Neutral Citation Number: [2017] EWHC 2019 (QB)

Case No: QB/2017/0022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/08/2017

Before:

THE HON MR JUSTICE FOSKETT

- -

Between:

SIMONE AGOREYO	**Appellant/ Claimant**
- and –	
-	
LONDON BOROUGH OF LAMBETH	**Respondent/ Defendant**

- -
- -

STEPHEN BUTLER (who did not appear below, **instructed by the Bar Pro Bono Unit)** for the **Claimant**
CHRISTOPHER MILSOM (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing date: 20 July 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Foskett:

Introduction

1. This is an appeal, brought with the permission of Morris J given on 17 May 2017, against the order of His Honour Judge Wulwik, made in the Central London County Court on 12 January 2017, whereby he dismissed the Claimant's claim against the Defendant for damages for breach of contract.

2. As will emerge, the trial was confined to liability only and the question of the causation of the losses claimed, and the quantum of those alleged losses, did not arise for consideration.

3. The Appellant (who was, of course, the Claimant below) was represented by experienced Counsel at the two-day trial on 19 and 20 December 2016. Counsel had pleaded the claim on her behalf and available to me have been the written closing submissions that he advanced before Judge Wulwik. The Appellant launched the application for permission to appeal in person and was, in part, critical of Counsel who had acted for her. This has not been pursued as such, but there is one feature of the appeal relating to the pleadings to which I will have to return later.

4. The Appellant has had the good fortune of representation at the hearing of the appeal by Counsel instructed by the Bar Pro Bono Unit. Mr Stephen Butler was instructed only shortly before the hearing and did not receive the full papers in the case until the afternoon before the hearing. He produced a first-class Skeleton Argument with appropriate references to the evidence, the judgment and the relevant authorities in what must have been a very short period of time, all of which were properly focused on the true issues in the appeal. The quality of the Skeleton Argument was matched also by the quality of his oral submissions. Whatever the outcome of this appeal, the Appellant could not have been better represented and I am very grateful to Mr Butler for his assistance and to the Bar Pro Bono Unit for making him available. Mr Christopher Milsom, Counsel for the Respondent, was appropriately generous in his recognition of the quality of Mr Butler's work. I am grateful to him too for his assistance.

Background

5. The Appellant is a teacher and at the time of the material events in November/December 2012 was aged 43 and had about 15 years' experience of teaching both in the UK and abroad. She had worked previously with children with special educational needs, but had had no training as to how to deal with children with behavioural difficulties.

6. On 8 November 2012, she entered into a contract with the Defendant to work as a teacher at Glenbrook Primary School, a community school in Clapham Park, South London, having been interviewed only the day before. The contract was for a fixed term from 9 November 2012 until 31 August 2013 at an annual salary of £36, 387.

7. In circumstances to which I will refer in more detail below, the Appellant ceased working in this role on 14 December 2012, some 5 weeks later. She was suspended that day because of the force she used in three incidents involving two particular

children (see paragraph 8 below) and she also "resigned" the same day. These proceedings arise out of those events.

8. On commencement of her employment, the Appellant was to take over from Ms Nancy Wayman to teach children in one of the two year 2 classes. The evidence does not demonstrate why Ms Wayman ceased teaching this class in the middle of a term. That meant dealing with children of the age of 5/6 years. There were 26-29 children in the class, two of whom were (as they have been called in these proceedings) 'Z' and 'O', aged 5 and 6 respectively according to the Defence. The Appellant's case was that each of these children had "behavioural, emotional and social difficulties" ('BESD'), an assertion put in issue in the Defence. She also asserted that she was not told before she accepted the offer of employment that she "would … be teaching a class in which there were two pupils with severe BESD" and "was also not asked … whether or not she had any experience of teaching a class with one or more children on the autistic spectrum within it." Those assertions were effectively admitted, the first on the basis that the children did not have BESD (and the issue thus did not arise for discussion) and the second on the basis that all teachers are required to be able to teach children with special needs.

9. Mr Butler was justified in saying that Judge Wulwik does not appear to have reached a specific conclusion about how difficult these two children were. His conclusion (to which I will refer in paragraph 12 below) was to the effect that other teachers had been able to deal with them and that the Appellant had been given all the support to which she could reasonably have expected to be entitled.

10. There were clear indications in the evidence that these two children were indeed difficult to control, leaving aside the incidents that lie behind what occurred in this case. The only witness called for the Defendant, Ms Tracey Fevrier, to whose evidence I will refer in more detail below, said that "O and Z did … present the most challenging behaviour of all of the pupils in the class" and acknowledged that at one stage the Head teacher (Ms Funmi Alder) had considered separating them. In the "Behaviour Book", some part of which was available at the trial, there were three entries in late November 2012 which showed that Z had been swearing a lot, had broken an object that he threw, wiped his spit from a tissue onto another child and swore and screamed at other children, continuing to do so until his parents were called to stop him. The documents that record the "targets" for each of these two children show that "hitting or grabbing" represented issues that each had to deal with and in Z's case to use a "talking voice", not one that involved shouting. In another document, Z is said to have "behaviour issues" and possessed a "lack of awareness of danger". O is said to have found it hard "to share and take turns", his behaviour is said to be "challenging" and that he can easily become upset. Ms Fevrier also acknowledged in a document prepared at the time that there was a "fraught/physical relationship" between O and Z and that each had "behavioural/learning difficulties".

11. All that evidence emanated from the Defendant's side and, however O and Z may have been characterised in a formal sense, it seems tolerably clear that they presented, both individually and in combination, as a challenge to any teacher when confronted with the task of teaching and controlling over twenty other pupils of a similar age. The Appellant's Counsel at the trial advanced the proposition, based upon the foregoing evidence and other matters, that the "behavioural difficulties" of O and Z were "severe".

12. Judge Wulwik's conclusion is to be found in the following paragraph of his judgment:

> "… while there is evidence from … Ms Wayman's interview notes from 17 December 2012 … and from the undated targets for the two children … that there had been problems with the behaviour of the two children, Ms Wayman appears to have been able to deal with any behavioural problems of the two children. … Ms Wayman's interview notes … referred to a problem at the beginning of September 2012, the notes stating,
>
> > 'TF [that is Tracy Fevrier] and I discussed what to do as I don't think you can physically remove a child from class. We knew they were aggressive towards one another and so we would send for another adult who would ask them to leave the room which they happily did, as this was not the challenging adult. I suggested this to Miss Agoreyo but my advice was not taken'.

13. As I have said, this appears to constitute a recognition of "problems with the behaviour of the two children", but behaviour which, on the evidence, other teachers coped with. That assessment of the position by Ms Wayman (who was not called to give evidence) was given after the Appellant and Ms Alder had been suspended. With respect, I am a little surprised that much evidential significance could be attached to that interview note so far as the issues before the court were concerned. However, the note itself indicates that even Ms Wayman was finding dealing with these two children difficult only a couple of months or so before the material events.

