In The Supreme Court of Bermuda

CIVIL JURISDICTION
2009: No. 414

BETWEEN:

KAREN RAE CLEMONS

Plaintiff

-v-

MINISTER OF EDUCATION

Defendant

JUDGMENT

(in Court)

Personal injuries - breach of duty to provide a safe place and/or system of work-teacher-psychological harm-physical harm-intentional infliction of harm-negligence

Date of hearing: May 16-20, August 15-17, September 6-9, September 20, 2016
Date of Judgment: November 14, 2016

The Plaintiff in person
Mr Norman MacDonald and Mr Michael Taylor, Attorney-General's Chambers, for the Defendant

Background

1. By a Generally Indorsed Writ of Summons issued on December 1, 2009, the Plaintiff commenced the present action for damages for intentional infliction of harm and negligence resulting in personal injuries (physical and/or emotional harm).

2. Her Statement of Claim went through various iterations until it was filed in Re-Amended form on or about March 3, 2013 ("RASC"). The RASC runs to 196 pages of letter size paper. The central allegation is that the Defendant's acts or omissions were responsible for the existence of a hostile working environment for the Plaintiff while she was employed as a teacher at CedarBridge Academy ("CBA") between 2000 and in or about 2006. These conditions, which are blamed primarily on the CBA Principal Ms Kalmar Richards, are alleged to have injured the Plaintiff in psychological and physical terms. This is probably the first claim of its type to come before the Bermudian courts.

3. The history of the proceedings may be summarised as follows:

    - December 1, 2009: Plaintiff acting in person issues Specially Indorsed Writ[1];
    - December 17, 2009: Defendant enters an appearance;
    - January 6, 2010: Plaintiff issues Summons to extend time for serving Statement of Claim;
    - January 14, 2010: Ground CJ extends time until January 18, 2010 for Plaintiff to serve Statement of Claim (Mr Harshaw appears on her behalf without formally coming onto the record);
    - February 4, 2010: Plaintiff files Statement of Claim;
    - February 10, 2010: Plaintiff files Amended Statement of Claim running to 248 pages;
    - March 16: 2010: Defendant issues Strike-Out Summons;
    - March 22, 2010: Harshaw & Co come on the record;
    - March 25, 2010: Ground CJ orders directions for Strike-Out Summons in present action and related defamation action;
    - May 6, 2010: Plaintiff issues Summons for leave to amend;

[1] On the same date she issued a Writ of Summons claiming damages for defamation in Civil Jurisdiction 2009: 415.

- November 1, 2010: Kawaley J adjourns all Summonses to a date to be fixed and grants leave for Re-Amended Statement of Claim to be filed within 21 days;

- December 12, 2012: Plaintiff files Notice of Intention to Act in Person and unmarked Re-Amended Statement of Claim;

- January 18, 2013: Plaintiff files Notice of Intention to Proceed;

- March 1, 2013: Plaintiff files underlined Re-Amended Statement of Claim dated February 28, 2013 ("RASC");

- April 9, 2013: Plaintiff files Summons seeking directions for trial;

- April 25, 2013: Court grants three weeks to Defendant to file a Defence. Strike-out Summons implicitly abandoned;

- May 31, 2013: Defendant files Defence;

- June 13, 2013: Court orders pre-trial directions including directions for service of expert reports with witness statements;

- June 21, 2013: Plaintiff files Reply;

- September 4, 2014: (after Lists of Documents have been served and various discovery-related Summonses have been issued but never heard) Court sets fresh deadlines for serving Witness Statements and Expert Reports;

- December 9, 2014: Defendant issues Summons for Plaintiff to submit for medical examination;

- January 8, 2015: Court orders Plaintiff to submit herself for medical examination by Defendant's expert and to produce particulars of a Grievance Hearing;

- September 24, 2015: following pre-trial review hearing (which commenced on August 24, 2015), Court orders split trial on liability and quantum and directs that the matter be fixed for trial on liability;

- February 25, 2016: Court permits Defendant to file a further witness Statement from Cheryl Burrows.

The Pleadings

4. The Plaintiff's case as pursued at trial relied upon two causes of action, the first alleging the intentional infliction of physical harm and the second negligent infliction of physical harm. In both instances, a psychological injury was primarily complained of. However, physical injuries were also particularised and the first injury complained of was "*exacerbated hypertension*". The RASC ran to nearly 200 pages. It is only necessary to summarise the allegations at this stage:

    (a) documents critical of the Plaintiff were placed on CBA or Ministry files without her knowledge;

    (b) complaints about a hostile working environment and/or adverse conditions were generally ignored. The Plaintiff's first complaint was by letter dated March 14, 2001to her supervisor;

    (c) insufficient information was given to the Plaintiff about students with special needs to allow her to effectively instruct them;

    (d) the Plaintiff was subjected to a campaign of psychological warfare and harassment between 2002 and 2006 because of her complaints about student welfare in the form of unequal treatment (being criticised for minor shortcomings which colleagues were not chastised for), being subjected to unofficial and irregular observations and being subjected to unfair evaluations (especially in 2004);

    (e) the Defendant was aware of the Plaintiff receiving stress tests from April 2002 and being medically certified sick for two weeks in late October 2003 and November 2011. It ought to have been aware that the Plaintiff was at risk for psychological injury at a time when other teachers were complaining of inadequate working conditions. In February 2004 a survey on stress was carried out with CBA teachers;

    (f) in January 2006, having been locked in the school the previous evening because she stayed at work till after 11.00pm, the following morning the Plaintiff parked her car illegally on the campus with a view to later transporting a load of books to another school. Her car was towed away while others illegally parked in the same area were not moved. This incident is relied upon as an instance of intentional infliction of harm; and

    (g) the injuries complained of include primarily emotional and some physical injuries but the main injuries complained of at trial were Post-Traumatic Stress Disorder ("PTSD") and Complex PTSD. The Plaintiff makes no

particularised claim for special damages and the prayer for relief simply seeks damages to be assessed.

5. The Defence ran to over 40 pages. The essential averments made in response can be summarised as follows:

    (a) the Defendant first learned of the alleged mental health concerns when the present proceedings were commenced and any suggestion that such concerns were repeatedly raised with the Principal are denied;

    (b) in September 2006 the Plaintiff complained that she could not work at CBA because of air quality concerns and she was immediately reassigned;

    (c) various specific complaints of alleged breaches of duty on the Defendant's part are either disputed on their merits or said not to amount to workplace bullying in any event;

    (d) reliance by the Plaintiff on the October 1, 2009 letter from Chartered Counselling Psychologist Ms Susan Adhemar in 2013 is said to place the Defendant and the Court at a disadvantage in terms of making it difficult to verify the Plaintiff's condition years after the material time.

6. The Plaintiff in her Reply joined issue on numerous issues of detail dealt with in the Defence and made averments including the following:

    (a) the CBA Principal and persons under her committed acts and omissions which it was reasonably foreseeable created a risk of harm to the Plaintiff;

    (b) the Plaintiff was not asked to move her car before it was towed away;

    (c) the Defendant exposed the Plaintiff to psychological re-injury by offering her an allocated substitute teacher's position despite having notice of her initial injury from at least October 2009.

7. It must also be acknowledged that the Plaintiff's pleadings, while largely expressed in temperate tones, were laced with hyperbolic attacks on the CBA Principal which essentially demonized the Principal. This could in part explain the Defendant's surprisingly sharp-edged approach at the trial of the present matter. The Plaintiff conducted her own case at trial with considerable moderation. She did not impugn the personal integrity of the CBA Principal to any great extent in the course of a comparatively polite and respectful cross-examination.

The Evidence

Preliminary

8. In recent years civil litigants have frequently agreed that overseas witnesses can give evidence via Skype to save costs, despite the absence of explicit Court powers to direct that evidence be given remotely. The Plaintiff applied for permission to call her overseas witnesses via Skype. The Defendant objected. It was obvious that the Plaintiff could not afford to fly in her overseas witnesses and that the effect of a purely tactical objection would be to prevent the Plaintiff from advancing significant elements of her case. I indicated that, having regard to the Defendant's positive duty to assist the Court to achieve the overriding objective[2], I was minded to make a pre-emptive costs order against the Defendant in respect of the witnesses' travel costs if the objection was maintained. On the morning of May 18, 2016, I ordered by consent that:

    (a) the Plaintiff's overseas fact witness statements could be read into evidence as could the witness statement of the Defendant's overseas fact witness Simon;

    (b) the overseas experts (the Plaintiff's Dr Blasé and the Defendant's Dr Brownell) would give evidence via Skype.

The Plaintiff's case

9. The following witnesses gave oral evidence and were cross-examined:

    (1) the Plaintiff herself (May 16-17, August 15, 2016);

    (2) Heather Stafford, a former CBA colleague (May 17, 2016);

    (3) Dr. Jo Blasé (expert on bullying by school administrators-via Skype-August 16, 2016);

    (4) Ms Susan Adhemar (expert psychologist-September 6, 7, 8, 2016).

10. The witness statements of the following witnesses were read into evidence:

    (1) Willie Clemons Jr (Dayton, Ohio), the Plaintiff's father;

[2] Rules of the Supreme Court 1985, Order 1A/3.

(2) Emma Lozman (South Kent, Connecticut), the Stanford Educational Consultant employed by the Defendant between 2003 and 2007 who trained the Plaintiff in relation to the Stanford computer curriculum;

(3) Racquel Rose-Green (London, England), an IT Teacher at CBA between 2000 and 2007, who worked closely with the Plaintiff;

(4) Candace Webb (Huntsville, Alabama), a Business Studies teacher at CBA between 2000 and 2007 and Union Representative for the school between 2003 and 2006.

11. The Plaintiff spent more than two days on the witness stand under cross-examination. She gave her oral evidence in a very balanced and careful manner, despite the often strident tones in her pleadings and witness statement. She demonstrated honesty, intelligence, sensitivity and a genuine passion for education. While it was clear by the end of her evidence that she had been genuinely emotionally upset by her working experience at CBA, it was far less clear that (a) her distress was as a result of workplace bullying, and (assuming the mistreatment of which she `complained occurred) (b) that this misconduct was either (i) intended to cause her injury or was (ii) reasonably foreseeable as likely to put her at risk of injury. In fact, the allegation that the Defendant intended to cause her injury seemed on its face to be improbable, while the question of whether it was reasonably foreseeable that harm would be caused seemed doubtful, on a superficial and ultimately incomplete view of the governing legal principles. The Plaintiff's evidence had the following principal strands to it which remained largely intact after her extensive cross-examination:

(a) immediately prior to being employed by the Defendant at CBA, the Plaintiff had been employed for six years as a Special Education Instructor in Fort Worth, Texas, USA. She came to Bermuda with an excellent reference from her former employer and had no disciplinary or health issues there;

(b) the Plaintiff and other teachers believed that the educational environment at CBA had serious shortcomings, in particular in terms of the quality of provision for students with learning difficulties, and she did not hesitate to advocate for a change of approach;

(c) the Plaintiff felt that she was singled out for disciplinary attention (most notably the car-towing incident) as a result of her advocacy and she responded by filing grievances which were typically resolved in favour of the Principal or other senior staff members concerned;

(d) the Plaintiff believes that the work-related stress caused her to be ill from time to time. She left CBA because of concerns about mould, but later discovered that she had been psychologically injured when she was unable to effectively teach despite being offered the chance to teach in other schools. She eventually reluctantly accepted a redundancy package. This belief was not simply based on her say so, but was supported by unchallenged evidence that she sought medical assistance and received treatment following particularly stressful incidents which she complained of.

12. Her evidence as to (a) was not contradicted by any other evidence. The sincerity of her belief as regards (b) - (d) was unshaken but required objective assessment in light of other evidence.

13. Heather Stafford was the other fact witness who gave oral evidence. She agreed under cross-examination that she would want to help the Plaintiff who was her friend and that much in her Witness Statement was based on what she had been told by the Plaintiff. Significant matters which she testified to include the following:

    (a) the Plaintiff's primary complaints were about how students were treated rather than herself;

    (b) the Plaintiff was more outspoken than she (Stafford) was on policy, procedure and welfare issues which were of mutual concern;

    (c) constructive criticism made by teachers in meetings was not received very well;

    (d) the Plaintiff left CBA because of mould and seemed quite positive after she left.

14. The Plaintiff's four overseas fact witnesses' written evidence may be summarised as follows:

    (a) her American and US resident father's Witness Statement provided background on her family circumstances and her father's general support for her but did not directly support the Plaintiff's case;

    (b) Ms Lozman, an American and US resident, employed by the Defendant as a Stanford Educational Consultant for four years, was working with the Plaintiff when the car-towing incident occurred. She crucially stated as follows:

"*23. I have always found Ms Clemons to be passionate about her work but I could see the toll that this ordeal had taken on her. For all the inner strength and confidence she was known for, this experience reduced Ms Clemons to someone I really didn't know. In all the time that I have known Ms Clemons, I had never seen her in such an emotional state. I really felt for her*";

(c) Ms Rose-Green, British UK resident, was an Information Technology Instructor at CBA between 2000 and 2007. As at the date of her Witness Statement, she was Head of Department at a school in Hertfordshire, England. She describes how she and the Plaintiff collaborated closely over teaching IT at CBA and became friends as well as professional colleagues and describes their shared passion for their subject area. Most significantly she states that the Plaintiff was singled out for criticism by senior staff for minor shortcomings such as attendance, the new marking system (the programme for which was problematic for all teachers) or the format of reports when she, Rose-Green, and others were not. She also:

(1) describes the Plaintiff taking sick leave for high blood pressure after the indignity of having her classroom assigned to a para-educator (Autumn term, 2003-2004);

(2) confirms that the Plaintiff's car was towed away, the day after the Plaintiff had been locked in the school because she had been working late, that other teacher's cars were parked in the same prohibited area and that she was told by the employee moving the car that the Plaintiff needed to be taught a lesson (or words to that effect); and

(3) stated that:

"*91. Miss Clemons was reproached by administration for what seemed to be innocuous matters; in fact, she was often singled out and reprimanded by Cedarbridge administration to the point where I could see that it was affecting her personality, her work and her health*";

(d) Ms Webb, a Bermudian US resident, was employed as a teacher at CBA between 2000 and 2007. She received IT training from the Plaintiff and Ms Rose-Green. She was also the Union Representative. She supported the Plaintiff's case in a general way by asserting that many teachers were affected by stress and low morale and confirming that the Plaintiff contended in interactions with the administration that poor behaviour was often attributable to the lack of adequate learning support rather than poorly

managed classrooms. She also supported the Plaintiff's general complaint of retribution being visited on teachers who criticised the way things were done at CBA because of a genuine desire to improve the educational provision. She asserted that when assisting the Plaintiff to retrieve her car, Police Officers indicated that they understood it was towed away so the Plaintiff would "learn a lesson". Ms Webb's Witness Statement is unabashedly partisan, effectively portraying herself and the Plaintiff as 'comrades in arms' in an ongoing battle with the CBA 'Establishment'; a battle which centred on competing approaches to educational and school administration policy.

