employee in the same circumstances.

341. When it comes to the complaint that this incident was sex-related harassment, even accepting that being sent home for his own well-being was seen by the claimant as "unwanted conduct" we do not accept that it was done with a harassing purpose or had a harassing effect. Although the claimant gave evidence he felt humiliated by the meeting, we do not think it was reasonable for the meeting to have that effect. We accepted Mrs Ruddy's evidence to Ms Hunt that the Head Teacher "could not have been nicer" to the claimant and that she accepted he had not been rude to her. It does not seem to us it was reasonable for the meeting to have had the humiliating effect on the claimant. If we are wrong about that, we do not accept that the conduct was "related to sex".

342. We make the same findings in relation to the second element of the claimant's allegation in relation to the incident, which is that he was criticised more harshly for pre-cooking potatoes and for being rude to the Head Teacher. We have found that the Head Teacher did raise a complaint and that the respondent was duty bound to consider it. We do not accept that the claimant would have been treated any differently if he had been a female employee against who a Head Teacher had made a complaint. Neither did we find any evidence that female staff would not have been criticised for leaving pre-cooked food in the bain marie.

343. Finally in relation to this incident, we find that even if the criticism was "unwanted conduct", it was not "related to sex".

344. The complaints that this incident was direct sex discrimination or sex related harassment fail and are dismissed.

K. Allegation of Claimant being AWOL

The following day Ms Harvey asked the Claimant why he was not at work. The Claimant agrees he had not returned to work because he understood he was suspended. Ms Harvey told the Claimant that he was absent without leave. (Eventually the Claimant was paid for both shifts).

345. The claimant confirmed he was alleging that this incident was direct age discrimination or direct sex discrimination or age-related harassment or sex-related harassment.

346. We found that the claimant was not told that he was AWOL nor that he would not be paid. We found that there was a genuine miscommunication between the claimant and Mrs Harvey about what was supposed to happen on the 11 May 2018.

347. As the alleged less favourable treatment did not happen the complaints of direct age and sex discrimination fail and are dismissed.

348. As the alleged unwanted conduct did not occur the complaints of age-related harassment and sex-related harassment fail and are dismissed.

L. Request to look for things that were wrong

When the Claimant was absent from work on sick leave in or around October 2017 Sandra Harvey asked for information from the relief cooks. In particular she asked the cook to look around the Claimant's kitchen and to find things that were wrong.

349. We found that Mrs Harvey did not encourage the relief cook, Ms Currie, to look around the claimant's kitchen and to find things that were wrong. That means the claimant was not treated less favourably in this way. In submissions the claimant confirmed he was no longer saying that this was less favourable treatment because of age or age-related harassment. However, he was saying that it was sex discrimination or sex-related harassment. Since we found that this treatment did not happen, the complaints that it was direct sex discrimination or sex-related harassment fail.

M. Not allowing the Claimant to comment

In a return to work meeting on or around 6 November 2017 Sandra Harvey showed the Claimant pictures of matters she said were wrong in the kitchen. She did not allow the Claimant to comment and when he tried to do

so she told him he could be subject to disciplinary action and it would be like court.

350. The claimant confirmed in cross-examination evidence that he was not saying that this was an act of direct age discrimination or age-related harassment. He was saying that this was an act of direct sex discrimination or sex-related harassment.

351. We found that this incident did occur and that the claimant was prevented from making comments during the meeting on 6 November 2017 and was told that unless he cooperated he could be subject to disciplinary action.

352. As we recorded above, we did not find that Ms Currie was an appropriate actual comparator for the direct sex discrimination complaint. We heard no evidence about other actual comparators or the way Mrs Harvey managed female employees in the same circumstances as the claimant which would support such a finding of less favourable treatment because of sex.

353. We took into account that it was at this same meeting that Mrs Harvey made the "little boys" comment (Alleged incident B) which we have found was a breach of the 2010 Act. We note the claimant's evidence was that that was a one-off incident. Considering the evidence as a whole our conclusion is that Mrs Harvey would have treated anyone who refused to accept her criticism and challenged her authority in the same way as she treated the claimant. We find he was not treated less favourably than a woman in the same circumstances would have been. The complaint of direct sex discrimination fails and is dismissed.

354. We find that the incident did involve unwanted conduct. We accept that it had a harassing purpose in that it was intended to intimidate the claimant. We also find that it had a harassing effect. We accept that the effect on the claimant was intimidating and that in the context of the meeting it was reasonable for him to perceive it as such. However, we do not accept that the conduct was related to sex.