14. At all events, the Defendant's case on this issue, as summarised by Judge Wulwik, was that "the class had previously been taught by Ms … Wayman who had just one year's post-qualification experience and that she managed to control the behaviour of the class, as did the claimant's successor, a newly qualified teacher." The inference sought to be drawn from the way this assertion was framed is that the behaviour was something that the Appellant should have been able to cope with.

15. Mr Butler contends that a finding as to how badly behaved these two children were was of fundamental importance to the issue of whether the use of reasonable force was justified and/or whether suspension was the appropriate response of the Defendant when the three incidents referred to below were drawn to the attention of the Executive Head teacher, Mrs Janet Mulholland.

16. I will return to this submission in due course.

17. As I have indicated, there were three separate incidents involving the children referred to above in which the Appellant considered it was necessary to use a degree of force to secure behavioural compliance. Before I describe briefly the background to those incidents, I should perhaps make it quite clear, since this will be a public judgment, that whatever action may have been taken by the Appellant and whatever the outcome of this appeal, the police in due course decided that there was no basis for any criminal proceedings against the Appellant and furthermore the Disclosure and Barring Service have not barred her from teaching. Indeed, she is continuing her work as a teacher.

18. The statutory context for the use of reasonable force by a teacher is set out in section 93(1) of the Education and Inspections Act 2006:

> "A person to whom this section applies may use such force as is reasonable in the circumstances for the purpose of preventing a pupil from doing (or continuing to do) any of the following, namely—
>
> (a) committing any offence,
>
> (b) causing personal injury to, or damage to the property of, any person (including the pupil himself), or
>
> (c) prejudicing the maintenance of good order and discipline at the school or among any pupils receiving education at the school, whether during a teaching session or otherwise."

19. It is the Appellant's case that, not merely was she entitled to use force in the particular circumstances, but no more than reasonable force was used.

20. The circumstances in which the letter from Mrs Mulholland confirming the Appellant's suspension was received by the Appellant were in dispute (see further below). However, it contained the following passage:

> "I must write to inform you of a decision taken today to suspend you from duty on your normal rate of pay with immediate effect.
>
> This is a precautionary suspension, in line with the disciplinary procedure, pending a full investigation into allegations:
>
> That on 3rd December 2012 you were seen to "drag a child, very aggressively, a few feet down the corridor whilst shouting at him".
>
> That on 19th November 2012 a child was dragged on the floor, out of the classroom door by yourself in the presence of another member of staff and the rest of the children and was heard to cry "help me".
>
> That on 5th December 2012 a child with special educational needs was told to leave a classroom, as he was unable to follow your instruction. When he refused, you were heard to state "If you don't walk then I will carry you out!" You then proceeded to pick up the child who kicked and screamed in the presence of all the class children …."

21. Although not referred to chronologically in the letter, the three incidents, took place chronologically on 19 November, 3 December and 5 December. Whilst the Appellant strongly refutes any suggestion of wrongdoing on her part (and subsequent events such as those referred to in paragraph 17 above support this position), it is not (and

was not) suggested on her behalf that allegations such as these (certainly expressed in the way they were) should not have been investigated by the school. Indeed, as will emerge, at least one had already been investigated by Ms Alder and the conclusion reached that only "reasonable force" had been used. However, the central issue is whether it was reasonable and/or necessary for the Appellant to be suspended pending that investigation. I should, perhaps, also say that, although not mentioned in Judge Wulwik's judgment, apparently Ms Alder was also suspended at or about the same time "due in part to an alleged failure to address the complaints as to the [Appellant's] conduct with the severity they required" (see Mr Milsom's Skeleton Argument, paragraph 3). As I will record further below (see paragraph 52), there was no documentary material before Judge Wulwik to indicate precisely why Ms Alder was suspended.

22. The balance of Mrs Mulholland's letter was as follows:

> "The suspension is a neutral action and is not a disciplinary sanction. The purpose of the suspension is to allow the investigation to be conducted fairly.
>
> Every effort will be made to complete the investigation as quickly as possible. You will be informed immediately if at any stage during the investigation or if applicable at any stage of the disciplinary process it is considered appropriate that your suspension should be lifted.
>
> During the period of your suspension, information on the allegations will be thoroughly investigated. As part of these investigations, you will be invited to an investigation meeting where you will be given full opportunity to provide your account of the alleged events.
>
> Following the investigation, a decision will be made as to whether or not there is a case for you to answer and you will be informed accordingly.
>
> I assure you that the confidentiality of the process will be strictly maintained by management and would ask that you maintain the same confidentiality. You should not discuss the details of the allegations or your suspension with any person except those named in this letter or your chosen representative."

23. The assertion is made that the suspension is a "neutral action" and that, as part of the investigatory process, the Appellant would have an opportunity to attend "an investigation meeting" where she could provide her account of the alleged events". A decision would then be taken about whether there was "a case … to answer". If there was, presumably there would be a further hearing to determine the outcome of such a case.

24. Whilst views generally might reasonably differ as to whether suspension is a "neutral act", the view of the courts is that it is not. In *Mezey v South West London and St*

George's Mental Health NHS Trust [2007] EWCA Civ 106, for example, Sedley LJ, with whom Dyson LJ and Sir Peter Gibson agreed, said this:

> "11. Mr Supperstone accepts that it is perfectly permissible to restrain a dismissal, but he contends that a suspension is a qualitatively different affair. It is, he submits in the skeleton argument:
>
> "a neutral act preserving the employment relationship".
>
> 12. I venture to disagree, at least in relation to the employment of a qualified professional in a function which is as much a vocation as a job. Suspension changes the status quo from work to no work, and it inevitably casts a shadow over the employee's competence. Of course this does not mean that it cannot be done, but it is not a neutral act. Indeed, Mr Supperstone goes on in his skeleton argument to justify the suspension on the grounds that the criticisms of the claimant in the most recent report were serious and that she had — I use his word — "failed" to accept the criticism of her in the two previous reports.
>
> 13. The justification of all this awaits the judgment of the disciplinary tribunal, but it seems to me inescapable that the Trust's decision to suspend the claimant meanwhile was not and could not be expected to be a neutral act. Like the court in its turn, the Trust was trying to do the best thing for the time being, but in the judge's considered view it had arguably mistaken its legal powers in so doing."

