EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr J Johnson	**v**	London Borough of Hackney

Heard at: Watford **On:** 15-19 January 2018; and 22-23 January 2018

Before: Employment Judge R Lewis
Members: Ms S Goldthorpe and Ms S Johnstone

Appearances
For the Claimant: In person
For the Respondent: Ms C Maclaren of Counsel

JUDGMENT

The claimant was not discriminated against by the respondent, and his claims of sex discrimination, howsoever formulated, fail and are dismissed.

REASONS

Procedural points

1. The reasons were requested by the claimant after judgment was given on 23 January 2018.

2. This was the hearing of a claim presented on 9 September 2016; Day A was 9 August and Day B was 9 September. There were case management hearings on 13 December 2016 (Judge Alliott) and on 15 March 2017 (the present Judge).

3. This hearing was conducted entirely in public. At the start of the hearing, the tribunal reminded the parties that as the case was based on events in a primary school, it must be conducted at all times in a manner which respected the privacy rights of any child. In the event, only one identifiable child was referred to in evidence, referred to here, and in the hearing, as A.

4. Although the March 2017 case management order provided for witness statements to be exchanged in October, we were told that this had in fact

been done a few days before the hearing. The claimant on the first day said that he had not read the respondent's witness statements. There were three bundles, the first two totalling about 700 pages on behalf of the respondent, and the third, about 350 pages, on behalf of the claimant. The claimant brought a single copy of a fourth bundle, if required. It was in the event not used.

5. The bundles were disproportionate in volume and unwieldy in arrangement. A modest core bundle, in chronological order, would have been of great assistance. The tribunal took pages 1 to 26 of the claimant's bundle as his witness statement, and thereafter worked from the respondent's bundles.

6. At the start of the hearing, it was agreed that the claimant would be heard first. As the allocation was for ten days and the claimant had prepared no evidence on remedy, the tribunal decided to split the hearing, with a view to remedy being heard on the last two allocated days if required.

7. Shortly after the tribunal had begun reading on the first morning, the claimant sent word that he had received notification of a domestic emergency, which required him to leave the tribunal. As a result, the first day was entirely taken up with reading. The claimant gave evidence throughout the second day, 16 January, and was the only witness on his own behalf.

8. The respondent called five witnesses. They were:

   Ms Sandra Chin, formerly Headteacher, gave evidence for almost the whole day of Wednesday 17 January;
   Ms Chrystine Gittens, Barrister, who had investigated and reported on the claimant's grievance, gave evidence on 19 January for just over an hour;
   Ms Louise Drew, formerly Deputy and now Headteacher, gave evidence on 19 January and was recalled briefly on 22 January; her evidence related mainly to her investigation of grievances against the claimant;
   Ms Jo Carter, Chair of Governors, gave evidence on 19 January; she had chaired the disciplinary panel which dismissed the claimant;
   On 22 January, the tribunal heard the evidence of Ms Maggie Kalnins, who had been a member of the panel which rejected the claimant's appeal against dismissal.

9. The claimant was absent from the tribunal on Thursday 18 January due to ill health, and the tribunal met the respondent's representatives briefly before adjourning for that day. After Ms Kalnins had concluded evidence, there were closing submissions and the tribunal gave judgment the following day.

10. The tribunal reminded the parties of paragraphs 6 to 14 inclusive of the order of March 2017. That order was sent on 29 March 2017, and there had been no correspondence from either side asking for any variation. This hearing proceeded therefore on the basis that the only issues before it were those identified at paragraph 14 of the March order, which were the conduct of the grievance and disciplinary proceedings, including dismissal, without regard to the merits of the disputes which lay beneath. In fact, the issue before the tribunal was not the abstract merit of the grievance and disciplinary decisions, or whether they were fair or unfair, but whether they were in any respect tainted by direct discrimination on grounds of sex.

Legal framework

11. The legal framework for the claim was straightforward. It was a claim brought solely under the provisions of section 13 of the Equality Act 2010 when read with sections 39(2)(b) and (c). The protected characteristic was that the claimant was a man. Section 13 of the Act defines direct discrimination as occurring where, "A discriminates against B if because of a protected characteristic, A treats B less favourably than A treats or would treat others".

12. Although the claimant had stated in March 2017 that he relied on a hypothetical comparator, he in fact at this hearing also relied on Ms O'Hare and Ms Carmichael as actual comparators for parts of the claim. Section 23 of the Equality Act provides so far as material as follows:

> "On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

13. Ms Maclaren in closing referred the tribunal briefly to the burden of proof provisions. Section 136 provides as follows:

> "If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred." That provision "does not apply if A shows that A did not contravene the provision."

14. Although Ms Maclaren invited us in closing submissions to find that there is no basis on which the tribunal could rule that the burden had shifted, it seemed to us in the interests of justice to consider the evidence which we heard at some length from the respondent which went to the reasons for the claimant's treatment.

Introductory comments

15. We preface our judgment with two general observations.

16. The first is that in this case, as in many cases which we hear, the tribunal heard about a wide range of issues, some of them in depth. Where we make no finding about a matter of which we heard; or where we do so, but not to the depth to which the parties went, that should not be taken as

oversight or omission, but as a true reflection of the extent to which the point in issue truly assisted the tribunal.

17. The second relates to the claimant's presentation. We are very accustomed in the tribunal to cases where only one side has legal representation. It is our duty to do our reasonable best to put both parties on equal footing. We accept that that is difficult, because a contest between a trained professional (such as a barrister) and a member of the public in person is likely to be an unequal contest. We must take particular care not to make the mistake of assuming that the better presented case is the successful case. We have given special care in this case to be sure that we find for the respondent on the merits, and not because Ms Maclaren presented her client's case more effectively than the claimant did his.

18. While it is not our role in general to comment on case presentation, it seems to us that where case presentation repeats or overlaps with the events in the case, we are entitled to make findings about case presentation and to attach some weight to it in our deliberations, if relevant. (The everyday example of this approach would be that of the claimant dismissed for bad timekeeping who is persistently late in attending tribunal hearings.) We deal with this issue in the 'General' section below.

Summary

19. It may make this judgment easier to follow if we give a short, executive summary.

20. At a time of difficulty in Benthal Primary School, London N16, the claimant was appointed to a new post to develop out-of-class learning and opportunities. He quickly fell into conflict with his two direct reports. The conflict lasted for most of the claimant's first school year, at the end of which an understanding was reached to achieve closure on complaints and counter-complaints. Unfortunately, the closure was short-lived, and at the start of the claimant's second school year, his two direct reports submitted formal grievances against him. Almost simultaneously, the claimant was suspended because information had come to light about a safeguarding issue, and the claimant's use of video footage legitimately taken at work. While on suspension, the claimant submitted a formal grievance about his treatment, which Ms Gittens was appointed to investigate.