The Plaintiff's Expert Evidence

15. The Plaintiff included in the Trial Bundle a letter from Dr Boonstra chronicling her medical history between 2003 and 2011 and opining that she had suffered "*physical symptoms and medical manifestations due to psychological stress*". This letter was never expressly admitted or agreed by the Defendant although the Plaintiff's own testimony at trial about her medical history (in terms of why she was given sick leave from work) was not, or not seriously, challenged. Dr Boonstra was not called, it having been my understanding prior to trial that the substantive elements of the Plaintiff's claim related to purely psychological injury which only Ms Adhemar was competent to give expert evidence as to. In hindsight I perhaps ought to have invited the Plaintiff as a litigant in person to consider whether she wished to call Dr Boonstra to opine as to the whether the Plaintiff suffered non-psychological injuries as a result of stress. From his letter it is far from obvious that he would regard himself as competent to give expert evidence in a trial on these matters. And for reasons which are set out below, I find that expert medical evidence was not required, in all the circumstances of the present case, to support a finding that the Plaintiff suffered a physical illness in the form of a worsening of an existing hypertension or high blood pressure condition. Nor was expert evidence necessary to support a finding that such an illness can be (or was in the present case) caused by stress.

16. I mention this because near the end of the trial when it became apparent that the Court was unlikely to place much reliance on the evidence of Ms Adhemar, the Plaintiff made reference to the evidence of Dr Boonstra as if it formed part of the evidence before the Court. Although the Plaintiff had quite confidently negotiated with counsel on which statements would or would not be read in and which witnesses would have to made available for cross-examination at trial, I was anxious that she might have been genuinely mistaken as to the evidential status of Dr Boonstra's opinion letter. I have accordingly considered, having reserved judgment, whether I should not in the interests of fairness take the exceptional step of reopening the trial and afford the Plaintiff an opportunity to call this potential witness. For reasons which I set out

below when recording my findings on the evidence, I have decided that no useful purpose would be served by pursuing this course.

17. In the event, the Plaintiff called two witnesses who were accepted as experts by the Court:

    (a) Dr Joe Blase, Professor Emerita in Educational Leadership , University of Colorado (via Skype), an expert in workplace bullying (August 16);

    (b) Ms Susan Adhemar, a British qualified Chartered Psychologist, an expert in counselling patients who have suffered from various forms of trauma. I had little difficulty in accepting her as an expert on trauma despite the fact that she had not pursued the special training for expert witnesses which her counterparts in the UK would undergo before giving expert testimony. The UK training requirements do not apply in Bermuda. Ms Adhemar's training and specialist experience in trauma were impressive. Her modesty about her expertise and the care with which she expressed her opinions only enhanced rather than undermined her reliability as a professional witness who could assist the Court. She attended Court, after initially declining to testify, after I directed the Plaintiff to inform her that she would be subpoenaed if she did not voluntarily attend (September 6, 7, 8).

18. Dr Blase's evidence was narrow in scope and consisted of reviewing the Plaintiff's account of her treatment at CBA and opining that, if her account was true, she had been a victim of workplace bullying. Mr MacDonald correctly submitted that since she did not carry out a balanced appraisal of all the evidence, this Court could not rely on her opinions to support a factual finding that bullying actually occurred. The witness relied upon, *inter alia*, the following factors as indicative of this:

    - ignoring complaints and concerns raised by the Plaintiff;
    - stonewalling;
    - withholding resources;
    - unfavourable treatment/nit-picking/targeting;
    - unfair performance evaluations.

19. Ms Adhemar's evidence was also narrow in scope. She opined that she concluded based on preliminary assessments carried out in 2008 that the Plaintiff was suffering from complex PTSD. If the Plaintiff was not a malingerer who had completely deceived her (which was improbable), this psychological injury was attributable to what the Plaintiff perceived as mistreatment while in the Defendant's employ at CBA.

However she qualified this central opinion contained in a letter dated October 1, 2009 which had served as her Report in one important respect. She did not feel able to advance this conclusion as a formal opinion to the Court because in her view further assessments by a specialist in diagnosis should have been carried out before a final opinion fit to be relied upon by a court could be reached. She testified that she had advised the Plaintiff of the need for this further assessment when supplying the October 1, 2009 letter.

The Defendant's case

20. The following witnesses attended for cross-examination and gave oral evidence for the Defendant:

    (1) Ms Kalmar Richards (May 18, 19 and August 15);

    (2) Mr Dean Foggo (May 19);

    (3) Ms Tina Duke (May 19-20);

    (4) Mr Albert Dowling (May 20);

    (5) Mr Ross Smith (May 20);

    (6) Ms Idonia Beckles (May 20);

    (7) Mr Warren Jones (August 16);

    (8) Mr O'Brien Osborne (September 6);

    (9) Ms Camille Chase (September 8).

21. Witness statements by the following witnesses were accepted as read into evidence by agreement:

    (a) Mr Winston Simon;

    (b) Mr Allen Smith;

    (c) Ms Devina Butterfield;

    (d) Ms Carol Simmons;

(e) Mr Timothy Jackson;

(f) Mr Anthony Wade;

(g) Ms Beverly Daniels;

(h) Ms Elizabeth Saunders;

(i) Ms Gina Davis;

(j) Ms Donna Swainson-Robinson;

(k) Ms Hope Andrea Morrissey;

(l) Ms Cheryl Burrows;

(m) Ms Trina Cariah.

22. Ms Kalmar Richards was a credible witness who gave her evidence in a straightforward manner despite being cast by the Plaintiff as the villain in this piece of litigation. She robustly rejected any suggestion that she had treated the Plaintiff unfairly let alone in a bullying manner. In her First Witness Statement, she points out that she was subject to only one grievance directed at her personally by the Plaintiff in 2007; both this grievance and the earlier 2004 grievance against Mr Simon were both found not to have merit. It was, however, ultimately common ground that the Plaintiff's request for a different supervisor was acceded to. Ms Richards stated that she maintained a working relationship with the Plaintiff throughout the latter's time at CBA and bore her no ill will. In Ms Richard's Second and Amended Third Witness Statements, she denies being aware of any poor relations with Ms Stafford and refutes various points made in the latter's Witness Statement. In her Fourth Witness Statement, Ms Richards responds in great detail to a range of criticisms of the CBA leadership made in Ms Webb's Statement, many of which points had no direct bearing on the Plaintiff's complaints. In her Fifth Witness Statement, Ms Richards disputes various assertions made by Ms Rose-Green in her Witness Statement, including the assertion that the Plaintiff was singled out for punitive treatment. She agrees (as she did in her Fourth Witness Statement) that there were problems implementing the SMS data system. In her Sixth Witness Statement, Ms Richards provides detailed responses to various assertions made in the Plaintiff's Sixth Affidavit. None of her Witness Statements challenged the evidence of Ms Emma Lozman, the Defendant's former Stanford Educational Consultant.

23. The Plaintiff never put to Ms Richards a single allegation of actual bullying on her part. Rather, it was primarily suggested that the Plaintiff had been treated unfairly by

the Principal using administrative processes unfairly (e.g. the disciplinary process, the teacher evaluation process and failing to respond adequately to concerns raised by teachers about special learning needs provision) or by others (e.g. the covert observation laid at the door of the Vice-Principal). Ms Richards firmly denied personally ordering the Plaintiff's car to be towed away. Overall, she gave her evidence in a balanced, straightforward and only occasionally combative manner. She appeared to the Court to be a dedicated educational leader who was capable of being firm (in a way which some might view as authoritarian), without being wholly insensitive. While committed to defending CBA's record, Ms Richards was nonetheless able to admit that there had been challenging times. The following interchange at the end of her oral testimony illustrates this point:

> Court: "*I am just curious as to whether there was ever any change in policy in terms of what information was given about… special needs students to teachers at any point. Because you gave the impression that the problems that existed in the early years at Cedarbridge have receded and I'm curious as to what your explanation is as to why those problems receded.*"
>
> Witness: "*We have over the years worked to put many interventions in place to assist children to be more successful. In terms of the process for learning support children we have endeavoured to structure and organize things differently for them as well. And they are experiencing success.*"

24. Dean Foggo was a colleague of the Plaintiff at CBA between 2000 and 2003, who was briefly promoted to Acting Head of the Computer Department and then left to enter politics. He gave oral evidence explaining that a letter which he wrote dated June 18, 2001 was written with the Plaintiff's consent with a view to obtaining a new supervisor for her. This was by way of response to the allegation in paragraphs 19 and 20 of the RASC that this letter was an "*unqualified, unsubstantiated evaluation of the Plaintiff's performance*" which was placed on the Plaintiff's CBA file without her knowledge. In his oral evidence he agreed that he did not copy the Plaintiff with the letter and did not appreciate that she no longer had a mentor by the time the letter was sent. I found him to be a credible witness.

25. Ms Tina Duke was a Learning Support Teacher at CBA between 1997 and 2004 and Instructional Leader for Learning Support from 2005 to 2012. She stated that CBA became the model school for student support in the Public School system during that period. She denied that Individual Education Plans ("IEPs") for students with special needs were not supplied to teachers while she led the Department. Ms Duke described a good professional relationship with the Plaintiff. She agreed that they should always have been supplied to teachers. She confirmed that the Plaintiff raised concerns about not being able to modify grades for special needs students as was done in the United States and being concerned about students placed in her elective class who could not

cope. She explained that US legislation governing special education was not in place in Bermuda and that this meant emulating the American approach was not feasible. In addition the SMS grading programme did not permit altering marks. As far as suitability for classes was concerned, she believed (consistently with CBA policy at the time) that a student should not be denied the right to do an elective they wished to pursue, conceding that this was a different philosophy from the Plaintiff's position. I found her to be a credible witness.

26. Mr Albert Dowling, a former Police Officer, was in 2007 Supervisor of the Student Management team at CBA until he retired in 2012. He testified that he arranged for the Plaintiff's car to be towed on the instructions of the Facilities Manager, Mr Ross Smith. This was the first time a teacher's car had been towed as far as he could recall. Under cross-examination he agreed that he was aware the Plaintiff had parked her car in the prohibited area to collect heavy books but insisted that he had given her a reasonable time to collect her books. He disagreed that he called the tow truck around noon rather than 4.00pm. He did not recall speaking to Ms Rose-Green about the incident. In re-examination he explained that when teachers were working late they would normally notify Security to avoid being locked in the Building as happened to the Plaintiff the day before the car-towing incident. In answer to questions from the Bench, he agreed that there was a strong possibility there were other cars in addition to the Plaintiff's parked in the prohibited area when the tow-truck arrived. I found him to be a credible witness.

27. Mr Ross Smith was Facilities Manager at CBA between 2000 and 2007 and his evidence was that his responsibilities included monitoring parking. He stated that the Plaintiff was one of several teachers who persistently parked in the Fire Lane and always gave the excuse that she was just collecting something. He found her difficult to deal with and regarded her attitude to him as a security officer as being "defiant". He gave instructions for the Plaintiff's car to be towed because it was not moved between 2.45 and 4.45 pm. He understood that the Plaintiff had both refused to move her car and promised to do so when she finished a class and declined Mr Dowling's offer to move the car for her. Under cross-examination he denied that the car was towed at lunchtime. Before instructing Mr Dowling to arrange for the tow-truck to remove the Plaintiff's car, he stated that he reported his proposed actions to the Principal, Ms Richards. He was clear that although she did not positively instruct him to proceed with the car-towing, Ms Richards did not forbid him from proceeding as he would never have ignored her instructions.

28. Under cross-examination Mr Smith also described what typically happened with parking infringements, implicitly accepting that removing a car was exceptional. When teachers were asked to move their cars from the prohibited area they would usually move them and the security staff would be lenient with them. If cars were not moved, security staff would speak to them or put stickers on their cars. Mr Smith admitted that after the car-towing incident it was initially believed that the removal of

the car was unlawful. However, he insisted that he later found out that this view of the law was incorrect. Signs were subsequently erected warning that parking offenders' vehicles might be removed. I found him to be a credible witness.

29. Ms Idonia Beckles was one of four Deputy Principals at CBA between 2003 and 2005. In 2003 and 2004 she was the Plaintiff's administrative supervisor. She stated that the Plaintiff expressed discontent about her own appraisals for the preceding academic year and often expressed concerns about other student-related matters. The Plaintiff never complained to Ms Beckles that she felt bullied or intimidated. She was cross-examined about specific incidents and documents which she unsurprisingly did not recall or recognise. I found her to be a credible witness.

30. Mr Warren Jones was Permanent Secretary in the Ministry of education between November 2010 and December 2013. Having left the Ministry, he made it clear at the outset of his oral evidence that he "had no dog in this fight". Mr Jones dealt with the Plaintiff during the period 2010-2013 when she had commenced the present proceedings and was formally linked to a post at CBA which she could not return to. She was frequently sick when assigned the role of Allocated Substitute and this did not work. She was made redundant in 2012 after her substantive post was abolished in June 2011. Under cross-examination Mr Jones explained that the Plaintiff was one of two teachers in a similar position. The Allocated Substitute solution was negotiated by the Union on behalf of the other teacher and extended to the Plaintiff as well. Because of a hiring freeze, it was not feasible to transfer the Plaintiff to another Government post. None of these matters had any direct bearing on the Defendant's liability for her present claims. Mr Jones agreed that she did complain of suffering from PTSD and being unable to work in the classroom during the final phase of her employment. I found him to be a credible witness.

