



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K E Leigh

**Respondent:** The Governing Body of Corpus Christi Roman Catholic High School

**Heard at:** Manchester

**On:** 12-15 February 2024 and  
in chambers on 4 April 2024

**Before:** Regional Employment Judge Franey  
Ms A Roscoe  
Mr P Dobson

## REPRESENTATION:

**Claimant:** Mrs K L James (Lay Representative) and  
Miss V Woods (Claimant's wife)

**Respondent:** Ms S Cummings (Counsel)

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The respondent did not commit any repudiatory breach of the claimant's contract, so the claimant's resignation was not a "constructive dismissal", and the complaint of unfair dismissal is dismissed.
2. As there was no dismissal the complaint of breach of contract in relation to notice pay is also dismissed.
3. The complaint of direct discrimination because of the protected characteristic of marriage contrary to section 13 Equality Act 2010 is dismissed upon withdrawal.
4. The complaint in relation to holiday pay fails and is dismissed.

# REASONS

## Introduction

1. By a claim form presented on 23 June 2022 the claimant complained that he had been the subject of an unfair dismissal (by way of a “constructive dismissal”) when he resigned in March 2022 from his role as a Site Manager for the respondent school. The claimant alleged that there had been a fundamental breach of his contract of employment in the way that the school had dealt with allegations of bullying made against him. He also alleged that there had been discrimination against him because he was married, and that he was owed notice pay and holiday pay. His claim form set out his claim at some length and explained that he had resigned following the imposition of a second stage disciplinary warning. He alleged that the investigation and disciplinary process had been unfair and biased.

2. By its response form of 27 July 2022 the respondent defended the claims on the basis that there had been no breach of contract, and no unfair dismissal. It denied that the claimant was due any notice pay or holiday pay or that there had been any less favourable treatment because he was married.

3. The legal complaints and issues were identified by Employment Judge Allen at a case management hearing on 7 October 2022, and this final hearing was listed to deal with liability only. There were two further case management hearings in June and August 2023 to deal with disputes about disclosure and witness orders.

4. The hearing began with the claimant represented by Mrs James, but she became unwell on the morning of 14 February 2024. She was unable to continue, but Miss Woods was able to take over as his representative in her personal capacity as his wife to ensure that the hearing remained on track. The Tribunal was very grateful that Miss Woods was able to step in at such short notice to represent the claimant. The time lost was limited, and we were able to complete evidence and submissions within the four days allocated. Judgment had to be reserved.

## Complaints and Issues

5. At the start of the hearing we clarified with both sides that the agreed List of Issues set out by Employment Judge Allen remained valid, and that was confirmed.

6. The list of issues changed during the hearing. Paragraphs were inserted to preserve the right of the respondent to argue that even if there had been a constructive dismissal, it was nevertheless fair, but that argument was abandoned in submissions.

7. On 14 February during the hearing the marital discrimination complaint was withdrawn.

8. Allegations j and m within the constructive dismissal complaint were withdrawn too. The real dispute about holiday pay became clear.

9. As a result, the List of Issues to be determined by the Tribunal was as follows:

**Constructive Unfair Dismissal - Part X Employment Rights Act 1996****Dismissal**

1. Did the respondent commit the alleged conduct summarised at paragraphs 57 and 59 of the Grounds of Claim, namely:
  - a. Allowing malicious and false allegations to be made by James Simpkin;
  - b. James Simpkin being aggressive towards the claimant;
  - c. Failing to address the aggression of James Simpkin, including by use of a risk assessment;
  - d. Allowing a hostile working environment to persist by requiring the claimant to work with James Simpkin, who was aggressive towards the claimant;
  - e. Failing to provide the claimant with any, or any sufficient support, regarding his concerns about and/or working relationship with James Simpkin;
  - f. Failing or refusing to change the claimant's line manager;
  - g. Failing in good time to inform the claimant that James Simpkin had lodged a grievance against the claimant in May 2021;
  - h. Failing to conduct a risk assessment in relation to the claimant and his working circumstances, on either occasion when the claimant returned to work following sick leave in 2021/22;
  - i. Challenging in writing the claimant's request for a risk assessment upon his return from sick leave;
  - j. [withdrawn];
  - k. Breaching the UK General Data Protection Regulation ("GDPR");
  - l. Failing to satisfactorily address any breach/es of GDPR;
  - m. [withdrawn];
  - n. Conducting an unfair disciplinary and/or investigation process into allegations against the claimant, including:
    - i. Conducting a formal, rather than informal, investigation process;
    - ii. Failing to consider the witness evidence of the claimant at the early stages of the investigation process which could have allowed the formal disciplinary process not to be required;
    - iii. Unreasonable delays in the investigation and disciplinary process;
    - iv. Failing to follow its own procedures regarding disciplinary, investigation and grievances;
    - v. Failing to speak to/contact Lancashire County Council management regarding the concerns regarding James Simpkin;
    - vi. Failing to take evidence from the claimant's wife;

- vii. **Acting unfairly and/or outside of policy and/or conducting a biased investigation, including:**
    - 1. **Failing to appoint a member of the senior leadership team within the School to conduct the investigation;**
    - 2. **Appointing an external party to carry out the disciplinary investigation;**
    - 3. **Protecting Claire Neville and/or Cath Wallace;**
  - viii. **Speaking to the claimant during the investigation in a manner that treated him like a criminal;**
  - ix. **Failing to provide the claimant with any, or any sufficient support during the investigation and/or disciplinary process;**
  - x. **Failing to provide an open and transparent investigation report that addressed the witness evidence of the claimant at the outset;**
  - o. **Requiring the claimant to attend a disciplinary hearing following an unfair and/or biased investigatory process;**
  - p. **Failing to believe the claimant during the investigatory and/or disciplinary process;**
  - q. **Believing James Simpkin instead of the claimant;**
  - r. **Issuing the claimant with any disciplinary sanction and/or issuing the claimant with a sanction of a second (stage) written warning.**
- 2. **Was the respondent's conduct, as alleged by the claimant in the Grounds of Claim, something which:**
  - a. **Was without reasonable and proper cause, and was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent?**
  - b. **Was a breach of the implied duty to provide a suitable working environment?**
  - c. **Was a breach of the respondent's duty of care for the claimant's health and safety?**
  - d. **Was a breach of the respondent's duty to provide the claimant with a redress of his grievance/s?**
  - e. **Was a breach of the respondent's duty to provide reasonable support to the claimant?**
- 3. **Was the respondent therefore in repudiatory breach of contract?**
- 4. **Did the claimant resign in response to such repudiatory breach of contract?**
- 5. **Alternatively, can the claimant show that any of the alleged breaches together formed a series of breaches capable of amounting to a repudiatory breach of contract?**
- 6. **If so, was the last in that series of breaches capable of amounting to the last straw?**

7. If so, did the claimant resign directly in response to any last straw?
8. Did the claimant affirm his contract of employment following the repudiatory breach but prior to his resignation?

**Fairness**

9. The respondent concedes that if there was a constructive dismissal, it was unfair.

**Remedy for Unfair Dismissal**

10. Is the claimant entitled to compensation?
11. Would the respondent have dismissed the claimant fairly but for his resignation (*Polkey -v- AE Dayton Services*)?
  - a. If yes, what, if any, adjustment should be made to the compensatory award to reflect this?
12. What, if any, adjustment should be made to any compensation awarded to reflect any unreasonable failure by the claimant or the respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?
13. What, if any, adjustment should be made to any compensation awarded to reflect any contributory conduct?

**Notice Pay**

14. Was the respondent in repudiatory breach of the claimant's contract of employment?
15. Did the claimant resign in response to a repudiatory breach of contract by the respondent?
16. What notice payment is the claimant entitled to in such circumstances?

**Holiday Pay**

17. Did the respondent fail to pay the claimant for five days of annual leave which had been carried over but not taken?

**Evidence**

10. The parties had agreed a bundle of documents which exceeded 615 pages, and with the agreement of both sides further documents were added at the start of our hearing. The final bundle exceeded 750 pages. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

11. We were also provided with a five page document from Mrs James which was a synopsis of the allegations in the investigation report and why the claimant said that the conclusions were unfounded. We treated that as a written submission, not as primary evidence of fact.

12. Permission had been given for supplementary statements to be served. The claimant gave evidence himself pursuant to a witness statement and a supplementary statement. He also called his wife, Miss Woods, and she too had made a statement and a supplemental statement. His third witness was Roy

Morden, a former colleague who represented the claimant at the disciplinary hearing. By agreement he gave evidence by video link, unlike the other witnesses who gave evidence in person.

13. The respondent called three witnesses. Catherine Wallace was the School Business Manager and the claimant's line manager at the relevant time. John Hankin was the Headteacher from September 2021, and the person who took the decision to impose a disciplinary warning on the claimant. Jeanette Whitham worked in Human Resources ("HR") for Lancashire County Council ("LCC"), the education authority, and at the time was Head of Schools HR. She conducted the investigation into the allegations made against the claimant.

14. Mrs James applied for the respondent's witnesses to give evidence first, so that she would have the opportunity of making a submission of "no case to answer" at the end of that evidence in the hope of shortening the trial. We refused that application. Firstly, in a constructive dismissal case the claimant bears the burden of proving that his resignation should be construed as a dismissal, and therefore it was the respondent who would have a case to answer once the claimant had given his evidence first. Secondly, even if the intention was to submit that the response should be struck out under rule 37 because it had no reasonable prospect of success, that was almost certainly not going to be appropriate in a fact sensitive case of this kind. The time spent in hearing and determining such an application would have eaten into the time available for oral evidence. We decided that the claimant and his witnesses should be heard first.

## Relevant Legal Principles

### Unfair Dismissal

15. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which 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."**

16. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

17. If there has been a repudiatory breach of contract by the employer, the employee's resignation will be construed as a dismissal as long as he has not affirmed the contract and the breach is a reason for his resignation.

18. The term of the contract upon which the claimant relied in this case was primarily the implied term of trust and confidence. In **Malik and Mahmud v Bank of**

**Credit and Commerce International SA [1998] AC 20** the House of Lords considered the scope of that implied term and Lord Nicholls expressed it as being that the employer would not:

**“...without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”**

19. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

**“The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.”**

20. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

21. Not every action by an employer which can properly give rise to complaint by an employee will breach trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King** **UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

**“12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O’Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying “damage” is “seriously”. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**

**“... apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.”**

**13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**

**14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was “conduct with which an employee could not be expected to put up”. In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.”**

22. In some cases the breach of trust and confidence may be established by a succession of events culminating in the “last straw” which triggers the resignation.

The last straw need not be a fundamental breach itself as long as it is not innocuous or trivial: **London Borough of Waltham Forest v Omilaju [2005] IRLR 35 ; Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

23. As well as the **Malik** term, the claimant relied on four other implied terms of his contract of employment set out in paragraph 2(b)-(e) of the list of issues above.

24. The first was the duty to provide a safe working environment. That is a duty to provide, so far as is reasonably practicable, a working environment reasonably suitable for the performance of contractual duties: **Waltons v Dorrington [1997] IRLR 488.**

25. The second was the duty to ensure, so far as is reasonably practicable, the health, safety and welfare of employees. It is derived from section 2 of the Health and Safety at Work etc Act 1974 and the subject of much subordinate legislation.

26. The third was the implied term obliging an employer to provide a means of obtaining redress for a grievance (**Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516**), although as the claimant did not lodge a grievance it was unclear where any breach was said to have occurred.

27. The fourth was implied duty to take such steps as it is reasonable to take to provide support to an employee in carrying out his duties, derived from **Wigan Borough Council v Davies [1979] ICR 411.**

#### Notice Pay

28. The complaint for notice pay was brought as a complaint of breach of contract. It hinged on whether there had been a constructive dismissal. If so, the employer's conduct would be what in truth brought the contract to an end when the claimant accepted that breach by resigning, and the claimant would be entitled to damages to put him in the position he would have been in if the contract had been terminated lawfully on notice.