25. It is this view of suspension to which a court must have regard.

26. A number of initial observations can be made about Mrs Mulholland's letter: first, the decision to suspend had apparently been taken on the day the letter was written; second, it does not indicate by whom the decision was made; third, no reference is made to any consideration having been given to the Appellant's version of events prior to the decision to suspend having been taken; fourth, there is no reference to any consideration having been given to whether any alternative to suspension might exist whilst the initial investigation was carried out; fifth, whilst the reason given for the suspension was said to be "to allow the investigation to be conducted fairly", the letter does not explain why it could not be conducted fairly without the need for suspension.

27. It is well-established that suspension is not be considered a routine response to the need for an investigation. If and to the extent that that requires authoritative support, such support is given in this particular context, in 'Dealing with allegations of abuse against teachers and other staff - Statutory guidance for local authorities, head teachers, school staff, governing bodies and proprietors of independent schools', issued by the Secretary of State in 2012, and which is one of the 7 documents referred to in the Particulars of Claim as containing relevant guidance. The following appears under the heading "Key Points":

- If an allegation is made against a teacher the quick resolution of that allegation should be a clear priority to the benefit of all concerned. Any unnecessary delays should be eradicated.

- In response to an allegation all other options should be considered before suspending a member of staff: suspension should not be the default option. An individual should be suspended only if there is no reasonable alternative. If suspension is deemed appropriate, the reasons and justification should be recorded by the employer and the individual notified of the reasons.

28. If authority is required in the legal sense, the case of *Gogay v Hertfordshire County Council* [2000] IRLR 703, provides it. In that case the issue was whether the defendant local authority acted reasonably in suspending the claimant from her post as a residential care worker in a residential children's home while they investigated the circumstances surrounding a child living in that home. The allegation (which was, in fact, entirely unfounded) was of sexual abuse. The source of the information giving rise to the allegation was a very troubled child whose story, it was said at a strategy meeting, was "difficult to evaluate". It was against that background that a decision was made to suspend the claimant pending an investigation. This decision was criticised by Hale LJ, as she then was, in the following terms with which Peter Gibson and May LJJ agreed: having referred to the contractual obligation "not, without reasonable and proper cause, to conduct oneself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee", she said this -

> "55. Did the authority's conduct in this case amount to a breach of this implied term? The test is a severe one. The conduct must be such as to destroy or seriously damage the relationship. The conduct in this case was not only to suspend the claimant, but to do so by means of a letter which stated that 'the issue to be investigated is an allegation of sexual abuse made by a young person in our care.' Sexual abuse is a very serious matter, doing untold damage to those who suffer it. To be accused of it is also a serious matter. To be told by one's employer that one has been so accused is clearly calculated seriously to damage the relationship between employer and employee. The question is therefore whether there was 'reasonable and proper cause' to do this.
>
> 56. In my judgment there clearly was not. The information considered [at the] strategy meeting was indeed 'difficult to evaluate'. The difficulty was in determining what, if anything, [the alleged victim] was trying to convey. It warranted further investigation. But to describe it as an 'allegation of sexual abuse' is putting it far too high. A close reading of the records

> coupled with further inquiries of the therapist were needed before it could be characterised as such.
>
> 57. Furthermore there was then a need to consider carefully what to do about the member of staff concerned. Was there indeed any reason to suppose that she had broken the guidelines for working with [the alleged victim]? How easy would it be to check? If there was some reason, however slight, it might indeed be right to separate her from [the alleged victim] for a short time. But how should this be done? Miss Sinclair [for the Defendant] argues that transfer was impossible because all the people in their care are vulnerable. But that leaves out of account the particular circumstances in this case. It is difficult to accept that there is no other useful work to which the claimant might not have been transferred for the very short time that it ought to have taken to make the further inquiries needed. It is equally difficult to accept that some other step might not have been contemplated, such as a short period of leave. In any event, given the timescale involved, what was the rush?
>
> 58. The authority's own guidelines point out that 'child sexual abuse rarely needs to be responded to as a crisis, but calls for a cool, clear and structured response' …. Instead what happened here was an immediate 'knee jerk' reaction. Had [the person deciding on suspension] had a clearer picture of the limited information available to the strategy meeting, the difficulty in evaluating it, and the simple inquiry needed to deal with the meeting's principal concern, she would surely have hesitated before sending a letter in the terms which she did. Her evidence was that she was 'amazed' that there had been a section 47 investigation and a suspension for what turned out to be no cause."

29. Whilst the facts were different from the present case, the need to avoid a "knee jerk" reaction, with suspension as the default position without consideration of the alternatives, was emphasised. In that case there was said to be a need to carry out "further investigation" into the allegation before deciding whether to suspend.

30. Before I deal with the way the matter was argued before Judge Wulwik and his conclusions, I should note the sources of the information underlying each of the allegations.

31. So far as the allegation relating to 19 November is concerned, the informant seems to have been Ms Fevrier. There is nothing in the written material showing that anything was reduced to writing about this at or about the time of the incident and the first written reference to it appears in a document prepared by Ms Fevrier sometime after 10 December (because the document refers to something occurring on 10 December) and intended for Ms Alder. It refers to the incident. Somewhat surprisingly, since Ms Fevrier was apparently present at the incident, the document does not refer to the incident on 3 December. That incident was reported by someone called Donna

Messenger (an Administrative Officer, according to Ms Alder's note: see below) who sent an email to Ms Alder, apparently shortly after the incident, and indicating that it was witnessed by Ms Fevrier. It appears that Ms Alder did look into this because 2 pages of a 3-page note in her handwriting is in the disclosed documentation. Although the date on it is slightly difficult to read, it appears to relate to the incident on 3 December. It records part of her discussion with Ms Fevrier in which she (Ms Fevrier) said initially that she had not seen anything untoward "that morning", but then said that there had been some problem with Z and O who always argued and fought over who was to press a particular green button. As I have indicated, it looks as if the second page of this document is missing, but it is clear that Ms Alder spoke to the Appellant also. Her conclusion was that, having spoken to Ms Fevrier and the Appellant, "it appears reasonable force was used in this case." She noted that she would continue to monitor the situation and it appears that she told the Appellant that either she or the AHTs (presumably, Assistant Head Teachers) would not mind being called if a child refused an instruction or was being really disruptive. This was better than a teacher finding herself accused of using unreasonable force. The incident on 5 December was noted by Ms Fevrier in the Behaviour Book. She recorded that O had run over and scratched Z in the eye and on the side of the cheek. She recorded that "[O] was taken out of the classroom, but he refused" and then said that "he was then lifted up by" the Appellant. Ms Fevrier recorded O as returning, kicking and screaming and knocking down boxes. She recorded other matters, including that O slapped Z at lunchtime and was taken elsewhere for the afternoon.

