



EMPLOYMENT TRIBUNALS

Claimant:
XX

v

Respondent:
YY

Heard at: Reading **On:** 3-6, 9 & 10 October &
12 October 2023 (in chambers)

Before: Employment Judge Anstis
Mrs S Laurence-Doig
Mr K Rose

Appearances:
For the Claimant: Mr B Phelps (counsel)
For the Respondent: Mr J Ratledge (counsel)

RESERVED JUDGMENT

The claimant's claims are dismissed.

REASONS

A. INTRODUCTION

1. The claimant was employed by the respondent as assistant head at a school until her dismissal without notice on 9 June 2020.
2. The respondent says that the claimant was dismissed for gross misconduct. The claimant alleges that her dismissal was an act of discrimination arising from disability, unfair and wrongful.

B. THE HEARING

3. Although originally listed for nine days, the hearing was reduced to six and a half days by the tribunal. It is a tribute to the skills of both counsel (and the fluency of the various witnesses) that evidence was completed comfortably within five days, by mid-morning on Monday 9 October 2023. It was agreed that the hearing should then adjourn for written submissions and brief oral replies to take place on Tuesday 10 October 2023.

4. The claimant was a vulnerable party or witness for the purposes of the Presidential Guidance on Vulnerable Parties and Witnesses in Employment Tribunal Proceedings. We discussed with counsel any necessary adjustments we should make to facilitate her participation in proceedings. Mr Phelps sought regular breaks for the claimant and these were granted as a ten-minute break every hour. Breaks were later granted every forty minutes for one of the respondent's witnesses on account of a back condition. Given the circumstances that appear below we have also had regard to the Equal Treatment Bench Book's sections on coercive and controlling relationships.
5. We understand this decision may be considered by the Teaching Regulation Agency although we have, of course, proceeded by reference to the legal tests applicable to claims of disability discrimination, unfair and wrongful dismissal, rather than any other test that they may apply.
6. In the first two days of the hearing the employment judge raised two points of his own motion: first whether the permission of the tribunal needed to be sought for the claimant to rely on the supplemental report of Dr JJ (which appeared to be expert evidence), and second whether the tribunal was obliged to make a rule 50 order by virtue of an allegation that had been made by the claimant during the course of her disciplinary hearing. Neither point was taken further by counsel at the time, but on the final day of the hearing the claimant applied for a rule 50 order. This was granted and its terms are set out in a separate order. That order accounts for this judgment (and individuals or institutions referred to in this judgment) being anonymised. The anonymisation has been done according to a cipher agreed by the parties.

C. THE FACTS

The underlying facts

7. At least by the time of this hearing the underlying facts of the case were not substantially in dispute.
8. The claimant has recurrent depressive disorder, which is accepted by the respondent to be a disability. She is a disabled person. Her disability renders her more vulnerable to coercion and exploitation than she would be if she did not have that condition.
9. She was in a coercive and controlling relationship with someone she was having an affair with from around mid-2015 to August 2018.
10. Around mid-2016, under pressure from that person, she sent a message ("*are you a virgin*") to someone she believed was aged under 18. The message was sent from a social media page previously established by the claimant.
11. That pressure is accepted by the respondent to include that her (the claimant's) or her children's lives would be in danger if the message was not sent. This has been described as sending the message under duress, and we will use this terminology, though it has not been necessary in the course of this case to (and

we have not been asked to) decide whether a definition of duress such as may apply in criminal cases is met.

12. Sending such a message would amount to a breach of the respondent's safeguarding procedures. Failing to report it would also amount to a breach of the respondent's safeguarding procedures. The claimant never reported it to the respondent but did admit to it when it was raised with her. Both the sending of the message and the failure to report the safeguarding breach would, in principle, amount to gross misconduct and justify her immediate dismissal.
13. Up to this point the claimant had been regarded as a good teacher by the respondent had had no previous disciplinary action taken against her. She had recently been promoted by the respondent.
14. There is a further allegation of misconduct not based on the sending of a message to a child. This relates to computer misuse. The claimant admits to accessing the "Illicit Encounters" website on one occasion during work time. In what follows we will focus on the sending of the message and the claimant not reporting her sending of the message, which are by far the more serious allegations. Everyone agrees that the claimant would not have been dismissed simply because of the allegations of computer misuse. We will refer to the allegation of computer misuse only so far as necessary.

The initial report

15. On 19 August 2018 the individual the claimant was having an affair with sent an email to DD (the Chief Executive of the Respondent) saying:

"Between May 2016 and September 2016 [XX] had a fake [social media] account where she adopted the identity of a 17 year old girl called [name]. During this five month period [XX] communicated with a number of boys ... At the time all those who she contacted were either 5th formers or 4th formers (remove) — aged 15 and 16 years old. She engaged in dialogue with them that became 'sexting' in nature and often resulted in the exchange of naked pictures. I have attached a number of screen shots of [XX's] fake [social media] account, as you will see there are pictures of her and her mobile telephone number. She would quickly move much of the dialogue onto snapchat. In addition to these screen grabs (of which I have many) I also have text dialogue between her and myself where she admits she was sexting the boys and exchanging naked pictures. I will be happy to pass these onto you in due course.

... I sought the advice of a chair of governors for a school in Bedford, this individual being both a lawyer and magistrate on the Luton bench. She advised me that I should contact you and share my concerns over the conduct of one of your teachers. I am deeply concerned that a primary school teacher ... engages in such activity. I am of the belief her conduct is potentially harmful and certainly damaging to the reputation of your academy and the wider profession."

16. Three screenshots of social media messages were attached. Although it is not entirely clear it appears these messages were from the social media page to two different individuals. They included messages of a sexual nature and one (clothed) photograph.
17. On 19 August 2018 the claimant reported the individual she was having an affair with to the police, following threats he had made to kill himself. It is not clear whether this was before or after the email was sent, but that does not matter for our purposes. He was arrested and released the following day, having received a caution for harassment. On 21 August 2018 he committed suicide.
18. On receipt of the email DD checked some details with AA, the headteacher of the school, and then reported the email to the LADO – “local authority designated officer” and on their advice also to the MASH – “multi-agency safeguarding hub”.
19. This was during summer holidays so the school was not open to students or staff, but on 23 August 2018 AA called the claimant into the school for a meeting with her and CC, the respondent’s Chief Operating Officer. They suspended her. They also required her to hand in her school laptop.
20. The letter suspending the claimant said, amongst other things:

“... you have been suspended from your duties as Assistant Headteacher ... until further notice pending an investigation into an allegation of a safeguarding nature which could amount to gross misconduct.

A disciplinary investigation by [the school] will be delayed pending completion of the Police investigation or until such time that the Police provide agreement for [the school] to commence a disciplinary investigation ...”

21. As the letter indicates, the first action from the report to the LADO/MASH was a police investigation. The police investigation took a long time, eventually concluding that no action would be taken.
22. The forum in which progress and developments in the matter were reviewed by those in authority was a “JEM”, or “Joint Engagement Meeting”, chaired by the LADO. The claimant had no entitlement to be present and had very little involvement in the JEM process. There were three JEM meetings concerning the claimant.