#### Holiday Pay

29. The holiday pay claim was put as one of unlawful deductions from pay. The respondent accepted it was obliged to make payment for accrued but untaken annual leave when a contract ends. It became apparent during the evidence that the issue was purely factual: whether the claimant could prove that he had carried over five days of leave into his final leave year.

#### **Findings of Fact**

30. This section of our Reasons sets out the broad chronology of events, resolving where necessary any disputes as to the primary facts.

#### Background – Contract and Policies

31. The respondent is a High School with almost 100 staff. The claimant was employed in September 2016 as Site Manager, reporting to the School Business Manager Catherine Wallace. As Site Manager the claimant was responsible for matters relating to premises, including opening and closing the school each day, and



dealing with any maintenance emergencies. He managed a team of approximately eight people including the cleaning staff.

32. The claimant's contract appeared at pages 195-204. It said he was employed in accordance with any policies adopted by the Governing Body.

33. The respondent had a bullying and harassment policy for staff dated February 2018 which appeared at pages 104-112. It defined bullying as follows:

**“Bullying is a form of harassment and can arise through the persistent, intentional or conscious abuse or misuse of power or position, malicious or insulting behaviour that criticises unreasonably or unjustifiably; condemns, humiliates and undermines an individual’s skills and ability such that he/she becomes fearful, his/her confidence lessens and belief in self is lost.”**

34. It went on to give examples of bullying which included “persistent unjust criticism and public humiliation”, “overbearing supervision or misuse of power or position”, and “excessive and unreasonable supervision”.

35. Clause 5.7 on page 111 set out the role of an investigating officer. Complaints were to be investigated thoroughly in an open and transparent way, and the investigator was then to prepare a report for consideration by the headteacher. He or she might attend subsequent hearings as a witness in relation to the investigation process and conclusions. That could involve a disciplinary hearing.

36. The policy was accompanied by an “Investigations Guide” revised in December 2016 (pages 114-125) and September 2021 (pages 147-157). The Guide came with model procedures (pages 132-146) which the respondent sought to follow. These provisions were relevant:

- The effect of clauses 7.3 and 7.4 was that the respondent to the complaint (i.e. the claimant in this case) should be advised in writing of the allegation within ten working days of the complaint being formally acknowledged.
- Clause 7.5 imposed an obligation on the headteacher to consider any immediate action such as alternative working arrangements.
- Clause 7.6 said that wherever possible the investigation process should commence within ten working days of the submission of the complaint form. The investigation process had to be “open and honest, without bias to either party”.
- Clause 7.7 said that the investigation process should last no longer than 30 working days, although it recognised that complexities or delayed availability could cause delays, in which case both sides should be informed.
- Clause 7.9 said that the role of the headteacher was to consider, in the light of the findings of the report, the possible outcomes and come to a decision. That clause read as follows:

**“In considering the findings of the investigation the headteacher...should bear in mind the principle that the investigating officer’s conclusions will have been reached on the balance of probability as to whether harassment took place in relation to the appropriate definition of harassment.”**

The clause went on to give a number of possible outcomes which included taking no formal action or disciplinary action.

- Clause 7.10 required a copy of the report to be provided both to the complainant and the respondent.

37. The respondent’s disciplinary and dismissal procedure for support staff dated from October 2021 and appeared at pages 158-170. The policy recognised that the Governing Body could delegate to the headteacher the power to make disciplinary decisions, although the decision to dismiss an employee had not been delegated (page 159). The powers of the headteacher to take disciplinary action appeared in clause 8.3 (page 163) and extended to demotion, transfer and issuing one of three levels of disciplinary warning. A second written warning would be appropriate if the misconduct was more serious than would warrant a first written warning, and a second written warning would be retained on file for a period of one year.

#### Recruitment of James Simpkin

38. In November 2020 the respondent was recruiting an Assistant Site Supervisor who would report to the claimant. He and Mrs Wallace conducted interviews. One of the candidates was Mr Simpkin. The claimant gave him a tour of the school lasting just more than an hour and he was interviewed for about an hour as well on 5 November 2020. The interview went well. He was offered the job subject to references.

39. The claimant’s wife, Miss Woods, is a Legal Executive employed by LCC who deals mainly with personal injury claims.

40. On either 5 or 6 November 2020 Miss Woods became aware that Mr Simpkin was about to be offered a role at the school. She told the claimant that she knew him, and it was evident to him that she had a concern about the school employing Mr Simpkin. Miss Woods spoke to Mrs Wallace on the telephone that evening and conveyed her concerns. She did not explain what those concerns were to the claimant, but he knew that she had some information about Mr Simpkin which might lead to her being “compromised” if he took up employment at the school.

41. On the following Monday morning Mrs Wallace reported the telephone call to the then headteacher, Mr Hubbard. Mrs Wallace spoke to Claire Neville, the HR adviser for the school from LCC, and told her what had happened. She was advised that the call from Miss Woods had been inappropriate, and that there was no reason why Mr Simpkin should not be appointed if the references proved satisfactory.

42. Mr Simpkin’s references proved satisfactory, and he started work at the school in January 2021.

43. When Mr Simpkin started the school was still quiet due to the national Covid lockdown. The claimant was training him so that he would be able to do the job. He

subsequently alleged that the claimant's attitude towards him had changed since the tour and interview in November, and that the claimant was "frosty" towards him when he started. He made seven allegations of inappropriate treatment by the claimant which we will summarise here. We will use the same headings as were later used in the investigation report.

#### Allegation 1 – Locking up procedures

44. The claimant started work at 6.00am each day and finished at 2.00pm. Mr Simpkin was contracted to start work at 12 noon and finish at 6.00pm. It was his responsibility for locking up the school at the end of each day.

45. Mr Simpkin alleged that from the start the claimant regularly chastised him for 15-20 minutes about minor errors when locking up, such as leaving a light on in a classroom or accidentally leaving a window open. He alleged that the claimant would remind Mr Simpkin that he was on trial and should not be making such mistakes.

#### Allegation 2 – Leaky pipe in Humanities Building

46. On Friday 5 February 2021 Mr Simpkin and cleaning staff noticed a leaking pipe. He was unable to locate a stop tap or valve and so rang the claimant, who asked him to trace the pipes through the wall and send some photographs. The stop tap could not be located so Mr Simpkin alleged he was told to leave it because the claimant and his daughter would come in to look at it.

47. He alleged that on the following Monday the claimant spoke abruptly to him, asking him why he had not mentioned a locked room next to the toilet, and said to him that his 14 year old daughter could find it so why couldn't Mr Simpkin. He alleged that the claimant again reminded him that he was still on trial and asked how he could cope if he could not sort out a simple leak.

#### Allegation 3 – Half-term week 15-19 February 2021

48. The claimant was to be on leave in the half-term week and Mr Simpkin alleged that in the previous week the claimant verbally forced him to work two additional hours each day during half term. Mr Simpkin alleged that he did not feel able to challenge the claimant about this. He said that he raised his concerns with Mrs Wallace who told him that the claimant was not allowed to instruct him in that way. He later alleged that Mrs Wallace told him to "watch his back" with the claimant.

#### Allegation 4 – Sticky substance removal

49. On 6 May 2021 Mr Simpkin had to use a new substance to remove some residue from a sticky tape, and alleged that he was verbally abused by the claimant when being questioned about how the substance had been mixed. He alleged that the claimant told him the product was too expensive to be wasted, questioned whether Mr Simpkin knew the CoSHH requirements and told Mr Simpkin he was "digging himself a hole" when explaining himself.

50. He also alleged that the cleaning staff told him later that day that the claimant had told them to say that he had not been bullying Mr Simpkin if they were asked anything by Mrs Wallace.

Allegation 5 – Boiler room incident 10 May 2021

51. The previous Friday Mr Simpkin had placed three broken chairs on a desk, but then had forgotten to do anything with them because he had some painting work to do. He alleged that the following week the claimant had placed the chairs in the boiler room and asked him if they “seemed familiar”. He alleged that the conversation with the claimant escalated, that the claimant blocked his exit and that Mr Simpkin had needed to push him out of the way to get past. He alleged that the claimant followed him outside, and that he felt threatened and had to ask the claimant to leave him alone.

52. The incident came to management’s attention and the two men were asked to write an account.

53. Mr Simpkin’s account appeared at pages 265-266. He gave an account of the sticky substance incident, in which he alleged that he had been verbally abused unnecessarily by the claimant over a minor issue. He then gave an account of the boiler room incident, alleging that the claimant tried to block his exit, followed him when he did leave, and that he felt threatened. His letter said:

**“I have been subjected to similar emotional attacks over the last nineteen weeks [of] which some have been reported.”**

54. The claimant’s note appeared at page 208. It gave a different account of events. He had had to move the chairs because Mr Simpkin had forgotten to do that the previous week. He did not think that Mr Simpkin’s excuse of having to do painting was a good one, and he was explaining why leaving damaged chairs on top of desks was a health and safety risk when Mr Simpkin “blew up”. Mr Simpkin was shouting and stormed off when the claimant tried to talk to him. The claimant went to follow him, but Mr Simpkin said threateningly that he had better not come anywhere near him. The claimant's note said he reported the incident to Mrs Wallace.

55. After this incident there was a series of meetings. These were informal, albeit involving the Headteacher. Mrs Wallace and Mr Hubbard had a meeting with Mr Simpkin, then a meeting with the claimant. He told them that he had been receiving silent phone calls. Mrs Wallace and the headteacher met Mr Simpkin again. There were no notes of these meetings in the bundle of documents although reference was made to them in different documents and in witness statements. Mediation was not taken forward because the two men would not agree. The position was that both of them had behaved inappropriately and things would be monitored.

56. Mrs Wallace confirmed in her oral evidence that in these discussions the claimant did say that if he had not handled matters properly there could be some training.

Allegation 6 – out of hours phone call 6 August 2021

57. Mr Simpkin alleged that on 6 August the claimant telephoned him. He had been on annual leave for two weeks. The call lasted nine minutes. The date happened to be his wedding anniversary.

58. He alleged that the claimant rang him to chastise him about not telling him about a resignation from one of the cleaners, and not repairing or reporting faults in the school. Mr Simpkin alleged that these issues could have waited for his return to work.

Allegation 7 – out of hours phone call 2 September 2021 and discussing private matters with contractors

59. Mr Simpkin alleged that he was contacted at just after 9.00pm by the claimant, but did not answer the call. He had a text from the claimant asking him to ring urgently but did not.

60. The following day at work he said he was questioned by the claimant about why he had not answered the call, but in front of a contractor who found it amusing.

61. Mr Simpkin also alleged that he later overheard the claimant telling the contractor about a time when Mr Simpkin had left early because he had lost his wallet. Mr Simpkin alleged that he asked to speak to the claimant privately but the claimant refused,

62. He said that this was the final straw. He went off sick the same day and did not return before his resignation with immediate effect on 10 October 2021.

Simpkin Complaint September 2021

63. On 3 September (page 267) Mr Simpkin submitted a letter to Mrs Wallace headed "Formal Grievance". He said he had been subject to chastisement and threats of losing his job, and bullied on a daily basis. He said that the claimant had spoken unprofessionally about his work and personal issues to contractors. He mentioned the threatening behaviour in the boiler room incident. His letter said that in a meeting with the previous Head, David Hubbard (who had been succeeded by Mr Hankin in September 2021) and Mrs Wallace it had been acknowledged that he was being abused by the claimant.

64. Management considered that this was a bullying and harassment complaint, and on 16 September Mr Simpkin completed the bullying and harassment formal individual complaint form (pages 248-251). That included the seven allegations summarised above, and supporting evidence in the form of telephone records and photographs. Attached at pages 252-257 were typed notes of each of the seven incidents.