32. As I have said, it has never been disputed by the Appellant that the allegations thus summarised required investigation. What is not accepted is that the Respondent had no alternative but to suspend her and the Appellant contends that Judge Wulwik was wrong to reach that conclusion. His judgment contained this passage:

> "The defendant was entitled and indeed bound to suspend the claimant after receiving reports of the allegations from colleagues, namely Ms Fevrier and Ms Donna Messenger, the latter being a teacher …."

33. The use of the word "bound" indicates that he considered that there was no alternative to suspension. Judge Wulwik gives no express reasons for this conclusion in this passage of his judgment although it seems to be derived (a) from the fact that the allegations were from colleagues who were teachers (he said Ms Messenger was a teacher and it may be that he considered Ms Fevrier to have the status of a teacher), (b) from the strength of the way each expressed themselves about the Appellant's conduct and (c) the need to protect the children. As to (b), Ms Fevrier described the incident on 19 November in fairly graphic terms in a report to Ms Alder. She said that it was "totally unacceptable" and described the incident on 5 December as one where the situation "had escalated" to a "dangerous" level and where "there was an unnecessary element of confrontation and provocation on Miss Agoreyo's part". She concluded the report in strident terms by asking Ms Alder to "provide [her] with a follow up response and further assurance that no similar incidents occur by Miss Agoreyo towards any child under her care". She made no reference to the incident on 3 December. Ms Messenger described that incident as "completely unacceptable". Ms Messenger did not give evidence.

34. A point relied on by the Appellant before Judge Wulwik was that Ms Alder had investigated the incident on 3 December and had concluded that "reasonable force" had been used in the circumstances as evidenced by her note (see paragraph 31 above). Judge Wulwik was not impressed with the point and dismissed it as follows:

> "However, there is no suggestion there that Ms Alder met with Ms Messenger who reported what she had witnessed on 3 December 2012: See again Ms Messenger's email to Ms Alder …."

35. I infer that he dismissed the suggestion that the incident had been properly investigated because Ms Alder had not spoken directly to Ms Messenger.

36. I am, of course, very hesitant about expressing reservations about assessments of the evidence made by Judge Wulwik who had such witnesses as there were before him, but I am a little concerned about some aspects of the foregoing. In the first instance, the evidence I have seen does not support the view that the allegations concerning the Appellant were made by qualified teachers: (i) the evidence (see paragraph 31 above) suggests that Ms Messenger was an Administrative Officer; (ii) Judge Wulwik had referred to Ms Fevrier earlier in his judgment as a "qualified social worker who had been teaching for eight to nine years, though she did not have any formal teaching qualifications." It is difficult for me, not having heard the evidence, to evaluate this conclusion, but her statement seems to indicate that she has largely been employed as a teaching assistant which is certainly how the Appellant described her. My observations about those two witnesses are not intended to belittle the importance of their respective accounts of what they saw, but there is a hint in Judge Wulwik's reference to each of them that he saw their status as something that warranted particular attention from the school authorities. If so, I am not sure that this was justified. The criticisms were being made of a teacher with 15 years' experience in relation to her handling of two children who, on any view, presented a challenge. In those circumstances, one would have thought that some observation from the Appellant herself would have been called for before she was suspended – not a full investigation, but enough to determine whether the potential stigma associated with a formal suspension could be avoided. Furthermore, I do not, with respect, think that Ms Alder's investigation into the incident on 3 December can be dismissed in the way in which Judge Wulwik dismissed it.

37. Judge Wulwik also said this about the decision to suspend:

> "In my judgment, the defendant clearly had reasonable and proper cause to suspend the claimant. It has an overriding duty to protect the children pending a full investigation of the allegations. That could only be achieved by the suspension of the claimant until the allegations were fully investigated, regardless of any other considerations."

38. I have to observe, with respect, that the protection of the children was <u>not</u> the reason given for the suspension in Mrs Mulholland's letter. She said that "[the] purpose of the suspension is to allow the investigation to be conducted fairly." Judge Wulwik appears to have placed some reliance on an answer given by the Appellant in evidence that she considered the suspension reasonable. The answer to the issue, as it seems to

me, must be determined by an objective analysis, not by reference to the personal view of any participant in the process, particularly if, as seems to be the case, that person's view has "wavered" as Judge Wulwik said. Mr Butler submits that the expression "regardless of any other considerations" also emphasises that Judge Wulwik did not consider, as the foregoing guidance (see paragraph 27 above) requires, that alternatives to suspension should at least be considered before the decision to suspend is made.

39. My observation relating to Ms Alder's investigation into the incident on 3 December (see paragraph 31 above) leads to another feature of this case to which I will turn before returning to the decision to suspend. It relates to the assistance that the Appellant sought when she appreciated the difficulties created by Z and O.

40. Almost immediately she started work, the Appellant spoke to Ms Alder about the challenging behaviour, in particular, of Z and O. It is accepted that Ms Alder recognised in that discussion that "there were challenges" in the class. It was the Appellant's case (and I do not think this was disputed) that the parents of the children in the class were not told in advance of the change of teacher which led to at least one complaint. The Appellant's case is that she spoke to Ms Alder on several occasions about the difficulties she was having and telling her that she had received no training about how to deal with children such as Z and O. It is unclear whether this was accepted by Ms Alder (who, of course, did not give evidence), but it is not in issue, I believe, that on 20 November, the day after the first incident, the Appellant sent to her a text message saying that she wanted to speak to her about Z and O (and one other child). There was no evidence from Ms Alder about this, but the Appellant's witness statement suggests that there was a discussion.

41. As is clear from above, the next incident was the incident on 3 December (a Monday), some two weeks later. It is to be noted that there was an email exchange between the Appellant and Ms Alder over the weekend prior to that Monday. There is one paragraph of the Appellant's email that is worth recording:

> "Funmi, I know you are encouraging us the best you can but you know Joanna and I are having some challenging times with those children so please when you can could you speak to other members of staff to be hands-on ready to help us as a team rather than point hands or whisper behind our backs that we are not controlling the children enough? The situation I explained to you at Friday assembly was quite disappointing. Not one teacher raised a hand to help Joan or myself when they saw the way we were struggling to calm them down. It really shouldn't be like that. Similarly the case outside when [Z] went on a slapping spree. Not one of the dinner ladies reported it to myself or Tracey and a lot of children were involved. I just don't want a situation where the children become too scared of coming to school or say no one does anything about it … and no one helps or they have bad memories about year two because of [Z and O]. The children are putting up with a lot of interference in their learning. I'm yet to see a teacher who can teach effectively when those disruptions start. In a nutshell we need members of staff to be more hands-on and helpful."

42. This has all the hallmarks of a genuine plea for help, combined with a hint that other members of staff were not being particularly supportive. Ms Alder's reply on this issue seems to have been as follows:

> "I will and am ensuring the most effective support is in place. We need year two to be a great success. You have made a positive start and I see [? no] reason we should not be able to iron out current difficulties. Much is part of the transition process."