The first JEM meeting

23. The first JEM meeting took place on 16 October 2018 with the LADO, social services, the police and AA and DD present.
24. The JEM meetings were to be kept confidential by those attending. Official minutes were prepared by or on behalf of the LADO but these were not intended

for release. The header to the minutes says, "*Notes of the meeting will not be ... used in disciplinary or other proceedings.*" These minutes were not distributed to the participants by the LADO but remained in the LADO's possession. AA kept her own notes of the meeting, which functioned as abbreviated versions of the official minutes.

25. At the first meeting it was said that the police were undertaking a "section 47" investigation. The minutes record that "*Once [YY] were aware of the allegation, they looked at her work laptop and discovered that she had been looking at some inappropriate websites that visited in working hours while she was in contact with children. The websites were commercial Dating/Contact sites.*" There was only one such website, visited on one day.
26. The police reported that they had "*interviewed [XX] and she disclosed a relationship ... which she describes as toxic and controlling ... [XX] sent messages under duress. She admits to sending the messages and that she knew that they were being sent to boys.*"
27. The "*outcome*" was "*review in 3 months*". The claimant was unaware of this meeting or its contents, and she did not participate in it.

The second JEM meeting

28. The second JEM meeting was on 8 January 2019.
29. The official minutes of the meeting record under "*information from employer*":

"[XX] is still suspended and a disciplinary can't yet be considered due to the Police investigation. There is no possibility of her returning to work in any guise. The school have taken legal advice regarding this and have been informed that they could dismiss [XX] on certain grounds, but this will not be looked at until more information is known."
30. And under "*information from police*":

"All devices seized from [XX] are currently being processed, but this can take some time and so the Police are still waiting for the results of this to come back. The Police are also speaking to the boys who could have information and this is also still ongoing. It is too early to say what information has been gleamed from this so far as it will need to all be put together when completed.

[XX] has been interviewed and has admitted to sending the messages, but states this was under duress."
31. The next JEM meeting was to take place in six months or on an outcome of the police investigation. The claimant was unaware of this meeting or its contents, and she did not participate in it.

The final JEM meeting

32. The third and final JEM meeting took place on 19 June 2019.
33. Under the heading “*information from police*”, the following is noted:

“... the Police investigation has now concluded and the outcome of this is that they will be taking no further action. However, this is because there is not enough evidence to take the case to CPS and there are concerns which have come out of the investigation.

When interviewed, [XX] admitted to sending messages and images of a sexual nature and said she knew that she had sent these to children. Her defence is that she sent them under duress ... threats to her around her children.

Of note is that a new law came into place in 2017 around sexual communications with a child and within that law duress is no longer considered a defence. As such, if [she] had sent the messages after this law came into place, the case would be going to CPS and the only reason it isn't now is because they were sent prior to this.”

34. No-one has ever identified what that new law was, but matters proceeded on the basis that the police's view of the law was correct.
35. The official minutes continue:

“The Designated Officer outlined the following facts which have come out of the Police investigation:

- *[XX] did engage with children in sexual activity*
- *[XX] did not report that she had done this. Her defence is that it was done under duress, but within teaching standards she has an obligation to safeguard children in her care and, even if done under duress, could've reported it. She would also have had safeguarding training so was aware of the role she has to perform regarding this. In fact, she did not report it until she got caught.*
- *Had the crime been committed at a later date, the case would've gone to CPS and she would likely have been charged.*

Information from Employer:

[XX's] DBS is clear and there have been no previous disciplinarys regarding her at the school ...

[AA] reported that [XX's] laptop has been looked at by the school's IT Technician who found that during July 2017 (approx.) there were two days when [XX] visited inappropriate (dating) websites.

She was not class based at this time, but was meant to be responsible for children and it would be a disciplinary offence.

[CC] shared that he has requested information from the Police disclosure unit but has heard nothing back ...

Any communication between the school and [XX] is now going through the union."

36. The claimant had submitted a letter that was read out in the meeting, emphasising the duress she was under. This was her only input into the JEM or LADO process.

37. The "outcome" is recorded as:

"The Designated Officer summarised that this case meets the LADO threshold as, at the time of the referral, it was believed that [XX] had behaved in a way which harmed a child, possibly committed a criminal offence against a child and behaved in a way which posed a risk to children. We now have to remove the criminal offence element of this as [XX] has not committed a crime, but the concerns around her behaving in a way to harm a child and possibly posing a risk to children remain. In order to make a decision on the LADO outcome of this case the meeting needs to decide whether [XX] has compromised her ability to be in a position of trust with children and if she has committed gross professional misconduct within her role as a Teacher.

With regards to compromising her position of trust, all those at the meeting agreed that [XX] has done this. She has admitted in Police interview to engaging in messages of a sexual nature with children and also failed to report this at the time. [XX] has used the duress argument very strongly, but her professional behaviour outweighs this and duress is not a good argument with regards to safeguarding. When in a position of trust, there is an obligation to report and she could've done this anonymously. In addition, if she is so easily influenced under duress, this would also compromise her professional position to safeguard children at the school. For example, if a safeguarding incident regarding a child was disclosed to her, there is no certainty that she would report it if under duress.

In relation to gross professional misconduct, again all those at the meeting felt that [XX] is guilty of this.

For all the reasons stated above, but also because there is evidence of her using IT equipment for personal use when she should've been working. A child could've stumbled across this and as such there is also a boundary issue around this. [XX] has not followed working together to safeguard children processes based on the allegation and other matters around her not following her work duties and bringing her personal life to work and boundaries.

The Designated Officer then read out the LADO outcomes with their definitions and attendees were asked for their opinion. [CC] was not asked to do this due to being in HR and needing to remain impartial.

[The police officer] felt that, based on Police evidence and information heard at the JEM, there is reason to believe that [XX] presents a risk to children and the allegation is substantiated.

[DD] also felt that the allegation is substantiated as [XX] has admitted to engaging in inappropriate sexual contact with a child online.

[AA] also agreed that the allegation was substantiated. In addition to admitting to having the conversations, [XX] has also not reported it.

The Designated Officer concluded that the allegation against [XX] is substantiated for all the reasons given above. She has compromised her professional conduct and ability to safeguard pupils and her duress argument is not strong enough regarding her professional role to give confidence that she is safe working with children.

... there is an argument that she is a risk to children in her professional role as a Teacher in a position of trust given the substantiated outcome. The Designated Officer can only advise and it is not for him to say that [XX] can no longer teach and this is a decision for Teaching Standards. It was therefore recommended that the school undertake their disciplinary process and make a referral to Teaching Standards. It is up to them which way round this is done."

38. The meeting concluded with recommendations that the claimant was given the outcome of the meeting in person and in writing, and that the school should carry out a disciplinary process and make referrals to the Teaching Regulation Agency and the Disclosure and Barring Service.
39. It is not at all clear to us why the LADO required the meeting to conclude whether the claimant had committed gross professional misconduct. DD suggested this was establishing that there was a case to answer, but that is not how it is put. As far as we can tell the LADO took no further part in the matter and, although DD said that there had been no formal closure of the case, it seems clear that the LADO considered that meeting to be the end of their involvement in the matter.
40. The police conclusions also appear unsatisfactory in the light of later developments. The police officer said that the claimant had "*admitted to sending messages and images of a sexual nature and that she knew that she had sent these to children*". Therefore we have a supposed admission by the claimant to sending multiple messages (and images) of a sexual nature to multiple children.
41. Finally, we note that in that meeting both AA and DD express concluded views that the claimant had committed gross professional misconduct, although "[CC] was not asked to do this due to being in HR and needing to remain impartial".