21. In late 2015 therefore, three simultaneous strands were in play: (a) the direct reports' grievances against the claimant; (b) the claimant's grievances; and (c) management of the disciplinary allegation against the claimant. The outcomes were respectively (a) that the grievance of one direct report was rejected and the other upheld in part; (b) that the claimant's grievances were mostly rejected, but upheld in part; and (c) that

the claimant was dismissed for misconduct. His appeal against dismissal failed.

22. His complaint to the tribunal was that the respondent's management of both sets of grievances and of the disciplinary allegation were all part of a campaign of sex discrimination. The tribunal finds that there was no element of discrimination whatsoever in the matters which we considered, and therefore all claims of sex discrimination fail.

23. We divide the fact find into phases. We depart from strict chronology where we think it helpful to do so.

Setting the scene

24. Ms Drew annexed to her statement a one page summary of Benthal Primary School. It is a two form entry primary school, aged 3 to 11; with 419 pupils on the roll. Of its pupils, 79% are from ethnic minority backgrounds and 49% have English as an additional language. Some 19% have special educational needs and disabilities. In common with the primary education sector, women are heavily represented in the staff of the school and at senior level. At the time of these events, the senior leadership team (SLT) was made up of four women under the leadership of Ms Chin.

25. The school was inspected by Ofsted in 2012 and categorised as "good". It then went through difficult times with turnovers of staff and headteacher, which, with falling results, led the respondent local authority to grant it "intensive support". That was a local authority matter, and not the same as the school being placed in special measures, a matter within the jurisdiction of Ofsted, which the claimant asserted had been the case: we reject this evidence, which was unsupported by any document. We should add, for the sake of completeness, that when Ofsted returned in 2016, it again rated the school as "good."

26. Ms Chin became the school's substantive head in April 2014, and held that post throughout the period in question. Ms Drew was appointed deputy head in September 2014 and has since become head.

27. In accordance with the intensive support, Ms Chin created the post of Learning Enrichment and Achievement Manager (37A). Her evidence was that she had successfully appointed a man to that post in the school where she had previously been head. The post focused on development of the school community outside core teaching times.

28. Ms Chin gave evidence that she interviewed and appointed the claimant. The short list consisted of the claimant and two unsuccessful female candidates. Ms Chin's evidence was that she was very pleased to appoint a man, and in particular a black man (Ms Chin is also black) to the post, so as to offer role models to the school community. Her evidence was also

that at the time of her headship, she had appointed seven out of the 13 male staff (out of over 50).

29. We accept Ms Chin's evidence, and find that in appointing the claimant, she took account of the protected characteristic of gender as a positive consideration in his favour. In our experience, it would be unusual, where that has happened, for the same person then to become one of the main discriminators on the basis of the same protected characteristic.

Events of September 2014 to Easter 2015

30. The claimant took up post on 1 September 2014 and we turn to the second phase, which was the period from then until the end of his second term. We heard no evidence which was in any respect critical of the claimant's functional delivery of the requirements of his post. He passed probation, and there was evidence to suggest that there were aspects of the role, particularly with children, which he performed successfully. We noted in the bundle formal recognition of achievement given to the claimant and his team.

31. On taking up appointment, the claimant became line manager of two play leaders, Ms Carmichael and Ms O'Hare. Although we heard a great deal about them, they did not give evidence and we therefore proceed with caution in making findings.

32. Although both Ms Carmichael and Ms O'Hare had been in post for many years, they had not before had any designated line manager. While we heard no criticism of their performance (other than from the claimant) it was common ground that they had been used to working according to their own ways and methods. The claimant therefore joined the school with an inherently difficult task, which encompassed introducing change, and being line manager of two long-serving employees who had not previously been line-managed. The claimant asserted that Ms Chin told him that they were difficult to manage. We accept Ms Chin's denial, and find that she probably alerted the claimant to the inherent challenges in his post. Ms Chin scarcely knew the individuals, and the point was that they had not been managed before, rather than being difficult to manage.

33. The claimant arrived at the school at an eventful and difficult time. Ms Chin had a great number of responsibilities, and the claimant's arrival was just one. We accept that she had to strike a balance between supporting the claimant, so as to assist him to create a new role and develop his team, while at the same time giving him sufficient freedom to create his own way of working and develop his own successes. Not long after the claimant's start, she designated a deputy head, Ms Mallick, to support the claimant, and she attended his team meetings. We accept that that was reasonable.

34. Ms Mallick and Ms Chin, along with Ms Drew and Ms Williams, formed the school's SLT, who met every Monday. The meetings were not formally minuted. On occasions when a specific issue arose on which the SLT

needed a contribution from the claimant, he was invited to attend that part of the SLT meeting which dealt with his issue, but not to remain. Otherwise, he did not attend SLT meetings. The claimant nevertheless asserted confidently that he must have been discussed at SLT meetings, and in particular discussed when he fell into conflict with Ms Carmichael and Ms O'Hare; and he cross-examined Ms Drew to the effect that she was lying when she denied it. It was an instance of the claimant's tendency to use language recklessly without any evidential basis for doing so: the claimant was in no position to know what had been discussed at meetings which he did not attend.

35. We accept Ms Drew's evidence that the SLT did not discuss the claimant or his direct reports as individuals or as an individual issue. We were sure that Ms Chin and Ms Drew (and their SLT colleagues) used SLT time to discuss the pressing issues which required discussion involving the whole SLT.

36. The claimant joined the respondent at a time which was difficult also for Ms Carmichael and Ms O'Hare. They faced the general insecurity of the school at a difficult time, and were asked to change ways of working which had been in place for many years. They faced working under line management, which they were not used to, and a complete stranger in that role. The claimant shared an office with Ms Carmichael and Ms O'Hare, which was of relatively modest size. In common with the policy of the school, the office kept an open door, so there may have been other colleagues present or working in a relatively confined space from time to time.

37. In that setting, we find that the claimant needed a range of skills which we would together designate emotional intelligence (such as tact, sensitivity and subtlety) in showing leadership in his management of Ms Carmichael and Ms O'Hare. He needed to win them over to his methods and goals, and to draw on their experience in a way which would make them feel valued. As appears below, we find that he did not demonstrate those skills.