31. Mr O'Brien Osborne has been Principal of Somerset Primary School since 2010. He denied recalling the incident the Plaintiff contends occurred and which resulted in her complaining to him of having a 'flashback' relating to CBA. However, he did recall observing the Plaintiff in class and concluding that she was unable to sound out words in the expected phonetic manner. I found him to be a credible witness.

32. Ms Camille Chase was a CBA student whose arm was bruised when the Plaintiff physically assisted her out of the classroom for sleeping in or about 2001. This incident ultimately did not result in disciplinary action being taken against the Plaintiff. The witness was now a composed and well-spoken young woman. Under cross-examination she stated that she felt the School treated the incident more seriously than she did at the time. She explained that the reason she was sleeping was due to a health issue which she never disclosed to the School before or after the incident. I found her to be a credible witness.

33. The evidence of the Defendant's witnesses whose Statements were read into evidence may be summarised as follows:

(a) Mr Winston Simon, now resident overseas, was Deputy Principal of CBA between 1999 and 2004. He robustly denies each allegation made against him, including the suggestions that he covertly observed the Plaintiff, damaged her reputation through his evaluations and enjoyed a special relationship with the Principal which he used to bully the Plaintiff;

(b) Mr Allen Smith has been employed as Assistant Information Technology Manager at CBA since 1997. He stated that I.T. accounts for teachers were usually disabled one year after the teacher left CBA;

(c) Ms Devina Butterfield had been Administrative Assistant to the Principal of CBA since 1997 and Office Manager since 2006. She denied giving the Plaintiff access to her file in 2004 on the grounds that the then Office Manager, Ms Virginia Bean, would have been in charge of such files at the time;

(d) Ms Carol Simmons served as Administrative Assistant, Assistant Registrar and Registrar at CBA between 1997 and 2008. She did not recall the Plaintiff speaking to her about the Plaintiff's class being displaced from the Library because of a scheduling problem. She does remember the Plaintiff discussing the mould issue with her and the car-towing incident. On the mould issue the Plaintiff was angry that the issue was being overlooked and Ms Simmons advised her to report the matter to the Facilities Manager, Mr Ross Smith. Ms Simmons admits that she frequently parked in the prohibited area although she cannot recall whether her car was parked there on the specific day when the Plaintiff's car was towed. She described the Plaintiff's reaction to her car being towed as "*so upset, anxious and stressed…Normally, Karen was a happy go lucky person*";

(e) Mr Timothy Jackson was Deputy Principal of CBA between 2005 and 2007. He states that he had a cordial professional relationship with the Plaintiff and discovered that they had various things in common but that she never complained to him about being bullied or mistreated;

(f) Mr Anthony Wade became a Social Studies teacher at CBA in 1997 and was Deputy Principal from 2003 until 2015. Fourteen of the 31 paragraphs of his Witness Statement explain that he is not in a position to respond to a particular allegation in the RASC. Substantively, he denies being aware of

any bullying of the Plaintiff and that any "dumping" policy was deployed at CBA. He explains that all teachers were held accountable through evaluations, observations and being notified when they fell short of expectations in relation to matters such as attendance; however teachers were also celebrated. Mr Wade, perhaps most importantly, responds to the allegation that the car towing incident was a penalty inflicted upon the Plaintiff because of her complaints about the SMS computer system. He states that those involved in towing her car would have been unaware of that issue;

(g) Ms Beverly Daniels was Human Resources Manager for the Ministry from 2004. She confirmed that an application for a sabbatical was processed and granted in respect of the Plaintiff after she had been on sick leave for almost two years because of a condition apparently caused by mould at CBA;

(h) Ms Elizabeth Saunders was Guidance Counsellor at CBA since its inception. In 2008 she became Head of Student Services and a team comprising six Guidance Counsellors and seven Educational Therapists/ Educational Therapist Assistants. After describing the system of support available for students, she concluded that "*providing services for students' needs…has become an integral part of how the school functions*…";

(i) Ms Gina Davis was Head of English at CBA from 2000 to 2002, and Director Staff Development and Instruction since 2004. She described the working environment at CBA as "robust" and explained in considerable detail the systems which were in place for dealing with problems faced by both pupils and staff. Ms Davis stated that quite often teachers did not avail themselves of resources which were at hand, positing a reluctance to follow the administrative procedures as an explanation. She balanced what might be viewed as a positive 'spin' with the admission that working at CBA "*is intense and stressful…it is not all peaches and cream*";

(j) Ms Donna Swainson Robinson became Director of Technology Assisted Instruction at CBA in 2004. Between 2000 and 2004 she was the Plaintiff's supervisor. She states that the Plaintiff never complained about being bullied, was offered a chance to attend a conference which she did not take up (having been refused a prior request) and was unhappy about a change of room from the Library to a larger room but did not complain and used the space creatively. She says the Plaintiff was "overwhelmed" about getting her marks in on time using the prescribed programme;

(k) Ms Hope Andrea Morrissey taught at CBA between 1997 and 2007, initially as a Business Studies Teacher and eventually as Business Studies and Information Technology Instructional Leader. She was on good terms with the Plaintiff and left CBA because of the mould issues. Ms Morrissey described the teacher evaluation and observation systems and noted that the Plaintiff did not always have her marks in on time;

(l) Ms Cheryl Burrows gave her written evidence as the Human Resources Manager for the Defendant Ministry. She stated that the Plaintiff was given a sabbatical in September 2008 to pursue a Masters' Degree in Instructional Technology but that she only obtained a Master Technology Certificate, which was not equivalent. The Ministry did not, although it could have done, seek reimbursement for what she was paid during this period;

(m) Ms Trina Cariah became Principal of Paget Primary School in 2009 and West End Primary School in 2015. She stated that she did not recall the Plaintiff complaining of her health while working as a substitute teacher at either school.

Supplementary Submissions on Physical Injury

34. The Plaintiff outlined her injuries including the exacerbation of an existing hypertension problem in paragraph 163 of her Witness Statement of June 22, 2015. She also swore a Sixth Affidavit on January 7, 2015 which exhibited Dr Boonstra's account of her medical history in his May 1, 2014 letter which the Plaintiff explicitly relied upon as an opinion "*as to the cause of my injuries*" in paragraph 18 of that Affidavit. Ms Richards' Sixth Witness Statement was made in response to the Plaintiff's Sixth Affidavit and she expressly made "no response" to paragraph 18. Curiously she made no written response at all to the Plaintiff's subsequent Witness Statement which was filed in Court on June 23, 2015, almost a year before the trial commenced.

35. It was accordingly effectively conceded that the Plaintiff suffered an exacerbation of an existing hypertension condition as alleged in paragraph 405(1) of the RASC and as asserted in both her Sixth Affidavit and her Witness Statement, documents she adopted in her evidence-in-chief at the beginning of the trial. What was positively disputed was: that the Defendant had not done anything which:

(a) amounted to workplace bullying;

(b) it was reasonably foreseeable would place the Plaintiff at risk of injury to her health; and

(c) that caused any physical or psychological injury.

36. To my mind, bearing in mind that the Plaintiff is a litigant in person and the Defendant was represented at trial by two counsel, it does not lie in the Defendant's mouth to contend that he did not realise that the Plaintiff was pursuing a claim for the very first injury complained of under paragraph 405(a) of her RASC. She never abandoned her case in relation to that comparatively minor injury even if she clearly focussed on the more serious complex PTSD. However I myself did not focus on the hypertension injury in the course of the trial and accordingly failed to invite the Defendant's counsel to address this alternative factual basis of liability (the legal basis of the claim for all injuries being the same) in their closing submissions. I assumed (and doubtless conveyed this assumption to counsel) that the Plaintiff's case stood or fell on the complex PTSD injury.

37. The interests of fairness, it nevertheless seemed obvious, required the Defendant to be permitted to address a point which would likely be decided against the Defendant and which the Court might have unwittingly encouraged counsel to overlook addressing at trial. On October 26, 2016 in the course of preparing this Judgment, I accordingly invited the Defendant's counsel to tender supplementary submissions on this slender remaining factual limb of the Plaintiff's claim and, in particular, the following two issues:

(1) any reasons why the Court should not find that the Plaintiff has proved the injury pleaded in para 405(1) of the RASC (exacerbated hypertension) through her Sixth Affidavit (paragraph 18) and her Witness Statement (paragraph 163) on the basis that this evidence was not positively challenged; and

(2) any reasons why the Court should not find that the risk of hypertension was reasonably foreseeable, further to the arguments advanced at trial on the foreseeability requirement as it relates to complex PTSD. I considered that the duty of care, breach of duty of care and causation elements of the claim were no different in their application to differing types of illness. On proper analysis the reasonable foreseeability issue is not materially different either as a claimant only needs to show that some form of stress-induced injury was foreseeable, not the specific injury which was sustained.

38. In his Supplementary Submissions, Mr MacDonald confirmed that when he sought to reply to the Plaintiff's closing oral submissions I indicated that I did not need to hear from him. This was because I indicated there was no need for him to reply on the law as the key case the Plaintiff referred to (*Dickins*-considered below) was broadly

consistent with the main case the Defendant relied upon (*Hatton*-considered below). In fact counsel was given an opportunity to refer the Court to an authority on the weight to be given to expert evidence. Even if I had considered inviting counsel to reply on the facts, in his own closing submissions the Defendant's counsel had only addressed the complex PTSD case and the Plaintiff herself, who had the last word, made only a passing implicit reference to the exacerbated hypertension injury limb of her claim when summarising the evidence as to her medical history. In short, in common with the Defendant's counsel, I did not appreciate the significance of this subsidiary injury limb of the Plaintiff's claim at the time, which is why I invited the Defendant to address this issue through supplementary submissions after the trial.

39. The Plaintiff introduced her medical history summary in the following way in her closing submissions:

> "*In my Witness Statement I refer-I made a special section where I had issues related to injuries and I was just going to run through those…because that also…should help me to show a pattern in the circumstances that led to that…*"

40. On balance, it seems clear that the Defendant's counsel has had an enhanced opportunity to respond to this aspect of the Plaintiff's case in the present circumstances, being afforded a reasonable amount of time to prepare a considered response to an overlooked point as opposed to being required to make an off-the-cuff oral response from the Bar. Be that as it may, the response advanced the following points:

    (a) the opinion letter of Dr Boonstra should be entirely disregarded because it is inadmissible and unreliable in any event to the extent that, as regards cardiac disease, it is contradicted by Dr Doherty's opinion as described by the Plaintiff;

    (b) the cause of the Plaintiff's high blood pressure could be hereditary;

    (c) the Defendant was never told about the Plaintiff suffering from stress or high blood pressure, and her sick note did not disclose the reasons for her absence;

    (d) many of the Plaintiff's problems likely stem from the fact that her Texas experience involved far smaller class sizes;

(e) there is no evidence that exacerbated hypertension is an illness which exists, let alone that the Defendant caused the Plaintiff to suffer this alleged injury, applying a 'but for' test;

(f) in terms of reasonable foreseeability, the Defendant relied upon the same arguments advanced in respect of complex PTSD.

Legal findings: the essential elements of the Plaintiff's claims

Intentional infliction of psychological or physical harm

41. In *Wong-v-Parkside NHS Trust* [2006]EWCA Civ 1721, Hale LJ (as she then was) opined as follows:

"*10. It follows from Wright J's formulation that, although the tort is commonly labelled 'intentional infliction of harm', it is not necessary to prove that the defendant actually wanted to produce such harm. If the conduct complained of was 'calculated' to do so, and does so, then that is enough. Much depends, therefore, on what is meant by 'calculated'.*

11. Professor Fleming states in The Law of Torts, 9th edition 1998, at p 38,

> *'Cases will be rare where nervous shock involving physical injury was fully intended (desired). More frequently, the defendant's aim would have been merely to frighten, terrify or alarm his victim. But this is quite sufficient, provided that his conduct was of a kind reasonably capable of terrifying a normal person, or was known or ought to have been known to the defendant to be likely to terrify the plaintiff for reasons special to him. Such conduct could be described as reckless.'*

This might be read to mean that the tort is committed if there is deliberate conduct which will foreseeably lead to alarm or distress falling short of the recognised psychiatric illness which is now considered the equivalent of physical harm, provided that such harm is actually suffered. We do not consider that English law has gone so far.

12. For the tort to be committed, as with any other action on the case, there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour." [emphasis added]

42. The examples of cases where such a tort was established in the courts cited by the English Court of Appeal in *Wong* included cases where:

    (a) a wife suffered nervous shock after a practical joker told the plaintiff that her husband had been seriously injured in an accident[3]; and

    (b) a plaintiff suffered nervous shock when the defendant sought correspondence from her under the false pretext that she was suspected of assisting the enemy in wartime[4].

43. The key evidence and findings in *Wong*, where evidence of an assault which had been criminally prosecuted was held to be inadmissible in support of the civil claim and the plaintiff was diagnosed by a psychiatrist as suffering from chronic PTSD, were as follows:

    "*2…The appellant's case was that Susan Mullins and Josie Lucas believed that Carmel Woods should have got the job and were extremely rude and unfriendly to her from the start. Carmel Woods did not explain the work properly to her. They criticised her for arriving on time, told her that she had not mastered the job and should leave, locked her out of the office, interfered with her desk and personal effects, and hid things that she needed. On 20 February 1995 the second defendant threatened her with reprisals from an ex convict if she told their employers about the second defendant's absences. On 9 March 1995 she was assaulted by the second defendant, who had also been responsible, with Josie Lucas, for setting off her car alarm and frightening her*

[3] *Wilkinson v Downton* [1897] 2 QB 57.
[4] *Janvier v Sweeney* [*1919] 2 KB 316.*

by throwing something against the office window. In all, out of 22 particulars of harassment, 13 applied to the second defendant, although in three further incidents of interference with the appellant's property the perpetrator was unknown…

17. The threat is different. It is the most serious of the other allegations made against the second defendant. But the claimant herself conceded to the judge that it had not caused her illness. The trigger had been the earlier incidents which had led to her two day absence in January. Without it, all that is left is a catalogue of rudeness and unfriendliness, behaviour not to be expected of grown up colleagues in the workplace, but not behaviour so 'calculated to infringe her legal right to personal safety' that an intention to do so should be imputed to the second defendant…

31. As the allegations in this case do not amount to… any…tort recognised at common law at the time when these events took place, the Recorder was right to strike out the claim and this appeal must be dismissed."