42. AA wrote to the claimant under the heading “*JEM Meeting Outcome – 19th June 2019*”, saying:

“On 19th June 2019 a JEM meeting was held between the police, local authority and education to discuss your investigation and the safeguarding allegations made. It is our responsibility as your employer to inform you about the outcome of the meeting.

The meeting concluded that the allegations made were substantiated as defined by the following LADO thresholds:

- *You have behaved in a way that has harmed a child, or may have harmed a child;*
- *You have behaved towards a child or children in a way that indicates you may pose a risk of harm to children.*

The JEM meeting reached this conclusion based on the following factual information:

- *In your police statement you admitted to sending messages to children of a sexual nature,*
- *In your professional duty as a teacher to safeguard children, you failed to report this.*

Given the outcome of the JEM meeting [we] will now be moving forward with conducting a disciplinary investigation ...”

43. On 21 June 2019, apparently in reply to this letter, the claimant asked AA for a copy of the original allegations made against her in the email to DD, the LADO JEM minutes and (if she could not get them herself) copies of the police evidence. These were not provided to her.

The appointment of an investigator

44. Around this time, CC engaged BB of ABC Ltd, consultants retained by the respondent, to conduct the investigation into the allegations against the claimant. In being briefed for this task, BB spoke to AA and obtained documents from her including her (AA’s) notes of the JEM meetings. Around this time solicitors acting for the respondent asked the police for copies of (or extracts from) notes of interviews with the claimant. These were not provided by the police.

45. On 1 July 2019 BB wrote to the claimant to introduce herself and arrange an investigatory interview with the claimant, setting out the following as allegations of gross misconduct:

- That you sent messages to children of a sexual nature.

- In your professional duty as a teacher to safeguard children, you failed to report this.
 - In your role as assistant headteacher, you used school IT equipment to look at inappropriate websites during school hours.
46. One of the unusual things about BB's investigation is that, as she accepted, she did not know what "*messages of a sexual nature*" the claimant was alleged to have sent. She must have taken that phrase from the JEM outcome or AA's notes of the JEM meetings. She said that at some point (she could not remember when) she had seen the first of the screenshots originally supplied to DD, but that it was in black and white and unreadable. We do not know why she had not asked for a better copy or asked questions of the respondent about this. BB took as her starting point that the claimant has confessed to the police that she had sent multiple messages of a sexual nature to multiple children, but BB had no idea what those messages were.
47. We explored with DD the question of what had happened to the original email and screenshots. She said she had passed them on to the LADO and may have passed them on to CC. However, by the time CC commissioned BB to investigate she (DD) was no longer part of the process. She did not pass it on to BB and did not enquire whether BB had it.
48. The claimant was accompanied by her trade union representative in the investigatory meeting and all subsequent meetings she attended during the disciplinary and appeal process.
49. The investigatory meeting took place on 9 September 2019.

The investigatory meeting

50. The following is recorded under the heading "allegation 1" in the notes of the investigatory meeting:
- "[BB] — the evidence contained within the letter from the LADO process says that you admitted to the police to sending messages to children of a sexual nature.*
- [XX] — "What I did admit to was one message; one message to one person under a significant amount of duress. "Are you a virgin" — under duress."*
51. The claimant goes on to describe the circumstances of her affair and the duress she was under. The subsequent two allegations were discussed, and the meeting took most of the day. Later that day BB conducted an investigatory interview with AA.
52. During our hearing the claimant said that no-one had ever established that the one message she had sent had been received by a child. She said that it may be that this was all part of the deception that she was subject to, and perhaps

the message had never been received by a child. However, it seems to us sufficient for the purposes of the disciplinary action and this hearing that she thought (at the time of sending it) that it was going to be received by a child, without the respondent needing to establish that it was received by a child.

The investigation report

53. BB submitted her investigatory report on 14 October 2019. The body of the report starts under the heading “*Allegations*”, where BB says:

“[YY] is not bound by the outcome of the JEM dated 19th June 2019 but does need good reason(s) not to accept it. Any decision not to accept the JEM outcome has the potential to put children at risk of harm in the future and is likely to be criticised by the local press, parents and other interested parties and therefore has the risk of bringing the reputation of [YY] in to disrepute.”

54. This is a problematic statement and led to some difficult questions for BB in cross-examination. These prompted a range of answers, starting from the police (or the LADO and various agencies that comprised the JEM) being inherently correct and reliable and finishing with the idea that far from being an encouragement to follow the outcome of the JEM it was an encouragement to the disciplinary panel to be independent and form their own view of the matter. We do not accept either point.
55. We asked BB whether there was any principle from, for instance, a guidance document or code of practice that meant that the respondent would need “*good reason*” not to accept the JEM outcome. She was unable to identify any such document.
56. BB’s original answers in respect of the reliability of the police, LADO and JEM panel were the more accurate statement of her views. Her starting position for the investigation was that the JEM outcome was accurate and that the claimant had committed safeguarding breaches in sending multiple messages and images to multiple children and then not reporting that.
57. That leads to a further point of concern. Having secured an admission from the claimant of sending one message of a sexual nature to one child she was content to leave it at that, but described it in her investigation report as being “*at least one*” message of a sexual nature.
58. It is true that her investigation had established that the claimant had sent “*at least one*” message of a sexual nature to one child, but it is not at all clear why she did not take it further and seek to establish whether there were multiple messages (and images) to multiple children. BB seems to have taken the view that one alone was sufficient for disciplinary purposes. Perhaps that is correct, but it left open the question of whether the claimant’s misconduct went further than that. The disciplinary hearing proceeded on the basis of that one message, and by the time of the appeal decision it was accepted by the respondent that there was only one message, but there is a clear gap in BB’s investigation in

failing to establish at that stage whether there was simply one message to one child, or multiple messages or images to multiple children. We accept that the respondent had tried and failed to get access to the police interviews that would have shown what the police had in mind, but we also know that the respondent had in its possession the original screenshots supposedly showing multiple messages to possibly two children, none of which included the message the claimant had admitted to. Those screenshots were not provided to either BB or the claimant, nor were they sought by BB.

59. BB's conclusion was that "*there may be a case to answer in respect of all three allegations*". She explained this odd form of wording on the basis that it was not for her to say whether there was a case to answer. That would be for the respondent to determine on submission of her report.
60. On 25 October 2019 CC met with and wrote to the claimant enclosing a copy of the report and saying that a disciplinary hearing would take place. As Mr Phelps points out, in that letter he adopted the wording previously used by BB, but this time without even the qualification that there may be "*good reason*" not to accept the JEM decision. He says:

"The report also highlights that any decision by [YY], not to accept the outcome of the Joint Evaluation Meeting (JEM), has the potential to put children at risk of harm in the future and is likely to be criticised by the local press, parents and other interested parties and therefore has the risk of bringing the reputation of [YY] into disrepute."

61. The minutes of the meeting record CC as having said that the claimant would be invited to a "*dismissal hearing*".

The addition to the investigatory report

62. By early December 2019 the respondent had persuaded the LADO to release the full JEM minutes. These were passed on to BB, who in turn sent them on to the claimant on 16 December 2019, saying:

"I have now had an opportunity to review the minutes and have concluded that there is insufficient new evidence within the minutes to justify inviting you to a second investigatory interview. However, I would like to give you the opportunity to comment upon the content of the documents and ask that you do so in writing by Monday 6th January 2020."