43. This does suggest that Ms Alder appreciated the difficulties and was in the process of putting more support in place. It does not suggest that she felt that all the support was yet in place, as indeed the email exchange the following weekend demonstrates.

44. The incident on 3 December took place, as did the incident on 5 December (the Wednesday of the same week). On Saturday, 8 December, Ms Alder sent the Appellant an email which contained the following:

> "I hope you will be getting plenty of rest this weekend. I know the last few weeks have been a challenge. For next week and the week after, you and Joan will be released each afternoon on Tuesday to Friday to give us time to properly induct you both as new staff. I will be speaking to Rachel about getting individualised programs in place for [Z and O] ASAP. I am also going to look into arranging for additional adult support in both classrooms by the end of next week. I will also give in class support and guidance ….
>
> Have a relaxing weekend, and I look forward to seeing you on Monday. We shall overcome!"

45. I do not know precisely who Joan and Rachel were, but it is quite clear that if the incident on 5 December had been reported to her, Ms Alder did not regard it as serious and equally that there was still additional support to be given, not just to the Appellant, but also to Joan (who I assume was a teacher for another class).

46. Ms Alder also sent a text message on Sunday, 9 December, to the Appellant in the following terms:

> "Morning Simone. I apologise that I have just tried to phone you – far too early for a Sunday. I just wanted you to know that I have listened to your concerns about the class and have made the decision to appoint an additional TA so that Tracy can be a class TA. I hope to have someone in place on Tuesday or Wednesday. I hope you are having a relaxing weekend and look forward to seeing you on Monday. Funmi."

47. The Appellant replied on the Monday (10 December) in the following terms:

> "Thank you for your text and email. I am sorry for the late reply. I had quite a lot to do this weekend. I am very grateful

> for the help and support that will be put in place for [Z and O] because they desperately need this as well as to reduce/eliminate the constant disruptions in the classroom during lessons. In the interim, I'm still not sure how the rewards and sanctions work especially for [O] and to implement them. On Friday, he started kicking off again because he wasn't chosen to pick the attendance prize for the class. He kicked a child in the process. I told him to stop but he wouldn't so I held him from behind as you suggested but it only made the kicking worse. I sent a child call you but no one came (not exactly sure whether the child went) ….
>
> …
>
> I am sorry I still have a lot of questions and things to be sorted out but hopefully everything will gradually fall in the right places and indeed we shall overcome. It may seem slow but the children are gradually making progress. This week I will be moving up two children from the lower table who have consistently been well focused (more than children in my middle group).
>
> Hopefully it will get better and better. Thanks again. See you tomorrow."

48. It was on Thursday, 14 December, that Mrs Mulholland told the Appellant she was suspended and the letter referred to above communicated to her.

49. The foregoing correspondence suggests that Ms Alder was at least by the weekend of 8/9 December understanding of the issues the Appellant (and apparently another teacher) was facing and supportive to the extent that she could be. It is also plain that not everything that she wished to put in place to assist resolution of the problem of Z and O had been put in place by the weekend of 8/9 December. Judge Wulwik, however, was of the view that nothing more could or should have been done for the Appellant. He expressed himself thus:

> "… insofar as training and support are concerned, the [Appellant] spent one day observing the class with their previous teacher, Ms Wayman. She stated in evidence that she would have liked two days for her induction, though she was aware that she was required to start her employment the following day. The head teacher, Ms Alder, was prepared to release the [Appellant] for further induction: See Miss Alder's email of 9 December 2012 .... In addition, the [Respondent] provided a further teaching assistant, Ms Keziah Williams, in the last week of the [Appellant's] employment in response to the [her] request for further support in her email to Ms Alder of 6 December 2012. That meant that the [Respondent] was providing three teaching assistants, namely Ms Williams, Mr Gayle and Ms Fevrier, access to an educational psychologist and a SENCO assistant, Ms Costick, apart from the induction

> with the outgoing teacher, Ms Wayman. It is difficult to see what further support there should have been for an experienced teacher."

50. Mr Milsom submits that this was a finding not just open to Judge Wulwik, but inevitable on the facts. I do not agree. I would respectfully think that that conclusion might well have been entirely justified a little further down the line if the problems continued after all this support had been put in place for a while. However, where the Head teacher had spoken on the previous Saturday/Sunday of putting these arrangements in place and yet the Appellant was suspended first thing on the next Thursday morning, the inference is irresistible that insufficient time had been allowed to elapse before any judgment about her capacity to cope with a class containing Z and O took place.

51. Nonetheless, this correspondence is relevant for another reason. After the Appellant was told by Mrs Mulholland that she had been suspended because, according to the Appellant, Mrs Mulholland said she had received a report that she had "manhandled a child in [her] class", she asked if she could put in a letter of resignation to which Mrs Mulholland agreed. According to the Appellant, she was very shocked and upset by what Mrs Mulholland said. I will turn to the terms of her resignation letter shortly, but the Appellant's account is that, immediately after the conversation with Mrs Mulholland, she went to see Ms Alder. According to the Appellant, Ms Alder, who said she did not know why the Appellant had been asked to leave, had received a letter from Ms Fevrier about the Appellant manhandling a child. Subsequently, there was apparently a confrontation between the Appellant and Ms Fevrier about why she is not spoken directly to the Appellant about her concerns.

52. I have already indicated that Ms Alder was suspended for a time. I know nothing about the circumstances save what Mr Milsom, on instructions, has said in his Skeleton Argument (see paragraph 22): so far as I am aware, nothing was disclosed in the proceedings that took place to show precisely why she was suspended and when, if it be the case, the suspension was lifted. It may have had something to do with revealing that Ms Fevrier was the source of the complaint as well as, if Mr Milsom's instructions are correct, not having taken the allegations sufficiently seriously.

53. The resignation letter, which was composed, according to the Appellant, when she was at the school and upset, was handwritten and in the following terms:

> "Dear Ms Alder,
>
> RE: RESIGNATION FROM POST OF YEAR 2 TEACHER
>
> I write with reference to the above mentioned issue.
>
> I am grateful for your support and guidance since I started on the 9th of November.
>
> There have been a lot of very unpleasant issues especially on the matter of proper communication that have led to this final decision but I believe after all things considered it is the best decision for me to make at this time.

> Once again, thank you for everything. I am very pleased with the gradual progress the children had already started to make. I am sure with the proper support put in place they will continue to make good progress.
>
> Have a good Christmas.
>
> Yours sincerely,
>
> Miss Agoreyo"

54. Judge Wulwik drew two conclusions from this letter: first, that it undermined the Appellant's case that the Respondent acted in breach of the implied term not without reasonable and proper cause to act in a way which is likely seriously to damage or destroy the relationship of trust and confidence which should exist between an employer and employee; second, that her motive for writing it was to jump before she was pushed and that "she was seeking to avoid a full investigation of the allegations". I will return to this below.