355. As with the direct sex discrimination complaint we considered whether the "little boy" comment was enough to pass the burden of proof to the respondent. Taking into account the claimant's evidence that that was a one-off incident we find it was not. The complaint of sex related harassment fails.

N. Raising concerns at "return to work meeting"

In the meeting on 6th November 2017, the Claimant was not informed that it was anything other than a return to work meeting and was unaware that concerns were going to be raised with him at that meeting. He was not invited to be accompanied

356. We found that the claimant was not given advance notice of the allegations against him nor was he given the opportunity to be accompanied to the meeting. In submissions the claimant confirmed he was no longer saying that this was less favourable treatment because of age or age-related harassment. However, he was saying that it was sex discrimination or sex-related harassment.

357. We found that there was no actual female comparator when it comes to the failure to inform the claimant that the meeting was anything other than a return to work meeting. There was also no evidence to support the claimant's assertion that a hypothetical female comparator would have been treated differently. The evidence instead was that the respondent's approach to that meeting was its standard practice. We find that the claimant was not treated less favourably than a female employee would have been in this regard and the complaint that this was an act of direct sex discrimination fails.

358. When it comes the failure to allow the claimant to be accompanied to the 6 November 2017 "record of discussion" meeting, there was an actual comparator, namely Rachel Currie. We found she was also not given the right to be accompanied to her record of discussion meeting on 9 January 2018. We found it was the respondent's standard practice not to allow employees to be accompanied to such meetings which it regarded as informal. The claimant was not treated less favourably than a female employee would have been by not being given the right to be accompanied to that meeting and his complaint that this was an act of direct sex discrimination fails.

359. The claimant's complaint that these were acts of sex-related harassment also fails. Even accepting the conduct (i.e. not warning him that the meeting would deal with concerns as well as his return to work and not giving him the right to be accompanied) was unwanted, we do not accept that it had the harassing intent or effect which s.27 of the 2010 Act requires. Even if we are wrong about that, we find there is nothing in those acts which are related to sex. The complaint of sex-related harassment therefore fails.

Our conclusions on the issue of time limits

360. We have found that Alleged Incident B (the "little boys" remark) was an act of both sex-related and age-related harassment. It was made, however, on 6 November 2017, nearly 11 months before the claimant submitted his claim to the Tribunal.

361. The claimant accepted in evidence that it was a "one-off" act. We did not find any other acts to be in breach of the 2010 Act. Applying **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19** we find that Alleged Incident B was a one-off act for the purposes of the 2010 Act time limit. To be in time the claim in relation to it should have been brought within three months of 6 November 2017. That means the deadline for bringing a claim under the 2010 Act in relation to it would have been 5 February 2018. The claim was filed on 1 October 2018. Even allowing for the fact that that time limit would have been extended to enable compliance with the Early Conciliation rules, the claim was filed some six-seven months after the deadline.

362. We have considered whether it would be just and equitable to extend the time for bringing the claim. We have taken into account the "Keeble" factors. We have reminded ourselves in particular of the two key factors identified in **Afolabi**, i.e.: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). We also remind ourselves that **Robertson** makes it clear

that exceptional circumstances are not required before the time limit can be extended on just and equitable grounds but that the exercise of discretion is the exception rather than the rule.

363. We have found that by 10 May 2018 at the latest the claimant was aware of the possibility of bringing a Tribunal claim for harassment in relation to the incident and of the time limit for doing so. This was not a case where the claimant was prevented from bringing a claim because the respondent was preventing him from having access to information or evidence needed to bring the claim. In fact, he had that evidence in the form of his recording of the meeting. We have considered whether the fact that the claimant was pursuing a grievance in relation to the incident explains the delay in bringing a claim. However, the grievance appeal outcome in relation to his complaint about that meeting was known to him by February 2018. Even if it could explain an initial delay in bringing a claim in the hope that matters might be resolved through the respondent's internal processes, that explanation for delay does not apply beyond February 2018. We do not find that the claimant's sickness absence from 17 May 2018 explains the delay. He was able to pursue his Second and Third Grievances during his period of sickness absence.

364. In terms of prejudice to the respondent, the claim was filed 11 months after the incident complained of. It is true that the respondent had carried out some internal investigation of the incident at the time because of the claimant's First Grievance. Against that, the incident complained of was a remark made in a long meeting. The remark was not central to that meeting and was not something evidenced by documentation. From the respondent's point of view it had been put to bed by the grievance appeal outcome in February 2018. We have considered whether the existence of the recording of the meeting (not disclosed by the claimant until September 2018) removed or reduced the prejudice to the respondent. We have decided it did not. We find that the length of time meant inevitably that the recollection of Mrs Harvey and Ms Gordon about the context of the meeting would have faded and that would have placed the respondent at a disadvantage.