63. The claimant asked for an extension of time to reply as her union rep was due to be on holiday. This was partially granted to 9 January 2020. The claimant replied on 9 January 2020 criticising the minutes. Amongst other things, she says:

"You will recall that from the outset I have expressed my concerns over the content of the JEM minutes and flaws in the process on which the [YY] are basing their decisions. I have serious concerns over the

inaccurate and incomplete information that has been provided by all agencies and have written to each agency in turn to raise various issues and failings that are highly likely to have prejudiced my position and given rise to fundamental unfairness.”

64. The same day BB prepared an update to her report, addressing the official JEM minutes.

Summary so far

65. Setting aside the question of her computer use, by the time of the disciplinary hearing the claimant had admitted to sending a message of a sexual nature to someone she thought was a child, and not reporting it. In ordinary circumstances we consider that was bound to amount to gross misconduct and to have led to her dismissal.
66. This had been investigated by the police, who had concluded that multiple messages and images of a sexual nature had been sent by the claimant to multiple children, but that this would not at the time have constituted a criminal offence because it was done under duress.
67. Based on that police report (but with little or no first-hand evidence or input from the claimant) the claimant's head teacher and the Chief Executive of the respondent had concluded that she was guilty of gross professional misconduct and the LADO and JEM had concluded that the safeguarding allegations had been substantiated.
68. BB had been commissioned to investigate the matter, but without any understanding of what these multiple messages and images of a sexual nature were, despite the respondent having the screenshots that comprised the original allegations. She had started from the point of view that the police and JEM had reached the correct conclusion, although at least initially she only had the JEM outcome letter and AA's unofficial notes of the meetings. The claimant admitted to sending one message of a sexual nature. BB had not enquired about any others. Her report had said that the respondent needed "*good reason*" to not accept the JEM outcome, even though this was reached without any real input from the claimant, and there was no statutory or other official basis for such a statement.
69. By the time the claimant was invited to the disciplinary hearing, the question of "*good reason*" had been removed, with the respondent apparently suggesting that a simple failure to follow the outcome of the JEM process might expose it to criticism. CC had also told the claimant that she was invited to a "*dismissal hearing*".
70. Throughout the claimant had said that what she had done had been done under duress, in the context of a coercive and controlling relationship.

The disciplinary panel

71. The respondent convened a panel of three to conduct the disciplinary hearing. EE was to chair the panel. She describes her credentials in her witness statement:

“I am an Independent Education Consultant specialising in governance, leadership and management of multi-academy trusts, and independent and local authority schools. I have a professional background in safeguarding ... I was also the Head of the Virtual School for Looked After Children. I obtained my NSPCC qualification for safeguarding in 2017, which supplements my prior professional knowledge of safeguarding having worked in schools and with the local authority since 2008. As well as this, I provide various training packages to schools including for all areas of governance, safeguarding and attachment and trauma ... I was a National Leader of Governance and have chaired a number of panels for schools and multi-academy trusts. These include conduct and disciplinary, complaints, exclusions and grievance panels.”

72. There is even more to her experience than that, but on the face of it she seems to be very well qualified to conduct the hearing, and was joined on the panel by two others who also held impeccable credentials.

Medical evidence – Dr JJ’s first report

73. Ahead of the disciplinary hearing, the claimant commissioned a report from Dr JJ. The first report is dated 31 October 2019. Dr JJ is a specialist in Forensic Psychiatry.
74. This is a comprehensive and thorough report, obviously the product of considerable work by Dr JJ, and prepared following a letter of instruction from her solicitors (which we have not seen).
75. Dr JJ addresses several issues which would later form the basis of the claimant’s disability discrimination claim. Dr JJ saw the claimant for lengthy appointments on two occasions a week apart.
76. Dr JJ recounts the claimant’s family and personal circumstances, and her history of depression. The key elements of his first report are in the answers to the questions he has been asked:

“... it is reasonable to conclude that someone with a depressive disorder is a more likely to experience reduced self-esteem, reduced self-confidence, disproportionate feelings of self-reproach etc. On this basis, it would be fair to extrapolate that individuals with such symptoms would be more vulnerable to adverse influence and manipulation from others. This phenomenon not limited purely to depressive disorder. Mental disorder as an umbrella term, is often associated with vulnerability. An individual who is mentally disordered may use defence mechanisms to manage external influence. However, the defence mechanisms which are used by people with depressive disorder may not always be helpful or demonstrate positive adaption ...

Suffering from a depressive disorder in its own right would not lead someone into inappropriate conduct; however, suffering from depressive features may affect an individual's judgment and decision making. Nevertheless, I do not conclude that having a depressive disorder would have affected [XX's] capacity to understand the wrong associated with sending a message of this kind. The effect of the controlling and coercive relationship in the context of the mental disorder however is likely to have had an adverse effect on [XX's] conduct ... The fact that she was depressed and vulnerable at that time would have made it more difficult for her to defend herself against [the instruction to send the message] ...

... the nature of the controlling and coercive relationship would have adversely affected her judgement in the decisions she made around sending the inappropriate message to a 16 year old boy and failing to report the safeguarding concerns in her role as a teacher ...

... the fact that [XX] has previously sent a message of a sexual nature to a 16-year-old boy ... places her at an increased risk of sending further messages in the future. This is based simply on an actuarial appraisal of risk which dictates that an individual with a history of specified behaviour is at increased risk of carrying out the same behaviour in the future when compared to an individual who does not have the same history. However, it must be borne in mind that the sending of the message was carried out in very different circumstances, namely in the context of a controlling and coercive relationship. Therefore the aggravating and precipitating factors for the act are no longer present. These factors are dynamic in nature; i.e. providing that [XX] does not enter into another abusive relationship the fact that she is no longer in [the previous relationship] will reduce her risk of future harm to others. The context in which [XX] sent the message was extraordinary. The risk that she would find herself in the same circumstances is minimal, particularly in view of the medication and psychological therapy she has received for her mental disorder ... the risk of her re-enacting similar risk behaviour is minimal."

Medical evidence – Dr KK

77. The claimant commissioned a further report from Dr KK, a Clinical and Forensic Psychologist. This is a much shorter report, but Dr KK's conclusion is clear:

"[XX] is the victim of an abusive and controlling relationship that was formed at a point of significant vulnerability given her depressed and anxious state ... The pattern described is consistent with emotional abuse such that the victim can believe that they are responsible for it and will accordingly try harder to please the abuser and on occasion act in uncharacteristic ways. This, together with her depression and what she felt to be very real threats to her health and safety of her family and her career would ... have rendered her much more liable to go along with sending the text in question to a 16 year old she did not know ... The

effect on her career is yet to be established but in my professional opinion she does not pose a threat in regard to either poor judgment or a lack of capacity to understand her responsibility, or the implications of her actions. Outside the context of the abusive relationship she was involved in, it is my belief that [XX] is not a safeguarding risk and would not in my opinion repeat the behaviour of a text message that she admits to ... Further, she would not be a risk in terms of not reporting a potential safeguarding risk as her reason for not doing so at the time was a result of the fear and abuse she was experiencing.”

The disciplinary hearing

78. The disciplinary hearing took place on 27 & 28 February 2020. By this time BB had been nominated to present the management case. The first day of the hearing was taken up with the case against the claimant, with the second day being her response. The claimant was accompanied by her husband and trade union representative for those two days.