55. The following day the Appellant sent a text, followed by an email, to Ms Alder saying that a letter she had received from Mrs Mulholland was "not a letter of suspension" and therefore would like to know what the allegations against her were and who made them. She asked if the allegations emanated from Ms Fevrier. She also asked where "to access the grievance and Disciplinary procedure when a member of staff needs to make a complaint with regards to false allegations" because she could not find it in the school's handbook.

56. Ms Alder replied saying that she was "not involved in the actions against [the Appellant]" and that "due to developments" she could not reply "at this point", but hoped to be able to do so "soon".

57. The letter from Mrs Mulholland to which the Appellant referred in her email to Ms Alder was presumably the letter dated 14 December that was in the following terms:

> "Dear Simone
>
> Resignation Confirmation
>
> I acknowledge receipt of your resignation email, dated 14th December 2012 advising us of your intention to resign from your post of fixed term Year 2 Class teacher at Glenbrook Primary School. I can confirm that your resignation has been accepted and your last day of service with Glenbrook Primary School will be today, Friday 14th December 2012. However, you'll be paid up to 31st December 2012.
>
> Your final salary will be paid on 14th December 2012 via your bank account and your P45 sent to your home address.
>
> In order that all the final clearances can be made as quickly as possible you should:-

> return any School/Council property including your swipe card, mobile phone, laptop, blackberry, PDA, name badges, keys and parking permit etc.
>
> ensure that any overtime, expenses or other similar claims are submitted to the School Business Manager to be sent to Payroll before your final week of service. Payments for forms submitted late will be made separately after your leaving date.
>
> Please note that if your last day of service falls within the second half of the month (i.e. between 16th and 31st), you may only be paid on the normal pay day up to and including the 15th of that month. Any remaining salary will be paid on the next scheduled pay run.
>
> Any outstanding loans or other monies to be recovered will be deducted from your final pay, unless you have made alternative arrangements. If it appears that there will be insufficient funds in your final pay, action may be taken by the School/Lambeth's Income Recovery department (if school uses Lambeth Payroll Services).
>
> In the light of the circumstances of your resignation, we have no option but to refer this matter to the London Borough of Lambeth Child Protection Team.
>
> If you require any further information, please contact me on the number below.
>
> Yours sincerely
>
> Janet M Mulholland
>
> Executive Head Teacher"

58. That letter referred to the Appellant's "resignation email" and was dated the same day as the "suspension letter" referred to in paragraphs 20-22 above. The evidence does not demonstrate any "resignation email", merely the handwritten letter to Ms Alder referred to above. It is presumably what Mrs Mulholland was referring to. There was a factual issue about when the Appellant received the "suspension letter" because her text and email to Ms Alder (see paragraph 55 above) was written expressly on the basis that she had not received a "letter of suspension". The Particulars of Claim asserted that the Appellant was told verbally by Mrs Mulholland that she was to be suspended and that it was not until Mrs Mulholland responded on 8 January 2013 to a letter from the Appellant dated 27 December 2012 that the Appellant was made aware of the allegations against her. In fact the Appellant had written to Mrs Mulholland on 20 December 2012 asking for details of the allegations which was not addressed in Mrs Mulholland's reply dated 21 December 2012 and the Appellant then followed that up with her letter of 27 December 2012. The correspondence at this time showed that Mrs Mulholland was asserting that the original of the "suspension letter" was given to the Appellant on 14 December 2012 whereas the Appellant was denying this.

59. In her witness statement dated 1 August 2016 the Appellant said that she did receive a letter from Mrs Mulholland before her departure from the school on 14 December, but it was the reply to her resignation letter. That would be consistent with the text message and email sent to Ms Alder the following day. However, as I understand it, when she gave her evidence she maintained that she had received no letter from Mrs Mulholland – the resignation confirmation letter was given to her by Ms Alder.

60. There was undoubtedly some confusion about all this, but Judge Wulwik did not have the advantage of hearing from Mrs Mulholland or Ms Alder about the circumstances. The Defendant's case was that the suspension letter was given to the Appellant by Mrs Mulholland and that this was supported by handwritten endorsements on two copies of the letter retained by the Defendant. Judge Wulwik concluded thus:

> "The suspension letter of 14 December 2012 was endorsed at the top of the first page with the words in manuscript, 'Original taken by JM and given to SA 14/12/12' …. It is also worth noting that on the top left hand side of that letter there appeared the words 'By hand. Private and confidential'."
>
> I find on a balance of probabilities that the suspension letter was given by Ms Mulholland to the [Appellant] on 14 December 2012 as evidenced by the manuscript endorsement on the letter …."

61. This finding immediately led to the following finding:

> "… that the [Appellant] was told that she was being suspended and the details of the allegations on 14 December 2012, and that [her] response was to resign, … in effect jumping before she was pushed. I find that the most likely explanation for [her] resignation was that she was seeking to avoid a full investigation of the allegations, which in the event still took place."

62. I regret to say that I do not think that this finding can be justified on the evidence referred to by Judge Wulwik. The handwritten endorsement to which he referred was not self-evidently written by Mrs Mulholland: indeed there were two copies of the letter with slightly differing endorsements, though probably in the same handwriting. The endorsement(s) could have been written by the person who typed the letter or assisted in its composition – it has the hallmarks of a letter written by lawyers or by the HR department within the local authority. It was doubtless <u>intended</u> to be given by hand, but that does not necessarily mean that it was. It is possible, of course, that Mrs Mulholland made a mistake and gave the Appellant (or gave to Ms Alder to give to the Appellant) the wrong letter in the somewhat dramatic circumstances obtaining that morning. At all events, everything on this issue could have been resolved by the calling of Mrs Mulholland as a witness. She was the obvious witness to respond to this factual issue as well as dealing with the general assertion made in paragraph 29 of the Particulars of Claim:

> "If those persons acting on behalf of the Defendant who made the decision that the Claimant should be suspended had

> analysed the matter carefully then they would have seen that ... the acts of the Claimant about which complaint was made could not reasonably have been said to be wrongful, let alone such as to justify her suspension."

63. As Mr Butler rightly says, the allegation that the alleged incidents were not sufficient to warrant suspension necessarily implies that some other course of action should have been taken prior to or instead of suspension. Mrs Mulholland would be the person who should have been able to deal with that assertion on behalf of the Defendant, but she came nowhere near the witness box.