38. There was cogent evidence of a rapid deterioration in the working relationship between the claimant and Ms Carmichael and Ms O'Hare. We attach considerable weight to an email which he sent Ms O'Hare on 12 September 2014 (122), which was about his tenth working day in post. He wrote to Ms O'Hare to state that Ms Carmichael had been "very aggressive and offensive" and that he had been "harassed/bullied verbally". He instructed Ms O'Hare that if she had concerns about any work matter, she should email him and he would reply in writing. He broke direct contact with Ms Carmichael ("If Jackie has any concerns, then she will have to relay them to or through you"). It was common ground that he sent email instructions to both play leaders, repeatedly sending the same email over a matter of days; and that on an occasion in October, when he considered that an email instruction had not been complied with, he sellotaped a hard copy to the computer screen used by the play leaders (and others). It will

be recalled that all three – the claimant, Ms Carmichael and Ms O'Hare – shared a small office.

39. On 8 October, the claimant emailed Ms Chin to keep her up to date, stating that he was not expecting any response, and setting out complaints about the conduct of Ms O'Hare (131). They were mostly about banal office events, and nothing turned on them.

40. On 6 February 2015, the claimant emailed Ms Chin "to highlight an incident". This was the incident involving Child A. The claimant ran after school activities. Child A, aged about 8 or 9, came from a troubled, deprived home. The claimant considered that he had banned her from his activities, and reported to Ms Chin that Ms Carmichael had nevertheless brought the child to an activity from which she was banned. He asserted that this was an instance of unco-operative, disruptive and offensive behaviour of the two play leaders and wrote "[they] are willing to use children under their care to do so… Yesterday to further their quest to implement the above goals, they were willing to leave a vulnerable child with a lone working adult…". (135-136).

41. Ms Chin knew A, her siblings and her family. Her evidence suggested that she felt that she knew them better, and had done so over a longer period of time, than the claimant did. She spoke to Ms Carmichael. She did not agree that A had been placed at risk in the incident in question. We find that that was a conclusion that was reasonably open to her. The underlying allegation was (as the claimant agreed in tribunal) that Ms Carmichael, Ms O'Hare and Ms Chin was each on occasion prepared to place a child at risk to further her part in a campaign against the claimant. We regard that allegation as at the extreme end of seriousness against each of the three. It would require cogent, compelling evidence. There was no such evidence, and we reject the allegation; we mention this as a further example of a reckless use of language.

<u>Events of April to July 2015</u>

42. On 17 April, the claimant gave Ms Carmichael and Ms O'Hare a pack (112-140) which consisted of a short letter (112-113) and a document headed "Joseph Johnson's Assessment" which was made up of a short narrative with multiple appendices, in all some 30 pages. It was common ground that he gave a hard copy to each of the two individuals. We accept Ms Chin's evidence that the claimant emailed her a copy. The claimant asserted that he had produced four hard copies and gave one to each member of the SLT; we do not accept that evidence.

43. The covering letter was curt to the point of rudeness. It presented as arrogant and authoritarian. Addressed to two people, it did not open with their names but with "Dear Lead play workers". (112). It then set out the results of 'an assessment' which the play workers had not known was taking place, and in which they had taken no part. He invited them to

attend an appraisal meeting in language far distant from reasonable management:

> "The purpose of your appraisal meeting will be solely to go over your targets and see how far you've gone in terms of completing them. And not a platform to discuss any issues you may or may not have with my assessment. For that you will need to schedule a separate meeting with the senior management team. Please note in an effort to ensure the meeting serves its purpose, and nothing else, I will be ending the meeting if I deem it to be unproductive. I will then proceed to analyse where you are in regards to your targets, with a member of the senior management team, and then make our findings available to you in writing." (113).

44. The document is also the first important example in the case of a matter to which we refer in the general section below, namely that the claimant struggled to express himself clearly in writing, and that his methodology, of writing a narrative with many appendices, many of them cut and pasted, created a totality which was difficult to follow. The claimant had little insight into this difficulty, and even less insight into the impact on others of how he expressed himself in writing.

45. Within the section headed "Overview", the claimant wrote that the play workers "were (and still are) determined to be as offensive and disruptive as possible which has meant them resorting to things like: …". He then set out nine matters (confusingly labelled v to z and aa to dd) of which the last was "Endangering the well-being of students and staff for the sake of being disruptive and offensive."

46. In a section headed "Child Development", he wrote that the play workers have "Put children's safety at risk for the sake of being offensive and disruptive". The appendices included the claimant's emails of 8 October 2014 (131) and 6 February 2015, the A incident (135).

47. It was not surprising that Ms Carmichael and Ms O'Hare objected to this form of language and management. They sought the support of Ms Chin.

48. Following further discussions, in which the claimant realised that the 17 April document met opposition, he wrote a further document called "Official Challenge to Grievance" (105) on 21 May, in which he repeated a number of his complaints about the behaviour of Ms Carmichael and Ms O'Hare and also wrote, for the first time, complaints of gender discrimination and race discrimination. He described the school as having "a discrimination filled environment" (110) and in particular wrote (109):

> "Now taking into account my contribution to Benthal Primary School (not to blow my own horn) has been nothing less than outstanding. With a willingness to use my own time and resources to get the job beyond done, it's hard for me not to come to the conclusion that I am right now a victim of gender discrimination, in a work environment where male workers in general are outnumbered, and male workers in positions of authority are few and far between."

49. The first question for us was whether the document of 17 April 2015 was a grievance. The claimant asserted that it was. We find that it was not. Nowhere does it engage the vocabulary of grievance, and it is addressed not to a person with authority to resolve a grievance but to two subordinates, who were the people whom the claimant was complaining about. It is headed "Assessment" and throughout uses, however poorly expressed, the language of performance review.

50. The claimant asserted that he told Ms Chin that it was a grievance against Ms Carmichael and Ms O'Hare. We accept Ms Chin's denial, and we find that he did not.

51. The second point was a more measured one. At a later stage in these events, Ms Gittens upheld the claimant's complaint that his grievance of 21 May, in which he had expressly engaged the vocabulary of discrimination, had not been taken seriously and had not been progressed. Ms Gittens reported that whatever the merits of the complaint, the claimant was entitled to have a grievance of discrimination taken seriously and considered through a formal process. Ms Chin did not do that.

52. In context, we find that Ms Chin did not take the allegations of discrimination seriously because having become involved in the dispute about the April 'assessment,' she knew them to be unfounded; and she also knew that the claimant had raised the complaint of discrimination in the ninth month of protracted dispute with his two direct reports, and as his response to their resistance to his April document. We find that while Ms Chin made an error of judgment in failing to progress the claimant's allegation of discrimination, or even seek HR involvement on it, she made a genuine error wholly unrelated to the claimant's gender.