79. At the end of the notes of the second day, the following is recorded:

“[EE] reported that the panel had discussed what should be done as they obviously needed to pose questions to [XX] and that everyone in the hearing was quite tired and [XX] also had a headache. In the interests of everyone, it was decided that the hearing should be reconvened and although not ideal, this was the fairest and best option in the circumstances. [EE] reiterated that it was important that the proceedings were not rushed but were carefully considered.”

80. There were difficulties with scheduling a third day for the hearing, and by late March 2020 the first national lockdown for Covid-19 had started. It was the claimant’s position that until lockdown restrictions were lifted she could not attend a resumed hearing either in person or by video. However, the respondent pressed the point, scheduling a third day and offering the claimant the opportunity to attend either in-person (but socially distanced), by video or by submitting written representations. The disciplinary hearing resumed on 3 June 2020 based on written representations submitted by the claimant.

81. On 9 June 2020 the respondent sent to the claimant a letter headed “confirmation of summary dismissal”. This starts:

“I am writing further to the disciplinary hearing which concluded on Wednesday, 3rd June 2020 to confirm the outcome. The panel has decided that your employment with [YY] as Assistant Headteacher at [the school] should be terminated immediately for gross misconduct.”

82. The letter goes on to say:

“The disciplinary panel made the following findings of fact:

Allegation 1

You sent at least one message of a sexual nature to a child. You told the Investigating Officer that the message enquired whether the child was a virgin.

You admitted to having sent the above message sometime in early 2017. While it was suggested in the JEM meetings from October 2018 to June 2019 that you had sent multiple messages to children, you strongly refuted this and the panel felt that the evidence of any further messages, in addition to the one you admitted, was not clear enough to make a finding that further messages were sent.

On the basis of your admission, the panel found that you sent at least one message of a sexual nature to a child.

Allegation 2

You disclosed to the police in August 2018 that you had sent an inappropriate message to a child. This admission was made 18 months after the message was sent. The panel found that, prior to the disclosure to the police in August 2018, you had made no disclosure to your employer, despite having many opportunities to do so.

The panel also found that you were aware of and up to date with safeguarding training and you were fully aware that the sending of the message was inappropriate and constituted a safeguarding risk. You were aware of your duty to report safeguarding risks to the school's Designated Safeguarding Lead and you failed to comply with that duty.

During the course of the investigation, further concerns about your ability to recognise and report safeguarding concerns came to light. This was in relation to your relationship with another member of staff. The issue was raised in JEM minutes and brought up at the hearing. Specifically, you alleged that you had been subject to a serious sexual assault by a colleague. At the hearing you described the individual as "disgusting and perverted" and stated that you were happy that he left ... You did not report the assault which, in the panel's view, was in itself a serious safeguarding risk. The panel heard but did not accept, your point that, as this was an offence against an adult, it was not relevant to the safety of children and therefore did not require a safeguarding report.

Allegation 3

The panel found that you accessed the following websites for reasons which were unrelated to your work at the school:

- ... University website - 9 July 2018*
- Website relating to Narcissistic Personality Disorder - 9 July 2018*
- Illicit Encounters website - 9 July 2018*

While the content of the ... University website and the website relating to narcissistic personality disorder might not be inappropriate, the panel found that all three websites were accessed on the same day for personal reasons. They were accessed at a time when you should have been undertaking your professional duties as Assistant Headteacher and you should not have used school equipment for this purpose. This is in breach of the Trust's Acceptable Use of Technologies agreement which you signed to confirm you had read and understood on 4 September 2017. This agreement specifically states the following:

"I know that I should only use the school equipment in an appropriate manner and for professional use, unless otherwise agreed by the Headteacher".

The panel finds that you did not use the school IT equipment in an appropriate manner but instead used it for personal use and without agreement from the Headteacher. The panel also finds that the Illicit Encounters website contains material which could reasonably be regarded as offensive."

83. Under the heading "sanction" the letter says:

"We heard from you and your representative about the mitigating factors you wished us to consider. We therefore considered the following:

- *You stated that you were under duress when you sent the messages and that your mental health had been compromised due to an abusive and controlling extra-marital relationship.*

While the panel was willing to accept your description of the relationship with [PP] and acknowledged that you have been through a difficult time and your mental health has been significantly impacted, it did not feel that this amounted to adequate mitigation for your actions. As an educational professional with over twenty years' experience and in a senior position within your setting, you were fully aware of the need to safeguard all children from harm and that this includes those outside of your school, regardless of the outside pressures you were facing. Your duty to safeguard children is one which must take priority over all other concerns. You have followed all other safeguarding practices during this time and are clearly able to articulate your responsibilities as an educational professional in terms of safeguarding. You were therefore aware that your behaviour (and that of [PP]) was a safeguarding risk but for a period of 18 months you failed to report the conduct to anyone, despite there being various opportunities for you to do so. You, by your own admission, chose to protect your marriage (and were concerned about the stigma attached to this) over safeguarding all children including a child/children outside of your school

setting. You did not give the panel any assurance that, should a situation of this nature arise again, you would be able to put the wellbeing of children ahead of your personal issues.

- *In relation to the accessing of inappropriate websites, you told the panel that you had only accessed the “Illicit Encounters” website for a total of 24 minutes.*

The panel does not accept this as adequate mitigation for your actions. Any time spent accessing inappropriate websites for personal reasons during the school day without permission is a breach of the Trust’s Acceptable Use of Technologies policy.

- *That you realise with hindsight that your behaviour was not appropriate.*

While you did accept that your behaviour was not appropriate, your representations to the panel focussed mostly on excusing the behaviour and did not give the panel any confidence that you would do anything differently in the future. We noted with some concern the situation involving [GG] with whom you had a relationship but also accused of serious sexual assault. You told the panel on days 1 & 2 of the hearing that you had been sexually assaulted by this colleague and that ... you were glad to see [GG] moved out of your classroom. The panel was subsequently provided with email correspondence in which you were very supportive of this colleague and sought to prevent him being transferred out of your class. Whilst the panel respects your right not to pursue the alleged sexual assault with the police, there was potentially an ongoing danger to children which went unreported to [YY]. Furthermore, the email documentation provided to the panel on day 3 of the hearing calls into question the account you had previously given and gives the panel cause to question your credibility.

Taking into account the evidence and the issues you raised in mitigation, the panel considered whether there were any suitable alternative options in your case. However due to the seriousness of the conduct, the panel concluded that alternatives to dismissal were not appropriate. In particular, the panel felt that as an employee of a school you should be aware of the expectations of you. You were in a position of trust and failed to put the safety of children above your own issues. The panel did not believe you showed an understanding of the severity of your conduct and was not satisfied that you would put the safety of children first, regardless of your own personal circumstances. As such, the panel concluded that dismissal without notice or payment in lieu of notice was the appropriate sanction.”