365. Taking those factors into account and accepting that there is a prejudice to the claimant in not being able to pursue his complaint, we find that in this case the lack of explanation for the delay in bringing the claim and the prejudice to the respondent arising from the delay mean it is not just and equitable to extend time in relation to Alleged Incident B. That complaint was brought out of time and is dismissed for that reason.

<u>Our conclusions about whether the claimant was dismissed</u>

Dismissal by the respondent or potential constructive dismissal?

366. We found that the claimant never received and read the notice of dismissal sent by Mr Craine on 9 October 2018. Applying **Haywood** we find that notice did not take effect. The claimant was not expressly dismissed by the respondent. Instead his employment was ended by his resignation with notice on 4 October 2018 (which he then shortened by his hand-delivered undated letter). For his unfair dismissal claim to succeed he must first show that his resignation was a constructive dismissal within the meaning of s.95(1)(c) ERA.

Resignation or constructive dismissal?

367. The claimant's case is that the Alleged Incidents either separately or together constituted a breach of the implied term of trust and confidence. We found the Alleged Incidents set out below did happen (though other than Alleged Incident B did not find they breached the 2010 Act). We have re-ordered them in chronological order for the purposes of our conclusions on whether the claimant was constructively dismissed:

- On 29 September 2017, Mrs Harvey describing a pizza cooked by the claimant as a "burnt piece of shit" (Alleged Incident F).
- The claimant was not told in advance about concerns that would be raised at the return to work meeting on 6 November 2017 and was not given the right to be accompanied to that meeting (Alleged incident N)
- On 6 November 2017 during a meeting, Mrs Harvey twice made the comment "Little boys will have their toys" (Alleged Incident B).
- On 6 November 2017 during that same meeting the claimant was prevented from making comments was told that unless he cooperated he could be subject to disciplinary action (Alleged Incident M)
- On 26 April 2018 Mrs Harvey told the claimant to "stop fighting" her and that it had been proven that that didn't work. We found that was a reference to the claimant having been substantially unsuccessful in his First Grievance relating to her (Alleged Incident I).

368. Although we found that technically the claimant was correct that no home visit occurred while he was on long term sick (Alleged Incident A) we also found that he did not in fact want such a visit. We found that the respondent did keep in regular touch with him while he was off on sick leave in line with its Sickness Policy. For that reason we do not include Alleged Incident A in the above list. We do not accept that, viewed objectively, it could contribute to a repudiatory breach even as a "last straw".

369. We have below applied the relevant law to those facts in deciding the questions identified in the List of Issues. We have found it more convenient to re-order those questions slightly.

Has there been a breach of contract by the employer (either an actual breach or an anticipatory breach?)

Has there been a fundamental breach in the contract entitling him to resign?

370. Because the alleged breach in this case is a breach of the implied terms of trust and confidence, these two questions stand and fall together. As **Morrow** says, a breach of that implied term is a fundamental breach.

371. In deciding whether the Alleged Incidents constitute a breach of the implied term the test we need to apply is whether they amount to the respondent "conduct[ing] itself in a manner calculated or likely to destroy or seriously damage

the relationship of trust and confidence between employer and employee. We have found that they do. It seems to us that even if the first incident ("burnt piece of shit") might not itself meet that standard, the events at the meeting on 6 November 2017 do.

372. We have found that Alleged Incident B was an act of sex-related and age-related harassment. We find that alone would have constituted a breach of the implied term. We also found (Alleged Incident M) that the claimant was not allowed to effectively comment about allegations made about his capability and conduct. We accept that the respondent's position was that since the "Record of Discussion" process was not a formal capability or disciplinary procedure, the claimant was not entitled to prior notice of the issues to be raised. However, in the claimant's case, he was also told that he would (without prior consultation) be being moved to another kitchen and that unless he accepted what was happening, he would be subject to disciplinary action. That does seem to us to meet the test of conduct likely to seriously damage the relationship of trust and confidence. We find that by the end of that meeting on 6 November 2017 the respondent was in breach of the implied term; that that was a repudiatory breach and the claimant would have been entitled to resign and treat himself as constructively dismissed. He did not do.