65. On 22 September Mrs Wallace emailed the HR adviser, Claire Neville (page 210) saying that Mr Simpkin had not completed questions 8 and 9, which asked him to outline details of attempts to resolve the matter and his preferred outcome. She also said she would really like to try and sort it out informally if they could as no form of mediation had been tried. Mrs Neville responded the same day (page 210) to

confirm that the whole form had to be completed, and that if both were willing to consider mediation then it might be possible. Mrs Wallace should check with Mr Simpkin first.

66. The missing page from the bullying and harassment complaint form was provided on 30 September (page 211). Mr Simpkin wanted it to be dealt with formally, not informally. He said that his preferred outcome was for the claimant not to be allowed to manage staff, and that he should have compensation.

#### October 2021

67. On 1 October Mrs Neville emailed Mrs Wallace to say that Jeanette Whitham of LCC HR would be the investigating officer. She told Mrs Wallace to make sure the claimant had a copy of the full complaint and the procedure.

68. On 10 October Mr Simpkin, who had been off sick since 3 September, resigned with immediate effect.

69. The meeting with the claimant to hand over the complaint and the procedures information did not take place until 15 October. The claimant was aggrieved because the information was given to him at the very end of the last working day before the half-term break, when he was going to be on leave. The claimant believed that it had been delayed to this point deliberately. Mr Hankin left it until late in the school day when it was quiet as he did not want the claimant to be interrupted if trying to read it all.

70. On 20 October the claimant supplied a witness statement responding to the allegations (pages 290-301). The witness statement made clear that he was the innocent party but made to feel guilty, and the effect this had had on his wellbeing. He provided a background to the events and his comments on the seven allegations. He made comments on the letters from Mr Simpkin of 10 May 2021 and 3 September 2021. He made clear that he was critical of Mr Simpkin's standard of work and use of foul language. He denied having bullied him or treated him inappropriately.

71. Ms Whitham made contact with the claimant on 29 October (page 218). She explained that she would interview other witnesses before interviewing him. She had received a copy of the witness statement which the claimant had already provided to Mr Hankin.

#### Whitham Investigation November – December 2021

72. Ms Whitham interviewed **Mr Simpkin** first, on 9 November 2021. Notes appeared at pages 284-289. At the top of page 285 Mr Simpkin was recorded as saying the following:

**“[The claimant] and Cath Wallace interviewed me. He was absolutely fine during the interview. I also spoke to him before I applied and it was great. I looked forward to starting. It was a much larger school and I was looking forward to the challenge. It was only when I started he had completely changed, like a different person...It was difficult from day one. On my first day he was doing a job in the conference centre and he hardly spoke to me. The atmosphere was quite frosty. I thought it was strange, as he was not like the chap I'd spoken to before and during my interview. When he asked**

me to do a job, he was quite abrupt, saying 'you do that'. I wondered where that had come from."

73. Mr Simpkin provided his version of events for each of the seven incidents. He confirmed that he had decided to resign because he could not work with the claimant any more.

74. **Mrs Wallace** was interviewed by Ms Witham on 22 November. The notes appeared at pages 314-318. They were signed by Mrs Wallace on 25 November. At the start of the interview (page 314) Ms Witham relayed that Mr Simpkin had said that the claimant had been a completely different person when he started at the school than how he had been during or immediately after the interview. She asked if any concerns were raised by the claimant or others about the interview or appointment. Mrs Wallace said that concerns had been raised with HR and then later with her by the claimant's wife. She described having spoken to Miss Woods on the telephone. She said that the claimant maintained that he had not been told of the detail, but he had also said to her that Mr Simpkin should not be appointed. Her advice from Mrs Neville in HR, however, had been that this should not influence the decision to appoint him.

75. On page 316 Ms Witham put it to Mrs Wallace that she had told Mr Simpkin to "watch his back" with the claimant. Mrs Wallace did not accept having used those words but said she might have said something like "just be careful". She accepted that she had told Mr Simpkin to make sure nothing was misinterpreted by the claimant as his line manager, and to see her if there was any issue.

76. In the rest of her interview Mrs Wallace went on to say that she had concerns about the claimant's management style, that both he and Mr Simpkin had raised concerns about the other and that after the boiler room incident she and the previous headteacher had met with each of them separately about their unacceptable behaviour. She also said that there was a split between two "camps" amongst the cleaners.

77. Two of the cleaners were interviewed. The notes of the interview with **Val Thompson** on 22 November appeared at pages 319-321. She supported the claimant but was critical of Mr Simpkin. She described inadequate work by Mr Simpkin, and the use of bad language.

78. **Dot Killeen** was interviewed the same day and the notes appeared at pages 322-324. She supported Mr Simpkin and described the claimant as a bully who manipulated people. She said he had taken the side of the other cleaners.

79. **Claire Neville**, the HR Adviser for the School from LCC, was interviewed on 24 November by Ms Whitham. The notes appeared at pages 325-326. The notes showed that the claimant's wife worked for LCC and had emailed her on 6 November 2020 to speak about a problem with a school. Mrs Neville said Miss Woods had told her that she had dealt with a legal claim by Mr Simpkin in relation to a role at another school and that he was not suitable to be employed. Mrs Neville advised the school that the issues raised did not relate to the safeguarding of children, and as an offer had been sent, subject to references, there were no official grounds to withdraw the offer.

80. **The claimant** was interviewed on 2 December 2021. The notes appeared at pages 302-311. The claimant made the following points:

- The working relationship had been all right at the beginning but the incident with the chairs in May 2021 had been significant, as Mr Simpkin had become more aggressive after that.
- He gave further details about each of the seven incidents which formed the basis of the complaint from Mr Simpkin.
- He confirmed that he had asked for the probationary period of Mr Simpkin to be extended because Mr Simpkin had not experienced a true reflection of school life due to Covid restrictions. The school was due to be fully back in September 2021.

81. Towards the end of the interview (page 310) Ms Whitham told the claimant what Mr Simpkin had said about him being a “completely different person” when he started at the school compared to how the claimant had been at the interview. She asked the claimant what had changed. The claimant denied having been “frosty” but explained that his wife had told him that she needed to speak to Mrs Wallace and her own manager because of what she knew about Mr Simpkin. He said:

**“She never told me the detail of the concerns, but she felt put into a position. But this did not impact on my treatment of [Mr Simpkin].”**

82. The notes of the interview with the claimant on 2 December were emailed to him for him to check and sign. He responded on 3 December 2021 (page 229) saying that as his wife had been brought into an unrelated aspect of the grievance he had forwarded the statement to her and she was going to report her concerns at Director level in LCC. He said he was not in a position to sign the document. Ms Whitham replied (page 228) saying that the notes of interview would be included in the report and shared with him and Mr Simpkin, although if they had not been signed that would be made clear.

83. The claimant went off sick on 6 December 2021.

84. Mrs Wallace was interviewed for a second time on 16 December. The notes appeared at pages 327-329. She was asked about the interview process and the decision to appoint Mr Simpkin. She said that after speaking to his wife on the telephone, she had told the claimant that he should not ever do that to her again (page 329).

#### January 2022

85. The claimant returned to work on 4 January 2022.

86. He emailed Ms Witham on 5 January 2022 (page 228) saying he was concerned that when her report was issued she would be disclosing to Mr Simpkin evidence of his wife’s involvement. He said again he did not accept the notes of his interview.

87. On 6 January 2022 (pages 226-227) the claimant emailed Ms Witham saying that he did not want Mr Simpkin to know of any of his responses because he was



“not prepared to throw fuel on the fire any further”. He had information Mr Simpkin was making enquiries about what was happening with the claimant. He said if he was disciplined, he would appeal.

Witham Investigation Report 11 January 2022

88. Ms Witham’s investigation report was completed on 11 January 2022. It appeared at pages 234-246 and the appendices at pages 248-329. The appendices included notes of all the interviews conducted in November and December, together with other documents. The report reached the following conclusions:

- The interaction between Miss Woods and Mrs Wallace after the job interview of James Simpkin was recorded, and Ms Witham did not accept the claimant’s denial that this information affected his view of Mr Simpkin when he started. She concluded that the claimant’s attitude towards Mr Simpkin had changed due to the knowledge that his wife did not think Mr Simpkin suitable for employment.
- **Allegation 1** about regular chastisement about locking up procedures was upheld. The claimant had wanted to extend Mr Simpkin’s probation when Mrs Wallace said there was no reason for it.
- **Allegation 2** over the leaky pipe incident was not upheld.
- **Allegation 3** over the working hours during the February half-term holiday was upheld. There was no evidence to corroborate the claimant’s assertion that Mr Simpkin had different working hours during holidays. It was found to be another example of the claimant abusing his position of power over Mr Simpkin.
- **Allegation 4** about the sticky substance removal was not upheld as bullying but the claimant needed to “consider his management style” to ensure that feedback was provided in a constructive way and in a private setting.
- **Allegation 5** about the boiler room incident was upheld. Placing the chairs strategically in the boiler room so that Mr Simpkin would see them, and asking him if they looked familiar, was sarcastic and provocative, which initiated an incident that escalated to both men shouting at each other. The claimant had followed Mr Simpkin outside. Mr Simpkin had behaved unacceptably, but the claimant’s behaviour provoked and exacerbated the situation. It was part of a pattern of behaviour to force Mr Simpkin out of his job.
- **Allegation 6** about the out of hours telephone call on 6 August 2021 was upheld. There was no need for the telephone call while Mr Simpkin was on leave.
- **Allegation 7** about the phone call on 2 September 2021 and the discussion in front of the contractors the following day was also upheld. Ms Witham concluded that the claimant had deliberately not provided Mr Simpkin’s number to the alarm company in order to exert control over Mr

Simpkin in that aspect of his role. He should have texted details of the reason for the call to Mr Simpkin rather than just requesting urgent contact. Mr Simpkin did not trust the claimant's intention in contacting him. The conversations in front of the contractor were inappropriate.

89. In the conclusion section (page 245) Ms Witham wrote that perceptions of behaviour between the two men differed, the claimant appeared to be "in denial" about his ill-treatment of Mr Simpkin, but on several occasions he had failed to support a new member of staff and had expectations of Mr Simpkin that exceeded what would be reasonable for a new colleague in school. There was evidence of bullying, and the important consideration was the impact on Mr Simpkin, regardless of any intention by the claimant. The conclusion was that the claimant's behaviour "could meet a threshold for disciplinary action".

90. The recommendation section of the report (page 246) contained the following:

**"The investigating officer concluded that [the claimant's] actions towards Mr Simpkin amounted to bullying, which may be considered to amount to gross misconduct, which could represent a fundamental breach of the trust and confidence that the Governing Body are entitled to place in him.**

**As a result of this, the headteacher should seriously considering referring the outcome of this investigation through the school's disciplinary procedure."**

#### Distribution of the Report

91. On 26 January 2022 Miss Woods emailed Ms Whitham (pages 636-637) raising her concerns about the inclusion of information about her in the report. Ms Whitham sought advice from her manager, Laura Sales. Miss Woods raised her concerns directly with Mr Hankin in an email on 27 January 2022 at page 638. Mr Hankin forwarded it to Ms Witham on 31 January 2022.

92. The report and appendices were handed to the claimant on 28 January 2022 with a covering letter from Mr Hankin which appeared at page 339. His letter said:

**"I find the report to be appropriately detailed and accurately weighted in its conclusions and recommendations. As such, I believe this matter constitutes potential serious misconduct which I will consider at a hearing under the school's disciplinary procedure (copy attached)."**

93. The letter went on to say that there would be a delay to allow Mr Simpkin a chance to appeal on the allegations which were not upheld, and that the report should remain confidential.