44. I find that these judicial pronouncements reflect the Bermuda law position. Having regard to the need for the Plaintiff to prove conduct on the part of the Defendant likely to cause physical or psychiatric harm, the Plaintiff's claim for damages for intentional infliction of harm claim seemed on its face to be tenuous even taking the allegations she relied upon at their highest. Perhaps because of the provisional views I expressed before closing speeches began, neither party made legal submissions in relation to this cause of action. Nevertheless, the Plaintiff assumed the burden of proving:

    (1) that the Defendant caused the Plaintiff to suffer a physical or psychiatric illness; and

    (2) that the Defendant and/or his servants and/or agents deliberately treated the Plaintiff in a way which was intended to cause or likely to cause such harm.

Breach of employer's duty to provide a safe place and/or system of work

45. Each party relied on one authority which articulated the same governing principles. It was common ground that:

(a) every employer is subject to a duty of care to his employees to provide a safe place and/or system of work;

(b) if the employer negligently fails to protect an employee from sustaining physical or psychiatric harm which is reasonably foreseeable, the employer will be liable in damages.

46. The Plaintiff referred the Court to *Dickins-v-O2PLC* [2008] EWCA Civ 1144, which essentially applied the principles enunciated in the Defendant's case of *Hatton,* and where both psychiatric experts were agreed that the Plaintiff had suffered a serious injury from work-related stress. In *Dickins,* Smith LJ dealt with three key elements of the cause of action in the following way:

(a) **Reasonable foreseeability**:

"24*…I cannot accept that the judge failed to appreciate the difference between stress and stress-related illness; nor did he fail to understand that the indication of impending illness must be clear before the employer is under a duty to do something about it. The judge held, at his paragraph 39, which I have cited at paragraph 19 above, that on or about 23 April, the respondent was 'palpably under extreme stress' and 'about to crack up' as she had said. That was or should have been plain to her two managers, Allen and Keith Brown, but they did nothing of substance about it. In my judgment, the evidence was quite strong enough for the judge to conclude, as he did, that the appellant had received a clear indication of impending illness*";

(b) **Breach of duty:**

"*27…At paragraph 17 of Hatton, where the desirability of an advice and counselling service was discussed, it was made plain that the advantage of such a service was because many employees were unwilling to admit to their line managers that they were not coping with their work for fear of damaging their reputations. A confidential service would enable the employee to take advice without making any potentially damaging disclosure direct to the*

employer. However, in the present case, the respondent was not afraid to tell her line manager (on 23 April) that she was 'at the end of her tether'. Mr Keith Brown's response included the suggestion that she should seek counselling from the body engaged by the appellant. The respondent did not do so; she was already receiving counselling through her own doctor. Given the situation where the respondent was describing severe symptoms, alleging they were due to stress at work and was warning that she did not know for how long she could carry on, I do not think that a mere suggestion that she seek counselling could be regarded as an adequate response…";

(c) **Causation**:

"38… *it is clear from the judge's findings and the psychiatric evidence that the identified breach had made a material contribution to the severe illness which began in June 2002. In my view, such a finding was inevitable. Here was a woman with a good work record. She had been promoted to work at the very limit of her capability. She had told the appellant that she needed help with her work and no or insufficient help had been provided. At the end of the February 2002 audit, she was exhausted and a short holiday did not make her any better. In March, she asked for a less stressful job and was asked to hold on for 3 months. On 23 April, she asked for a 'sabbatical' and told her employer, in effect, that she was at the end of her tether. She described an inability to drag herself into work which was quite uncharacteristic of her. Nothing was done; she remained at work and her state of exhaustion continued. On 30 May, she repeated her request for a sabbatical and repeated her descriptions of her condition. At that late stage, she was referred to Occupational Health but not as a matter of urgency and within a few days she was completely unfit and indeed unable to attend work. It seems to me that the history shows that, at that time, she tipped over the edge from suffering from stress into complete breakdown. The obvious inference is that she tipped over the edge because nothing significant had been done to recognise and address her need for a rest and for a change to her work requirements. It seems to me that it would have been perverse to hold that the failure to address her problems had not materially contributed to the tipping over into psychiatric*

illness. It plainly had. It is true that there were other factors in play. The respondent's vulnerable personality was no doubt an underlying cause of her breakdown. Her relationship with her partner could have been another; so might her IBS although that could be seen as an effect of stress rather than a cause of it. But the appellant's failure plainly made a material contribution".

47. Mr MacDonald referred the Court to *Sutherland-v-Hatton* [2002] EWCA Civ 76. I find the following passages in the leading judgment of Hale LJ (as she then was) to be helpful:

(a) **Creating new rules to protect vulnerable employees in stressful occupations such as teaching is not a proper function for the courts**:

"*16. There is an argument that stress is so prevalent in some employments, of which teaching is one, and employees so reluctant to disclose it, that all employers should have in place systems to detect it and prevent its developing into actual harm. As the above discussion shows, this raises some difficult issues of policy and practice which are unsuitable for resolution in individual cases before the courts. If knowledge advances to such an extent as to justify the imposition of obligations upon some or all employers to take particular steps to protect their employees from stress-related harm, this is better done by way of regulations imposing specific statutory duties. In the meantime the ordinary law of negligence governs the matter*";

(b) **Physical or mental harm:**

"9…*a general booklet of guidance from the Health and Safety Executive, Stress at work (1995)…is particularly helpful in distinguishing clearly between pressure, stress, and the physical or psychiatric consequences (p 2):*

'There is no such thing as a pressure free job. Every job

brings its own set of tasks, responsibilities and day-to-day problems, and the pressures and demands these place on us are an unavoidable part of working life. We are, after all, paid to work and to work hard, and to accept the reasonable pressures which go with that.

Some pressures can, in fact, be a good thing. It is often the tasks and challenges we face at work that provide the structure to our working days, keep us motivated and are the key to a sense of achievement and job satisfaction.

But people's ability to deal with pressure is not limitless. Excessive workplace pressure and the stress to which it can lead can be harmful. They can damage your business's performance and undermine the health of your workforce.'

Stress is defined (p 4) as 'the reaction people have to excessive pressures or other types of demand placed upon them. It arises when they worry that they can't cope.' It can involve both physical and behavioural effects, but these 'are usually short-lived and cause no lasting harm. When the pressures recede, there is a quick return to normal.'

'Stress is not therefore the same as ill-health. But in some cases, particularly where pressures are intense and continue for some time, the effect of stress can be more sustained and far more damaging, leading to longer-term psychological problems and physical ill-health.'

10. Two other important messages emerge from these documents. First, and perhaps contrary to popular belief, harmful levels of stress are most likely to occur in situations where people feel powerless or trapped. These are more likely to affect people on the shop floor or at the more junior levels than those who are in a position to shape what they do. Second, stress – in the sense of a perceived mismatch between the pressures of the job and the individual's ability to meet them – is a psychological

phenomenon but it can lead to either physical or mental ill-health or both. When considering the issues raised by these four cases, in which the claimants all suffered psychiatric illnesses, it may therefore be important to bear in mind that the same issues might arise had they instead suffered some stress-related physical disorder, such as ulcers, heart disease or hypertension." [Emphasis added]

(c) **The employer's duty of care**:

"*22. There are… no special control mechanisms applying to claims for psychiatric (or physical) injury or illness arising from the stress of doing the work which the employee is required to do. But these claims do require particular care in determination, because they give rise to some difficult issues of foreseeability and causation and, we would add, identifying a relevant breach of duty. As Simon Brown LJ pithily put it in Garrett, at para 63:*

> *'Many, alas, suffer breakdowns and depressive illnesses and a significant proportion could doubtless ascribe some at least of their problems to the strains and stresses of their work situation: be it simply overworking, the tensions of difficult relationships, career prospect worries, fears or feelings of discrimination or harassment, to take just some examples. Unless, however, there was a real risk of breakdown which the claimant's employers ought reasonably to have foreseen and which they ought properly to have averted, there can be no liability.' (Emphasis supplied)*"

(d) **Foreseeability**:

"*15. Some things are no-one's fault. No-one can blame an employee who tries to soldier on despite his own desperate fears that he cannot*

cope, perhaps especially where those fears are groundless. No-one can blame an employee for being reluctant to give clear warnings to his employer of the stress he is feeling. His very job, let alone his credibility or hopes of promotion, may be at risk. Few would blame an employee for continuing or returning to work despite the warnings of his doctor that he should give it up. There are many reasons why the job may be precious to him. On the other hand it may be difficult in those circumstances to blame the employer for failing to recognise the problem and what might be done to solve it….

26. It will be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is in all the circumstances of the case unreasonable. Also relevant is whether there are signs that others doing the same work are under harmful levels of stress. There may be others who have already suffered injury to their health arising from their work. Or there may be an abnormal level of sickness and absence amongst others at the same grade or in the same department. But if there is no evidence of this, then the focus must turn to the individual, as Colman J put it in Walker, at p 752e:

> *'Accordingly, the question is whether it ought to have been foreseen that Mr Walker was exposed to a risk of mental illness materially higher than that which would ordinarily affect a social services middle manager in his position with a really heavy workload.'*

27. More important are the signs from the employee himself. Here again, it is important to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health. Walker is an obvious illustration: Mr Walker was a highly conscientious and seriously overworked manager of a social work area office with a heavy and emotionally demanding case load of child abuse cases. Yet although he complained and asked for help and for extra leave, the judge held that

his first mental breakdown was not foreseeable. There was, however, liability when he returned to work with a promise of extra help which did not materialise and experienced a second breakdown only a few months later. If the employee or his doctor makes it plain that unless something is done to help there is a clear risk of a breakdown in mental or physical health, then the employer will have to think what can be done about it.

28. Harm to health may sometimes be foreseeable without such an express warning. Factors to take into account would be frequent or prolonged absences from work which are uncharacteristic for the person concerned; these could be for physical or psychological complaints; but there must also be good reason to think that the underlying cause is occupational stress rather than other factors; this could arise from the nature of the employee's work or from complaints made about it by the employee or from warnings given by the employee or others around him.

(e) **Breach of duty**:

"*33. It is essential, therefore, once the risk of harm to health from stresses in the workplace is foreseeable, to consider whether and in what respect the employer has broken that duty. There may be a temptation, having concluded that some harm was foreseeable and that harm of that kind has taken place, to go on to conclude that the employer was in breach of his duty of care in failing to prevent that harm (and that that breach of duty caused the harm). But in every case it is necessary to consider what the employer not only could but should have done. We are not here concerned with such comparatively simple things as gloves, goggles, earmuffs or non-slip flooring. Many steps might be suggested: giving the employee a sabbatical; transferring him to other work; redistributing the work; giving him some extra help for a while; arranging treatment or counselling; providing buddying or mentoring schemes to encourage confidence; and much more. But in all of these suggestions it will be necessary to consider how reasonable it is to expect the employer to do this, either in general or in particular: the size and scope of its operation will be relevant to this, as will its resources, whether in the public or private sector, and the other*

demands placed upon it… an employer who tries to balance all these interests by offering confidential help to employees who fear that they may be suffering harmful levels of stress is unlikely to be found in breach of duty: except where he has been placing totally unreasonable demands upon an individual in circumstances where the risk of harm was clear…";

(f) **Causation**:

"*35. Having shown a breach of duty, it is still necessary to show that the particular breach of duty found caused the harm. It is not enough to show that occupational stress caused the harm. Where there are several different possible causes, as will often be the case with stress related illness of any kind, the claimant may have difficulty proving that the employer's fault was one of them: see Wilsher v Essex Area Health Authority [1988] AC 1074 . This will be a particular problem if, as in Garrett, the main cause was a vulnerable personality which the employer knew nothing about. However, the employee does not have to show that the breach of duty was the whole cause of his ill-health: it is enough to show that it made a material contribution: see Bonnington Castings v Wardlaw [1956] AC 613.*"

48. I would summarize the key elements of the Plaintiff's main cause of action which she must prove as follows:

(1) that the Defendant owed her a duty of care to provide a safe working environment which would not expose her to reasonably foreseeable risks of physical or psychological/psychiatric harm (not disputed);

(2) that the Plaintiff suffered a physical or mental injury, as opposed to merely suffering effects of 'ordinary' work-related stress. It is important to remember than in *Hatton*, upon which the Defendant generally relied, Hale LJ noted that although the four claimants in that case all complained of psychiatric injury, "*the same issues might arise had they instead suffered some stress-related physical disorder, such as ulcers, heart disease or hypertension"*(at paragraph 10);

(3) that the risk of the injuries of which the Plaintiff complains was reasonably foreseeable by the Defendant;

(4) that the Defendant breached the duty of care by failing to prevent such harm;

(5) that the Defendant's failure to prevent the injury was a material cause of it.

49. However, it is important to add an important *caveat*. The cases referred to in relation to this cause of action both concerned situations where the breach of duty complained of consisted primarily of failing to appreciate that the claimant was at risk of injury from, in effect, overwork. Here, the central complaint is that the Defendant's inappropriate treatment of the Plaintiff amounted to workplace bullying and this resulted in physical and/or psychological injuries. The key element of reasonable foreseeability must accordingly be viewed through a slightly different lens taking into account the fact that the key allegations are not merely that the Defendant is liable for the negligent infliction of physical or serious psychological harm. Here the breach of duty is alleged to have occurred not through the ordinary operation of the employer's work processes, but because specific actions which ought to have been avoided because, objectively viewed, the actions were obviously inappropriate.

50. Accordingly I reject a central plank of the Defendant's counsel's legal analysis on reasonable foreseeability. This was not a case where the employer was entitled to assume that the employee was not at risk of harm from ordinary work-related stress unless she took positive steps to bring the fact that she was suffering to the employer's attention. The Plaintiff's case was from the outset that the Defendant's inappropriate manner of carrying out his work put her health at risk and that a reasonable employer was or ought to have been aware of this risk. This argument was at first blush quite attractive and appeared to me to be compelling. But on careful analysis it was based on a misapplication of correct legal principles formulated in language suitable for application in an entirely different factual context. For the avoidance of doubt, I find no support in the authorities placed before the Court for the proposition that where a stress-related injury is complained of, the specific form of injury sustained must itself be reasonably foreseeable. Such a requirement would to my mind be wholly inconsistent with the fundamental tenets of the law of tort.