373. We find that there was then a further incident on 26 April 2018 (Alleged Incident I) when the claimant was told to "stop fighting" Mrs Harvey. We found that was a reference to the claimant having been substantially unsuccessful in his First Grievance relating to her. Had that been a one-off incident we are not convinced that it would have been sufficient to amount to a breach of the implied term. However, we do find that it meets the definition of a "last straw" in that it was more than very trivial. We find (to use the wording in **Omilaju)** that it was an act capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence

374. We find that even if the claimant had affirmed the contract after November 2017, Alleged Incident I was a last straw which "revived" the breach and meant that as at 26 April 2018 the claimant would have been entitled to resign and treat himself as constructively dismissed.

375. We asked the claimant in submissions what he regarded as the "last straw" and he said it was the conversation with Mrs Harvey on 26 April 2018 after she had carried out the full audit.

376. The first question which the Court of Appeal in **Kaur** says a Tribunal should ask itself is "What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?". We find that the answer in this case was Alleged Incident M on 26 April 2018. We also find (in answer to the third and fourth questions in **Kaur)** that although not itself a repudiatory breach, that incident was part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of contract.

Has the employee delayed too long before resigning?

377. Rather than follow the order of the questions in the List of Issues we find it more convenient to deal next with the second question in **Kaur**, namely "Has [the

claimant] affirmed the contract since that act?". In this case the question is whether the claimant affirmed the contract since the 26 April 2018.

378. The claimant's first resignation was dated 4 October 2018. That is over 5 months after the "last straw" relied on by the claimant. As the case-law makes clear, mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract. However if (as we find it was in this case) it is prolonged it may be evidence of an implied affirmation.

379. We have taken into account the fact that from the 17 May 2018 until his resignation, the claimant was on sick leave and receiving sick pay. In **Mari v Reuters Ltd EAT0539/13** the EAT said that the significance to be afforded to the acceptance of sick pay will depend on the circumstances: at one extreme, an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay contributed to affirmation. At the other, an employee may continue to claim and accept sick pay when better and when seeking to exercise other contractual rights.

380. We accept that in this case the claimant was signed off due to stress. However, we find he was not at the "seriously ill" extreme. He took an active part in a grievance meeting (5 June 2018) and pursued a grievance appeal as well as taking an active part in disciplinary interviews. He was also during this period of absence asking for information about paternity rights (Alleged Incidents D and E). That seems to us nearer the other extreme of an employee seeking to exercise other contractual rights.

381. We do take into account the fact that the claimant had an ongoing grievance from May 2018 which was not finally resolved until the grievance appeal outcome letter sent on the 17 September 2018. We do not think that amounts to the claimant working "under protest". We say that because the Second and Third Grievances did not relate to the incident on 26 April 2018 nor the incidents in November 2017. If anything, it seems to us the claimant's grievance was another example of his continue to assert rights as an employee and tends to point towards affirmation rather than the other way.

382. Finally, we have considered the claimant's email exchange with Mrs Wilkinson at 14:23 on 9 August 2018 in which the claimant asked "if I was to constructive dismiss myself from my duties would I still be able to have my meeting in September?". Mrs Wilkinson said she would need to check and the claimant followed up on 3 September 2018 when he had not received any further information saying in an email he was "disappointed I've had no further correspondence with regard to me leaving on constructive dismissal". We have considered whether that amounts to "working under protest" and ultimately decided it is not. Although it indicates that the claimant was considering constructive dismissal it is a request for information (to a relatively junior member of the respondent's staff) and does not seem to us to amount to an assertion that the claimant was not affirming the contract because the respondent was in breach of that. If we are wrong about that, we find that even after that follow-up email the claimant delayed resigning for a further month and raised no further questions about constructive dismissal with the respodent.

383. Taken those matters in the round, we find that the claimant did affirm the contract following 26 April 2018.

Did the employee leave in response to the breach and not for some other unconnected reason?

384. We have for the sake of completeness have briefly considered this final question (the fifth in **Kaur's** list). We have found the claimant resigned on 4 October 2018 initially with notice (ending 1 November 2018) but then curtailed that notice in the undated letter received by the respondent on 12 October 2018 so his employment ended with immediate effect. In brief, we accept Mr Mensah's submission that the reason the claimant resigned on 4 October 2018 was that he was imminently due to take part in disciplinary proceedings which he knew was likely to lead to his dismissal. We find that the resignation was not in response to the breach which we have found happened on 26 April 2018 but to the impending disciplinary sanction.

Summary of conclusions

385. Of the complaints not withdrawn by the claimant we found that Alleged Incidents A, C, D, E, H, J, M and N were not acts of sex discrimination or sex-related harassment.

386. We found that Alleged Incidents I, K were neither acts of direct sex discrimination or sex-related harassment nor acts of direct age discrimination or age-related harassment.