94. After speaking to Mr Hankin the claimant rang his wife and told her that there was a statement from Claire Neville with the report. She told him to refuse to read it and to hand the package back to Mr Hankin. Mr Hankin was not available so the claimant spoke to Mrs Wallace and raised concerns about the Neville statement being sent out. The claimant kept his copy, but Mrs Wallace later spoke to Mr Hankin and they agreed it would not go out in the post to Mr Simpkin that evening. The envelope with the unredacted report and covering letter to Mr Simpkin (page 641) was locked in Mr Hankin's desk drawer, and remained there until about two weeks before our hearing when it was discovered and disclosed.

95. The claimant started a period of sick leave after 28 January. He did not return to work until 4 March 2022.

96. The claimant was under the impression that the report and appendices were being sent to Mr Simpkin at the same time. After 8.00pm that evening he sent an email to Mr Hankin which appeared at pages 340-342. He alleged that there had been a breach of GDPR in that the conversation between his wife and Claire Neville had been relayed to the school, and a witness statement about it disclosed to him. He said that that was two breaches and disclosure to Mr Simpkin would be a third breach. He suggested that the telephone conversation between his wife and the school had nothing whatsoever to do with the grievance from Mr Simpkin, and that his wife had told him that Mrs Wallace had misrepresented their conversation on the telephone in November 2020. He said he was getting legal advice and would consider whether to deem himself constructively dismissed. He asked for the hearing to be a full hearing before the governors and said he would be calling witnesses.

97. On 30 January 2022 (page 343) the claimant emailed Mr Hankin again. He said he had told Ms Witham that he did not give permission for his statement to her to be disclosed to Mr Simpkin, but it was in the pack that he thought had been sent out to Mr Simpkin. He also said he had received more silent phone calls to his phone and that they were being reported to the police.

98. On 31 January 2022 (pages 344-345) the claimant wrote to formally challenge the decision to invite him to a disciplinary meeting. He said the investigation report was flawed and biased and based on an unfair decision made in the report by an HR investigator that had a clear conflict of interests from the outset. He denied that he could possibly have changed his attitude to Mr Simpkin between the interview and the start date. The disclosure of Miss Woods' conversation with Mrs Neville rendered the investigation unfair. He knew nothing about that conversation. He said he had been made to feel as though he had committed a criminal offence by Ms Witham. He said he had not been allowed any witnesses to the investigation. Ms Witham had not accepted his response but had relied on her own staff, Claire Neville and Mrs Wallace without considering other concerns raised. The school was paying for the services of Ms Witham. He sought an immediate reinvestigation by an impartial independent panel.

### February 2022

99. Ms Witham prepared a redacted version of her report. That was done on 4 February. It appeared at pages 741-761. The redactions concerned Miss Woods' dealings with Mrs Wallace and Mrs Neville. They appeared in the body of the report, in the notes of the interview with Mrs Wallace, and in the interview with Mrs Neville.

100. Mr Hankin responded to the emails on 7 February 2022 (page 346). He confirmed that because of the concerns raised by the claimant the report had not been sent to Mr Simpkin but a new redacted report would be sent out. The claimant was asked to return the original report. He explained that he would be leading the disciplinary meeting because it did not require a meeting of the disciplinary and dismissal committee. In effect he was saying that dismissal was not a possible sanction. As the claimant had been off sick since 28 January there would be an Occupational Health ("OH") referral.

101. On 9 February 2022 (page 347) Mr Hankin wrote to the claimant with the redacted report and confirmed again that the original version had not been sent to Mr Simpkin. The redacted version of the report and its appendices was sent to Mr Simpkin too, with a letter notifying him of his right to appeal.

102. The claimant responded on 16 February 2022 (pages 348-350). He was very concerned that there had been mention of a “legal claim” by Mr Simpkin in the statement from Claire Neville, he said that Mr Hankin had no legal right to speak to him or invite him to a disciplinary meeting because there had been a flawed investigation, and he raised his concerns about the investigation process. He said he had taken legal advice and would pursue the school for constructive dismissal.

103. His letter went on to say that he now could not work alongside Mrs Wallace. The two silent phone calls had been reported to the police. He wanted the matter to go before a panel.

104. Mr Hankin replied on 23 February 2022 (pages 351-352). He confirmed that the content of the report had been altered before it was shared with Mr Simpkin as a result of advice the school received from the LCC Information Governance Team. He pointed out that the disciplinary procedure provided for the headteacher to hear a case where there was no dismissal proposed. He confirmed that Mr Simpkin had submitted his complaint on 16 September 2021, before his resignation took effect. The OH referral was being pursued.

#### March 2022 Return to Work

105. The claimant was returning to work on 7 March 2022. On 3 March he wrote to a number of potential witnesses (pages 355-356) asking them to appear at his disciplinary hearing. The witnesses included the headteachers at the schools at which Mr Simpkin had previously worked, including Jill Lucas from Brookfield Primary School.

106. He also emailed Mr Hankin on 3 March 2022 (pages 353-354) asking for the disciplinary meeting to be held away from the school, confirming that he would be accompanied by Mr Morden, and setting out the witnesses he required to be called. They included Miss Woods and the people interviewed by Ms Witham. In relation to his return to work he said a risk assessment should be completed and he would not communicate with Mrs Wallace.

107. Mr Hankin responded on 4 March 2022 (page 357). He said it was for the claimant to arrange for his witnesses to attend and he did not intend to call any witnesses. He asked what the claimant meant by a risk assessment, and said the claimant would need to communicate with Mrs Wallace as his line manager. Nevertheless, Mr Hankin would carry out the return to work interview.

108. The claimant responded on 5 March (page 358). He confirmed the basis on which Miss Woods would be giving evidence at the disciplinary hearing. He said he would need a stress risk assessment as he had experienced two periods of sickness caused by staff and the investigation.

109. The claimant returned to work on Monday 7 March 2022. The return to work interview was conducted by Mr Hankin. The note appeared at page 359. The

claimant said he was fit for work but anxious about returning after five weeks' absence. Mr Hankin said it was important to leave the HR process out of day-to-day work matters. Mrs Wallace was to stay as his line manager, but Mr Hankin made arrangements to ensure that the claimant had access to him as required, instructing his PA that the claimant should be allowed to see him when he wanted. He said the claimant should trust him.

#### Disciplinary Invitation 11 March 2022

110. The disciplinary invitation letter was issued on 11 March 2022 (pages 361-362). The hearing was arranged for Friday 25 March 2022. The letter said:

**“The purpose of this hearing is for me to consider your responses to the allegation that you have displayed bullying behaviour towards James Simpkin as outlined in the investigating officer’s report, a copy of which was provided to you on 28 January 2022.”**

111. The claimant responded on 13 March 2022. He asked for the hearing to be given a full day. He said that Ms Lucas was willing to assist but was seeking advice from HR. Miss Woods was not going to attend as she had been “bypassed” in the initial witness stage. He queried which version of the policy was being used.

112. The claimant wrote to four people that day asking them to be witnesses (pages 365-368). They were Mr Hubbard, Mrs Wallace, Ms Witham and Mrs Neville. He wrote again to Ms Lucas on 15 March (page 370).

113. On 15 March 2022 Mr Hankin replied to the claimant's letter of 11 March. His letter appeared at page 369. He said he was not going to call the four individuals to whom the claimant had sent letters on 13 March but would forward the letters to them so the claimant could arrange for them to attend. He said the meeting was held under the school disciplinary procedure whereas the investigation had taken place under the bullying and harassment procedure.

#### Disciplinary Hearing 25 March 2022

114. The disciplinary hearing took place on 25 March 2022 before Mr Hankin, supported by Ms Burns from the school's HR team. The claimant was not present, save when he gave his evidence to the hearing, but he was represented by Mr Morden.

115. The respondent's minutes of the disciplinary hearing appeared at pages 376-405. Mr Morden made a covert recording of that hearing which was later transcribed; the transcription appeared at pages 550-607. Mr Morden had also prepared notes of the questions he wanted to ask, and he made handwritten notes of the answers given. Those notes appeared at pages 406-441.

116. Ms Lucas was the first witness. The notes of her evidence appeared at pages 377-378. She said she had taken advice as to which questions to answer. She said that to her knowledge Mr Simpkin had never displayed behaviour that could be construed as being angry or aggressive. Mr Morden told her that Mr Simpkin had informed the claimant that he had been “bullied” by Ms Lucas, subsequently complained, and had been “paid out”. He asked if that comment surprised her, and

Ms Lucas said it did. On page 378 the minute recorded Mr Hankin saying that her answer on that point would not affect his decision.

117. The transcript of that exchange appeared on pages 554-555. There was a discussion between Mr Morden and Ms Burns about the scope of the hearing and that it was not about the competency of Mr Simpkin. Mr Hankin said he did not need to know whether Mr Simpkin was competent “at that school”. Ms Lucas was recorded as saying this:

**“Sorry I am not being unhelpful but I have already spoken to Claire Neville in HR and she has already told me that I cannot share anything with regard to his behaviour other than the basics.”**

118. The minutes show that the claimant joined the meeting as the third witness (page 383). The claimant told us that as he came into the centre where the meeting was being held he heard Mr Hankin in a side room with Ms Burns and heard Ms Burns say to Mr Hankin that “this was serious as it was premeditated”. In his evidence to the disciplinary hearing he was taken through his position by Mr Morden and went through the various allegations.

119. The other witnesses were Ms Witham and Mrs Wallace.

#### Outcome and resignation

120. The claimant made clear that he wanted to know the outcome as soon as possible. Mr Hankin rang the claimant later that day and told him that there would be a second written warning. He asked the claimant to meet him the following Monday to discuss the outcome so he could explain his reasoning in full. He planned to do that and then confirm his decision in writing.

121. Before he could do that the claimant resigned by a letter of 25 March 2022 (pages 442-444). He made the following points:

- The decision to offer a written warning differed from the conversation when the claimant returned to work when Mr Hankin said the claimant should trust him.
- The statements from Mrs Wallace and Mrs Neville differed significantly from the truth as his wife had confirmed, and he believed that Mrs Wallace had told Mr Simpkin to “watch your back”.
- The telephone call with the outcome had caused significant mental harm and injury and was “the straw that broke the camel’s back”.
- He reiterated what he said were the flaws in the investigation process, and that the investigator from the outset had a conflict of interest and was clearly biased.
- There had been a lack of training and support.

122. The letter ended as follows:

**“All these fundamental unlawful errors make it impossible for me to work for you again. I went over and above to ensure that your school was covered with site staff, working over 12 hours most days and this is how you repay me. I feel totally let down and deflated. The Governors should know the reason that I have left.**

**Down to your fundamental breaches of trust in common law, I deem myself to have a breach of contract and am constructively unfairly dismissed. I have no other option but to resign to enable the recovery process, from the harm that you have displayed to me. You have failed in your duty of care to me, as your loyal employee and believed a ‘parent of the Head Girl’ who must be a man of good character!**

**I have no faith whatsoever in the appeal process, which will be as equally flawed. I have lost all trust in you and your school. I am putting my family first and prefer the option of proceeding via the court route, which will ensure that documents are disclosed and the truth emerges.”**

### After Resignation

123. Mr Hankin wrote the following day (page 445) to invite the claimant to treat his letter as a grievance, and to reconsider his decision to resign by way of a “cooling off period” until 1 April 2022. The claimant refused these offers by email of 30 March at pages 446-447.