64. Judge Wulwik's conclusion referred to at paragraph 60 above was at variance with what the Appellant was saying in the contemporaneous documentary evidence in the form of the correspondence and it means that she must have been adopting a cynical and dishonest approach in that correspondence by pretending that she had not received the suspension letter when she had. That he made no such additional finding does raise the question of whether the foregoing conclusion can be sustained. It also required a finding that within minutes of being told she was being suspended she made the deliberate and considered decision to resign in order to avoid a full investigation of the allegations.

65. The issues that it was agreed that Judge Wulwik should decide were as follows:

(1) Did the defendant fail to comply with any aspect of the guidance to which reference is made in paragraphs 24 and 25 of the particulars of claim, whether issued by the Secretary of State or otherwise, and if so which part or parts?
(2) Did such a failure or did such failures amount to a breach of the implied term of trust and confidence by the defendant?
(3) Was there reasonable and proper cause for suspending the claimant from her employment on 14 December 2012?
(4) If there was no such reasonable and proper cause, was the claimant's suspension a breach of the implied term of trust and confidence?
(5) Was there in any event a breach of the implied term of trust and confidence in the form of such failure or failures as have been determined by the Court to have occurred in answer to question 1 above taken together with the suspension of the claimant?

66. Counsel for the Appellant prepared a 10-page document entitled 'Claimant's Outline Closing Submissions on Liability'. He addressed the five agreed issues in the way summarised below.

67. As to Issue 1, he contended that the evidence demonstrated that the behavioural difficulties of O and Z were severe. Given that this was so, he submitted that the evidence demonstrated that insufficient support had been put in place to assist the Appellant, relying upon much of the material to which I have referred above.

68. As to Issue 2, he submitted that, if the foregoing was correct, then this breach was established.

69. As to Issue 3, he drew attention to two letters she wrote soon after 14 December 2012 indicating that the way she was dealt with made her position "untenable" and how

distressing she had found the situation with which she was confronted. Her resignation came in response to her knowledge that she was being suspended and, he submitted, "even her letter of resignation … referred to 'a lot of very unpleasant issues especially on the matter of proper communication that have led to this final decision', and the absence of 'proper support' for the children in the class". He relied, so far as necessary, on the case of *Weathersfield Ltd. v Sargent* [1999] ICR 425 for the proposition that she did not need to give the precise reasons for her resignation in order for constructive dismissal to be established. He drew attention to the fact that all that Mrs Mulholland had relied upon to justify suspending the Appellant was what Ms Fevrier and Ms Messenger had said and had not taken into account the fact that Ms Alder had already investigated at least two of the allegations and had not considered that disciplinary action was required; indeed she recognised that insufficient support had been put in place. Against that background, he submitted that Mrs Mulholland should have spoken to the Appellant and asked for her response to the allegations before suspending her. He argued that that pupils were not put at risk by the Appellant's continued presence in the classroom given the arrangements that Ms Alder was putting in place during the week beginning 10 December. He also contended that the guidance (see paragraph 22 above) required that an alternative to suspension should be considered and that no such consideration had been given.

70. As to Issue 4, he contended that suspension was not a neutral act and that it can, if there is no reasonable and proper cause for it, constitute conduct by an employer that is likely to destroy or damage the relationship of trust and confidence between employer and employee.

71. As to Issue 5, he contended that it was possible to rely upon a combination of conduct to constitute a breach of the implied term relating to trust and confidence. Not providing sufficient support in dealing with O and Z was one thing; then, being forced to use a degree of force, which on at least two occasions was assessed by her head teacher as being reasonable, being told that those assessments were being effectively ignored by the school authorities because of the statement of someone who was not a teacher (Ms Fevrier), represented in totality a breach of the implied term.

72. Counsel for the Appellant did not address in these submissions the argument that had been foreshadowed in a proposed application by the Defendant to strike out the claim, but which was not pursued, that the claim was an impermissible attempt to circumvent the employment legislation that requires that there be two years of continuous employment before a claim for unfair dismissal can be brought: see *Johnson v Unisys Ltd* [2003] 1 AC 518 and *Eastwood and anor v Magnox Electric plc* [2005] 1 AC 503. The argument he would have advanced (because it is foreshadowed in the 'Claimant's Case Summary') is that since this is a case of constructive dismissal and/or based upon an alleged breach of the implied term relating to trust and confidence, the "Johnson exclusion" does not apply. I say nothing about the merits or otherwise of the argument, but it was <u>not</u> an issue for Judge Wulwik to resolve: the issue was liability only. That being so, it is rather surprising to find this observation at the end of the judgment:

> "I would add by way of postscript that like the defendant I am of the view that these proceedings were a blatant attempt by the claimant to recover, through the back door of a claim for breach of the implied term of trust and confidence, damages for what

> was otherwise a constructive, unfair dismissal claim, which an employment tribunal would have been precluded from hearing because the claimant's employment with the defendant lasted less than the requisite period of two years."

73. It does suggest that Judge Wulwik may have been influenced in his general approach to the case by the fact that in his view it represented a "blatant attempt" to circumvent the statutory provisions to which reference was made.

74. He also seems to have been heavily influenced by the way the case had been pleaded on the Appellant's behalf. When dealing with Issue 1 he said as follows:

> "16. The claimant, in paragraphs 24 and 25 of the particulars of claim, pleaded reliance on guidance issued by the Secretary of State in relation to the education of children with special educational needs (SEN), including children with behavioural, emotional and social difficulties (BESD) and/or who were on the autistic spectrum. Paragraph 24 of the particulars of claim simply listed a number of guidance documents without specifying the particular passages of the guidance relied on. Paragraph 25 of the particulars of claim did refer to paragraph 1.21 of the Special Educational Needs Code of Practice issued in 2001, requiring the governing body of the school to 'do its best to ensure that necessary provision is made for any pupil who has special educational needs' and 'ensure that where the responsible person - the head teacher or the appropriate governor - has been informed by the LEA that a pupil has special educational needs, those needs are made known to all who are likely to teach them'. The particulars of claim did not otherwise seek to identify the particular passages of guidance documents relied upon. The defendant, for its part, did not dispute the existence of the voluminous guidance referred to in paragraphs 24 and 25 of the particulars of claim.
>
> 17. The first difficulty that the claimant has in relation to the first issue is that it presupposes that the relevant passages of the guidance relied upon by the claimant have been pleaded in the particulars of claim, but other than the reference to paragraph 1.21 of the SEN Code of Practice the relevant passages of the guidance referred to were not pleaded."

75. His conclusion on Issue 1 was –

> "The claimant's allegation that the defendant failed to comply with aspects of the guidance documents listed in paragraphs 24 and 25 of the particulars of claim fails on both pleading grounds and on the evidence."