387. We found that Alleged Incident B was an act of age-related harassment and of sex-related harassment (so could not also be acts of direct sex or age discrimination). However, we also found that it was a one-off act of harassment and that the tribunal claim about it was brought outside the time limit. We decided it was not just and equitable to allow the claim to be brought as late as it was so the claim fails and is dismissed.

388. We have decided that the claimant was not unfairly dismissed. He was not constructively dismissed. The respondent was in breach of the implied term as at 26 April 2018, entitling the claimant to resign and claim constructive dismissal. However, he delayed doing so and affirmed the contract. That meant he could not long rely on that breach. In any event we find he resigned because of the imminent disciplinary proceedings outcome not because of that breach.

389. Although not strictly necessary to do so we do find that the respondent carried out a reasonable investigation into the allegations against the claimant which led to Mr Craine making a decision to dismiss him for gross misconduct on 4 October 2018. We find his decision that the claimant had committed an act of gross misconduct was one he genuinely believed and was made on reasonable grounds, not least the corroborative evidence from the independent witness from Livesey's who confirmed it was the claimant not Mrs Harvey who had given them a key.

390. We do feel a degree of sympathy for the claimant. Mrs Harvey in her evidence said he had been promoted quickly to UCS because she saw him as having

excellent potential. There were clearly genuine issues with the claimant complying with HACCP and other standards and an unwillingness on his part to accept fault. Although it is clear that after problems were identified the respondent did provide training and support to him we do find that in his very early months he may not have received the training and support he needed to fulfil that potential in his supervisory role. That was not an issue we were deciding but it is something that the respondent should bear in mind when deciding who and when to promote and in assessing the support needed for those promoted quickly into supervisory roles.

391. As will also be clear from our findings, we did not find that Mrs Harvey and Ms Gordon acted appropriately and professionally on all occasions, especially at the meeting on 6 November 2017. However, for the reasons given above all the claimants complaints ultimately fail and are dismissed.

Employment Judge McDonald
Date: 7 May 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
12 May 2020

FOR THE TRIBUNAL OFFICE

Annex – List of Issues

Dismissal

1. Was the Claimant dismissed by the Respondent for gross misconduct or did he resign?

2. If the Claimant was dismissed, what was the reason for dismissal?

3. If the Claimant was dismissed, was dismissal fair within the meaning of s.98(4) Employment Rights Act 1996?

4. Was the Claimant dismissed because of his sex?

5. Who is the hypothetical or actual comparator relied upon by the Claimant?

6. Was the Claimant dismissed because of his age?

7. Who is the hypothetical or actual comparator relied upon by the Claimant?

8. If the Respondent was dismissed because of his age, can the Respondent show that his dismissal was a proportionate means of achieving a legitimate aim?

Constructive dismissal

The Claimant sent the Respondent a resignation notice on 4th October 2018 (p.480-3) giving notice to terminate his employment on 1st November 2018.

9. Has there been a breach of contract by the employer (either an actual breach or an anticipatory breach?)

10. Has there been a fundamental breach in the contract entitling him to resign?

11. Did the employee leave in response to the breach and not for some other unconnected reason?

12. Has the employee delayed too long before resigning?

13. Were the following matters/allegations breaches of the implied duty of trust and confidence?

A. Not receiving home visits during his six-month absence from work

B. "Little boys" comment

On 6th November 2017, Sandra Harvey causing him stress and to be off sick by calling the Claimant a "little boy" and telling him “this little boy can have his toys" after the Claimant requested some personal information.

It is accepted that the term “little boy” and “little boys can have toys” was used by Sandra Harvey on 16th November 2017.

Jurisdiction - is the claim in time?

The claim was presented on 1st October 2018.

14. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

15. Who is the hypothetical or actual comparator relied upon by the Claimant?

16. Was the Claimant treated less favourably than a hypothetical female?

17. If so, was the reason for the difference in treatment his gender?

18. Was this less favourable treatment on the grounds of the Claimants age?

19. Who is the hypothetical or actual comparator relied upon by the Claimant?

20. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

21. Was the comment unwanted conduct related to the Claimants sex?

22. Was the comment unwanted conduct related to the Claimants age?

23. Did the comment have the purpose or effect of violating the Claimants dignity?

24. Taking in to account:

    - The Claimants perception
    - The other circumstances of the case
    - Whether it was reasonable for the conduct to have that effect,

did the comment create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

C. Information about paternity rights

When his girlfriend was 15 weeks pregnant the Claimant asked for information about paternity rights from Sandra Harvey. The Claimant also asked for information about flexible working and shared leave with his partner. Sandra Harvey told him that it was usually a woman who would ask and she could not help him and did not know but would find out. She failed to do so.

s.123 Jurisdiction - is the claim in time?