124. The disciplinary outcome was confirmed by a letter of 31 March 2022 at pages 448-449. The letter came from Ms Burns. It said that Mr Hankin had given careful consideration to the bullying and harassment report, all the written statements, all the documentation and all the oral submissions on the day. The letter said:

**“In relation to the allegation that you had bullied and harassed James Simpkin, the headteacher accepted the findings of the investigation. He did not accept your view that the investigation was biased, nor that the school’s policy had not been applied properly.**

**The headteacher concluded that the allegation was that of serious misconduct. He therefore resolved that you would be issued with a second written warning in accordance with the school’s disciplinary procedure. This warning will remain on your personal file for a period of one year.**

**As a result of this decision, to ensure that there is no repetition of the behaviour considered during the hearing, the headteacher would like to issue the following management instructions for future conduct:**

- You must not deal with employee performance issues in a public place or in view of others, unless deemed appropriate by senior management.**
- You must continue to communicate effectively with your line manager in order to fulfil your duties and responsibilities.”**

125. A letter accepting the claimant’s resignation was issued on 5 April 2022 (page 450). The letter did not require the claimant to serve his contractual notice.

126. The claimant did not appeal his disciplinary warning.

### Submissions on Liability

127. At the end of the evidence each side made a submission to the Tribunal. The respondent's submission was made orally only, but Miss Woods had prepared a written submission which we read before hearing from her. We also had the benefit of the synopsis document prepared by Mrs James which was provided to us at the start of the hearing. What appears below is just a summary of the position taken by each side on the main points we had to determine. We have omitted what was said about remedy as it did not arise.

#### Respondent's Submission

128. Ms Cummings began by inviting us to conclude that the respondent's witnesses were more reliable than the claimant, who had been unclear what he had meant by certain passages in his witness statement and had contradicted himself on occasions. She went through the List of Issues methodically and summarised the respondent's position.

129. In broad terms she invited us to conclude that the respondent had not breached the contract in any way, let alone a fundamental way. The only occasion of Mr Simpkin being aggressive towards the claimant was the boiler room incident in May 2021, and that had been dealt with appropriately on both sides. The next incident of aggression between the two of them was alleged to have been on 3 September, which was Mr Simpkin's last day in work. The claimant had been provided with adequate support, particularly in being allowed to contact the headteacher, Mr Hankin, directly after his return to work in March 2022. There was no cause for a risk assessment given that the main issue was the relationship with Mr Simpkin and he was no longer at the school after 3 September 2021. The GDPR breach, if any, was not significant as far as the claimant's contract was concerned.

130. As to the investigation, we were invited to conclude that it had been a thorough and fair investigation carried out in line with policies even if timescales had been missed by a small margin. Ms Witham had reasonable cause for the views she took about the relevance of the evidence for her to look at. Instructing an external HR person to carry out the investigation could not be seen as a breach of contract or any evidence of bias, and getting one of the school's own senior leadership team would have taken longer. Ms Cummings emphasised the lack of any complaints from the claimant about the investigatory process until the result was known. He had been properly supported throughout. The decision of Mr Hankin to proceed with a disciplinary sanction was one for which there was proper cause given the conclusions in the investigator's report. It was noteworthy that he had not proceeded on the basis it could be gross misconduct.

131. There was no basis for the suggestion that any failure to provide the claimant with training was a breach because in the claimant's own witness statement (paragraph 42) he had said no training was needed. He had never put forward that argument in the investigation and the disciplinary process.

132. She submitted that the claimant had not proved any loss in relation to holiday pay.



Claimant's Submission

133. The written submission provided by Miss Woods has been retained on file. It began with a consideration of each of the seven allegations which featured in the investigation report and summarised why the claimant argued that the conclusion that he had bullied Mr Simpkin in relation to five of them was unsustainable.

134. The submission then went through the List of Issues and made clear that the respondent should have taken further action after the boiler room incident to protect the claimant from the aggression of Mr Simpkin, that a risk assessment should have been done then and on each occasion he returned from stress-related sickness absence, and that by allowing the two to work together the respondent had placed the claimant in an unsafe and hostile working environment. Miss Woods emphasised the absence of any risk assessment.

135. On the GDPR breach issue, Miss Woods suggested that the claimant relied on two breaches. The first was the disclosure to him of the identity of his wife in the unredacted report, observing that the redactions included her identity in the later version, and also the disclosure to Mr Simpkin of the witness statement done by the claimant on 20 October (pages 290-301). He had made clear he did not want that going to Mr Simpkin.

136. On the investigation, Miss Woods submitted that it was fundamentally flawed, and that Ms Witham was conflicted because Mrs Neville was also a member of the LCC HR team with knowledge of the telephone call, and because the school was paying LCC for Ms Witham's services. Although she accepted that the fact of the November 2020 call would have come out anyway, when Mrs Wallace was interviewed, she said that it would not have been taken at face value had a member of the senior leadership team been doing the investigation. She suggested there was a clear bias shown by Ms Witham not interviewing Miss Woods. The report had not been written as an expression of opinion on the balance of probabilities, but written as though it was simply fact.

137. She suggested that it was startling to hear Mr Hankin said that he did not want to lose the claimant, yet take the view that there had been serious misconduct warranting a second stage disciplinary warning.

138. Miss Woods also highlighted the lack of training for the claimant and said that it should have been put in place after the boiler room incident in May 2021.

139. Overall she submitted that there was overwhelming evidence that the relationship of trust and confidence had been destroyed by the way the investigation was commissioned and undertaken and the decision to give a disciplinary warning at the conclusion, which had "crushed" the claimant. He had been trusting the process up to that point.

140. In relation to holiday pay, Miss Woods invited us to accept the claimant's oral evidence that he was only paid for two weeks and carried over five days. It was for the respondent to keep and produce the documentation.

**Discussion and Conclusions: Repudiatory Breach of Contract**

141. The length of this next section and its convoluted structure is a reflection of the way the case was put in the claim form, with many allegations which overlapped and which were out of sequence, and which contained a number of subsidiary points.

142. We considered each of the component parts of issue 1, reviewing the factual background where necessary before deciding whether it amounted in isolation to a repudiatory breach of contract.

143. Having conducted that exercise we then stepped back to consider whether cumulatively the matters in question could amount to a repudiatory breach.

144. In deciding if there had been a repudiation of the contract we did not consider each of the five proposed implied contractual terms separately but concentrated our analysis on the **Malik** test: whether there was conduct by the respondent for which there was no reasonable or proper cause and which, when viewed objectively, was capable of destroying or seriously damaging trust and confidence. The implied term as to redress for a grievance appeared irrelevant as the claimant had not presented a grievance. The other three additional implied terms required the respondent to act reasonably, overlapping the first limb of the **Malik** test. This, and the need for any breach of such terms to be a repudiatory breach, meant that in practice in this case these implied terms added nothing to the **Malik** test.

145. In the rest of these reasons, therefore, we will refer only to the implied term of trust and confidence. Anything found not to be in breach of that term can be taken as not being a fundamental breach of these other implied terms.

146. The relevant parts of issue 1 will be used as sub-headings to aid navigation of this section.

a. Allowing malicious and false allegations to be made by James Simpkin.

147. It was unclear how the respondent could be said to have been in breach of contract when allegations were made by Mr Simpkin against the claimant. The claimant did not identify anything which the respondent could have done to have prevented those allegations being made. There was no basis for the claimant to lose trust and confidence in the respondent simply from the fact that a colleague chose to make allegations against him, as opposed to how the respondent subsequently handled such allegations.

148. Nor could it be said that the respondent breached the claimant's contract when it decided to employ Mr Simpkin in late 2020. Sensibly that argument was not pursued in submissions.

149. There was no conduct capable of constituting or contributing to a fundamental breach of contract in this allegation.

b. James Simpkin being aggressive towards the claimant.

150. For the same reasons we decided that this was not something which could give rise to any fundamental breach of contract by the respondent. Although there are legal contexts in which an employer can be vicariously liable for the conduct of its employees, in a constructive dismissal complaint conduct of a subordinate, as opposed to a line manager, will not objectively lead to a loss of trust and confidence in the employer.

151. There was no conduct capable of constituting or contributing to a fundamental breach of contract in this allegation.

c. Failing to address the aggression of James Simpkin, including by use of a risk assessment.

d. Allowing a hostile working environment to persist by requiring the claimant to work with James Simpkin, who was aggressive towards the claimant.

152. We decided to deal with these two allegations together as they overlapped. These were about the response by the respondent to the situation with which it was faced.

153. We reviewed what management knew about the issues between the two men.

154. The first occasion upon which there was evidence of management becoming aware of a problem was in relation to the issue about additional hours over the half-term break in February 2021, which was described in the investigation report as allegation 3. Mr Simpkin spoke to Mrs Wallace about that, and she told him he could not be required to do extra hours and that he should be careful that what he did could not be misinterpreted by the claimant. There was, however, no suggestion there of any aggression by either party.

155. That changed with the boiler room incident in May 2021. The matter was reported to Mrs Wallace by the claimant. The respondent did take the following action:

- Each man was asked to put in writing what had happened;
- Each of them was spoken to individually;
- Mr Simpkin was then spoken to a second time;
- No formal action was taken but they were told that their behaviour had been inappropriate and that management would monitor what was happening.

156. We considered that this amounted to a response to the situation for which there was reasonable cause. Taking formal action in this situation would have been

disproportionate. Each of them was blaming the other for aggressive behaviour and there was no obvious way to reconcile those two competing accounts.

157. Further, there was no basis on which the respondent could be criticised for not carrying out a risk assessment after this incident. The claimant's account of the event at page 208 contained no suggestion that there was any health or safety issue in what had happened. The only suggestion of any such issue came from Mr Simpkin in the final paragraph of his written account on page 266 where he referred to stress and anxiety. From the claimant's perspective the respondent cannot be criticised for not undertaking a risk assessment at this stage.

158. The other suggestion made by the claimant was that there was a breach of contract in the failure to separate him from Mr Simpkin in their working relationship. We were satisfied that that criticism contained no substance. The claimant was Mr Simpkin's direct line manager and the head of the team in which Mr Simpkin worked. Mr Simpkin had only been there for four months at that stage. This was the sole incident of aggression alleged by either of them towards the other, although plainly there had been difficulties in the working relationship. There was reasonable cause to conclude that to have separated them, for example by allowing Mr Simpkin to report directly to Mrs Wallace, would have been disproportionate and inappropriate.

159. In reaching these conclusions we took into account that it was not for us to assess what management did in May 2021 with the benefit of hindsight. The Tribunal was of course aware that ultimately the working relationship foundered some months later and Mr Simpkin went off sick and then resigned. However, hindsight also shows that in fact there were no further incidents of physical aggression or direct confrontation of this kind: the later incidents were of a different nature.

160. There was no conduct capable of constituting or contributing to a fundamental breach of contract in these allegations.

- g. Failing in good time to inform the claimant that James Simpkin had lodged a grievance against the claimant in May 2021.

161. We decided to take this out of order because it related to the aftermath of the boiler room incident. The claimant only became aware in the disciplinary investigation in early 2022 that Mr Simpkin had written his letter of 10 May 2021 at pages 265-266. This was essentially a procedural criticism, namely that as a grievance it should have been dealt with more swiftly and he should have been made aware of it at the time.

162. The difficulty with that criticism is that this was not a grievance. It was the result of management asking both parties to the altercation to put in writing what had happened. Mrs Wallace confirmed in oral evidence to our hearing that she had asked Mr Simpkin if he did want it to be treated as a formal grievance, but he did not. The document came into being not as a grievance but as a consequence of the gathering of information by management to enable them to deal with the incident informally. We were satisfied that there was reasonable cause for not providing the

claimant with a copy of that document from Mr Simpkin, as indeed Mr Simpkin was not provided with a copy of the claimant's account at page 208.

163. There was no conduct capable of constituting or contributing to a fundamental breach of contract in this allegation.

- e. Failing to provide the claimant with any, or any sufficient support, regarding his concerns about and/or working relationship with James Simpkin.

164. This allegation overlapped with the previous ones in so far as it was concerned in part with the period up to the aftermath of the boiler room incident in May 2021. For reasons set out above we were satisfied that by the end of May 2021 there had been no failure to provide the claimant with support.