53. Ms Chin was concerned to achieve closure on all these events before the end of the school year, before everyone dispersed for the summer holiday, so that all involved could make a fresh start the following September. That was plainly a reasonable management objective.

54. Ms Chin also formed the view, which we find was reasonably open to her, that the claimant was at fault in springing the April document on Ms Carmichael and Ms O'Hare, and in the manner in which he had done so, using the language which he had used.

55. By mid-July, she brokered an arrangement whereby the claimant on instruction apologised to Ms Carmichael and Ms O'Hare, and agreed that the 17 April document could be treated as null and void; and was offered support to achieve an appropriate standard of management. It is obvious from Ms Chin's letter to the claimant of 8 July 2015 (46-47) in which she set out how matters stood, that there had been a number of informal meetings, an informal resolution, and that she considered that the claimant had been at fault. In particular we note the following three paragraphs of her letter:

> "I must reiterate that each time I have met with you, you have been informed that whilst I accept that you may have difficulties managing the behaviours of these staff, to provide such a document to them is inappropriate and unacceptable and I have urged you to reconsider and apologise to these staff.
>
> This matter could have been avoided had you checked it with a Senior Management first. It is not the first time that I have had discussions with you regarding sending out documents without first checking them with myself.
>
> I am disappointed that after so many informal discussions that you still do not understand the repercussions of your actions. It is important that these matters are resolved and in my view the appropriate resolution is an apology."

56. Ms Chin issued a formal instruction to the claimant to provide a written apology and reminded him that a failure to follow a reasonable management instruction could lead to formal disciplinary action. The claimant presented a form of apology (not available to us) and the matter was considered resolved by the end of that term, when the school closed for the summer.

57. Ms Chin's letter of 8 July is an important summary and we add only that if she wrote in parallel terms to Ms Carmichael and Ms O'Hare about closure, it would have been helpful for the tribunal to have seen that letter.

Autumn 2015 and the play leaders' grievances

58. The school closed for the summer, but when it re-opened, the peace which Ms Chin had brokered proved short-lived. An incident took place involving the claimant and Ms O'Hare on about 9 September 2015. We make no finding as to what precisely took place. We find that the school in general had an open door policy, and that it was understood that that policy was in place in part to protected staff from allegations. We also accept that there were occasions when the needs of a child required departure from the policy. We do not accept the claimant's comment that he might feel free to depart from the policy if he wanted a quiet space within which to do paperwork. The outline of the incident was that the claimant was working alone in the shared office with the door shut; and that when Ms O'Hare came into the office, she wanted to open the door in accordance with the policy; the claimant objected.

59. As stated, we make no finding as to what happened, save to find that the fact that the truce which had been brokered in July broke down within a few days of the start of the new term is an indication that it was a fragile peace.

60. On 23 September, Ms O'Hare and Ms Carmichael submitted written grievances through their Unison convenor, Ms Lynn (53-53A). Ms Carmichael's grievance (53A) related entirely to events the previous term, although it concluded that she found that the apology delivered by the claimant in July "was not sincere, I feel joseph Johnson has still remained

as unprofessional and aggressive in his behaviour". However, no specific instance was mentioned (53A).

61. Ms O'Hare's grievance reiterated matters from the previous term and then stated:-

> "I still find his behaviour towards me aggressive, abusive, inappropriate and unprofessional. I don't feel safe around him."
>
> Ms Lynn wrote,
>
> "I understand there has been further issues since this was sent to me and that an incident occurred on 9th and 10th September which we will add to the grievance but we would like to start the process asap as the current situation is untenable and causing much distress and upset to Caroline." (53).

62. The respondent's grievance procedure (638) included the following: "A grievance will not be accepted where… the events have previously been heard through the grievance procedure involving the same parties." The claimant raised the point that the grievances should not have been accepted, because they had already been heard and disposed of the previous July.

63. Ms Chin was tasked with dealing with the grievances. She drew on the support of the external HR function. She appointed Ms Drew, as deputy head, to investigate the grievances and report. Ms Drew also drew on the support of the HR function.

64. The claimant objected to the appointment of Ms Drew as investigator. Part of his objection was based on the allegation that she was a member of a campaign of sex discrimination against him: we find that there was no campaign. The claimant also objected on the basis that Ms Drew took part in discussions about him and his relationship with the play leaders at the SLT. Ms Drew denied that there had been such discussions, and we accept her evidence. We find that she had some general awareness of a management issue, which she understood was supported by Ms Mallick. We do not find that Ms Drew had knowledge or involvement such as to render it inappropriate for her to be the grievance investigator. In saying so, we bear well in mind that it is not our task to make a ruling as to whether she was inappropriate, but as to whether her appointment was discriminatory. We find that it was not.

65. The claimant complained that members of the HR function who were involved in his matters, all of them female, were also part of a campaign against him, and became compromised as a result. We do not agree with any part of that approach, of which there was no evidence whatsoever. We do not agree with the claimant that there was a campaign. However, that apart, we accept a number of points about the involvement of HR with which the claimant seemed unfamiliar.

66. We find that Ms Chin and Ms Drew (and later, Ms Carter and Ms Kalnins) understood that the respondent had in place detailed policies which applied across the borough and to the staff in the school. They had access to the policies which they read as required. They were conscious that they were not HR experienced or professionals, and that the policies might require clarification from an experienced professional, who might for example give guidance on their practical applications. Each requested the support, guidance and assistance of members of the HR team in that respect, and we find that HR team members gave such support, while taking care to ensure that decision-making remained firmly in the hands of the individual manager. That is the conventional pattern in our experience of the relationship between management and HR professionals.

67. We do not agree with any general proposition which states that an HR professional should stand down from advising on a matter in which she has previously advised, simply by virtue of having previously advised. We do not agree that an HR professional is required to stand down from advising on a matter, in response to an ill-founded allegation, complaint or objection by an individual employee. We accept that there may be situations in practice where the HR professional does stand down, if the individual case circumstances warrant doing so.

68. We have heard no evidence which indicated that any member of the HR function acted in any way inappropriately in these events, let alone discriminated against the claimant in any respect whatsoever.

69. Ms Drew interviewed those involved in the dispute, read the relevant paperwork, and on 22 April, gave her conclusions in lengthy letters to Ms O'Hare (55-63); to Ms Carmichael (64-67); and to the claimant (68-69).