The claimant’s appeal

84. The claimant appealed against the decision by way of a letter dated 16 June 2020, which starts with the following points:

“My reasons for appeal are as follows:

- *The panel failed to consider medical evidence and the impact of abuse on my actions*
- *The panel failed to recognise my remorse*
- *The panel erred in finding my actions were deliberate and wilfully negligent, such as to constitute a finding of gross misconduct*
- *There were several procedural failings*
- *The panel made factual errors which were recorded in their outcome letter*
- *The investigation was biased against me and the investigation lacked objectivity. The investigating officer’s opinions and speculation were evident throughout and a thorough investigation was not completed*
- *The outcome was pre-determined and the panel deferred to other agencies to support their decision*
- *There was no adequate consideration of my mitigation*
- *The minutes were not accurate and had significant omissions at both the investigation and hearing stage, as well as additional information inserted that was not discussed*
- *A disproportionate sanction was applied to me*
- *There was a failure to make a reasonable adjustment in connection with my disability*
- *The panel erroneously decided I was a future risk despite information to the contrary*
- *There were delays in the process which I feel provided an advantage to the panel*
- *The finding of gross misconduct was too harsh given the circumstances”*

85. The appeal hearing took place across three days, with the appeal outcome being contained in a letter dated 5 August 2020. The claimant’s appeal was dismissed.

86. We briefly note the following from the appeal outcome letter:

“The Appeal Panel did not consider that [the] medical evidence was sufficient to mitigate the finding of gross misconduct ...

The Appeal Panel acknowledges that there were some procedural failings. However, the Appeal Panel is of the view that these are minor points of procedural failing and they did not affect the outcome of the Disciplinary Hearing or materially impact the fairness of proceedings.

...

The Appeal Panel considered the information presented in respect of what you considered to be factual errors in the outcome letter ... The reference to “at least one message” – it was agreed that the Disciplinary Panel only had evidence of one message having been sent ...

The Appeal Panel are in agreement that there are factual errors in the outcome letter, but they do not consider these errors affected the outcome of the Disciplinary Hearing.

...

The Disciplinary Panel did not try to play down your account of the traumatic events you experienced, and they did acknowledge this. The Appeal Panel concur with this view but agree that this was not sufficient to mitigate the finding of gross misconduct.

...

Having considered all of the evidence, the Disciplinary Panel determined that you had committed gross misconduct and therefore the decision to terminate your employment summarily was appropriate. We do not consider the sanction applied to you was disproportionate and, as set out above, we believe adequate consideration was given to your mitigation.

...

The Appeal Panel agrees with the conclusion of the Disciplinary Panel that, on the balance of probabilities, the allegations of misconduct against you were proven. The Appeal Panel considers that these allegations (both collectively and individually) amount to gross misconduct and the decision to summarily dismiss you was therefore reasonable and fair in all of the circumstances.”

87. Thus while some of the claimant’s appeal points were upheld (at least in part) the appeal panel concluded that the decision to dismiss her was, nevertheless, correct, and her appeal failed to overturn the decision to dismiss her.

D. THE LAW

Unfair dismissal

88. Unfair dismissal is dealt with at section 98 of the Employment Rights Act 1996. It does not seem to be in dispute that the reason for the claimant's dismissal was a reason relating to her conduct, and that is a potentially fair reason. That being so, our decision is governed by section 98(4), which reads:

"... the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

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

(b) shall be determined in accordance with equity and the substantial merits of the case."

89. We adopt the following propositions (which we do not consider to be controversial) from Mr Phelps's closing submissions:

"An employer must follow a fair procedure when dismissing an employee (Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)).

The employer must act reasonably in treating the reason as a sufficient reason for dismissal: dismissal should fall within the "range of reasonable responses" Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.

BHS v Burchell [1980] ICR 303 provides that the employer must show at the time of dismissal, the employer believed the employee to be guilty of misconduct. Further, the Tribunal must be satisfied that at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct, and at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances."

Wrongful dismissal

90. On the question of a wrongful dismissal, the onus is on the respondent to show on the balance of probability that the claimant committed a repudiatory breach of contract and that the respondent dismissed her without notice in response to that. That is typically spoken of as being "gross misconduct" but the underlying question is whether the actions amounted to a fundamental breach of contract, and that is to be assessed on an objective basis.

Disability discrimination

91. Section 15(1) of the Equality Act 2010 provides that:

“A person (A) discriminates against a disabled person (B) if:

- (a) A treats B unfavourably because of something arising in consequence of B’s disability, and*
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.”*

92. Mr Phelps quotes the following from the judgment of Simler P in Pnaiser v NHS England [2016] IRLR 170:

“The ‘something’ that causes the unfavourable treatment need not be the sole or main reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

... the causal link between the something that causes unfavourable treatment and the disability may include more than one link ... it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.”

E. DISCUSSION AND CONCLUSIONS

Disability discrimination

“Arising from”

93. We have decided to look at the question of disability discrimination first, primarily because any finding that there had been disability discrimination must be considered when we look at unfair dismissal.

94. The first question is whether the sending of the message (and subsequent failure to report) is *“something arising from”* her disability.

95. Mr Phelps puts it this way in his closing submissions: *“C’s depression meant that she was more vulnerable to the coercion and manipulation exercised by PP”*.

96. We see this from Dr JJ’s first report: *“individuals with [symptoms arising from depression] would be more vulnerable to adverse influence and manipulation from other”* and *“the fact that she was depressed and vulnerable at that time would have made it more difficult for her to defend herself against [the instruction to send the message]”*. Dr KK says *“[The] abusive and controlling relationship ... together with her depression and what she felt to be very real threats to her health and safety of her family and her career would ... have rendered her much more liable to go along with sending the text in question.”*

97. The medical evidence is clear and not contradicted by the respondent. The claimant’s depression and its symptoms were a factor that made her more likely

to send such a message – by making her more vulnerable to “*the coercion and manipulation exercised by [PP]*”.

98. Faced with this medical evidence the respondent says that there is insufficient link between the disability and the sending of the message. As Mr Ratledge puts it in his closing submissions “*the connection is too far removed here ... the messaging was the result of extreme threats and coercion ... it would likely have still happened even absent depression. Even on the claimant’s basis the messaging was a result of the coercion and threats. The depression was simply part of the context.*”
99. In principle we accept that the claimant’s disability is not the most proximate cause of the sending of the message. The message was sent because of the duress from PP. PP was able to exercise such duress because of his abusive relationship with the claimant. The matter arising from the claimant’s disability was that she was less able to resist his threats and coercion.
100. As is clear from the extract from Pnaiser cited above there is no need for the matter arising from the disability to be the sole or even main cause of the unfavourable treatment. The connection may be indirect – that is, having more than one link. All that is required is for the matter arising from the disability to have a significant (or more than trivial) influence on the unfavourable treatment. In the context of this case that means the disability having a more than trivial influence on the behaviour that led to the unfavourable treatment: the sending and non-reporting of the message.
101. Neither of the medical experts attempt to put a figure on the degree to which the claimant’s disability contributed to her sending the message. That would be an impossible task, but the clear implication of both medical reports is that the depression was a significant factor. That comes across most clearly in Dr KK’s report where he says that it made her “*much more liable to go along with sending the text in question*”. Making it “*much more liable*” seems to us to indicate a significant or non-trivial effect. The sending of the message and failure to report it was a matter arising from the claimant’s disability.

Unfavourable treatment

102. Once the link is established, it is clear that there is unfavourable treatment. The claimant’s dismissal was unfavourable treatment. It is also clear that by the time of the dismissal (if not before) the respondent was aware of the claimant’s disability. Apart from anything else it had the reports from Dr JJ and Dr KK by the time of her dismissal.