165. There were no further incidents between the two men until the telephone call on 6 August 2021 which formed allegation 6, but that was not something of which management were aware at the time.

166. They only became aware after allegation 7, which was the phone call on 2 September 2021 and the discussion in front of the contractor the following day. But that was the date on which Mr Simpkin went off sick, meaning that the claimant and he were not working together in the immediate aftermath of the formal grievance, and then on 10 October 2021 Mr Simpkin resigned with immediate effect.

167. Accordingly, management were never faced with a situation where a formal grievance had been lodged by Mr Simpkin and the two men were being expected to work together.

168. The only time the claimant had raised concerns about Mr Simpkin was after the boiler room incident, but as indicated above those concerns had been properly addressed at the time.

169. In her oral submissions Miss Woods said that the claimant should have received training after the boiler room incident in May 2021. That was not an allegation made specifically in paragraphs 57 or 59 of the claim form, although we accepted it could form part of the alleged failure to support the claimant. On his own case (paragraph 11 of the Grounds of Complaint) the claimant was given some guidance from the Head Teacher about how to behave following that incident, and in paragraph 6 of his supplementary witness statement for our hearing the claimant complained that the minutes of the disciplinary interview were incorrect insofar as they showed him agreeing that he needed training. However, given that he was an experienced manager with no record of issues of this kind in the previous five years in his role we were satisfied that there was reasonable cause for not offering him training beyond the informal guidance about how to deal with such matters.

170. Taking stock of the period when the two men were working together, therefore, we were satisfied that even putting together these matters there was no breach of trust and confidence, or any other fundamental breach of contract, by the respondent in how that difficult situation was managed between January and September 2021.

- h. Failing to conduct a risk assessment in relation to the claimant and his working circumstances, on either occasion when the claimant returned to work following sick leave in 2021/22.
- i. Challenging in writing the claimant's request for a risk assessment upon his return from sick leave.

171. We considered together these two allegations about risk assessments in relation to two different periods of absence for the claimant.

172. The first was a period of about a month when he was on sick leave between 6 December 2021 and 4 January 2022. We did not see a fit note for this period but we understood from paragraph 30 of the claimant's witness statement that the trigger for this absence was his investigatory interview with Ms Whitham. Upon his return to work on 4 January 2022 there was no record of any request by the claimant for a risk assessment, or indeed any OH referral.

173. From the perspective of management this was a situation where he had been certified fit for work, had been off for a relatively short period including the Christmas break, and where there were two sources of stress for him:

- The working relationship with Mr Simpkin, which had come to an end in practical terms in September and which had been finally ended by Mr Simpkin's resignation in October 2021. That could not be regarded as a continuing risk factor.
- The investigation being undertaken by Ms Whitham. The claimant had been interviewed by her and it was now simply a question of waiting for her report.

174. Given those factors, and the absence of any request by the claimant for a risk assessment, we are satisfied there was no breach of contract by the respondent in not arranging a risk assessment in January 2022 upon his return.

175. The second period of absence for the claimant began on 31 January 2022 but was triggered by receipt on Friday 28 January of the letter confirming that there would be a disciplinary hearing. He responded to that letter by an email on the morning of 31 January at page 344 but did not mention either a risk assessment or an OH referral.

176. An OH referral was first mentioned by Mr Hankin in his letter of 7 February at page 346, by which stage the claimant had been off for just over a week.

177. There was further correspondence from the claimant on 16 February at page 348 which made no mention of a risk assessment, and in his letter of 23 February at page 351 Mr Hankin confirmed that the OH referral was being undertaken.

178. There was no further development in this respect until 3 March at page 353 when the claimant emailed Mr Hankin saying he would be returning to work on Monday, dealing with some issues regarding witnesses, and said that he was awaiting the OH referral. He also said that he trusted that a risk assessment would be completed and that he would not speak with or communicate to Mrs Wallace. He

did not want any contact with her. This was the first mention of any risk assessment by the claimant.

179. Mr Hankin responded on 4 March at page 357. He asked the claimant to clarify what he meant with regard to a risk assessment. He said the claimant would have to communicate with Mrs Wallace because she was responsible for the operation of the site and his line manager. However, he would undertake the return to work meeting himself. His letter also said that the OH referral had been processed and they should be in contact shortly.

180. The claimant responded on 5 March at page 358. He explained that he needed a stress risk assessment as his two periods of sickness had been caused by “your staff and your investigation”.

181. The claimant met Mr Hankin at the return to work meeting on 7 March. The note appeared at page 359. It was signed by both of them. The action discussed included the facility for the claimant to speak to Mr Hankin about how he was feeling in relation to his return to work, and that the claimant would continue to work with Mrs Wallace as his line manager. There was no mention of the stress risk assessment or the pending OH referral.

182. Matters then moved into the disciplinary phase by the disciplinary invitation letter of 11 March at pages 361-362 inviting the claimant to the hearing on 25 March. The correspondence that ensued was all about the disciplinary procedure. There was no mention of the risk assessment or what was happening with the OH referral before the claimant resigned on 25 March after the disciplinary hearing.

183. Putting this together we were satisfied that the respondent could be criticised for the apparent delay in relation to the OH referral. It does not appear that there was any contact with the claimant from OH by the time he resigned. There was no reason for this delay in the evidence before us, perhaps because the claimant did not make any distinct allegation about this.

184. However, we were satisfied that the handling of his return to work, when viewed objectively, did not constitute a breach of trust and confidence or any other fundamental breach of a term of the contract. That was for two reasons.

185. Firstly, the request for a risk assessment was not refused but was being actively considered and it was reasonable to await the result of the OH referral to help identify what the causes of stress were and therefore how the risks to the claimant might be properly assessed.

186. Secondly, the claimant in his email of 3 March 2022 at page 353 tied in the stress risk assessment closely with working with Mrs Wallace. He made that clear in the three line paragraph in which both matters were mentioned on page 354. Mr Hankin pointed out in response that the claimant had to work with Mrs Wallace given her position, and the two of them discussed that at the return to work meeting on 7 March. The agreed and signed action points at the return to work meeting at page 359 confirmed that the claimant would carry on working with Mrs Wallace but that he would be able to approach the Head Teacher directly with any concerns about how he was feeling in relation to his return to work. The claimant did not make any note on that form to say that he still wanted a stress risk assessment, and nor did he raise

that again in the numerous emails he sent during March in the lead-up to the disciplinary hearing.

187. Although it would have been preferable in hindsight had the OH referral been undertaken more swiftly, in relation to both periods of absence we were satisfied that there was no conduct capable of constituting or contributing to a fundamental breach of contract.

f. Failing or refusing to change the claimant's line manager.

188. The factual background to this was summarised in relation to the previous allegation. The claimant did make a strong request for him not to have to report to or have contact with Mrs Wallace in his email of 3 March at page 354 before he returned to work, but Mr Hankin explained in correspondence why that would not be possible.

189. Following the return to work interview on 7 March the claimant signed the record of the discussion confirming that he would continue to work with her as his line manager, but that he could have a direct line to Mr Hankin as Head Teacher on any matters about his return to work. The claimant was effectively reporting to Mrs Wallace only in relation to operational matters if he so chose.

190. In the circumstances we were satisfied there was reasonable cause for adopting that arrangement, rather than putting in place some other line management structure. This did not cause or contribute to any fundamental breach of contract.

k. Breaching GDPR.

l. Failing to satisfactorily address any breach/es of GDPR.

191. The origin of this allegation in our proceedings was paragraph 34 of the Grounds of Claim. That paragraph identified two breaches of GDPR:

- (a) The disclosure of the claimant's witness statement/interview notes to Mr Simpkin;
- (b) The disclosure to him and to Mr Simpkin of the interview notes of Mrs Neville (page 325) in so far as those notes made reference to the conversation between Miss Woods and Mrs Neville in late 2020, and the legal claim pursued by Mr Simpkin in relation to a different school.

192. Concerns about GDPR were first raised by the claimant on the evening of 28 January. The claimant had been given the full investigation pack with the interview notes attached, although the copy for Mr Simpkin was never sent. The email sent by the claimant that evening appeared at pages 340-342. The third paragraph reported a GDPR breach. He raised concerns about the conversation between his wife, of LCC Legal Services, and Mrs Neville of LCC HR, and that the discussion had been relayed to a third party, being the school. That must be a reference to Mrs Neville



having disclosed details of that discussion in her witness interview. He also complained of a second breach: that the witness statement in question had been provided to him as a third party. He asked for those two breaches of GDPR to be reported.

193. In early February a redacted version of the investigation report and appendices was prepared. It appeared at pages 741-761. The summary in Ms Witham's report of what Mrs Neville had said at page 743 (paragraphs 4.3 and 4.4) was redacted, as was the passage in Mrs Wallace's interview notes at page 755 where she repeated what Miss Woods had told her. The interview notes of Mrs Neville at page 760 were also redacted to remove two references to the legal claim and another reference to Mr Simpkin having shouted at a member of staff at a different school.

194. It was a feature of the respondent's Investigations Guide (clause 7.10) that it required a copy of the investigating officer's report to be provided both to the complainant and to the respondent. That meant that it was within procedure for the Witham report and appendices to be provided both to the claimant and to Mr Simpkin. Such provision is in our experience unusual, although we recognised that because the policy gave Mr Simpkin as the complainant a right of appeal against a decision to reject any of his allegations, there might be a basis for him to see the investigation outcome in that way.

195. In considering this we took account of the provisions of the GDPR. In our hearing the claimant had not identified by reference to the terms of the GDPR where the breach had arisen. We noted that article 6 provides that processing of data shall be lawful if at least one of the conditions set out in paragraph 1 of that article applies. Those conditions include where the processing is necessary for the performance of a contract to which the data subject is party, and where processing is necessary for the purposes of legitimate interests pursued by the data controller, save where those interests are overridden by the interests or fundamental rights and freedoms of the data subject.

196. The first alleged breach was the disclosure by the school to Mr Simpkin of the witness statement made by the claimant in October 2021 and the interview notes from December 2021. They came with the redacted version of the Witham report in February 2022. That was not obviously a breach of article 6. The processing appeared necessary for the purposes of the legitimate interest pursued by the school in conducting a fair and transparent investigation of the allegations made by Mr Simpkin, and in complying with its own procedures which gave him a right to see a copy to underpin his right of appeal. The claimant did not pursue any argument that the interest in processing the data in that way for that purpose was overridden by his interests or his fundamental rights and freedoms as the data subject. There was no clear GDPR breach in that respect.

197. The second alleged breach related to the details contained in Mrs Neville's interview notes of what Miss Woods told her about the legal claim and other matters relating to Mr Simpkin. We were satisfied that the claimant was not the data subject of those passages. The data subject was Mr Simpkin, or possibly Miss Woods. Even if there had been a breach of GDPR, therefore, that would not have been a

breach of the claimant's contract: he was in fact the recipient of any disclosure made in breach of article 6.

198. In any event, we considered that the disclosure by Mrs Neville of those details was likely to be lawful under article 6 because it was processing necessary for the purpose of legitimate interests and also processing necessary for the performance of the contract of employment with the claimant. In order to investigate the allegations of bullying and harassment made against the claimant his employer had to get to the bottom of what had happened. It had been alleged by Mr Simpkin that the claimant's attitude had changed towards him between the interview in November 2020 and him starting work in January 2021. The concerns raised by his wife, and how they had been communicated to the school, were relevant to that enquiry and therefore the inclusion of Mrs Neville's statement in the unredacted report was probably not a breach of GDPR in our view. In any event, by the time the report was disclosed to Mr Simpkin those details had been redacted as a consequence of the GDPR concerns raised by the claimant.