70. Ms Carmichael's grievance was rejected in full essentially on the basis that it had been dealt with and concluded through the apology given by the claimant the previous July. Ms Drew upheld a number of points of Ms O'Hare's grievance, but only parts which she found had not been dealt with the previous July. The points which were upheld included excessive use of email in autumn 2014; the closed door incident in September 2015; and in part the complaint about the assessment document of 17 April 2015.

71. She made a number of practical recommendations (63, 67, 69) which were geared towards a re-creation of the working relationship between the three individuals, including voluntary mediation, and training and coaching for the claimant, and the continued involvement of Ms Mallick in team meetings. By the time the recommendations were issued, the claimant had been suspended for several months, and in the event, never returned to work.

72. The claimant alleged that the recommendations were "lip service" and were insincere. We find that the grievance process and outcome represented Ms Drew's honest enquiry, and her sincere conclusions. We

do not agree that any part of her work in that respect was tainted by a discriminatory consideration of gender. We add that had the claimant not been suspended, there must be some doubt as to the practicability of implementing the recommendations.

The claimant's grievance

73. As stated below, the claimant was suspended on 12 October 2015 and never returned to work before his dismissal (he was on long term sick leave after 29 January 2016).

74. The claimant issued a detailed grievance on 8 November 2017. In closing, Ms Maclaren submitted that the claimant's motive in issuing the grievance had been response and defence in reply to the disciplinary allegation. We make no finding on that point.

75. The grievance exceeded 100 pages (70-175). It named nine women against whom the grievance was presented as individuals (70) and beside seven of the names used a near identical form of words: "For creating, cultivating, and maintaining a work environment that bullied, harassed, victimised and discriminated against me because I am a man". (The last nine words were absent from the names of Ms O'Hare and Ms Carmichael.) The claimant set out a short narrative, a long timeline of events interspersed with illustrative documents, and then attached a large number of appendices. The arrangement of the narrative, timeline and appendices was repetitive, not chronological, prolix, and consequently unclear. On 2 February 2016, the claimant amended the grievance by adding the names of three more female discriminators, Ms Carter, Ms Adam (Ms Carter's predecessor as Chair of Governors) and Ms Turner of HR, against each of whom he repeated the form of words set out above (175A).

76. Ms Chin took advice from HR, and understood that given the breadth of allegations raised by the claimant, and the numbers against whom he expressed his grievance, it was appropriate to appoint an external investigator. Ms Gittens was appointed.

77. Ms Gittens is a qualified barrister in independent practice, specialising in employment law. The first paragraph of her witness statement reads as follows:

> "I am a qualified barrister and hold a practising certificate. My main area of work is employment law. I also provide advice and assistance on employee relations and have in the past (and currently) worked closely with HR personnel. I have been engaged to carry out independent investigations into grievances and disciplinary matters both in the private and public sector. I am also an accredited mediator."

78. She was formally retained on 26 January 2016, and produced a report dated March 2016 (176-218).

79. The claimant alleged that Ms Gittens was compromised through what he understood to be conflicts of interests. He referred to her relationships with Ms Adams and Ms Carbury. Ms Gittens' understanding was that she was recommended to the then Chair of Governors, Ms Adams, by a member of the respondent's HR team, Ms Carbury, with whom she, Ms Gittens, had been co-employed in a different local authority about 20 years previously. Ms Gittens' evidence, which we accept, was that she had never met Ms Adams, and certainly not met her before Ms Adams appointed her. The claimant challenged Ms Gittens, alleging that this evidence was a lie, although he could not be (and agreed in evidence that in fact he was not) in a position to prove that Ms Gittens and Ms Adams had met.

80. We find that Ms Gittens was appropriately qualified and experienced for the task to which she was instructed. We accept her evidence that she had had no previous dealings with Ms Adams, whom she had never met. We accept her understanding that her name was put forward to Ms Adams by Ms Carbury. We find that the mere fact that Ms Gittens and Ms Carbury had been colleagues in a different local authority many years in the past would not require Ms Gittens to have refused instructions, because it would not on a reasonable view give rise to any compromise or conflict.

81. In paragraphs 4.1 to 4.10 of her report, Ms Gittens set out a list of the documents which she read, and described the process which she followed. She had not met the claimant. She interviewed in person Ms Chin, Ms Mallick, Ms Drew and did so in the presence of a note taker. She did not interview in person any of Ms Adams, Ms Lynn, Ms Antwi and Ms Lyndley, but sent questions to them in writing. In a third category, she set out the names of Ms Carter, Ms O'Hare and Ms Carmichael whom she neither interviewed nor sent written questions.

82. The claimant's case focused heavily on Ms Gittens' decisions to put written questions to those named above but not to the claimant. Although written questions were put to Ms Adams and Ms Lynn, the claimant focused on the questions put to Ms Antwi and Ms Lyndley, both of HR, when no written questions were put to him.

83. In her report, Ms Gittens wrote the following:

> "The reason that I chose to send a list of questions to the above as opposed to holding meetings with them were twofold. Firstly, the allegations against them were specific and minimal. Secondly, there was a genuine concern as to the time that additional face to face interviews would take given the additional associated processes involved." (181).

84. She supplemented the point in evidence by adding that she had to put questions in writing to Ms Antwi and Ms Lyndley in effect because she had no information from either of them.

85. The relevant communication with the claimant was set out at pages 175K to 175Q of the bundle, which we briefly summarise.

86. On 28 January, Ms Gittens wrote to the claimant by email to introduce herself and to ask him to a meeting on 3 February, with accompaniment if desired, to be interviewed about his grievance (175K-L). The claimant replied at 7:12 pm on 2 February to state the following (175N):

> "Hope all is well. Due to health reasons, I will be unable to attend your meeting scheduled for the 3rd February 2016. Please find information below, which along with the attached updated grievance, should be more than enough to assist you to conduct a fair and thorough investigation, if that is truly what you intend to do."

87. The claimant attached his grievance (which as stated above he had amended by adding three additional named individuals) and a fresh copy of outline information.

88. Ms Gittens rescheduled the meeting for 10 February. At 8:34 pm on 9 February, the claimant sent an email which apart from changing the date 3 to 10 was word for word identical to that quoted above of 2 February (175P).

89. On 18 February, Ms Gittens wrote to the claimant asking him to attend a meeting on the morning of 25 February, and stating:

> "If you do not feel able to attend a meeting with me, I wonder whether you feel well enough to answer a few questions that will assist me in my investigation into your complaints." (175P1).

