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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs R Begum**

**Respondent:** **St Martin's School**

**Heard at:** **East London Hearing Centre** **On: 12 – 15 December 2016**

**Before:** **Employment Judge M Warren**

**Members:** **Ms J Hartland**
**Mrs P Alford**

**Representation**

**Claimant:** **Ms S Chan (Counsel)**

**Respondent:** **Mr R Miles (Counsel)**

# RESERVED JUDGMENT

The Claimant's claims of race discrimination and of detriment and automatically unfair dismissal for having made protected disclosures, all fail and are dismissed.

## REASONS

### Background

1. Mrs Begum brings complaints of race discrimination and of having been constructively unfairly dismissed and subjected to detriment because she had made protected disclosures. She resigned her employment with the Respondent as a teacher on 30 May 2014, her employment coming to an end at the end of that academic year.

### Preliminary Issue

2. At the start of the case, Ms Chan suggested that I ought not to hear this case because I had made a Deposit Order at an Open Preliminary Hearing on 24

September 2015. I pointed out to Ms Chan that whilst the old 2004 Rules of Procedure stated that a judge who conducted a hearing at which a Deposit Order was considered is not permitted to hear the substantive case, (2004 Rules, Rule 18(9)) that restriction was not replicated in the 2013 Rules of Procedure under which we now operate.

3. I explained to Ms Chan that if she felt I ought not to hear this case, she should make a formal application for me to recuse myself on the grounds of bias in accordance with the principles set out in the case of *Locabail v Bayfield Properties Ltd* [2000] IRLR 96 as approved for cases in the Employment Tribunal in *Ansar v Lloyds TSB Bank Plc* [2007] IRLR 211. Ms Chan stated that she did not wish to make such an application.

4. Regardless of whether such an application was made, I should of course consider myself whether I ought to recuse myself from a case, if it might be thought that the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that I would be biased. I reviewed what I had said at the Preliminary Hearing on 24 September 2015. At that hearing, I refused the Respondent's application for the Claimant's claims to be struck out as having no reasonable prospect of success. In doing so, I explained that I bore in mind the Claimant's illness, which may offer an explanation why at that stage, she had not been able to particularise her race discrimination claim. I said that she ought to be allowed a further opportunity to provide those particulars. To put this in context:

4.1. The claim had been submitted on 21 September 2014 and was listed for hearing in April 2015.

4.2. Ms Begum did not attend a Preliminary Hearing on 5 January 2015. She had been ordered to provide particulars of her race discrimination claim before that hearing and had not complied with that order. The hearing listed in April 2015 was postponed, (because of the Claimant's illness) and relisted for September 2015.

4.3. The matter was case managed at a further Closed Preliminary Hearing on 9 September 2015, which Mrs Begum attended by telephone. Arrangements were made to hold an Open Preliminary hearing on 24 September to consider strike out and Deposit Order applications. That came before me.

5. At the Preliminary Hearing on 24 September, in respect of the unfair dismissal and whistleblowing detriment claims, I noted that the Respondent pointed to lesson observations conducted before the alleged protected disclosures, which were negative in nature and to the notes of an investigatory meeting in which Mrs Begum was said to have acknowledged that she showed a student how to access a drive on the Respondent's IT system which contained confidential information. In that investigatory meeting, the record suggested that Ms Beguam acknowledged that she had done wrong. I observed that as Mrs Begum was not at the hearing, I did not know how she would respond to that and whether she would agree that the minutes were correct. I noted that it was possible that all she had done was follow up on something a student had told her he was able to do and that what had occurred could amount to a protected disclosure. I expressed disagreement with the Respondent's submission that such a

disclosure could not arguably be in the public interest. My point in reciting my consideration of the strike out application, is that the informed and objective independent observer would see that I was taking a neutral open minded approach to the Claimant's case.

6. In respect of the Deposit Order application, I expressed that I had serious misgivings as to the prospect of success on the race discrimination claim, because Ms Begum's pleaded claim at that time contained nothing that even hinted at race. I observed that she was not there to given an explanation. I explained that I deliberately set the deposit at a modest sum of £50 and that if Mrs Begum could not afford that sum, she could apply for a reconsideration.

7. In respect of the unfair dismissal and detriment claim, I expressed the view that the case was unlikely to succeed as it stood, because I saw parallels with *Bolton School v Evans* [2007] ICR 641 where a teacher who had made an alleged protected disclosure was disciplined, not for the disclosure, but for hacking into the school's IT system. I was also concerned that the documents suggested that there were concerns about Mrs Begum's abilities before she made her disclosure. Once again, I made an order for a deposit to be paid of a very modest sum, £50 subject to the same caveat, that if Mrs Begum could not afford it, she could apply for a reconsideration.

8. An informed and objective observer would see that I had taken an open and balanced approach to the claim as pleaded at the time. It could not be said that I had in any way been outspoken such as to throw doubt on my ability to approach the case with an open mind, nor had I expressed views in extreme and unbalanced terms such as to throw doubt on my ability to try the case with an objective judicial mind, (see *Locabail* at paragraph 25).

9. I observed to the parties at the outset of this hearing, that the Claimant's case now looked very different, now that she had provided further and better particulars, as reflected in the list of issues set out by me at the Closed Preliminary Hearing on 5 September 2016.

10. I should also make the point that this matter came before me and my members for a four day hearing at the Colchester Hearing Centre, where no other Employment Judges were available. Were I to have recused myself, it would have been likely that this case, which is already more than two years old, would have to be further postponed for probably four or five months, or transferred back to East London the following day, (if an Employment Judge were available there) and the case would then have had to have been completed within three days, which was unlikely to have been enough. Having said that, even if the matter were to be heard at a location where other Employment Judges were available to replace me, I would not have chosen to recuse myself, for the reasons I explain above.