199. We are therefore satisfied that the allegations that the respondent acted in breach of GDPR and/or failed to deal with it properly did not provide any support for the claimant's argument that there was a fundamental breach of his contract.

n. Conducting an unfair disciplinary and/or investigation process into allegations against the claimant....:

200. Allegation n and its ten constituent sub-allegations took us into the investigation and disciplinary process.

201. **Sub-allegation (i)** was that the process was formal rather than informal. But Mr Simpkin's letter of 3 September was headed "formal grievance". On 16 September he completed the bullying and harassment formal individual complaint form. Mr Simpkin would have had grounds for complaint had the matter been dealt with informally despite that documentation, and we were satisfied that there was reasonable cause to deal with the issue formally given that the informal attempt in May after the boiler room incident had plainly been unsuccessful.

202. **Sub-allegation (ii)** was that the respondent should have dropped the formal process at an early stage when considering the witness evidence from the claimant. We understood that to be a reference to the claimant's witness statement of 20 October 2021 at pages 290-301, which was a detailed response to the formal complaint made by Mr Simpkin. Essentially the claimant was complaining that the respondent should have believed what he said and dropped the matter at that stage. That was unrealistic. The formal process had begun. An investigator had been identified. It was important that both sides were allowed to give their account of events and witnesses were interviewed before any decision was taken on the merits of the allegations. There was no basis for saying that the decision to continue with the formal investigation after receipt of this witness statement amounted to any breach of contract, particularly where the majority of the allegations boiled down to one person's word against another's.

203. **Sub-allegation (iii)** was of unreasonable delay in the investigation and disciplinary process. **Sub-allegation (iv)** was the same point put as a breach of procedure. We dealt with them together.

204. We reviewed the chronology. Mr Simpkin lodged his formal complaint on 3 September but the final page of the bullying and harassment form was not received until 30 September 2021. Ms Witham was identified as investigator the next day. The claimant was informed of the complaint on 15 October. Half-term then intervened, and the claimant was contacted by Ms Witham for the first time on 29 October. He was told that he would be the last to be interviewed.

205. Ms Witham conducted interviews between 9 and 24 November, and then interviewed the claimant on 2 December 2021. She had to interview Mrs Wallace a second time, which was done on 16 December. There was then the Christmas period, and her report was completed on 11 January 2022. It was considered by Mr Hankin and on 28 January 2022 he notified the claimant that matters would be pursued to a disciplinary hearing. He informed the claimant that it would be necessary to allow time for Mr Simpkin to appeal before the matter could proceed.

206. There was then a slight delay caused by the GDPR issues which meant the redacted report was not issued until 9 February 2022. The claimant was off sick during February and did not return to work until 4 March. By a letter of 11 March he was invited to a disciplinary hearing on 25 March 2022.

207. We noted that the policy said in clause 7.6 that wherever possible the investigation process should commence within ten working days of submission of the complaint form, and clause 7.7 said that the investigation process should last no longer than 30 working days, although recognising that complexities or delayed availability might cause delay.

208. We considered that the respondent could properly be criticised for not getting the investigation up and running more quickly after the “formal complaint” was submitted by Mr Simpkin on 3 September. It took almost a full month to get the final page of the formal complaint form completed and in that period the claimant was unaware that he was the subject of formal allegations. The respondent could either have obtained that documentation more quickly from Mr Simpkin or notified the claimant of the complaint much earlier on so that he would have a chance to think about those matters and prepare his response in early September rather than in mid October.

209. Further, we concluded that the investigation did take a lot longer than the policy envisaged, which was 30 working days. Ms Witham was appointed on 1 October and her report was produced on 11 January 2022, a period of over three months. We recognised that there were seven different allegations to be considered, and a total of six witnesses to be interviewed, but the claimant should have been kept informed of the delay.

210. However, despite those matters we were satisfied that when viewed objectively this was not conduct which was likely to destroy or seriously damage trust and confidence. The delay at the start of the process did not prevent the claimant preparing a detailed statement in response in mid-October 2021. The fact that matters were eventually concluded in late March 2022, almost seven months after

the formal complaint was first made, meant it had taken longer than it should. However, given the claimant's sickness absence and the need to allow time for Mr Simpkin to appeal, that was not such delay as would destroy or seriously damage trust and confidence. Nor were the breaches of procedure inherent in that timescale enough to amount to a fundamental breach of contract.

211. **Sub-allegation (v)** was that the respondent failed to contact LCC management regarding the concerns about Mr Simpkin. In so far as that related to Ms Witham's investigation, she did of course interview Mrs Neville about what had been relayed to her by Miss Woods at the time Mr Simpkin was recruited. To that extent there was nothing in this allegation.

212. If, however, it was a suggestion that the respondent should have made enquiries about Mr Simpkin's alleged behaviour at other schools, we were satisfied there was reasonable cause not to expand the investigation in that way. The purpose of the investigation was to find out what had happened between Mr Simpkin and the claimant at the respondent's school, and investigating allegations about events elsewhere would not have been fruitful. There was no basis for saying that this amounted to a breach of contract.

213. **Sub-allegation (vi)** was that the respondent failed to interview Miss Woods in the investigation. We concluded there was reasonable cause for Ms Witham not to take that step. Firstly, Miss Woods was not a witness to any of the seven allegations. Secondly, her involvement was limited to the discussions after the interview about whether Mr Simpkin was suitable for appointment. On that point the claimant accepted when interviewed by Ms Witham (page 310) that his wife had told him that there were concerns about Mr Simpkin and "she felt put into a position". There was therefore no need to make further enquiries to establish whether he knew of the concerns which Miss Woods had also raised with Mrs Wallace. Of course, the claimant denied that being aware that there were concerns had affected his treatment of Mr Simpkin, but that was a different point. There was no breach of contract in the failure to interview Miss Woods.

214. **Sub-allegation (vii)** was a general allegation that the investigation had been done unfairly and in a biased way with three specific examples given.

215. The three specific examples were, we concluded, linked. They were essentially that it was wrong of Ms Witham to be the investigator because she worked in the HR team with Claire Neville, and that instead there should have been a member of the senior leadership team within the school conducting the investigation. The claimant was particularly aggrieved by the fact that Ms Witham had asked Mrs Wallace in her interview at page 314 whether anything had changed between the interview and the commencement of employment as far as the claimant and Mr Simpkin were concerned, since that question had prompted Mrs Wallace to volunteer the information from Miss Woods which had been conveyed to the school. The difficulty for the claimant was that that was an obvious question given what Mr Simpkin had said when interviewed (page 285) about the change in the claimant when he started work.

216. More broadly, Mr Hankin explained in evidence how it would not have been appropriate for him to have done the investigation, because he knew the claimant well but not Mr Simpkin and would therefore not have been seen as impartial. His

unchallenged evidence was that the other two members of the senior leadership team had only been in post a few days at the start of the new academic year. They did not have capacity to take it on. It was therefore within policy to use an external investigator and to ask LCC HR to provide someone.

217. Within LCC HR the policy was not to allow someone with day-to-day HR responsibilities for the school in question to conduct the investigation, which ruled out Mrs Neville, and Ms Witham had the capacity and experience to do it.

218. Overall, we were satisfied that there was reasonable cause for Ms Witham to be appointed as an external investigator. The fact she was a paid employee of LCC was irrelevant: an investigator from the respondent's management structure would have been paid by the school.

219. Those three specific points were made, however, within the broader context of an allegation that the investigation was unfair and biased. In considering that we took account of the role of the investigating officer according to the respondent's policies. The Bullying and Harassment Investigation Guide revised in September 2021 appeared at page 147 onwards. The role of the investigating officer was said to be to establish the facts and then produce a report. According to page 150 the report should also indicate whether there were any mitigating circumstances that also require consideration. That passage, which went over to page 151, made clear that the investigator only needed to decide on the balance of probabilities whether an incident was more likely to have occurred than not. It was also the responsibility of the investigator to indicate whether the conduct found to have occurred amounted to bullying or simply "the exercise of proper management". Some examples were given.

220. The passage on page 152 contained the following guidance for the investigator:

**"Once the investigating officer has determined their view, they will need to decide what the recommendations to the Head Teacher...will be. Their responsibility is to decide if the complaint is upheld, in full or in part or not at all and if the complaint is upheld, is it so serious as to warrant formal disciplinary action?"**

221. The bullying and harassment policy itself made clear at clause 7.9 on page 142 that when considering the investigation report the Head Teacher had to decide on a number of possible outcomes, which included dealing with the matter under the disciplinary procedure.

222. It was clear from that, and from the evidence Mr Hankin gave our hearing, that in considering the report he had power to disregard it if, for example, he had factual information which showed him that the investigator's conclusions were incorrect, or if he had concerns about the integrity of the investigator or the process. He could have disregarded it had the claimant established that the Witham investigation had been biased. Absent such exceptional circumstances, however, he would treat the report as the investigator's findings on the balance of probability. It was not for him to reopen those findings. The decision for him to make at the disciplinary hearing would be what level of sanction, if any, to impose.

223. Against that background we considered that to a large extent the allegations of bias about the investigation process made in the claim form simply reflected the

claimant's dissatisfaction that Ms Witham had upheld five of the seven allegations. That was not in itself evidence of bias since clearly Ms Witham had to make a finding on each allegation one way or the other.

224. We noted, however, that the claimant had been more specific about his allegations of bias in his email sent on 31 January 2022 at pages 344-345, a few days after he had been given the investigation report and appendices. From that email we extracted four main allegations of bias which it is appropriate to consider here.

225. The **first bias allegation** was that he could not possibly have changed his attitude to Mr Simpkin between the interview and the start of employment because he had not worked with Mr Simpkin, and because Mr Simpkin did not know him so could not possibly state that he had changed. We did not consider that this provided any evidence of bias. Mr Simpkin had met the claimant at interview and when shown round the premises, and volunteered (without knowing anything of the telephone calls behind the scenes in November 2020) that the claimant had behaved differently towards him when he started employment in January 2021. Ms Witham ascertained that there was a reason for him to have changed his view of Mr Simpkin in that period, that being the fact that his wife conveyed to him that she had concerns about Mr Simpkin being appointed. The claimant denied that this had any impact on his treatment of Mr Simpkin, but there was reasonable cause for Ms Witham to take a different view and conclude that this did explain Mr Simpkin's perception that the claimant was "frosty" towards him from the start of employment. This point did not provide any support for the allegation of bias.

226. The **second bias allegation** was that the account given by Mrs Wallace about her conversation with Miss Woods was inaccurate, and Miss Woods had not been interviewed to correct it. Again the difficulty for the claimant with this point was that the conversation between Miss Woods and Mrs Wallace was not itself significant: what was significant was the conversation between Miss Woods and the claimant when he became aware that there were concerns about Mr Simpkin. That was the salient point which, in the view of Ms Witham, affected his attitude towards Mr Simpkin when he began employment. We did not consider that the investigator needed to interview Miss Woods (for reasons set out above) or to get to the bottom of what was said to the school by her in November 2020.

227. The **third bias allegation** was that the claimant was made to feel like a criminal by Ms Witham. We considered carefully the notes of the claimant's interview which appeared between pages 302-311. Ms Witham asked him some open questions about the background and then went through each of the individual allegations. She was questioning him about allegations made by Mr Simpkin, or asking him about passages from the lengthy witness statement he had prepared in October 2021. We were satisfied that these were open questions, or questions about specific details of the allegations, and it was appropriate for her to put those questions to him to make sure that she had his response to what was being alleged. There was no record in the interview of the claimant protesting at the questions he was being asked or objecting to the tone in which they were being put. Whilst we do not doubt that being interviewed in this way was embarrassing and humiliating for the claimant, and may well have made him feel as though he was a criminal, the reality is that viewed objectively this was an internal investigation into allegations of

bullying and harassment conducted by HR, not the police, and it was conducted in an appropriate way.