Justification of discrimination

103. Justification of such discrimination requires the respondent to show that its behaviour was a proportionate means of achieving a legitimate aim. There is no “range of reasonable responses” in considering this. The tribunal must assess for itself whether the respondent’s behaviour amounted to a proportionate means of achieving a legitimate aim.

104. The “legitimate aim” relied upon by the respondent is its “*duty as an educational establishment to safeguard children and to mitigate the risk of harm to children*”. We do not think it is or can be disputed that this is a legitimate aim and was in fact pursued by the respondent in its dismissal of the claimant. Argument on this point must be around the question of whether dismissal was a “*proportionate means*” of achieving that legitimate aim. In this context, “*proportionate*” can be spoken of as equivalent to “*appropriate and necessary*”, which requires, amongst other things, considerations of whether it was necessary at all, and whether any lesser action would have been appropriate.
105. At first sight, our acceptance of the claimant’s argument that her disability had a significant (or more than trivial) effect on her sending the message (and not reporting it) is not necessarily helpful to the claimant.
106. It is not in dispute that the claimant’s depression is a life-long condition. It cannot be “cured”. There may be periods of remission, and symptoms may be eased with various coping strategies, therapies or perhaps medication. Nevertheless, the symptoms are liable to recur and it will always be with her. That raises the prospect that the conditions which lead to the claimant being vulnerable or prone to dangerous behaviour such as sending the message may recur. If so, there is nothing the claimant could do by way of willpower that could remove that risk. It is something she is medically vulnerable to. In those circumstances, it might be said that dismissal is more appropriate and necessary in her case than it would be in the case of someone who did not have that disability.
107. However, it is the claimant’s case that in fact the risks of recurrence of these conditions or her behaviour is negligible, so that the respondent’s decision to dismiss her is disproportionate.
108. In saying this, she relies on the opinions of Dr JJ and Dr KK. Dr JJ’s view is that:

“...the sending of the message was carried out ... in the context of a controlling and coercive relationship. Therefore the aggravating and precipitating factors for the act are no longer present. These factors are dynamic in nature; i.e. providing that [XX] does not enter into another abusive relationship the fact that she is no longer in [the previous relationship] will reduce her risk of future harm to others. The context in which [XX] sent the message was extraordinary. The risk that she would find herself in the same circumstances is minimal, particularly in view of the medication and psychological therapy she has received for her mental disorder ... the risk of her re-enacting similar risk behaviour is minimal.”

109. Dr KK says:

“Outside the context of the abusive relationship she was involved in, it is my belief that [XX] is not a safeguarding risk and would not in my opinion repeat the behaviour of a text message that she admits to ... Further,

she would not be a risk in terms of not reporting a potential safeguarding risk as her reason for not doing so at the time was a result of the fear and abuse she was experiencing.”

110. Both doctors emphasise that the misconduct took place in the context of the abusive relationship with PP. For Dr JJ, the steps taken by the claimant in seeking therapy and assistance with her disability mean that *“the risk that she should find herself in the same circumstance is minimal”* and *“the risk of her re-enacting similar risk behaviour is minimal”*. Dr KK says that there is essentially no safeguarding risk *“outside the context of the abusive relationship”*.
111. The respondent’s answer to this was given in the evidence of EE, to the effect that safeguarding is an absolute obligation and any risk – even a “minimal” risk – is unacceptable.
112. As Mr Phelps put it to EE in cross-examination, this appears to be setting an impossibly high standard. There will always be some degree of risk associated with anyone employed by the respondent, and the respondent employs hundreds if not thousands of people in front-line roles in education. How can EE be sure that all those people pose absolutely no risk to children?
113. The answer to this lies in an earlier passage of Dr JJ’s report:
- “... the fact that [XX] has previously sent a message of a sexual nature to a 16-year-old boy ... places her at an increased risk of sending further messages in the future. This is based simply on an actuarial appraisal of risk which dictates that an individual with a history of specified behaviour is at increased risk of carrying out the same behaviour in the future when compared to an individual who does not have the same history.”*
114. Dr JJ’s view is that, all other things being equal, someone who has done something once is more likely to repeat it than someone who has never done it is likely to do it for the first time. That accords with everyday intuition.
115. During her employment with the respondent the claimant had been through all necessary safeguarding tests and training. The respondent had no reason to think that she was any more likely than any other member of staff to commit a safeguarding breach. However, now that she had done so the respondent was right to regard the claimant as more likely than others on its staff to be a safeguarding risk, albeit that that would only arise in particular circumstances.
116. The question that remains for us is what the effect of the medical evidence is, and whether in the light of the medical evidence dismissal was proportionate: appropriate and necessary.
117. There are two rival medical opinions, with Dr JJ saying that the risk of a repeat was *“minimal”* and Dr KK saying there was *“no risk”*. We consider the opinion of Dr JJ to be more reliable. His report is, overall, more thorough than Dr KK’s. He contemplates the possibility of the same circumstances arising for the claimant, which Dr KK does not seem to. We do not think the same

circumstances can be ruled out, so it is appropriate to contemplate what might occur if that happened. Dr JJ's conclusion that the risk was "minimal" is correct and reliable.

118. What is the consequence of a minimal but non-zero risk of safeguarding issues arising? Mr Phelps must be right to say that the respondent can never be sure that each of its members of staff poses absolutely no safeguarding risk. The best it can do ahead of an incident is to put in place proper checks and training, which will no doubt include staff being alert to risks. However, the position changes once an incident has occurred and a person has been identified as having, in extreme circumstances, sent a message of a sexual nature to someone they think is under 18. As identified by Dr JJ they are more likely to repeat that than someone else would be to do it for the first time. In those circumstances the respondent is right to be cautious, and to regard a "minimal" risk as still amounting to a risk that it needs to address.
119. What could be done to address that risk short of dismissal? While the claimant (or her union representative) was seeking some action short of dismissal during the disciplinary hearing it was not clear what this might be. In his closing submissions in relation to unfair dismissal, Mr Phelps refers to Dr JJ's advice for supervision and attending a therapeutic program, but we do not see how those could be enforced by the respondent nor properly monitored by them. It is impractical to suggest that having identified some risk the respondent could mitigate them by insisting on therapy or supervision for the claimant. The nature of the claimant's previous offence had been that it was hidden and carried out even though she knew it was wrong. We find that the only effective way the respondent had to address the "minimal" risk of the claimant reoffending was by dismissing her.
120. The claimant's dismissal was a proportionate means of achieving a legitimate aim and so did not amount to unlawful disability discrimination.

Unfair dismissal

121. As Mr Ratledge said in his closing submissions, it does not seem to be in dispute that the reason for the claimant's dismissal was a reason relating to her conduct, and therefore a potentially fair reason under s98(1) of the Employment Rights Act 1996.
122. In his closing submissions, Mr Phelps addressed the question of fairness under two headings: substantive fairness and procedural fairness. Those are not necessarily formal legal categories of fairness. We are concerned with whether the dismissal is fair, not whether it is either procedurally or substantively fair. However, we will adopt the terms as they were used in argument before us.