The claim was presented on 1st October 2018.

This incident would have occurred in around February/March 2018.

25. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

26. Who is the hypothetical or actual comparator relied upon by the Claimant?

27. Was the Claimant treated less favourably than a hypothetical female?

28. If so, was the reason for the difference in treatment his gender?

29. Was this less favourable treatment on the grounds of the Claimants age?

30. Who is the hypothetical or actual comparator relied upon by the Claimant?

31. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

32. Was the alleged failure to provide the information unwanted conduct related to the Claimants sex?

33. Was the alleged failure to provide the information unwanted conduct related to the Claimants age?

34. Did the alleged failure to provide the information have the purpose or effect of violating the Claimants dignity?
35. Taking in to account

    - The Claimants perception

- The other circumstances of the case

- Whether it was reasonable for the conduct to have that effect,

did the alleged failure to provide the information create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

D. Information about paternity leave

The Claimant asked again about paternity leave in a meeting which was grievance appeal meeting with Diane Hunt on 24 July 2018. He asked for the information about the leave he was entitled to take and referred to flexible working or sharing leave with his partner. Ms Hunt promised to supply the information but the Claimant did not receive it from her.

s.13(1) – Direct discrimination

36. Who is the hypothetical or actual comparator relied upon by the Claimant?

37. Was the Claimant treated less favourably than a hypothetical female?

38. If so, was the reason for the difference in treatment his gender?

39. Was this less favourable treatment on the grounds of the Claimants age?

40. Who is the hypothetical or actual comparator relied upon by the Claimant?

41. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

42. Was the alleged failure to provide the information unwanted conduct related to the Claimants sex?

43. Was the alleged failure to provide the information unwanted conduct related to the Claimants age?

44. Did the alleged failure to provide the information have the purpose or effect of violating the Claimants dignity?

45. Taking in to account

- The Claimants perception

- The other circumstances of the case

- Whether it was reasonable for the conduct to have that effect,

did the alleged failure to provide the information create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

E. Information about paternity leave

The Claimant emailed Jayne Wilkinson, Business Support Officer in or around July or August 2018 asking for information on paternity leave and/or shared leave and flexible working. He received the information when his daughter was eight days old (she was born on 5 August 2018). By that time the Claimant felt it was too late.

s.13(1) – Direct discrimination

46. Who is the hypothetical or actual comparator relied upon by the Claimant?

47. Was the Claimant treated less favourably than a hypothetical female?

48. If so, was the reason for the difference in treatment his gender?

49. Was this less favourable treatment on the grounds of the Claimants age?

50. Who is the hypothetical or actual comparator relied upon by the Claimant?

51. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

52. Was the failure to provide the information before the birth of his daughter unwanted conduct related to the Claimants sex?

53. Was the failure to provide the information before the birth of his daughter unwanted conduct related to the Claimants age?

54. Did the failure to provide the information before the birth of his daughter have the purpose or effect of violating the Claimants dignity?

55. Taking in to account

- The Claimants perception
- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect,

did the failure to provide the information before the birth of his daughter create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

F. Pizza

On Friday 29th September 2017 Sandra Harvey informed the Claimant, "this pizza is a cremated piece of shit".

Jurisdiction - is the claim in time?

The claim was presented on 1st October 2018.

56. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

57. Who is the hypothetical or actual comparator relied upon by the Claimant?

58. Was the Claimant treated less favourably than a hypothetical female?

59. If so, was the reason for the difference in treatment his gender?

60. Was this less favourable treatment on the grounds of the Claimants age?

61. Who is the hypothetical or actual comparator relied upon by the Claimant?

62. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

63. Was the comment unwanted conduct related to the Claimants sex?

64. Was the comment unwanted conduct related to the Claimants age?

65. Did the comment have the purpose or effect of violating the Claimants dignity?

66. Taking in to account:

- The Claimants perception
- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect,

did the comment create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

G. Short-staffing

During the course of his employment with the Respondent the Claimant was continually short-staffed in the kitchen. There should have been three members of staff on duty including the Claimant, or ideally four, but on repeated occasions throughout his employment there were only two members of staff including the Claimant on duty.