228. The **fourth bias allegation** was that the claimant says that he was not allowed any witnesses to the investigation. We dealt above with why there was reasonable cause for not interviewing Miss Woods. She was not a primary witness to any of the alleged incidents. In his October witness statement at page 300 the claimant also asked for the Heads of two other schools where Mr Simpkin had worked to be interviewed, saying that he understood that Mr Simpkin had had a “pay out” from one of them for being bullied. Ms Witham explained in her evidence to our hearing that she did not consider them to be relevant witnesses as she was investigating the incidents at the school between Mr Simpkin and the claimant. We were satisfied there was reasonable cause for that view. In any event the claimant had the opportunity to call witnesses of his choice to the disciplinary hearing, and indeed one of those Head Teachers did give evidence.

229. The only other person identified by the claimant as a witness who should have been interviewed was the contractor present during allegation 7 on 3 September. In his October 2021 witness statement (page 295) the claimant acknowledged that he had asked Mr Simpkin why he had not rung him back or contacted him the previous evening, and that he did so in front of the contractor. He explained that this had happened because Mr Simpkin had approached him with the contractor present and spoken to him rudely and aggressively. It was not in dispute, however, that the claimant had spoken to Mr Simpkin with the contractor present. Ms Witham could not have been criticised had she sought to trace the contractor and interview him in order to get details of exactly how that exchange took place. However, her report at page 244 recorded that it was common ground that there had been a discussion with the contractor present, and her view was that as the senior member of staff the claimant should have informed Mr Simpkin he would speak to him later rather than allowing the discussion to take place with the contractor present. In those circumstances we were satisfied that not interviewing the contractor was not evidence of bias, as the core point was not in dispute.

230. There was also criticism made by the claimant of the language used in the Witham report. The criticism was that the report read as though Ms Witham was making firm findings of fact, when in fact she was presenting her opinions as to what had happened on the balance of probabilities. The difficulty with this argument is that the role of the investigator was to make findings of fact, according to the bullying and harassment investigation guide. It was in any event obvious to Mr Hankin that the findings in that report reflected the opinion of Ms Witham about what had happened based on the evidence that she had gathered. None of this suggested that the investigation lacked fairness.

231. Putting those matters together we were satisfied that the investigation was not biased in the way alleged by the claimant, and there was no fundamental breach in the way the investigation was conducted.

232. **Sub-allegation (viii)** was the claimant being spoken to and treated like a criminal during the investigation. For reasons set out above, we did not consider there had been any inappropriate behaviour by Ms Witham in this respect.

233. **Sub-allegation (ix)** was that the claimant had not been provided with sufficient support during the investigation and/or disciplinary process. We dealt above with the support offered to the claimant in relation to his health and absences from work on sick leave, including the discussions about a possible risk assessment and the OH referral. There was no lack of support there.

234. As for the investigation process itself, Ms Witham made clear in her first contact with the claimant (email 29 October 2021 page 218) that he could be accompanied by a trade union representative or work colleague during the interview. The note of the interview itself at page 302 began with a record of the claimant saying he was not a union member and therefore not going to be accompanied. He was represented by Mr Morden at the disciplinary hearing. There was no basis for a conclusion that he was denied any appropriate support in that sense.

235. **Sub-allegation (x)** was that the respondent failed to provide an open and transparent investigation report that addressed the witness evidence of the claimant at the outset. In so far as this point suggested that the matter should have been dropped after the claimant did his written witness statement in October 2021, we dealt with it above. There was reasonable cause for continuing with the investigation.

236. The investigation was open and transparent in the sense that Ms Witham explained the procedure she would be following in her email of 29 October 2021, and then followed that procedure in the order of interviews. The claimant was given the notes of his interview to sign before they were included in the investigation report. He was given the investigation report and all the appendices (the notes of other interviews) in an unredacted form at the end of January, and of course they were available to him in the redacted form in February as well. We could not see any basis on which it could be suggested that the investigation was neither open nor transparent.

- o. Requiring the claimant to attend a disciplinary hearing following an unfair and/or biased investigatory process.

237. We analysed above the split of responsibilities. It was Ms Witham's role to make a finding on the balance of probabilities about what happened and whether it amounted to bullying and harassment. Her recommendation was that there be a gross misconduct disciplinary hearing. As explained above, we rejected the claimant's case that her investigation was unfair or biased.

238. It was then the responsibility of Mr Hankin to decide whether there should be a disciplinary hearing or not. He did not accept the recommendation to treat it as potentially gross misconduct but downgraded it to potential serious misconduct, meaning the claimant was not at risk of dismissal.

239. To a large extent this point simply reflected the claimant's sense of injustice that he had been found guilty of inappropriate behaviour. That is not enough to amount to a breach of trust and confidence when viewed objectively. In reality there was reasonable and proper cause for Mr Hankin to conclude that there should be a disciplinary hearing given the findings of the investigation report. There was no



breach of trust and confidence or indeed any breach of contract in that decision on his part.

- p. Failing to believe the claimant during the investigatory and/or disciplinary process.
- q. Believing James Simpkin instead of the claimant.

240. The difficulty for the claimant with this allegation is that it simply reflected his conviction that he had done nothing wrong. In reality management were faced with a situation where there were two conflicting accounts and very little independent corroborative evidence. It might well have been a reasonable course of action to have decided that the allegations of bullying and harassment made by Mr Simpkin had not been proven and to have found that no further action was warranted. But that does not mean that it was a breach of the implied term of trust and confidence to take the opposite view. The claimant would only be able to succeed with this allegation if he had established that the evidence against him was so weak that there was no reasonable cause for preferring the account given by Mr Simpkin on the balance of probabilities. The evidence we heard fell far short of that. There was no breach of trust and confidence in the conclusion that five of the seven allegations made by Mr Simpkin were upheld.

- r. Issuing the claimant with any disciplinary sanction and/or issuing the claimant with a sanction of a second (stage) written warning.

241. We noted that the bullying and harassment policy at page 105 said that harassment and bullying in the workplace would not be permitted or condoned, and that it would be regarded as a disciplinary matter. Guidance on what might constitute the different levels of misconduct appeared in Annex 1 to the disciplinary procedure on page 168. Examples of gross misconduct included harassment of other employees, although on the page that was restricted to harassment on grounds prohibited by the Equality Act 2010. There is no doubt, however, that harassment and bullying could amount to gross misconduct depending on the circumstances.

242. We took into account the claimant's evidence (recorded in paragraph 118 above) that at the disciplinary hearing he heard Ms Burns advise Mr Hankin that it was serious as it was premeditated. That advice perhaps went further than the language of the Witham report but it was not inconsistent with it because Ms Witham recommended disciplinary proceedings for gross misconduct, which would be more serious.

243. Yet Mr Hankin had already decided that dismissal was not a possible outcome after considering Ms Witham's report. He characterised it as serious misconduct. That gave him the options set out in the policy at page 163. He was able to impose a transfer or demotion, or a first, second or final written warning. He chose to give a second written warning which would remain live for a 12 month period. That was two levels below the most serious sanction open to him (demotion).

244. Given that the claimant had on the balance of probabilities been found to have bullied or harassed Mr Simpkin on five of the seven alleged occasions, it cannot be said that the decision to impose a second written warning amounted to a fundamental breach of contract which showed that the employer no longer intended to be bound by the terms of that contract. On the contrary, it was an effort to keep the contract in place by retaining the claimant in employment albeit with a disciplinary warning live for 12 months about avoiding a recurrence of similar behaviour.

245. In considering this we noted that the boiler room incident which had already been addressed by management in May 2021. The claimant did not at any stage raise a concern about this incident being resurrected and used against him in a formal way, a point which might well have been made had he had a union representative acting for him. However, even if it could have been argued that it was inappropriate for the matter to form the basis of a formal finding of bullying when previously it had been dealt with informally, there was no basis on which we could conclude that the overall outcome would have been any different. The decision of Mr Hankin to impose a second stage written warning, rather than a final warning or a demotion, was a sanction less severe than a reasonable employer might have imposed even if there had been only four allegations of bullying and harassment upheld. The boiler incident was reasonably viewed as part of a pattern of behaviour by the claimant towards Mr Simpkin.

246. We rejected the contention that this disciplinary sanction of a second written warning could be regarded as a breach of trust and confidence or any other fundamental breach.

#### Cumulative Effect

247. Although we concluded for reasons set out above that none of the individual allegations in the List of Issues amounted to a breach of trust and confidence, or any fundamental breach of contract, in isolation, we did consider whether the sequence of events overall had that effect.

248. We found for reasons set out above that the respondent had behaved in an appropriate way in trying to manage the relationship informally once the boiler room incident came to light, although with hindsight that had not been successful. There were no further incidents of alleged aggression between the two men until 3 September, the day Mr Simpkin went on sick leave. Once he had gone on sick leave the position at work was clearly different and the source of stress for the claimant was the fact of the investigation.

249. We have been critical of the respondent for not initiating the formal investigation more quickly at the start of September, as it was in the end some six weeks or so before the claimant was informed of it, but that did not have any overall impact on the fairness of the investigation because the claimant was still able to prepare an extremely detailed response to those allegations in his October witness statement.

250. We also criticised the respondent for the fact the investigation took longer than envisaged by the policy, but that also was not a significant flaw given that matters were moving ahead.

251. The root of the claimant's dissatisfaction appears to have been a combination of concerns about the data breach involving Miss Woods, and of course the conclusion that he was guilty of bullying and harassing Mr Simpkin. However, as we have set out above, neither of those were actions by the respondent for which there was no reasonable and proper cause. Indeed, the conclusion to the disciplinary proceedings could be seen as lenient given that Mr Hankin could have imposed a final written warning, demotion or transfer of the claimant, or even referred the matter for dismissal.

252. Viewed overall, therefore, the Tribunal unanimously concluded that the claimant had failed to establish that there was any breach of his contract of employment or any of its implied terms which amounted to a fundamental repudiation of the contract.

### **Outcome of Unfair Dismissal Claim**

253. It therefore followed that his resignation was not a dismissal under section 95 Employment Rights Act 1996, so the unfair dismissal claim failed.

254. That meant that we did not need to consider the remaining issues in the unfair dismissal complaint, which were the reason for the claimant's resignation or whether there had been any affirmation of the contract following a breach of contract. Nor did questions of remedy arise.

### **Outcome of Notice Pay Claim**

255. There was no breach of contract by the respondent. It could not be said that it was the respondent which really brought the contract to an end by repudiating it. The contract ended because the claimant chose to leave employment. He was not forced into resigning. No notice pay was due.

### **Discussion and Conclusions - Holiday Pay Claim**

256. The final matter we had to deal with was the holiday pay claim.

257. There were documents relating to holiday pay and payments for it between pages 520 and 524. Page 524 was reconciliation of the holiday entitlement for the leave year which began in April 2021, the claimant's final year before he resigned in March 2022. The claimant accepted that the record of leave he took in that year was accurate, and that he had been paid for eight days when he left employment, but he said that the running total at the start of that year was short by five days because he had been allowed to carry over five days earlier on.

258. In response to a question from the Tribunal he confirmed that each time he carried leave over there would be a permission slip recording what was still held, but he said he did not have a copy.

259. The claimant had not pursued any application for an order from the Tribunal requiring the respondent to disclose the permission slips. When the issue became clear during the hearing the respondent did make some enquiries but none could be obtained. We were therefore left in the situation where there was no documentary evidence at all to show that there was any entitlement to five days carried over save

for what the claimant said in his oral evidence to our hearing. It was not something which he had addressed in his witness statement.

260. The burden of proof lay on the claimant to prove that he had accrued annual leave which had not been taken when he left and for which he had not been paid. In the absence of any documentary records we concluded that the claimant had failed to prove his case on this point. The holiday pay claim was also dismissed.

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Regional Employment Judge Franey

9 April 2024

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

23 April 2024

FOR THE TRIBUNAL OFFICE

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