90. At 9:33 pm on 24 February, the claimant replied. Apart from changing the date from 3rd to 25th, his reply was word for word identical to his previous two emails (175Q). All three emails were sent well after close of business on the evening before the meeting in question. Ms Gittens took the claimant at face value. She had by that stage well over 100 pages of material which he had submitted. He had on three occasions stated that that material was "more than enough". That had also been his reply to her proposal to put to him questions, although, as he repeatedly pointed out to the tribunal, he had not actually refused to answer any question.

91. We make two findings about this exchange. The claimant complained of a difference in treatment in that Ms Lyndley and Ms Antwi had the facility of answering written questions and he did not. While that is a difference in treatment, we find that the circumstances of the two were hugely different, and far outside the remit of the like with like comparison requirements of section 23. Ms Gittens had no material from Ms Lyndley and Ms Antwi; she had ample material from the claimant. She had taken an informed judgment not to interview Ms Lyndley and Ms Antwi in person, but she made a pragmatic decision not to pursue the claimant's refusals to meet. The claimant had in terms stated that he had given Ms Gittens "more than enough" whereas she had had nothing from the other two.

92. Ms Gittens was unmoved by the rudeness of the claimant's emails. We comment below on the claimant's lack of insight into the impact of his

written material. We find that by using the same form of words, word for word, on three occasions spread over three weeks, the claimant conveyed not just his refusal to meet but also the sense that nothing that Ms Gittens could put on paper could change his mindset. That conveyed the impression of both arrogance and inflexibility. That impression was in our judgment enhanced by the gratuitous sneer with which he concluded each email.

93. Ms Gittens' report and conclusions should be read in full, and we would do little justice to her report if we tried to summarise it. The report gave rise to problems for the parties. Ms Gittens criticised a number of aspects in which the claimant had been managed. The claimant wished in this hearing to adopt those criticisms. The respondent accepted some of the criticism, but not all of it. Ms Gittens found firmly that the reasons for the claimant's treatment were not discriminatory reasons. That finding was one which the respondent wished to adopt in this hearing, but which the claimant rejected.

94. It is not our task to go through her findings, observations and conclusions to set out whether we agree with each of them. It is our task only to find whether we consider that in any respect her process and conclusions were tainted by the discriminatory consideration of gender. We find that Ms Gittens read such documentation as was placed before her, and where she found the material provided by the claimant unclear, did her best to understand it, but was deprived of the opportunity to discuss it with him further. We consider that she made objective balanced judgments as to whether to interview certain individuals. She weighed up the matters before her and she reached balanced conclusions.

95. It is important to note that she did not reach a binary conclusion. Her report upheld a number of the claimant's complaints and concerns, though not a complaint of discrimination. Our finding is that the process followed by Ms Gittens, and her conclusions, were in no respect whatsoever tainted by the claimant's gender.

96. Departing again from chronology, we add the following observation: Ms Gittens, like Ms Drew, Ms Carter and colleagues and Ms Kalnins and colleagues did not reach a conclusion wholly for the respondent and against the claimant, and that pattern is, we consider, indicative of reflective balanced decision-making, and at odds with any suggestion of discrimination.

<u>The disciplinary case</u>

97. The final strand in the matters before us were the disciplinary process (and dismissal) of the claimant. It was by far the clearest part of the case which we had to decide.

98. As part of its work, the school uses film and video footage. The use of footage gives rise to safeguarding issues. In her last answer to the tribunal, Ms Kalnins explained compellingly what the issue was:

> "A child could be vulnerable, for example due to a family situation or as a result of bullying. A child's presence in a school could be unknown, and footage can reveal the location of a child. Permission to appear in footage is an entitlement [of both parent and child]. Images on a website can identify the building at Benthal Primary school, it is striking and unusual design, and known to Hackney residents. The school is a safe place. All this should be implicitly understood by school staff."

The quotation is from the judge's note, amplified [to explain context according to the judge's recollection]. We accept not only that that is well stated, honest evidence, but that its contents represent the understanding and knowledge of experienced teachers and those who work in schools.

99. The claimant had lead responsibility among staff for footage, and for developing its use to promote and support the school, for example on the school's website, through intranet, and on YouTube. The claimant had safeguarding training after taking up this employment, and must have known of these general issues as a result of any experience in other schools.

100. Ms Chin accepted that the use of footage is not an absolute right of the school, and, as indicated by Ms Kalnins, must take place within the framework set by the school, and subject to individual consents. That meant that the claimant's ability to develop the use of footage was at all times subject to the school's requirements, and the wishes of individual parents and children. The latter point gave rise inherently to practical problems. It would for example be perfectly possible for 95% of children in a class to have given consent and parental consent, but that use of footage of the class would have to be subject to the non-consent of the other 5%.

101. We need not go through all the documents in relation to the above. The claimant's email to Ms Chin of 15 December 2014 (434) is clear evidence of his understanding in principle of the issues. Email trails of June 2015 (436) show that an issue had arisen about the appearance of school footage on YouTube. The school had procedures to ensure that footage was not accessible to the general public outside the school. The claimant was given urgent instructions to ensure compliance. It was also apparent that the issue was a concern of Governors, and was dealt with at Governors' meeting level (439, 30 June).

102. Following discussion with Ms Chin, the claimant on 14 September 2015 drafted an important document (441) which was the form on which parents were to be asked to give consent to the appearance of their child in footage. The form of consent is less important than the pledge drafted by the claimant on behalf of the school. It included four specific promises, which were that all videos uploaded on online will be marked "unlisted" so

that they could not be accessed without the school's consent; that videos "will not be passed on to third parties"; there were also provisions for password protection of the school's own channel.

103. At a Governors' meeting on 30 September 2105 (444), it was reported that there was an unprotected link to the school on YouTube. This meant that the security provisions were still not in place. A parent governor subsequently reported that there were concerns from a specific parent about these issues (545).

104. The claimant was repeatedly instructed to ensure that the security provisions which applied to the school's footage were in place, and he was alive to the issues which followed.

105. On 9 October it was found that the claimant failed to ensure this. On that day it was also found that the claimant had created a link to school footage on a personal YouTube channel which he owned and controlled (446). In other words: the claimant had placed footage which he had taken of identifiable children at school on a channel which only he controlled, over which the respondent, the school and parents had no authority, which was accessible to the public, and which appeared to be part of a business venture set up for his own gain.

106. On 12 October 2015, Ms Chin, after taking HR advice, suspended the claimant. A considerable part of this hearing was taken up with the claimant's contention that there was a discriminatory difference in treatment. He submitted that whereas Ms Chin had suspended him in October 2015, in response to a report of a safeguarding issue (namely accessibility on his YouTube channel) he had not suspended Ms Carmichael, against whom on 6 February 2015 he had reported a potential child safety issue in relation to Child A (see above).