Findings: Intentional Infliction of Harm

51. Whether the Defendant caused the Plaintiff physical or psychiatric harm centres around the same evidence which will be considered below in relation to the breach of the employer's duty of care or negligence claim. It is only proposed to consider here the element of intentionality. Did the Defendant deliberately treat the Plaintiff in a way which was likely to cause her physical or psychiatric injury?

52. Taking the Plaintiff's case at its highest, the following conduct was complained of:

- unfair performance appraisals/evaluations;
- being observed while teaching in a surreptitious manner;

- being singled out generally for disciplinary action for comparatively minor infractions;

- being ignored and/or unsupported when she raised valid concerns about student welfare or other governance issues;

- having her car towed for parking in a prohibited area when other cars similarly parked were not towed.

53. In my judgment it is not possible to infer from the allegations relied upon by the Plaintiff that the Defendant (or any of his servants and/or agents) deliberately treated the Plaintiff in a way which was intended to or was likely to cause her physical or harm. The Plaintiff's case simply does not allege let alone prove conduct, to use Professor Fleming's above-quoted[5] words, which "*was of a kind reasonably capable of terrifying a normal person, or was known or ought to have been known to the defendant to be likely to terrify the plaintiff for reasons special to* [her]".

54. The intentional infliction of harm claim is accordingly dismissed.

Findings: breach of employer's duty to provide a safe place and/or system of work claim

Did the Plaintiff suffer a physical or mental injury as opposed to merely suffering the short-term effects of 'ordinary' work-related stress?

55. Although her employment did not formally end until 2012, the Plaintiff's case is centrally grounded in events occurring while she was a teacher at CBA between 2000 and 2006. As far as her general medical history is concerned, I make the following findings:

(a) although Dr Boonstra's May 1, 2014 letter report was never admitted in evidence as an agreed expert report, it was exhibited to the Plaintiff's Sixth Affidavit. It was clearly a document reviewed by Dr Jo Blase and implicitly referenced in her Report and her oral evidence. Ms Adhemar also spoke to the Plaintiff's general medical history. The Plaintiff's own evidence about being prescribed medication for exacerbated hypertension was not challenged. The letter primarily sets out the Plaintiff's medical history between 2003 and 2011which she testified to and was cross-examined on at trial. I accept the Defendant's objection to

[5] *Wong-v-Parkside NHS Trust* [2006] EWCA Civ 1721 at paragraph 11.

the admissibility of any opinions expressed in the letter but find that the factual matters recorded therein may be taken into account. Ignoring the opinion set out in the penultimate paragraph of Dr Boonstra's letter, I treat this document as being properly in evidence for the purpose of confirming the Plaintiff's and other witnesses' factual accounts of her medical history, an account which was not or not positively challenged and which was in any event for all material purposes conclusively supported by her prescription records and Hospital stress test records;

(b) the medical visits recorded between 2000 and 2006 are as follows:

(i) **2003**: stress reaction/anxiety (14 days sick leave certified by Dr Samantha Price-October, following the assignment of her Advisory classroom to a para-educator),

(ii) **2004**:hypertension/continued anxiety, blamed by Plaintiff on working conditions (medication prescribed for both conditions),

(iii) **2005**: hypertension, anxiety, respiratory allergies (seven visits),

(iv) **2006**: hypertension, anxiety, respiratory allergies (nine visits);

(c) the medical visits prior to 2009 (the year when the present proceedings were commenced) were as follows:

(i) **2007**: two visits to Island Health Services,

(ii) **2008**: referred to Ms Adhemar for anxiety and stress and to Dr Doherty (cardiologist) for chest pains. Prescribed medication for anxiety. Diagnosed with type 2 diabetes;

(d) the medical visits from 2009 until the end of the Plaintiff's employment were as follows:

(i) **2009-2010**: five visits for anxiety symptoms;

(ii) **2011**: seen for anxiety in September and November (certified sick November 7-19, 2011).

56. It is convenient to record at this point that I accept the Plaintiff's evidence that the trigger for her October 2003 sick leave was the reassignment of her Advisory classroom to a para-educator in late October 2003. Her distress about this incident was confirmed by other testimony (Ms Rose-Green) which was not challenged. I also accept the Plaintiff's evidence that the trigger for her being placed on a second blood pressure medication in 2004 was being put on review, just before the beginning of the 2004-2005 academic year. I also find that in mid-September 2004 she was prescribed anxiety medication in the prelude to a meeting with Senior Education Officer Donna Daniels about the Plaintiff's Summative Evaluation Report. Finally, I accept the Plaintiff's evidence corroborated by subsequent email correspondence that when discussing the car-towing incident with Ms Donna Daniels she broke down in tears. By the Plaintiff's own account in her written evidence[6], however, she made light of the breakdown to Ms Daniels. I accept the Defendant's evidence that the Plaintiff was not certified sick in the aftermath of this incident as she mistakenly suggested in her oral (but not her written) evidence.

57. I fully appreciate, in light of Ms Adhemar's evidence, that the absence of any significant physical symptoms by way of reaction to this incident does not exclude the possibility of psychological injury. Moreover, since the car-towing incident took place on or about January 5 2006 and the Plaintiff visited her doctor nine times that year for, *inter alia*, hypertension, it is easy to infer that at least one of those visits was to a material extent contributed to by the car-towing incident and the drama which followed. It seems obvious that the distress of the car-towing incident would have contributed to at least a temporary elevation of the Plaintiff's blood pressure (which would not have mitigated the injury sustained in July 2004) in light of the aftermath of the event, considering that:

    (a) I accept Candace Webb's evidence that the Plaintiff was agitated while seeking to secure the release of the vehicle and the evidence of Racquel Rose-Green that the Plaintiff was angry and not herself after the incident; and

    (b) the Plaintiff made complaints to the Ministry[7] about the legality of the seizure, and in February 2006 she was formally threatened with disciplinary action by her Principal over the use of a cell phone in class (which she admitted) and failing to attend a meeting (which she denied) shortly before Ms Richards wrote an apology for the seizure of the Plaintiff's car[8];

[6] June 22, 2015 Witness Statement, page 35.
[7] Witness Statement of Racquel Rose-Green, paragraph 79.
[8] Exhibits 28-30.

(c) I accept the Plaintiff's evidence that in addition to breaking down at the Ministry of Education on January 9, 2006 when discussing the incident with Ms Donna Daniels, the Plaintiff broke down at CBA on February 1, 2006 after a meeting about the incident;

(d) I accept the Plaintiff's evidence supported by prescription records from Caesar's Pharmacy, that she filled an atypically large prescription for her secondary hypertension medication (Norvasc) on December 19, 2005, and an even larger prescription on June 8, 2006[9], and that she felt ill enough to have a stress test carried out at the Hospital which was negative for heart disease on March 23, 2006;

(e) I accept the evidence of Emma Lozman that "*this experience reduced Ms Clemons to someone I really didn't know. In all the time that I have known Ms Clemons, I had never seen her in such an emotional state.*"

58. On balance I find that the Plaintiff did suffer some physical injury in the form of elevated blood pressure for which she was prescribed medication from July 2004 while working at CBA. This represented an exacerbation of an existing condition and is pleaded as the first particular of injuries under paragraph 405(1) of the RASC. These symptoms appear to have stabilised after 2006 as they are not mentioned in her doctor's medical records. They were also symptoms which were not sufficiently grave to warrant sick leave as none was certified on this account. However, I accept the Plaintiff's unchallenged evidence that she continues to take this secondary blood pressure medication to this day[10]; however it is not necessary for me to make any finding at this stage as to whether her current condition is linked to the CBA incidents described above. That would be a matter potentially relevant to quantum and would, in this context, likely require expert evidence to decide. For instance, in *Hatton*, Hale LJ noted:

> "*42. Where the tortfeasor's breach of duty has exacerbated a pre-existing disorder or accelerated the effect of pre-existing vulnerability, the award of general damages for pain, suffering and loss of amenity will reflect only the exacerbation or acceleration. Further, the quantification of damages for financial losses must take some account of contingencies. In this context, one of those contingencies may well be the chance that the claimant would have succumbed to a stress-related disorder in any event.*"

59. *Wikipedia* defines hypertension as *"a long term medical condition in which the blood pressure in the arteries is persistently elevated*". I find that this is an illness which it

[9] Sixth Affidavit, Exhibit "KRC-6 210 pages 6-7.
[10] Witness Statement, paragraph 163 at page 35.

is sufficiently straightforward to conclude that the Plaintiff suffered from without receiving expert opinion evidence. This conclusion would perhaps not be justified based solely on the Plaintiff's own evidence of a self-diagnosis using her own blood pressure machine, but in the present case is based on credible evidence (most significantly the prescription records) that the Plaintiff was being treated for this condition and that a medical practitioner prescribed a new medication for it. I am also bound to find that it is obvious that the Plaintiff from time to time suffered from work-related stress which manifested itself in anxiety for which she was also prescribed medication. Although there is no evidential basis for finding this anxiety was a legally actionable psychological "injury", it does suggest that the Plaintiff's true emotional state while at CBA was far less upbeat than appeared to others to be the case. What must be reasonably foreseeable, in any event, is some physical or psychiatric harm from work-related stress, not the particular ailment in question.

60. I accordingly reject the Defendant's submission that the Court required expert medical opinion evidence to justify making a finding, supported by a combination of the Plaintiff's own oral evidence, hospital records and pharmacy records, that she suffered such a straightforward medical condition as the worsening of an existing hypertension or high blood pressure condition. The position would be otherwise if the evidence that she had been prescribed new hypertension medication had been positively challenged at trial. As already noted, the position may well be otherwise at the quantum stage of the present proceedings where the Court is required to make fine judgments about the extent of an injury for which a defendant is legally responsible. This Court routinely makes findings in personal injuries cases about the fact that injuries have been sustained based solely on documentary records. This is because in the face of such records it would have been an absurd waste of time and costs to require the claimant to prove through oral evidence matters which could not seriously be subject to doubt. In any event, I find that it is a notorious fact that hypertension, alongside the other physical illnesses mentioned in paragraph 10 of Hale LJ's judgment in *Hatton*, is an illness frequently caused by stress.

61. The failure of the Defendant to challenge the Plaintiff's evidence that she suffered from hypertension before the matters she complains of, and was prescribed an additional medication in July 2004, was entirely consistent with common sense and proportionality. It did not amount to a concession that there was any connection between this treatment and any breaches of duty on the Plaintiff's behalf.

62. Whether the Plaintiff suffered a psychiatric or other recognised mental illness due to work-related stress requires expert opinion evidence. No or no sufficient evidence was placed before the Court to justify a finding in the Plaintiff's favour on this issue. There might be cases where it is obvious that such an injury was sustained (e.g. because the claimant was admitted to a mental institution following a particularly obvious incident of workplace abuse) but this is not such a case. The Plaintiff was only referred for psychological assessment in 2008 after she had left the working

environment she complains of and made no formal complaint of not being able to cope due to a bullying environment while she was there.

63. Ms Adhemar in the course of her impressive evidence explained why it was desirable that the strong preliminary diagnosis that she reached of Complex PTSD should be confirmed by an expert diagnostician in the Plaintiff's particular case. Diagnosing a mental injury and its causes is a very complex exercise. The most illuminating part of the expert's evidence was her opinion that what is important to understand about trauma is not what events objectively occurred but how the victim of the trauma perceived those events. This explained why the treating psychologist was not interested in carrying out an objective forensic analysis of what objectively happened during the Plaintiff's challenging tenure at CBA. She also explained that trauma victims often do not display obvious signs of their illness and are capable of achieving surprisingly high levels of functionality despite their impaired condition.

64. When Ms Adhemar rendered her opinion letter to the Plaintiff in 2009, she made it clear to the Plaintiff that as a treating psychologist she would not be willing and able to give evidence in Court that she had diagnosed such illness as this went beyond her expertise. Ms Adhemar advised her to get an overseas expert. This was stunning evidence which I accepted. It meant that the Plaintiff had decided to soldier on for reasons which are not entirely clear but are obviously to some extent at least costs-related. Her failure to pursue overseas expert advice may also in part have been due to the mistaken belief that Ms Adhemar's letter report, once filed in Court, would be admitted in evidence and open to the Court to take into account in any event. In the lead up to the trial it appeared that there was at least some common ground between the parties' respective psychological experts as Dr Brownell agreed that the Plaintiff had probably suffered some anxiety related illness connected with her work but doubted the more serious complex PTSD diagnosis. There was no suggestion from the Defence side that any objection would be made to the admissibility of Ms Adhemar's evidence. Did the Plaintiff even recall Ms Adhemar's verbal indication in or about 2009 that she was unwilling to give evidence by the time the trial began almost seven years later? She appeared confident of being able to call Ms Adhemar when the trial commenced.

65. Bearing in mind that the Plaintiff visited her doctor for work-related anxiety as early as 2003 and was prescribed medication for anxiety and hypertension in 2004 at a time when the Plaintiff could not conceivably have been contemplating the present litigation, I reject entirely the Defendant's suggestion that she is a malingerer who has deceived a series of doctors and an experienced psychologist over the years. I accept Ms Adhemar's expert opinion that there are strong grounds for suspecting that the Plaintiff suffers from complex PTSD as a result of work-related stress. But I am unable to find that she actually sustained any such injury because there is no expert opinion evidence before the Court capable of supporting such a finding.

66. In summary I find that the Plaintiff has established that she suffered a physical illness (elevated blood pressure or hypertension) from which she suffered between 2004 and 2006.

Was the risk of the injuries which the Plaintiff sustained reasonably foreseeable by the Defendant?

67. It is not possible or appropriate for me to resolve most of the controversies which were canvassed at trial as to matters such as the following:

- whether adequate provision was made for informing teachers about students' special needs;
- whether various policies contended for by the Plaintiff based on her experience in Texas ought to have been implemented at CBA;
- whether or not the Plaintiff's evaluations were generally fair;
- whether or not the Plaintiff's various grievances were justified.