Procedural fairness

123. Starting with procedural fairness, Mr Phelps says "*The procedure adopted by the respondent was manifestly unfair to the claimant.*"

124. The first point made by Mr Phelps is the undue influence of the JEM meetings, which the claimant had no or next to no input into. This had two elements. The first was that at the final JEM meeting both the claimant's head teacher and the respondent's chief executive had expressed concluded views that the claimant had committed gross professional misconduct. The second was the view taken by both BB and CC at various stages that the respondent was either bound to follow the LADO or JEM meeting recommendations or could only depart from it with "good reason" (and we note also CC's reference to convening a "dismissal meeting").
125. Both points have given us cause for concern. Prejudging the outcome of a disciplinary hearing will often, perhaps always, be unfair. BB took the wrong approach to her investigation, which was later reinforced by CC in setting up the disciplinary hearing.
126. However, it is clear that the decision to dismiss was taken by the panel chaired by EE, not AA or DD who had previously expressed views in the JEM meeting, or CC. The lack of any input to the decision to dismiss from DD is shown by the fact that neither the investigator nor disciplinary panel were aware of the screenshots that had originally been provided to her. It was not AA, CC or DD's decision to dismiss the claimant. It was the decision of the panel chaired by EE, and that panel had not previously expressed any conclusion as to the claimant having committed professional misconduct. It is clear from the three days taken over the disciplinary hearing that the panel, although entitled to be very concerned about the allegations, did not prejudge the matter and did take into account what they were told by the claimant. Similarly, it does not seem to us that the panel took the view that they had to abide by the LADO/JEM's findings, or that they could only depart from the with "good reason". The decision of the panel was formed without the prejudgment that seemed to affect AA, BB, CC and DD.
127. We can add to our concerns about the investigation that BB never took any steps to establish whether there were multiple messages (and images) sent to multiple children. This seems to us to be a remarkable omission. However, the panel made their decision on the basis that there was one message, and it has not been suggested that investigating the possibility of other messages could have made things any better for the claimant or itself is a matter of unfairness.
128. There is a further issue as to the significance of the claimant's allegation of sexual assault or rape by a colleague, GG.
129. This emerged during the disciplinary hearing. The disciplinary panel were critical of how the school handled this point when it was first raised with them (in a somewhat different form). As cited above, the dismissal letter says that the claimant's account of this "*gives the panel cause to question your credibility*". That was on the basis that after the hearing the panel were provided with an email previously sent by the claimant said to be supportive of GG. The claimant was never shown this email before it was addressed by the disciplinary panel, and says that if she had been shown the email she would have explained that

it was not a supportive email and should not have given rise to the question around credibility that the panel thought it did.

130. The disciplinary panel taking into account matters that the claimant was not aware of is a cause for concern and might often be said to lead to unfairness. However, we do not find that it does so in this case. Given that the underlying facts were not in dispute in this case, and the disciplinary panel accepted the essential element of the claimant's case – that she had sent one message under duress, it does not seem to us that substantial issues of credibility arose. Accordingly, the panel's reference to this email did not give rise to unfairness.
131. We note that a further aspect of procedural unfairness is said by the claimant to be that the panel were not independent, as all had previous connections with the respondent. We do not accept that as a relevant criticism. It has never been the case that those who decide on dismissal must have no previous connection with the employer. The reverse is true. In most cases they will be employees of the employer. What matters for the purposes of this case is that they were independent of the views of AA, BB, CC and DD as referred to above.
132. The investigation was unsatisfactory but does not make the claimant's dismissal unfair. The failure to investigate whether there were multiple messages or images to multiple children makes it difficult for us to say that as much investigation as was reasonable in the circumstances was carried out. The investigation should have gone further, but going further would not have made things any better for the claimant and the failure to go further did not make her dismissal unfair.

Substantive unfairness

133. On "substantive fairness" Mr Phelps says that the decision to dismiss the claimant was outside the range of reasonable responses open to an employer and goes on to consider that by reference to four sub-headings: the role of duress, C's minimal safeguarding risk, R's investigation into the misconduct and "Allegation 3".

Substantive unfairness – the effect of duress

134. Although we accept it is not entirely clear from the dismissal letter, EE was clear in her oral evidence that her panel accepted the claimant's position that the sending of the message had been carried out under duress – that is, that her or her children's lives would be at risk if she did not send the message.
135. Employment law does not have an established doctrine of duress in the way that other areas of law may have. Such extreme circumstances as occurred in this case are not common. Equally, rigid rules and legal structures as to the effect of duress are not necessary when looking at unfair dismissal, where the tribunal is to consider "*equity and the substantial merits of the case*". Duress is a factor to be considered by the employer, and equally to be considered by the tribunal in assessing whether the respondent acted outside the range of reasonable responses in this case.

136. We have spent some time discussing the effect of duress in looking at the question of discrimination arising from a disability. That was while forming our own view of whether the respondent's behaviour towards the claimant was justified in the context of disability discrimination.
137. So far as unfair dismissal is concerned, it is not a question of what we would have done, and the respondent has the benefit of the "range of reasonable responses". Was it outside the range of reasonable responses for the respondent to dismiss an employee who committed a breach of safeguarding rules (and did not report it) while under duress?
138. We find that this was not outside the range of reasonable responses open to an employer in this situation. In saying so, we draw on our analysis of matters in relation to the disability discrimination claim. The problem described by EE was how the respondent could continue to employ the claimant knowing that she had committed a breach of safeguarding (and therefore was more likely than other to do it again) albeit against the background of "minimal" ongoing risk. The respondent's decision to dismiss the claimant was within the range of reasonable responses for essentially the reasons we give in our analysis of justification of disability discrimination.

Substantive unfairness – the investigation

139. We have addressed the problems with the investigation under the heading "procedural issues" and in doing so have also addressed any questions of substantive unfairness.

Substantive unfairness – allegation 3

140. For the reasons previously given we do not consider that allegation 3 played any substantial part in the decision to dismiss the claimant and we do not need to address the claimant's arguments on that point.
141. The claimant's dismissal was not unfair.

Wrongful dismissal

142. As we have made clear previously, we regard it as clear that without the explanation of duress the claimant's actions in sending the message and failing to report it would be bound to be considered gross misconduct: a repudiatory breach of her contract.
143. The question that follows is what difference the duress makes. The respondent accepted (as do we) that the claimant sent the message under duress, in that she believed that either she or her children would come to harm if the message was not sent.
144. It was the claimant's case that this provided the context to the sending of the message, and that context took the message outside the realms of gross misconduct.

145. The significance of duress in assessing whether there has been a repudiatory breach of contract is a difficult one. Setting aside statutory overlays such as unfair dismissal, employment contracts are usually thought of as being subject to the same legal rules as any other contracts are, but neither counsel were able to refer us to authority on the effect of duress on whether there has been a fundamental breach of contract.
146. We start from the position that repudiatory breaches of employment contracts are to be determined on an objective basis, and that it is not necessary for someone to intend to commit a repudiatory breach of contract. Approaching it from that perspective, we consider that the sending of the message (and failure to report it) is, objectively speaking, a repudiatory breach of contract. The motives for that do not affect that. The explanation of duress may, in that context, be a reason why the respondent chooses not to exercise its right to terminate the contract but does not deprive the respondent of the right to terminate the contract. Even given that her breach of contract was committed under duress, the claimant was in repudiatory breach of contract. The respondent then had the right to summarily terminate the contract, which it did. The respondent did not breach the claimant's contract in dismissing her without notice. The claimant was not wrongfully dismissed.

**Employment Judge Anstis
3 November 2023**

Sent to the parties on: 28 November 2023

For the Tribunals Office