107. We set out our findings in two respects. We find first that Ms Chin was reasonably entitled to suspend the claimant in context. He had been under instruction for many months to ensure the security of any footage of a child at the school. He had not only failed to do so, he had been found to have uploaded material to his own personal YouTube channel, outside the access or control of any person at the school except himself. Ms Chin was reasonably entitled to suspend the claimant because he appeared unwilling or unable to recognise the legitimacy of management instructions about a matter which was regarded as utterly serious. His default was a continuing matter, and Ms Chin had personal knowledge of it without further enquiry. As a standalone decision therefore, we find that it was a reasonable exercise of legitimate management authority, and that a hypothetical female comparator who had uploaded the identical material to her personal YouTube channel in the same circumstances would have been suspended. The claimant's assertion in evidence, "I am one million per cent sure that a woman would not have been suspended" was fanciful.

108. We find that the situation was not comparable with the allegation about Child A because that was a one off situation which, as Ms Chin knew at the time, arose in the sixth month of a growing conflict between the claimant and Ms Carmichael, and which, after brief enquiry, she did not as a matter of professional judgment consider gave rise to a safeguarding issue.

109. We find that the decision to suspend the claimant was not comparable with the decision not to suspend Ms Carmichael and was in any event wholly untainted by discrimination.

110. The disciplinary procedure was triggered. The claimant asserted that the Chair of Governors, Ms Carter, should have told all Governors what had happened and that he had been suspended. Ms Carter explained, with reference to the disciplinary procedure, that she informed those governors who had a "need to know" that the claimant had been suspended, and that her approach was precisely not to inform all governors, so that separate panels without knowledge or involvement could be convened to deal with the disciplinary hearing and with any appeal.

111. We have no hesitation in finding that Ms Carter's approach was in accordance with the procedure, and in accordance in particular with the tribunal's experience of usual practice in such cases. It cannot be faulted. It was in the claimant's own interests at that time, given that the allegation against him had not been tested, and could readily have been mis-reported and misunderstood. The claimant's assertion in evidence that "If Ms Carter didn't tell them that was because she had an agenda" was likewise fanciful.

112. The claimant challenged the appointment and membership of the disciplinary and appeal panels. Faced with the logical difficulty that the disciplinary panel was made up of four people, two of whom came from outside Benthal (the headteacher of another primary school and the chair of governors of a third primary school) the claimant asserted that the other governors were under the control of Ms Carter or under her influence, because she had appointed them to the panel and organised the disciplinary procedure. There was no evidence to support that proposition. We do not accept that by carrying out the organisational tasks, Ms Carter was in some way in control of the panellists.

113. The disciplinary hearing took place on 22 July. Ms Chin attended to present the management case, supported by Ms Antwi of HR. Ms Carter, then Chair of Governors, chaired the meeting. The other members of the panel were Ms Clode, a governor of Benthal, and the two other members. The claimant did not attend and was not represented.

114. Although the case presented by Ms Chin referred to a number of separate allegations, the reason for dismissal written by Ms Carter was one and one only:

> "You are being dismissed on the grounds of your gross misconduct in relation to willingly making videos and images of Benthal Primary School pupils publicly accessible across the internet via your own personal enrichment website. The fact that you did this knowing full well that the school had instructed that the videos of pupils should not be available on the internet has been deemed sufficiently serious enough to allow us to dismiss you without notice or pay in lieu of notice". (555-556).

115. The claimant appealed. The appeal panel likewise consisted of two governors of Benthal and two from other schools, including Ms Kalnins, chair of governors at another school, and highly experienced in issues of school management. The appeal was heard on 28 September and the claimant again did not attend. Ms Carter put to the panel the basis upon which the disciplinary panel had dismissed, and the appeal panel endorsed the first range approach.

116. In rejecting the appeal, Mr Harvey-Jones, who chaired the panel (but was not available to give evidence) wrote as follows:

> "There was clear evidence that you had not followed school practice or policy and as such, your actions were so serious that it met the threshold of gross misconduct on its own. In particular, despite clear instruction that parents of Benthal children must give permission before images of them could be used, you continued to use their images on the school website. Furthermore, you used videos and images of Benthal pupils on your own business website, which is in no way connected with the school and this was done without any apparent permission from the parents of any of the children, nor from the school, thus potentially compromising the children's safety." (598-600).

117. The claimant's evidence on his dismissal was striking. Ms Maclaren put a number of nuanced questions, asking whether the claimant's conduct "looked like" the point of the question. The claimant agreed that his actions looked like a failure to comply with management instruction; that it looked like improper use of footage; that it looked like a breach of the pledge to parents at 441; and that it looked like he had done so for personal gain.

118. The claimant put forward the explanation that the YouTube material had been uploaded in support of an application for funding which he had made on behalf of the school. It was common ground that fundraising was part of his responsibility, but Ms Chin was firm that he did not have autonomous responsibility to apply for sources of funds without the permission of the school. The claimant agreed in evidence that the application in question was not one which the school had approved, because he had not applied for approval. It therefore had not been supported or signed off by Ms Chin or a member of the SLT. He was unable to produce evidence of having made the application, because (he said) he had submitted it online and there was no reference number or receipt.

119. Seemingly for the first time in evidence, he mentioned that the footage in fact was in support of a funding application on behalf of a number of schools including Benthal. This point seemed to take the respondent and

Ms Maclaren by surprise, and the claimant confirmed that he had used footage of Benthal pupils in support of his company's application for funding on behalf of a number of local schools, again without the permission of Benthal.

120. The task of this tribunal is not to find whether the claimant's dismissal was fair but to find whether a hypothetical female in identical material circumstances so far as material would have been dismissed. The material circumstances for the comparison include the history of instruction about video use; the safeguarding background and training; involvement in preparation of the pledge; and the repeated instructions as to privacy, passwording and the like; followed by the use of school footage on a personal YouTube channel, without permission, and seemingly for a commercial venture which would involve other schools. We have no hesitation whatsoever in finding that a hypothetical woman in that situation would have been dismissed.

121. We find that the reason for dismissal was that the respondent had reasonable evidence that the claimant had placed footage taken at the school on an accessible YouTube channel; without the knowledge or consent of any person of authority within the school; without the consent or knowledge of any parent; for the personal use of the claimant's own business; potentially for the claimant's own financial gain; and that the explanation which he provided was unsupported by evidence, unknown to management at the time, and, even if proved, was in any event not acceptable.