68. The relevant factual question which arises in relation to the Plaintiff's negligence claim is whether anything occurred in the workplace for which the Defendant was responsible which it was reasonably foreseeable created a risk that the Plaintiff's health would be injured in the way which it was. In his Supplementary Submissions, Mr MacDonald advanced the following arguments which straddled the boundaries between reasonable foreseeability, breach of duty and causation but which it is helpful to consider at this juncture:

> "20. *The Defendant repeats and relies upon the submission made by Defense Counsel in closing submissions regarding PTSD and complex PRSD and asks that they be applied mutatis mutandis with respect to the issue of 'exacerbated hypertension'.*
>
> *21. The leading case on an employer's duty to protect an employee from foreseeable risk of danger to health is Hatton v Sutherland [200] 2 All ER The ratio of the case can be summarized into the following principles:*
>
> 1. *There are no special control mechanisms applying to claims for psychiatric or physical illness or injury arising from the stress of doing the work that the employee is required to do.*

2. *The threshold question is whether the particular kind of harm – an injury to health (as distinct from occupational stress) which was attributable to stress at work (as distinct from other factors) – to the particular employee was reasonably foreseeable.*

3. *Unless he knows of some particular problem or vulnerability, an employer is entitled to assume that the employee is up to the normal pressures of the job.*

4. *An employee who returns to work after a period of sickness without making further disclosure or explanation to his employer is usually implying that he believes himself fit to return to the work which he or she was doing.*

5. *An employer is generally not required to make searching enquires of the employee or seek permission to make further enquires of his other medical advisors.*

6. *In view of the difficulties of knowing when and why a particular person will go over the edge from pressure to stress and from stress to injury to health, the indication must be plain and obvious for any reasonable employer to realize that he should do something about it.*

7. *An employer would only be in breach of duty if he failed to take steps which were reasonable in the circumstances.*

8. *An employer could only reasonably be expected to take steps that were likely to do some good, and the court would likely need expert evidence on that.*

9. *If the only reasonable and effective stop would be to dismiss the employee, or demote the employee, the employer would not be in breach of duty in allowing the employee to continue in the job.*

10. *If there is no alternative solution, it has to be for the employee to decide whether or not to carry on in the same employment and take the risk of a breakdown in his or her health or whether to leave that employment and look for work elsewhere.*

11. *Even if the employee is able to show a breach of duty, it is still necessary for the employee to show that the particular breach of duty found caused the harm. It is not enough that occupational stress caused the harm.*"

69. As mentioned above when discussing the governing legal principles and the assistance which the case of *Hatton* provides, it is important to bear in mind that the shape which general legal principles take in practice is always informed by the peculiar facts of each case. As the Defendant's submissions explicitly acknowledge, the reasonable foreseeability test formulated in *Hatton* was articulated in a factual

context where the central complaint of the employee was that she had been injured by ordinary occupational stress. The crucial facts as summarised in the English Court of Appeal's judgment which led to a finding that the psychiatric injury was not reasonably foreseeable were as follows:

> "*46… Mrs Hatton's workload was no greater or more burdensome than that of any other teacher in a similar school. Nor had she complained to anyone about it…*
>
> *48. Her workload and her pattern of absence taken together could not amount to a sufficiently clear indication that she was likely to suffer from psychiatric injury as a result of stress at work such as to trigger a duty to do more than was in fact done. The school could not reasonably be expected to probe further into the causes of her absence in the summer term 1994 when she herself had attributed it to problems at home which the school knew to be real. Hence the claim must fail at the first threshold of foreseeability.*"

70. More relevant to the allegations in the present case that (a) the Plaintiff was singled out for discriminatory treatment, and (b) the working environment was generally unusually stressful for other teachers as well at material times, are the following observations of Hale LJ in *Hatton*:

> "*26…It will be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is in all the circumstances of the case unreasonable. Also relevant is whether there are signs that others doing the same work are under harmful levels of stress.*"

71. It was essentially common ground that:

(a) the Plaintiff did not present as a vulnerable person. Rather, she was outspoken and by her own account was singled out for unfair treatment because of this, while less forthright colleagues 'kept their heads down';

(b) the Plaintiff did not take unusual amounts of sick leave whilst at CBA, even if she did suffer temporary stress-induced illness;

(c) while the Plaintiff's complaints about mould may not have been initially well received, once the health risk was documented she and other teachers who believed they were affected by mould were transferred from the School for their protection;

(d) the Plaintiff was afforded the opportunity to attend training overseas while at CBA notwithstanding the background of conflict and did receive positive evaluations and commendations as well as criticism;

(e) the Plaintiff made no complaints about bullying at any point during her time at CBA.

72. The suggestion that the work environment was on an ongoing basis so hostile that the Defendant ought to have appreciated that the Plaintiff was being put at risk of serious mental harm or serious physical injury is not supported by the evidence. Much of what the Plaintiff's evidence portrays is typical of a 'knowledge professional' workplace where there is a divide between management and the employees on how the institution should be run. When such a divide occurs, the 'dissident workers' will strive to campaign for their point of view and, in the process, demonize the management, occasionally making mountains out of molehills and exaggerating the significance of minor slights. The sharpness of the conflict between the 'Establishment" and the 'dissidents' is often increased in the case of a dissident who, as the Plaintiff appeared to me to be, is a person who possesses a natural orientation towards being a 'thought leader' and/or a 'change agent'. This conflictual tendency was likely sharpened further still by the fact that the Principal and her administration were themselves under considerable pressure because of a spike of behavioural problems amongst a minority of students which created exceptional challenges for teachers and educational leaders alike.

73. It is clear that the Plaintiff started off her time at CBA with two main gripes:

(1) having previously worked overseas for six years, her professional pride was wounded when she was placed on 'probation' at the outset and she was in my judgment understandably hypersensitive about her own evaluation process as a result ; and

(2) joining CBA at a particularly turbulent period in terms of student behaviour management challenges, she repeatedly critiqued the status quo by reference to what she considered to be the higher and desirable standards based on her teaching experience in Texas. (CBA management and staff whose experience was exclusively local would, however, likely have found these repeated 'foreign' allusions to be irritating).

74. In choosing to lock horns with the CBA management rather than being compliant, I find that the Plaintiff voluntarily assumed the risk of at least a cool relationship rather than a warm one and, to some extent at least, a heightened level of professional scrutiny. This is not to suggest that outspoken employees deserved to be victimized for speaking out, but merely to emphasise the importance when assessing the evidence overall of distinguishing firm management from abusive management in this sort of conflictual context. An employee characterised as a nuisance at best or a troublemaker at worst will not create a 'warm and fuzzy' feeling for the most tolerant of managers. The Plaintiff's complaints about mistreatment must be placed in an objectively realistic and fair context. In the Defendant's favour, some allowance must be made for the fact that the Plaintiff to some extent made herself a target for more disciplinary attention than her peers as her own witnesses themselves testified (Ms Stafford and Ms Rose-Green). In the Plaintiff's favour, the Court can only accept Ms Richards' denial that she treated the Plaintiff unfairly as true to this extent: the Principal never consciously treated the Plaintiff unfairly nor did she intend to do so. In my judgment Ms Richards would not be human if she did not have some unconscious bias against the Plaintiff with whom she was often in an adversarial relationship for much of the Plaintiff's tenure at CBA.

75. I find Dr Blase's evidence to be of general assistance in demonstrating that the matters of which the Plaintiff complains are not inherently improbable or unforeseeable because they have been used by American teachers as a basis for legal actions against their employers in the past. The term 'workplace bullying' seems inappropriate and overly pejorative for the present legal and factual context and conveys an image of far more harsh managerial conduct than the complaints which the Plaintiff has actually established or made out. It may well be a term which has currency in the context of US jury trial litigation where hyperbolic language appears (from a British Commonwealth legal perspective) to be *de rigueur*. Such language is probably at least commonplace if not an essential part of 'jury-trial-speak'.

76. While rejecting the somewhat extravagant claim that, in effect, the Plaintiff was subjected to a continuous campaign of workplace bullying, I do find that the working environment was for most of the Plaintiff's time at CBA an unusually stressful one. As Candace Webb testified in her Witness Statement, student disciplinary problems from the 2000-2001 academic year prompted teachers to down tools and resulted in the Brock Report. She stated that these problems persisted even two years later. Teachers generally were exposed to high levels of stress (paragraphs 13-17). While Tina Duke in her examination-in-chief was invited to disagree with what Ms Webb said about learning support deficiencies, Ms Richards was not asked by her counsel to challenge the assertions Ms Webb made about high stress levels and student disciplinary problems in paragraphs 13-17 of her Witness Statement. Ms Richards' Fourth Witness Statement was devoted to responding to Ms Webb's. Her response to, *inter alia*, paragraphs 13-17 of Ms Webb's Witness Statement was as follows:

> "*I am unable to respond as those paragraphs are commentary and opinion.*"

77. I disagree. The following statements made by Ms Webb as the former Union representative included factual and highly relevant assertions in relation to the issue of what was reasonably foreseeable as creating a risk of harm to the Plaintiff's health:

> "…*Whether the teachers were new to the profession, seasoned veterans, locals, expatriates, teachers experienced highly stressful working conditions that affected their level of satisfaction with their jobs and school administration…Several factors contributed to teachers experiencing high levels of stress which was the cause of low teacher morale at the School. A number of teachers that I spoke with at the School were dissatisfied with their jobs for a host of reasons, among them …dealing with anger and resentment when teachers felt that they were being 'punished' with threats and reprimands from administration…Although the Brock Report was borne out of an incident of teacher unrest over disciplinary issues at the School, there was no acceptable change…two years later.*"

78. Ms Webb's Witness Statement was read into evidence, it is important to recall, because the Defendant elected not to cross-examine her via Skype and directly challenge her evidence. The Defendant adduced evidence from 21 witnesses none of whom denied that during the period of 2000 to 2006 when the Plaintiff was at CBA, many teachers were stressed and staff morale was low. The Plaintiff produced evidence that the results of a "Stress Survey" conducted on behalf of teachers at CBA were circulated in February 2004 and that the Staff Christmas Party was cancelled due to lack of interest in December 2005. She also produced a January 19, 2006 news story quoting the Union head Mr Mike Charles citing an "*exodus of teachers every June*" and describing the situation at the School as sounding "*very stressful*"[11]. The Plaintiff herself responded to the email of December 13, 2005 notifying her of the cancellation of the Christmas party at the time with the wry remark: "*That is sad, but very telling*".

79. I am bound to find that the Plaintiff's evidence establishes that the Defendant knew or ought to have known that the general working environment at CBA was unusually stressful during the Plaintiff's time there. This evidence finds some support in the Defendant's own evidence (see paragraph 33(i) above). On the other hand, it is important to acknowledge that the environment, whilst exceptionally challenging, was also undoubtedly capable of producing successes. For instance, Ms Rose-Greene mentions, with apparent pride, the fact that the current English-based professional footballer Nahki Wells spent time in the classrooms of both she and the Plaintiff.

[11] Exhibit 21, pages 25-26.

Neither Ms Lozman nor Ms Rose-Greene, who support the Plaintiff's case that she was as an individual treated unfairly (and whom I regard as generally far more independent than Ms Webb, the obviously partisan former Union representative), support the more sweeping criticisms made by the Plaintiff about the CBA administration.

80. In my judgment the Plaintiff's case is best determined by identifying one or more specific and unusual instances of inappropriate managerial conduct which a reasonable employer would have foreseen placed the Plaintiff at risk of injury to her health. Such instances would have stronger probative force than generalised assertions that she was often treated in a discriminatory way. The surrounding context of working conditions is of course relevant as well. I find that she was in an environment which was known (or ought to have been known by the Defendant) to be an unusually stressful one, both (a) generally, and (b) for the Plaintiff with her uniquely antagonistic history surrounding issues of discipline and performance. By the Plaintiff's own credible account, many of her stress-related medical visits were prompted by emblematic events, notably:

    (1) having her room given to a para-educator in October 2003 (anxiety);

    (2) being placed on review at the beginning of the 2004-2005 school year (hypertension);

    (3) having her car towed and clamped in January 2006, and pursuing complaints into February when she was required to respond to additional minor disciplinary complaints (stress tests in March).

81. There is no evidence that the Defendant was aware that the Plaintiff was certified sick for two weeks because of anxiety in October 2003 (after her classroom was assigned to a para-educator). On balance, I do find that the Defendant knew or ought to have known that her medically certified sick leave was triggered by that event. It is clear that the Plaintiff regarded this event as humiliating and told Ms Rose-Green at the time that she had been certified sick for high blood pressure (perhaps wishing to hide her anxiety diagnosis). It seems clear, moreover, that the Plaintiff was deprived of a home room by design rather than by accident. The Plaintiff suggested in her Witness Statement that this incident caused her blood pressure to be elevated, but this was not supported by Dr Boonstra's summary medical history and any elevation may have been merely temporary. It was nevertheless the only occasion during her time at CBA that the Plaintiff actually took sick leave, so this was on any view a significant health event for her at the time. Ms Rose-Greene stated:

> "*32….Being a former hospital employee, I remember thinking that this was like asking a doctor to give up his office to a nurse. It's just not done…*"

82. I accept that the Plaintiff was surprised to discover in late October that her classroom had been assigned to a para-educator and thereafter spent two days of wandering the School corridors with her class looking for a vacant room. The Plaintiff clearly complained to the administration because she was assigned an alternative shared room while the para-educator was permitted to "*remain in the library on her own*". This position was communicated to the Plaintiff by an email dated October 28, 2003 from the Office Manager Penny Garrison which was copied to the Principal and other senior staff members[12]. I infer from this that this administrative decision which the Plaintiff understandably found to be humiliating was a 'management' decision. Since the Plaintiff was certified sick shortly after this incident, I find that it was reasonably foreseeable that exposing the Plaintiff to treatment which she would legitimately perceive as humiliating and/or unfair created a risk of stress-induced harm to her health through an illness such as hypertension. There is, however, no reliable evidence that any legally actionable injury was sustained at this particular juncture.