s.13(1) – Direct discrimination

67. Who is the hypothetical or actual comparator relied upon by the Claimant?

68. Was the Claimant treated less favourably than a hypothetical female?

69. If so, was the reason for the difference in treatment his gender?

70. Was this less favourable treatment on the grounds of the Claimants age?

71. Who is the hypothetical or actual comparator relied upon by the Claimant?

72. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

73. Was the alleged short-staffing unwanted conduct related to the Claimants sex?

74. Was the alleged short-staffing unwanted conduct related to the Claimants age?

75. Did the alleged short-staffing have the purpose or effect of violating the Claimants dignity?

76. Taking in to account:

- The Claimants perception
- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect,

did the alleged short-staffing create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

H. Refusal of day off

When the Claimant's girlfriend was approximately 15 weeks' pregnant she was bleeding heavily and had to go into hospital in A & E. She was kept in hospital for a week. The Claimant telephoned Sandra Harvey on a Sunday to ask if she would cover for him the following day so that he could accompany his partner to A & E.

Sandra Harvey refused him a day off and required him to work despite the serious nature of his partners condition.

s.13(1) – Direct discrimination

77. Who is the hypothetical or actual comparator relied upon by the Claimant?

78. Was the Claimant treated less favourably than a hypothetical female?

79. If so, was the reason for the difference in treatment his gender?

80. Was this less favourable treatment on the grounds of the Claimants age?

81. Who is the hypothetical or actual comparator relied upon by the Claimant?

82. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

83. Was the refusal unwanted conduct related to the Claimants sex?

84. Was the refusal unwanted conduct related to the Claimants age?

85. Did the refusal have the purpose or effect of violating the Claimants dignity?

86. Taking in to account:

    - The Claimants perception
    - The other circumstances of the case
    - Whether it was reasonable for the conduct to have that effect,

    did the refusal create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

I. Fighting comment

Sandra Harvey, line manager, told the Claimant he was fighting with her and she would win "like last time". She made this remark after his first grievance and appeal.

Jurisdiction - is the claim in time?

The claim was presented on 1st October 2018.

87. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

88. Who is the hypothetical or actual comparator relied upon by the Claimant?

89. Was the Claimant treated less favourably than a hypothetical female?

90. If so, was the reason for the difference in treatment his gender?

91. Was this less favourable treatment on the grounds of the Claimants age?

92. Who is the hypothetical or actual comparator relied upon by the Claimant?

93. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

94. Was the comment unwanted conduct related to the Claimants sex?

95. Was the comment unwanted conduct related to the Claimants age?

96. Did the comment have the purpose or effect of violating the Claimants dignity?

97. Taking in to account:

- The Claimants perception
- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect,

did the comment create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

J. Suspension incident

There was an incident in the kitchen where the Head Teacher was concerned about the potatoes. Sandra Harvey and Lucinda Ruddy

called a meeting with the Claimant and the Head Teacher in the office. Subsequently both Sandra Harvey and Lucinda Roddy said the Claimant was rude to the Head Teacher. (The Claimant accepts he was defensive but denies he was rude). Ms Harvey and Ms Roddy suspended the Claimant and sent him home and told him they would be in touch.

Jurisdiction - is the claim in time?

This incident was on 10th May 2018.

The claim was presented on 1st October 2018.

98. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

99. Who is the hypothetical or actual comparator relied upon by the Claimant?

100. Was the Claimant treated less favourably than a hypothetical female?

101. If so, was the reason for the difference in treatment his gender?

102. Was this less favourable treatment on the grounds of the Claimants age?

103. Who is the hypothetical or actual comparator relied upon by the Claimant?

104. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

105. Was the alleged suspension unwanted conduct related to the Claimants sex?

106. Was the alleged suspension unwanted conduct related to the Claimants age?

107. Did the alleged suspension have the purpose or effect of violating the Claimants dignity?

108. Taking in to account:

- The Claimants perception
- The other circumstances of the case

- Whether it was reasonable for the conduct to have that effect,

did the alleged suspension create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

K. Allegation of Claimant being AWOL

The following day Ms Harvey asked the Claimant why he was not at work. The Claimant agrees he had not returned to work because he understood he was suspended. Ms Harvey told the Claimant that he was absent without leave. (Eventually the Claimant was paid for both shifts).

Jurisdiction - is the claim in time?

The claim was presented on 1st October 2018.

109. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

110. Who is the hypothetical or actual comparator relied upon by the Claimant?

111. Was the Claimant treated less favourably than a hypothetical female?

112. If so, was the reason for the difference in treatment his gender?

113. Was this less favourable treatment on the grounds of the Claimants age?

114. Who is the hypothetical or actual comparator relied upon by the Claimant?

115. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

116. Was the allegation of the Claimant being AWOL unwanted conduct related to the Claimants sex?

117. Was the allegation of the Claimant being AWOL unwanted conduct related to the Claimants age?

118. Did the allegation of the Claimant being AWOL have the purpose or effect of violating the Claimants dignity?

119. Taking in to account:

- The Claimants perception

- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect,

did the allegation of the Claimant being AWOL create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

L. Request to look for things that were wrong

When the Claimant was absent from work on sick leave in or around October 2017 Sandra Harvey asked for information from the relief cooks. In particular she asked the cook to look around the Claimant's kitchen and to find things that were wrong.

Jurisdiction - is the claim in time?

The claim was presented on 1st October 2018.

120. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

121. Who is the hypothetical or actual comparator relied upon by the Claimant?

122. Was the Claimant treated less favourably than a hypothetical female?

123. If so, was the reason for the difference in treatment his gender?

124. Was this less favourable treatment on the grounds of the Claimants age?

125. Who is the hypothetical or actual comparator relied upon by the Claimant?

126. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

127. Was the request to look for things that were wrong unwanted conduct related to the Claimants sex?
128. Was the request to look for things that were wrong unwanted conduct related to the Claimants age?

129. Did the request to look for things that were wrong have the purpose or effect of violating the Claimants dignity?

130. Taking in to account:

- The Claimants perception
- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect,

did the request to look for things that were wrong create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

M. Not allowing the Claimant to comment

In a return to work meeting on or around 6 November 2017Sandra Harvey showed the Claimant pictures of matters she said were wrong in the kitchen. She did not allow the Claimant to comment and when he tried to do so she told him he could be subject to disciplinary action and it would be like court.

Jurisdiction - is the claim in time?

The claim was presented on 1st October 2018.

131. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

132. Who is the hypothetical or actual comparator relied upon by the Claimant?

133. Was the Claimant treated less favourably than a hypothetical female?

134. If so, was the reason for the difference in treatment his gender?

135. Was this less favourable treatment on the grounds of the Claimants age?

136. Who is the hypothetical or actual comparator relied upon by the Claimant?

137. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

138. Was the alleged failure to allow the Claimant to comment unwanted conduct related to the Claimants sex?

139. Was the alleged failure to allow the Claimant to comment unwanted conduct related to the Claimants age?

140. Did the alleged failure to allow the Claimant to comment have the purpose or effect of violating the Claimants dignity?

141. Taking in to account:

- The Claimants perception
- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect,

did the alleged failure to allow the Claimant to comment create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

N. Raising concerns at "return to work meeting"

In the meeting on 6th November 2017, the Claimant was not informed that it was anything other than a return to work meeting and was unaware that concerns were going to be raised with him at that meeting. He was not invited to be accompanied

Jurisdiction - is the claim in time?

The claim was presented on 1st October 2018.

142. Would it be just and equitable to extend the time limit to allow presentation of the claim?

s.13(1) – Direct discrimination

143. Who is the hypothetical or actual comparator relied upon by the Claimant?

144. Was the Claimant treated less favourably than a hypothetical female?

145. If so, was the reason for the difference in treatment his gender?

146. Was this less favourable treatment on the grounds of the Claimants age?

147. Who is the hypothetical or actual comparator relied upon by the Claimant?

148. Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

s.26 – Harassment

149. Was raising concerns at what was supposed to be a return to work meeting unwanted conduct related to the Claimants sex?

150. Was raising concerns at what was supposed to be a return to work meeting unwanted conduct related to the Claimants age?

151. Did the raising of concerns have the purpose or effect of violating the Claimants dignity?

152. Taking in to account:

- The Claimants perception
- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect,

did the comment create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

s.27 - Victimisation

153. Did the Claimant carry out a protected act?

Namely, presenting a grievance to the Respondent in or around November 2017?

154. If so, was the Claimant subjected to a detriment?

The detriment relied upon is the receipt of a management letter on 31st January 2018.

155. Did the Claimant carry out a protected act?

Namely, presenting a grievance to the Respondent on or around 11th May 2018?

156. If so, was the Claimant subjected to a detriment?

The detriment relied upon is the Respondent's attempt to discipline him in the investigation letter on 12th July 2018 and the disciplinary hearings which took place after that.

Paternity Leave and Parental Leave Regulations.

157. Did the Respondent fail to grant the Claimant paternity leave in breach of regulations 4 and 5 of the PAL Regulations 2002 and s.80 of the Employment Rights Act 1996?

158. Did the Respondent fail to grant the Claimant shared parental leave in breach of the Shared Parental Leave Regulations 2014, regulations 3(1), 4 and 5?