122. There was no respect whatsoever in which the decision to dismiss was tainted by gender.

General

123. In giving judgment, we thought it right to make a number of general observations about presentation of the case, not gratuitously, but because the claimant's manner of presenting the case in certain respects replicated the conduct at work which underpinned his management and dismissal, and was therefore relevant to our conclusions.

124. We find that the claimant's credibility was seriously harmed by the recklessness of his language. He repeatedly used language without regard to its meaning, gravity and its impact on others.

125. We take as examples the safeguarding allegation which he made against Ms Carmichael in February 2015, which he bolstered in evidence by stating that Ms Carmichael and Ms Chin would have a put a child's safety at risk for the sake of undermining him (the claimant). Seemingly for the first time in evidence, the claimant alleged that Ms Carter had decided to dismiss him for a corrupt motive, which was to create a gap in the school's services, which she could fill with her theatre project, for personal gain. We find that that allegation was unfounded. The claimant accused Ms Gittens

of lying when she denied having met Ms Adams and Ms Drew of lying when she denied that the SLT had discussed the dispute between him and the playleaders. We comment on those two allegations because they were based on factual events about which the claimant could have no personal or better knowledge than the witness – he was not in a position to prove whether Ms Gittens had ever met Ms Adams, and he was not in a position to know what had been discussed at SLT meetings which he had not attended. He alleged the existence of conflicts of interest without having a reasonable understanding of the meaning of the phrase, or its potential gravity.

126. Secondly, the claimant produced paperwork which was prolix, unclear and repetitive, and he cut and pasted documents into his own submissions without leaving it clear that that which he cut and pasted was a true copy of an original. Late in the hearing for example he asked to introduce a fresh copy of the covering memo for his 'assessment' of 17 April 2015. In fact the text of the document was in the bundle at 112 and in Bundle 3 at page 50, but the copy which the claimant asked to produce was in different format with a different heading. The claimant showed little insight into the problems of understanding caused by his writing style. He seemed not to understand, even at this hearing, the impact of his choice of words on others. The relevance of this is that where the claimant complained of discrimination by those who had failed to read, understand or respond to his documentation, he simply did not see the unclarity in the documentation. We also find that the objections raised by others (notably the direct reports and Ms Chin) to his April document were well founded, and wholly unrelated to gender.

127. The claimant demonstrated a poor understanding of aspects of the world of the workplace. For example, he showed little insight into the challenges of managing long serving staff at a time of change. He did not understand the importance to the SLT of delegation; or the professional use of HR; or the compartmentalisation of information within the governing body. He repeatedly submitted that individuals were unsuitable to be involved in management of these events because of what he called conflicts of interest. However, on examination, these turned out to be unrealistic complaints of prior involvement. We have dealt above with the example of the alleged relationship between Ms Gittens and Ms Carbury.

128. The claimant did not understand the fundamental elements of discrimination and therefore of his own claim. Repeatedly the claimant advanced his case on the basis that he, as a man, had experienced a detrimental event (or dismissal) at the hands of a woman, and seemed unaware, despite guidance from the tribunal, that he must at least prove some element of causation, or prove some facts which go beyond merely demonstrating the protected characteristic and the form of treatment complained of. He failed to do so. The mere fact that most of the decisions complained of were taken by women was not sufficient to do so, and was a matter which we regarded as of marginal bearing. He gave the tribunal no analysis or discussion of any causative link between protected

characteristic and detriment, and we were unclear, at the end of the case, whether he understood the place in a discrimination claim of comparison, and the need to show how a hypothetical female comparator would have been treated.

129. We note finally that the claimant showed poor understanding of what might constitute evidence for the purposes of proceedings. The claimant repeatedly made assertions based on assumption and speculation, without evidential support. He took for granted the foundations of the case which he needed in fact to prove; and then built his case on foundations which had not been established. In doing so, he failed to analyse each step in the process, or to consider any evidence which ran counter to his underlying assumption. The most striking example was his repetition that he was the victim of a 'campaign' of women who were discriminating against him.

130. The claimant relied repeatedly on bare assertions (e.g. that there was a campaign against him) and relied on repetition as making the assertions stronger. He clearly had not analysed any part of the case which went against his approach. Many of these weaknesses were summarised in his discussion of page 370 of the bundle, which appeared to be the reprinted text of a WhatsApp message from a former male colleague. The document was in the bundle as if it were evidence from the individual who sent it. There was no evidence that the item in the bundle was in fact the WhatsApp message that had been sent (370); or the context in which it had been sent; and while it showed that the individual was unhappy at work, it was not evidence of discrimination. The claimant's assertion that it was evidence of discrimination because it was an indication that a man was unhappy with management by a woman repeated the underlying flaw in these proceedings.

Conclusions

131. We here set out a summary of our conclusions. As a matter of general approach, we do not, for reasons set out, find the claimant a credible witness or narrator. Where we are asked to accept a bare assertion which he has made, or his account of an undocumented event, we do not do so. We approach documents which he prepared with the cautions indicated.

132. When we ask whether he has shown facts which indicate less favourable treatment than either an actual or a hypothetical comparator, in materially the same circumstances, we find that he has not. The circumstances set out above are to a large degree fact-specific. We have to construct a woman who had, for example, written the same 'Assessment' document as the claimant, or had uploaded footage to her YouTube channel; once we do so, we have no difficulty in finding that a hypothetical woman would have been treated identically. Where we are asked to consider the treatment of an actual comparator, we find that the comparison fails because the circumstances were not materially the same. We accept Ms Gittens' evidence as to why she offered others the opportunity to answer written questions, but not the claimant. We do not accept that the

circumstances of the claimant's grievance can be considered materially the same as those of the play workers.

133. Turning to the specific matters set out in the March 2017 order, and referring to the paragraphs of that order, we find as follows. Under 14.1.1 we find that the disciplinary process was in no respect whatsoever tainted by any consideration of the claimant's gender. We find that the sole reason for the process was the legitimate and reasonable concern of the respondent that the claimant had committed a serious contravention of its safeguarding policies, possibly for personal gain, and in full knowledge of the issues of all the issues involved. Under 14.1.2, we find that the process of selecting Ms Drew, following HR guidance, and of Ms Drew in conducting the process was likewise in no respect whatsoever tainted by any consideration of gender, whether that of the claimant or of any other person. We reach the parallel conclusion under 14.1.3 in relation to the process followed by Ms Gittens.

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Employment Judge R Lewis

Date: ……20 February 2018……..

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office