76. When dealing with Issue 3 he said this in relation to Counsel's argument:

> "It was not part of the claimant's pleaded case in the particulars of claim that the claimant should have been interviewed by Ms Mulholland and asked for her response to the allegations before suspension was considered, as I pointed out to the claimant's counsel in closing submissions."

77. Pleadings are, of course, important, but pure pleading points should rarely stand in the way of doing justice and for a case (certainly one such as this) to fail on "pleading grounds" would be unusual. Subject to issues of costs, pleadings can be amended at any time provided that to do so does not of itself cause injustice. I do not have a full transcript of the proceedings before Judge Wulwik. Mr Milsom says that the fact that the pleadings were deficient was uncontroversial, but that there was at no stage an application to amend. The mention of arguments in closing submissions was, he says, insufficient. In her self-drafted Grounds of Appeal the Appellant says that Counsel did ask for permission to plead certain matters during his closing submissions, but this was refused by Judge Wulwik. If that is so, I have not been told what the objections were.

78. At all events, I cannot resolve this difference of recollection, but, like Morris J when granting permission to appeal, I would be more anxious to consider the merits of the case, rather than issues of pleading, unless the pleading points are of substantive effect.

79. Since both parties want me to resolve this appeal rather than sending it elsewhere for trial if I should be persuaded that the appeal should be allowed, I will need to "take a view" on the pleading issue.

Discussion

80. As will be apparent from my review of the background, I have reservations about some of the important conclusions reached by Judge Wulwik. It seems to me that each of the following conclusions is justified by the evidence he heard and the documentary material (including the "suspension letter") put before him:

(i) that Z and O were children who exhibited extremely challenging behaviour and had done so prior to the Appellant becoming their class teacher;

(ii) that no clear solution to dealing with that behaviour, when at the same time handling the rest of the class, had been found even prior to the Appellant's arrival, but certainly thereafter;

(iii) that the Appellant expressed to Ms Alder concerns about her ability to deal with Z and O and her lack of training to deal with such issues as soon as she appreciated the problem;

(iv) that the Appellant had told Ms Alder that some members of staff were not being as helpful as they could be when it came to dealing with these problems;

(v) it was not until the weekend of 8/9 December (and thus after all three of the incidents now relied upon had taken place) that Ms Alder formulated a detailed plan for assisting the Appellant;

(vi) by then Ms Alder had inquired about at least the incidents on 19 November and 3 December (and may well have known about the incident on 5 December) and had concluded that no more than reasonable force was used;

(vii) by the time the Appellant was told she had been suspended (on the morning of 14 December), Ms Alder's plan had not been activated fully;

(viii) prior to the decision to suspend the Appellant was made –

(a) there is no evidence that the decision-maker (presumed to be Mrs Mulholland) had spoken to Ms Alder about her knowledge of what had occurred;

(b) there is no evidence that Mrs Mulholland asked Ms Alder about the support put in place for the Appellant;

(c) the Appellant was not asked for her response to the allegations;

(d) there is no evidence that consideration was given to any alternative to suspension before the decision to suspend was taken.

81. So far as the matters referred to under (viii) above are concerned, they add up to the conclusion that suspension was adopted as the default position and as largely a knee-jerk reaction to the strident terms in which Ms Fevrier's report to Ms Alder was phrased.

82. In my judgment, suspension itself, against that background, would have been sufficient to breach the implied term relating to trust and confidence, particularly when the Appellant's "line manager" (Ms Alder) had investigated at least two of the incidents and not considered them worthy of disciplinary action. But if I was wrong about that, I would certainly say that suspension within a few days of being told finally (after several weeks of requests for help) of the introduction of a scheme of support and further induction because of the problems with Z and O was a further reason for that term having been broken, particularly when that proposed scheme had not yet been fully implemented. Either or both of these approaches in combination would constitute a repudiatory breach of contract by the Defendant.

83. Does the Appellant's letter of resignation alter that picture? In my view, the answer is 'no'. In the absence of evidence from Mrs Mulholland (or someone else who could testify directly about the issue), I do not think it is possible to conclude that the "suspension letter" (which was the only letter dated 14 December that set out the detailed allegations) was given to the Appellant that day. All the correspondence over the next few weeks emanating from the Appellant was asking for details of the allegations and refuting the suggestion that she had been given the suspension letter. I do not think that the conclusion that her decision to "resign" was designed to avoid a full investigation could be justified unless she had received the suspension letter and had read it. Furthermore, it does seem to me to be an unduly strong conclusion to reach when someone who has been struggling to cope with the issues the Appellant had been trying to cope with has just been told that she was to be suspended: she will hardly have been able to reach a fully considered response in that state. Her resignation letter, which was addressed to Ms Alder, was in friendly terms towards

her, expressing thanks for her support. The email and text message traffic at least supports the proposition that Ms Alder had been sympathetic, albeit only in a position to put in place an appropriate "support package" just before the suspension took place. I do not consider the letter negates or undermines the case on breach of the implied term as to trust and confidence.

84. Mr Butler rightly conceded that the Particulars of Claim did not include an express assertion that the Appellant's response to the allegations should have been invited before the decision to suspend was taken. Equally, it was not averred expressly that alternatives to suspension should have been considered before that decision was taken. He does, however, contend that the pleading referred to at paragraph 62 above encompassed the case that some other cause should have been taken or considered prior to or instead of suspension. The points were taken in the closing submissions of Counsel then acting for the Appellant and Mr Milsom could have been afforded the opportunity to deal with them.

85. The facts upon which each of these contentions is based can simply be derived from the terms of the suspension letter: there is nothing in that letter to suggest that the Appellant was asked for her response to the allegations and nothing to suggest that any alternative to suspension was considered. Although there are a number of reasons why one would have expected Mrs Mulholland to be a witness at the trial, her evidence on this would not have added anything. If an application had been made to make these allegations and her absence as a witness was relied upon as a reason for not granting the amendment, it would have been a wrong basis for refusing the application.

Conclusion

86. Judge Wulwik was concerned only with the issue of liability and not with damages or the causation of any damage. If and to the extent that he was influenced by the view expressed in the paragraph of his judgement quoted at paragraph 72 above, then he was, with respect, distracted by that consideration.

87. For the reasons I have given, in my judgement, there were very strong reasons on the evidence he heard for finding that the Defendant had been in repudiatory breach of contract and that the Appellant's so-called "resignation" amounted to a constructive dismissal.

88. I would, therefore, allow the appeal, set aside Judge Wulwik's order and substitute that finding in the Appellant's favour.

89. I will consider what the parties say in response to this judgement, but I am minded to direct that the issue of damages should be transferred to the High Court and dealt with by High Court judge.

90. I understand that no attempt had been made to resolve this case by way of mediation prior to the hearing before Judge Wulwik. I would merely express the hope that efforts are made to resolve this long-standing issue without the need for further court proceedings.