83. Ms Richards understandably had no recollection of the specifics of this incident (in which she was not directly involved) and suggested that room assignment problems did occur from time to time. On balance I find it more probable than not that a deliberate decision was made to snub the Plaintiff because it beggars belief that an administrative decision which Ms Rose-Green found to be incredible was taken against someone who was in conflict with the CBA Administration purely by accident. So the decision was to my mind, very narrowly, just sufficient to put the Defendant on notice that the Plaintiff was at risk of illness as a result incidents which she found distressing.

84. The Plaintiff, who was in her fourth year, had never taken sick leave before despite prior conflicts over performance evaluations and probation. She was then off sick for two weeks (not one or two days) immediately following a conflictual incident which had formed the subject of email correspondence. This happened in the same academic year in which a stress survey was carried out amongst CBA staff, the results of which were circulated in February 2004. In my judgment it would be setting the bar for the reasonable employer far too low to suggest that, in these circumstances, the Defendant ought not to have inquired about the nature of the Plaintiff's illness and whether it may have been linked to the homeroom assignment incident. The stresses that the CBA administration was itself under makes this omission understandable, but not legally justifiable. The position here could not be more far removed from the situation of the overworked employee in a workplace where everyone else was coping with the stress, resulting in an obligation on the employee to actively advise the employer of her special vulnerable condition.

[12] Exhibit 24.

85. It is common ground that the Plaintiff was placed on review based on her 2003-2004 Evaluation and that she learned of this after she returned from compassionate leave following the death of her grandmother. The background to this disciplinary action was described in the Plaintiff's letter dated October 11, 2004 to the Senior Education Officer. Her Supervisor for the previous academic year was Ms Idonia Beckles who was assigned after she objected to Mr Winston Simon, because she had filed a grievance against Mr Simon the previous year which resulted in the Ministry uplifting two of her ratings. In her letter, the Plaintiff challenged two of the three marginal ratings:

    (1) one criticism was that certain grades for the first semester had been incorrectly recorded. She explained that this was due to a change in grading of which she was unaware;

    (2) the other category of criticisms she complained of as discriminatory were:

        (a) the complaint that she had submitted certain progress reports late when all members of the IT Department submitted information within the same specified time and she alone was accused of being late;

        (b) the complaint that on 31 occasions she had submitted class attendance late while her colleague Racquel Rose-Green had similarly lapsed on 30 occasions but not been criticised.

86. Ms Beckles agreed that the Summative Evaluation had been forwarded to the Principal without Ms Clemons' comments because the Plaintiff was on compassionate leave, and also agreed that the Principal might well have forwarded it on to the Ministry. She could not remember the details underlying the evaluations and did not contradict the Plaintiff's explanations or complaints of being singled out for unfair treatment in any reasoned way. On balance, I accept the Plaintiff's case which she advanced coherently in October 2004 that she was unfairly placed on review because:

    (1) the Plaintiff's Evaluation form was completed without her own feedback (because she was on compassionate leave) and the decision to place her on "on-review" was made before she was given the first opportunity to comment on the evaluation at a meeting on September 15, 2004 attended by the Senior Education Officer, the CBA Principal, Ms Beckles and Mr Charles of the BUT. A follow-up letter from the Ministry suggests that the Plaintiff did not effectively advance the points subsequently made in her October 11, 2004 letter at that meeting, which was hardly the best forum for giving initial feedback to an evaluation;

    (2) the Plaintiff had a substantially valid explanation for the late submission of progress reports matter for which she was given a marginal grade;

(3) the Plaintiff was singled out from the rest of her Department for a marginal grade in respect of a late report which was probably not late at all in any event and in respect of a second late submission for which her friend and colleague was not similarly sanctioned despite achieving an almost identical compliance level. In this respect I do not rely solely on the absence of any evidence from the Defendant contradicting the key aspects of the Plaintiff's October 11, 2004 letter, but also find support in the evidence of Racquel Rose-Greene:

> "*48…Miss Clemons and my attendance submissions were almost identical but my attendance data did not adversely affect my performance record, nor the status of my position at CedarBridge. According to the letter from the Ministry, the student attendance issue almost cost Miss Clemons her job…56. As a Department we presented our student failure reports to CedarBridge in identical formats on the same day at virtually the same time. It didn't make sense to me that they would single out Miss Clemons and not include the rest of the Department if Administration wasn't satisfied with the way the data was presented…*"

87. Rejecting entirely the allegation that Ms Richards was determined to ruin the Plaintiff's professional reputation, I find that it was reasonably foreseeable that the Plaintiff would be placed at risk of harm to her health by a stress-related illness such as hypertension by being placed on review in the circumstances which occurred. The Defendant knew or ought to have known that the Plaintiff was hypersensitive about her performance evaluations because of her initial protests at being placed on 'probation' despite her overseas experience, as well as her past complaints about unfair assessments by Mr Simon. The Defendant knew or ought to have known that the Plaintiff had been affected by the stressful working environment as a result of the Camille Chase incident (which reflected a loss of control on the Plaintiff's part) and her detailed logging of extraordinary student behaviour problems in which she received verbal abuse and threats[13] in 2001. The Defendant must have been aware of the Stress Survey carried out by teachers, the results of which were circulated in February 2004. This survey occurred against a backdrop of general 'teacher unrest' over working conditions.

88. In addition, the Defendant had cogent evidence about the Plaintiff's propensity to be deeply upset about negative evaluations or evaluations she perceived to be unfair and to "press on" regardless. In March 2002 '*Post Observation Conference Summary Report*'[14], the Plaintiff herself stated:

[13] Incident Referrals since 14/09/01, Exhibit 21.
[14] Exhibit 9.

> "*(d)* ***Broken spirit****: My concerns last year were by and large unresolved. I was being penalised for handicapping classroom conditions I did not have the power to change. Contradictory accounts of my performance from my Supervising deputy…made me very apathetic and jaded about the educational system in Bermuda. By the time of my final observation, I had already 'thrown in the towel'. These issues are why I shouldn't have been put on Clinical Supervision in the first place. To add insult to injury this also prevented me from receiving my salary increase for teaching a second year. If a man is already crippled, you don't admonish him for not being able to walk properly.* ***So far this year I've enjoyed a better rapport with the administration and have a new attitude with a healthy dose of optimism. I will continue to press on.***"

89. The Plaintiff signed her evaluation on March 28, 2002. On April 18, 2002 she had a stress test at the Hospital which, according to Hospital records, was ordered by Dr. Boonstra. At this point she had "*mild systolic and moderate diastolic hypertension*"[15]. The following week she had a second test. However, although Ms Adhemar found the Plaintiff's concluding commitment to "press on" (despite past disappointments) encouraging, the comments under the heading "broken spirit" looked at as a whole clearly signified an employee who was somewhat emotionally vulnerable, despite also being tenacious and determined. Was it not obvious that the Plaintiff needed support and encouragement, not nit-picking correction? In my judgment it ought to have been obvious that the Plaintiff needed support.

90. In the Defendant's Supplementary Submissions, it was suggested that the real cause of the Plaintiff's problems was an inability to cope with a drastically increased class-size at CBA compared to what she was accustomed to in Texas. If this argument is valid, as I believe to some extent it must be, it is a consideration amounting to a special vulnerability of which the Defendant either was or ought to have been aware. It seems obvious that the Plaintiff faced challenges at CBA which she found both unacceptable and unmanageable. Her persistent pleas for a different approach and references to how things were done in Texas can only have been informed by the fact that her teaching experience there was less demanding. A reasonable employer, appreciating that a teacher was shouldering a burden far heavier than she was accustomed to bearing, would take steps to ease the burden rather than making it heavier. This argument only strengthens rather than weakens the force of the Plaintiff's case the Defendant's general approach to the Plaintiff's evaluations was generally unfair.

91. Against this contextual background, the severe (if not draconian) penalty of being placed on review based on the procedurally flawed and substantively unfair 2003-

[15] Sixth Affidavit, Exhibit KRC-6 172 at page 2.

2004 evaluation was almost guaranteed to provoke an extreme and negative emotional response on the Plaintiff's part. The Administrative Monitoring Report itself acknowledged that the Plaintiff had been overseas during the week commencing June 21, 2004 and was on compassionate leave from June 28, 2004 and had not been contactable for input. In addition to all other School-related considerations, it was or ought to have been obvious to the Defendant that the Plaintiff would have been likely to be in an emotionally vulnerable state while grieving the loss of a close family member. The Evaluation was signed on July 2, 2004 and presumably forwarded to the Ministry in accordance with standard timetables. I accept the Plaintiff's evidence that she received the Report shortly thereafter and that this was the trigger for her filling her first prescription for a second blood pressure medication on July 16, 2004, as confirmed by her Pharmacy's records[16].

92. It appears that the Plaintiff's "on review" status for the 2004-2005 academic year effectively lapsed rather than being formally upheld or rescinded in a manner which lends further credence to the Plaintiff's complaint that this sanction imposed the previous year was not a valid one. In a December 2005 email, the Ministry's Department of Human Resources advised the Plaintiff as follows:

> "*In terms of your standing regarding the evaluation from last year when you were 'in danger of termination', please be aware of the following:*
>
> - *That on review status was not upheld. This means that you are a teacher in good standing.*
> - *It also means that there is nothing on your file that states that you are on review or have been placed on review. A letter was sent to you last year stating that this was the case but, due to insufficient support for this to happen, the on review process was not started.*"[17]

93. The allegation that is most serious is the car-towing incident which was said to have been intended to "*teach her a lesson*". The Plaintiff described this as the "*straw that broke the camel's back*". It is true that this punitive action took place in relation to a car which was admittedly improperly parked against a background of warnings that cars parked there would be towed. I also accept that the Plaintiff was clearly not universally viewed as having a delicate constitution (hence, according to her own case, the perceived need to "*teach her a lesson*"). I find that the ordinary person would be distressed by having their car towed and clamped, especially against a background of feeling that they were being singled out in relation to other minor infractions. They might not be psychiatrically injured by the event, perhaps, as Mr MacDonald suggested to the Plaintiff in cross-examination. But this assumes that one

[16] Exhibit KRC-6 210 at page 5.

[17] Witness Statement of Candace Webb, Exhibit CW-4, pages 2-3.

can properly view this event in isolation from the unusual pressure which the Plaintiff was under in light of previous events, at least one of which was demonstrably unfair and had caused her a physical injury, and the stressful aftermath of the car-towing saga.

94. In my judgment it was reasonably foreseeable that this incident would place the Plaintiff at risk of harm to her health even though she does not need to rely upon this event as pivotally causative of any further injury. I reach this conclusion because:

(a) I accept the evidence of Ms Rose-Green that from her perspective the Plaintiff was generally, and in July 2004 specifically, subjected to discriminatory disciplinary treatment;

(b) I accept Ms Rose-Green's evidence that she recalled the Plaintiff had three stress tests at the Hospital, the last which she recalled being for a suspected heart attack, all of which tests required the Plaintiff to be absent from School. The second occasion she recalled the Plaintiff wearing a track suit at School and explaining to the Principal that she had a stress test scheduled that day[18]. Ms Richards in her Fifth Witness Statement did not refute these assertions but merely stated that she did not recall the incident. The Plaintiff documented two of these tests on April 18, 2002 and February 24, 2003 which were before the car-towing incident, and a third test which taken in March 2006. I find that the Defendant knew or ought to have known that the Plaintiff was absent from School for two stress tests in 2002 shortly after her latest evaluation (a finding which is also supportive of my above holding that injury flowing from the July 2004 Evaluation was reasonably foreseeable);

(c) the car-towing penalty was unprecedented and, I find, was imposed on the Plaintiff alone while other cars were similarly parked in the prohibited area;

(d) the nature of the penalty was inherently likely to embarrass the Plaintiff in the eyes of colleagues and students;

(e) the penalty was imposed at a time when the Plaintiff was genuinely parked in the prohibited area with a view to loading the vehicle with books. While I accept the Defendant's case that she ignored requests to move her car, I find that her refusals were in part because she was genuinely preoccupied with work (having been locked in the School the previous evening while working late);

[18] Witness Statement, paragraphs 95-96.

(f) the primary motivation of the car-towing penalty, I find, was the improper motive of "teaching her a lesson" because the Plaintiff was viewed as a thorn in the side of certain elements of the CBA Administration.

95. Although Mr Dowling did not remember telling Ms Rose-Green that the Plaintiff's car was being towed because she needed to be taught a lesson, I find that Mr Ross Smith who authorised the towing must have said this to Mr Dowling. The most compelling support for this finding is the following passage in the Witness Statement of Mr Smith himself:

> "*8…I made the decision because it was a Friday and I didn't feel like being bothered and I felt she had now learned her lesson of not parking her car in front of the school…*" [Emphasis added]

96. Meanwhile, in the weeks preceding the car-towing incident, the Plaintiff did little to endear herself to her Principal. In an October 21, 2005 email sent to Ms Duke and copied to Ms Richards at 12.39 pm, she commended adopting the US problem-solving technique of "*disaggregation*". This was apparently a tool to analyse student performance taking into account demographic considerations such as race, poverty, language proficiency and special learning needs. The email ended with a distinctly sharp sting in the tail:

> "*There is an ethics issue here that is being overlooked and ignored. It seems that the problem is such that it cannot be determined or resolved without a formal meeting, one that should perhaps involve Ministry officials.*"

97. The email implied that the Plaintiff would have to go over the heads of the CBA administration and involve the Ministry to get a satisfactory outcome and that the Principal and/or her administration were unethical. This was not communicating in a style which would have been commended by Dale Carnegie in '*How to Win Friends and Influence People*'. The undiplomatically expressed cynicism on the Plaintiff's behalf about the prospects of a positive School response was soon vindicated, however. The initial response from Ms Duke at 12.42 was curt: "*We are not in the US…*" Undeterred, the Plaintiff sent a follow up query, again copied to the Principal, at 1.58pm. This generated a firm request to stop sending such emails coupled with a cordial invitation to meet to discuss the topic. (On January 11, 2006, after the car-towing incident, the Plaintiff would forward the email chain to the Senior Education Officer).

98. Having been placed on review the previous year and told that her job was at risk, the Plaintiff also took aggressive action to try to clear her name on the professional evaluation front. In a December 7, 2015 email to the Human Resources Department she sought information about the qualifications of the Deputy Principal Simon to carry out evaluations during the period 2000-2003. This generated the response which was apparently intended to serve as a palliative, advising the Plaintiff that her "on review" status no longer existed and was not on her record. The Plaintiff forwarded this correspondence to the BUT and to Ms Webb[19].

99. On the eve of the car-towing incident, therefore, the Plaintiff was both stirring the evaluation pot by suggesting that her former supervisor was not qualified to do his job and questioning the ethics of how the Principal was managing student data. When Mr Smith told Ms Richards on January 5, 2006 that he proposed to have the Plaintiff's car towed because it was 'illegally' parked and she was refusing to move it, it is hardly surprising that the Principal's instinctive response was not to tell the Facilities Manager to cease and desist. Bearing in mind that the Defendant had no apparent legal authority to remove the Plaintiff's car and clamp it refusing to release it unless she paid a fine, however, this was a draconian action obviously likely (and apparently intended) to cause the Plaintiff extreme distress. By necessary implication, this punishment was reasonably foreseeable as likely to place the Plaintiff at risk of a stress-induced physical injury such as hypertension, based on everything the Defendant knew or ought to have known about the Plaintiff's particular vulnerabilities to stress and her sensitivity about disciplinary action she perceived to be unfair.

100. In reaching this finding, I consider it essential to look at the car-towing incident in its wider context. This means having regard to not simply the removal of the car, or indeed the subsequent efforts to procure the car's release against the background of thwarting the Plaintiff's plans of taking a load of books to Berkeley Institute on or about January 5, 2006 altogether. Understandably, the incident generated emotive follow-up meetings and complaints to the Ministry, coupled with two incidents of the Plaintiff breaking down in tears. Shortly before the Principal was forced to write what might well have seemed to her to be a grovelling letter of apology to the Plaintiff for the car-towing incident on February 27, 2006, the Plaintiff was compelled to deal with two further threats of disciplinary action:

    (a) on February 20, 2006, the Plaintiff (admittedly with others) was required to "*explain why you should not be disciplined*" for failing to attend professional development activities on February 15, 2006. The Plaintiff responded that she was indeed present but went outside the building due to her allergies;

[19] Exhibit CW-4 to the Witness Statement of Candace Webb.

(b) on February 24, 2006 the Principal wrote the Plaintiff alleging that she and other teachers had been reportedly (according to students) using cell-phones in class and asking her, if this was true, to "*please indicate why you should not be disciplined for this action*". The same day the Plaintiff responded admitting using her cell-phone for work purposes including making calls in relation to non-compliant students. She further stated:

> "*The accusatory tone and punitive aspect of the correspondence seemed unwarranted, particularly since it was based on the questionable motives of …students, not concerns from my superiors or my peers. It implies that I am using a cell phone in the classroom irresponsibly, and this is* ***not*** *the case.*"

101. It is impossible to avoid viewing these two threats of further disciplinary action, despite their being carefully couched as generic complaints pursued against the Plaintiff and other teachers, as being retaliatory to some extent in light of their timing. The capacity of the Defendant to take retaliatory action when under attack was most chillingly demonstrated in the course of the trial when Mr MacDonald (a) purporting to have taken instructions from disgruntled evicted former tenants of the Plaintiff, sought to embarrass the Plaintiff by cross-examining her about wholly irrelevant aspects of her private life and (b) suggested that all of the Plaintiff's problems at CBA were attributable to her being unable to teach. The reiteration of the second line of argument in closing submissions prompted the Court to query whether it was necessary for the defence of a claim alleging institutional bullying to be conducted in such a bullying manner.

Did the Defendant breach his duty of care by failing to prevent the Plaintiff from suffering harm to her health?

102. The relevant injury proved is hypertension, the Plaintiff's evidence in relation to which was not challenged at trial, the main focus being on the far more serious psychological injury. Having found that this injury was reasonably foreseeable, I have little difficulty in concluding that the Defendant breached his duty of care by failing to prevent the Plaintiff from suffering harm to her health.

103. The Plaintiff's case on duty of care was pleaded in the alternative, positive victimization (intentional infliction of harm) or failing to prevent the Plaintiff from suffering harm by reason of the acts of the employees or agents of the Defendant (negligence). No coherent case on deliberate victimization or work-place bullying was actually put to Ms Richards or any other witness in cross-examination and Ms Richards denied in her Witness Statements all allegations of bad faith, ill-will or

deliberate misconduct made in the Plaintiff's written evidence. It appeared to me that, as Ms Richards herself insisted in her oral evidence, that she and the Plaintiff had maintained a professional relationship throughout notwithstanding that it was, overall, an adversarial one.

104. In such conflicts, as I have already noted above, it is not unusual for the weaker party, in private communications with 'allies', to cast the 'boss' as a villain, in what becomes part of an ongoing workplace narrative which is only partially grounded in the literal or objectively verifiable truth. In the courtroom drama of Ms Richards' cross-examination by her former employee adversary, the similarity between the two strong, intelligent women with a shared passion for education, a thinly veiled mutual respect was strikingly evident. It was difficult to avoid the suspicion that had the Plaintiff been afforded the opportunity to work as part of the Principal's management team, she would have been a faithful and loyal lieutenant of Ms Richards. This vivid picture of an adversarial conflict which was largely carried out in a restrained manner forms part of the backdrop for the finding set out above that the case for intentional infliction of harm was not made out.

105. The case on breach of duty was summarised in the RASC as follows:

> "*400. By reason of the acts [or failures to act] on the part of the Defendant, her servants and/or agents set out in paragraphs 239 through 255 hereof, the Defendant failed to take any or any proper and/or adequate steps to prevent the said Kalmar Richards and/or other employees and/or agents of the Defendant from inflicting harm on the Plaintiff…*
>
> *401. In the premises the Defendant has failed in her duty to protect the Plaintiff from harm…and/or she has caused and/or permitted the infliction of harm on the Plaintiff by other employees and/or agents of the Defendant.*"

106. The Plaintiff in fact alleged that her health was injured, *inter alia*, in paragraphs 76-84 of the RASC (loss of her home room resulting in two weeks sick leave in October 2003), in paragraphs 146 to 159 (the Summative Evaluation received in July 2004 resulting in her being prescribed a new hypertension medication which she still takes) and in paragraphs 234-267, 283 (the car-towing incident on January 5, 2006 and its aftermath, which prompted a stress test in March 2006 for a suspected heart attack). I have found that the second and third of those three particular incidents caused the Plaintiff physical harm. In *Hatton*, upon which the Defendant's counsel relied, Hale LJ observed:

> "*33… It is essential, therefore, once the risk of harm to health from stresses in the workplace is foreseeable, to consider whether and in what respect the employer has broken that duty. There may be a temptation, having*

concluded that some harm was foreseeable and that harm of that kind has taken place, to go on to conclude that the employer was in breach of his duty of care in failing to prevent that harm (and that that breach of duty caused the harm). But in every case it is necessary to consider what the employer not only could but should have done."

107. The present case is one where the Court has found that the illness complained of was not caused by the pressures of the ordinary operations of the employer's system of work. Instead, my crucial findings are that the employer did or permitted to be done things to the Plaintiff which did not form part of the ordinary operations of the School, properly carried out, and which placed the Plaintiff at risk of suffering the physical injury she sustained. In particular:

(a) placing the Plaintiff 'on review' in 2004 based on an evaluation which the Plaintiff had not been given a chance to comment on and which contained unjustified marginal ratings ought not, had the Defendant exercised reasonable care for the Plaintiff's health in all the circumstances, to have occurred. The most powerful proof that the evaluation was, at best, flawed is that the 'on review' status penalty was never actually enforced. The Defendant in my judgment could and should have deferred any decision to place the Plaintiff on review until the Plaintiff had been given an opportunity to comment on the Evaluation. No convincing reason was advanced as to why this 'rush to punishment' could not have been avoided;

(b) towing the Plaintiff's car for parking in a prohibited area without clear lawful authority ought not, had the Plaintiff exercised reasonable care for the Plaintiff's health in all the circumstances, to have occurred. The most powerful proof that this punishment ought not to have been imposed is that the Principal was required to formally apologise for the incident a few weeks afterwards. The Principal when told that the Facilities Manager proposed to tow the Plaintiff's car away could and should have instructed him not to proceed. Various less draconian steps could have been taken, including the Principal personally discussing the parking matter with the Plaintiff and attempting to cajole her into modifying her parking behaviour.

108. More broadly, the Defendant breached his duty of care to maintain a safe place and system of work by failing to prevent the disciplinary system being applied in an unfair manner to the Plaintiff. It is self-evident that the Plaintiff was from a managerial perspective 'a handful'; an opinionated teacher with overseas experience whose passion for advocating changes was not matched by her diplomatic skills. At a time when School leaders were facing significant challenges including staff unrest, and subject to unimaginable pressures and stress themselves, it is understandable if

the instinctive response to the Plaintiff as someone perceived as not willing to be a team player was, from time to time, a punitive one. However the reasonable employer would not in matters of health and safety act on instinct but in a precautionary manner, having regard to the positive duty to have regard to the health and safety of workers in an environment which was known to be exceptionally stressful for teachers generally by February 2004 at the latest. I have little difficulty in finding that the Defendant had the institutional capacity to resolve the conflicts with the Plaintiff by a variety of other 'soft' options, including:

(a) adopting a more appreciative approach to evaluations, taking into account the Plaintiff's obvious sensitivities to evaluation as a teacher with previous experience who was placed 'on probation' at a reduced salary at the outset;

(b) mediating conflicts over evaluations and other issues;

(c) affording the Plaintiff an opportunity to feel part of the management team through giving her special research assignments;

(d) avoiding the propensity for a more rigorous approach to discipline to the Plaintiff than was taken towards the Plaintiff's peers.

109. This is, of course, the judgment of hindsight. It is easy to understand how the combination of the administrative pressures of forwarding reports to the Ministry within standard timelines and, quite possibly, a merely subconscious bias against the Plaintiff, likely caused the Evaluation to be handled in the way it was without any conscious intention of harming the Plaintiff in the manner which occurred. It is also to understand how, in the heat of battle of a busy and stressful working day, an error of judgment came to be made in authorising the car-towing 'punishment'.

Causation

110. I have little difficulty in finding that the Defendant's breaches of duty materially caused the Plaintiff's injury. She was, to the employer's knowledge, working in an unusually stressful overall environment. More pertinently still, she was, to the employer's knowledge, extremely sensitive about negative performance evaluations. It is true that she may well have been affected by the loss of her grandmother in July 2004 when she received news that she had been placed on review without even having an opportunity to comment on a report subsequently shown to be flawed. But the Defendant knew she was on compassionate leave-that was why she was unavailable to comment on the Evaluation. Far from being an unknown

consideration, the Defendant's knowledge of her personal circumstances made the way the disciplinary process was applied to her more negligent still. I accept the Plaintiff's own evidence that this event caused her illness without hesitation as it is supported by credible contemporaneous independent documentary evidence. She filled her first prescription for an additional hypertension medication within days of receiving the relevant report. *Res ipsa loquitur*. The facts speak for themselves.

111. Having found that being placed on review in July 2004 materially caused the only health injury which the Plaintiff has proved, no further finding on causation is required in relation to the car-towing incident. Nevertheless in my judgment it is self-evident that this incident and its aftermath was sufficiently traumatic to, at the very least, ensure that her elevated blood pressure did not return to its former lower level and I accept[20] the Plaintiff's evidence that she has needed to remain on her second hypertension medication ever since. The incident materially contributed to the injury which she sustained. This incident and its aftermath (which disturbed the Plaintiff enough for her to undergo stress tests later that year) is also cogent evidence of a continuing working environment in which routinely high stress levels had spikes capable of causing physical harm to the Plaintiff. Again, it is easy to find that the breaches in duty on the Defendant's part occurred without any conscious intention of causing her harm.

112. I make no formal findings in relation to the period of the Plaintiff's employment after she left CBA in or about September 2006 due to suspected mould allergies, because I accept the Defendant's broad case that genuine attempts were made to find alternative work for the Plaintiff when it became clear that she was unable to return to the classroom. As far as exacerbating her hypertension is concerned, I find that no further breaches of duty which caused harm occurred during this period. It seems more likely than not in the post-CBA period of her employment, the Plaintiff was suffering from some form of emotional or psychological imbalance which made it impossible for her to continue to teach on a fulltime basis. What that imbalance was attributable to was never diagnosed with sufficient clarity to enable this Court to find that the Defendant was liable for causing a psychological injury.

113. The Defendant in general terms did its best to try and accommodate the Plaintiff in less stressful teaching roles between 2006 and 2012. There is no credible evidence that any employee or other agent of the Defendant during this period caused her further physical harm.

114. It bears repeating, that in finding that the Defendant failed to take reasonable steps to prevent the Plaintiff suffering harm to her health, I make no finding that Ms Richards or any other employee of the Defendant actually intended to harm the

[20] I make this finding without prejudice to the Defendant's right to explore this issue further during the damages phase of the trial as regards events which may have occurred after the termination of the Plaintiff's employment, which was not clearly covered by the Plaintiff's evidence on this topic.

Plaintiff. It is an interesting postscript to the end of the Plaintiff's tenure at CBA that the Plaintiff received the following email from Ms Richards on November 5, 2006, several weeks after she had left CBA:

> "*Dear Karen:*
> *I hope you receive this email. I have been getting second hand updates on how you are doing. You just came to mind so I thought I would email and see how you are doing.*
> *I really am sorry that you have not been well and that you have not been able to be here. We have certainly felt the impact!*
> *Take care!*
> *KR*".

Conclusion

115. For the above reasons, the Plaintiff's claim for negligence succeeds on the grounds that she has proven that she suffered an exacerbation of an existing hypertension condition because of a breach by the Defendant of its duty to exercise reasonable care to provide a safe system of work to the Plaintiff as an employee. The Plaintiff has liberty to apply for the hearing of the assessment of damages phase of the trial.

116. The Plaintiff's claim for damages for the intentional infliction of harm is dismissed.

117. I will hear the parties as to costs although it is difficult to see any reason why costs should not, as in the ordinary course, follow the event.

Dated this 14th day of November, 2016 _____

IAN RC KAWALEY CJ