## Issues

11. The issues were identified at a Preliminary Hearing before me on 5 September 2016. At this Preliminary Hearing, Mrs Begum was represented by counsel, Mr Mohammed. I adjourned for a period of time to allow Mr Mohammed to take instructions from his client and for the legal representatives to discuss the issues. After

that break, I identified the issues in discussion with the legal representatives, as follows:

***Whistleblowing***

*The Protected Disclosures*

1. *The Claimant relies upon the following as protected disclosures:*

    1.1. *An email dated 28 January 2014 to IT support, reporting that students were able to access confidential information through the school network C drive, and*

    1.2. *A letter dated 6 May 2014, (referred to previously in error as dated 2 May) which reported that whilst the Claimant had been absent on training, those teaching her class in her place, (David and Elaine) had subjected her pupils to an examination, (the outcome of which counted towards their grades) on the topics of Hardware and Logic instead of Hardware and Software, (setting the Claimant and her pupils up to fail, as the pupils had not been taught Logic) and conducting the exam in a room in which was displayed binary charts on the wall, a matter which ought to be investigated by the examination board.*

2. *In respect of both of these, was information disclosed which in the Claimant's reasonable belief, tended to show one of the following:*

    2.1. *A criminal offence had been committed; the Claimant says that the examination issue amounted to fraud, (sections 1 to 3 of the Fraud Act), or*

    2.2. *A person had failed to comply with a legal obligation; that is an obligation to keep data confidential, to prepare children appropriately for examinations and to conduct such examinations under appropriate circumstances.*

3. *The Respondents position with regard to the 28 January 2014 alleged protected disclosure, is that it says that the Claimant told the pupil in question how to do what he did and so she can not have had a reasonable belief that the disclosure was a crime or a breach of a legal obligation and she can not have had a reasonable belief that her disclosure was in the public interest, in circumstances where she had shown the pupil how to do what he did. The information set out herein relating to the letter of 6 May 2014 and the allegations of detriment flowing there from, is new to the Respondent and its position will be confirmed when Ms Gould has had the opportunity to take instructions.*

4. *The tribunal will have to decide whether the Claimant reasonably believed that the disclosures were made in the public interest. The Claimant says that it is in the public interest that pupils will not have access to confidential information, that children are properly prepared for their examinations and that examinations that lead to formal qualifications are conducted in a proper and fair way*

*5. It is not disputed that the alleged disclosures were made to, "the employer".*

*The Detriments*

*6. If the protected disclosures are proven, was the Claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that:*

*6.1. She was subjected to an investigation into the matters she had reported on 28 January 2014;*

*6.2. She received negative feedback leading to performance management;*

*6.3. She was subjected to a performance management procedure;*

*6.4. Her grievance was not investigated promptly;*

*6.5. She was not offered the, "Getting to Good" programme;*

*6.6. She received inadequate support during the monitoring process;*

*6.7. A threat of dismissal was made on 25 March 2014;*

*6.8. She was put under pressure to withdraw her grievance;*

*6.9. She was given unrealistic targets to meet during the monitoring process;*

*6.10. She received negative feedback following an observation on 29 April 2014, and*

*6.11. The foregoing were intensified after the letter of 6 May 2014.*

***Unfair Dismissal***

*7. Was the making of any proven protected disclosure the principal reason for the dismissal?*

*8. The Claimant did not have two year's continuous employment, therefore the burden is on the Claimant to show jurisdiction and therefore to prove that the reason, or if more than one, the principal reason for the dismissal was the protected disclosure(s)*

*9. As the case is one of constructive dismissal, the Claimant's case is that the detriments referred to above were inflicted on her because of the protected disclosures and the detriments were the reason for her resignation.*

***Direct Discrimination on the Grounds of Race***

*10. The Claimant describes her ethnicity as British Asian*

*11. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely:*

*11.1. Not placing her on the, "Getting to Good" program following a lesson observation in October 2013;*

*11.2. Withholding feed back following lesson observations, and*

*11.3. Subjecting her to a more intense regime of assessment?*

*12. Has the respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on as a comparator, Ellen Hale and/or a hypothetical comparator.*

*13. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race?*

14. *If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?*

**Evidence**

12. For the Claimant's case, we heard evidence from Mrs Begum alone and we had before us her witness statement consisting of 28 pages.

13. For the Respondent, we had witness statements before us and heard evidence from:

13.1. Mr Dean Nicholas Goddard, (Deputy Head Teacher, performance managed Claimant);

13.2. Mr Andrew James, (Deputy Head Teacher, heard grievance);

13.3. Mr Michael John O'Sullivan, (Head Teacher, chaired capability hearing); and

13.4. Mrs Elaine Hale, (colleague, teacher and named comparator).

14. We also had a witness statement from Mr Plume, (Parent Governor, heard grievance appeal). Mr Plume tendered his statement under oath, but was not asked any questions.

15. We had before us a paginated, indexed bundle running originally to page number 827.

16. We added to the bundle a photograph at page 828 produced by Mrs Begum during her evidence, to which the Respondent raised no objection.

17. Also added to the bundle, were various documents at page 830 to 847 including evidence as to the ethnicity of the Respondent's employees and an occupational health report. These were produced by the Respondent during the course of the hearing at the request of the Tribunal.

## The law

### Public Interest Disclosure

18. Mrs Begum says that she was subjected to detriment for having made a protected disclosure, (whistle-blowing) and that her resignation was by reason of that detriment. The relevant law is derived from the Employment Rights Act 1996, (the "ERA").

### *Protected Disclosure*

19. What amounts to a protected disclosure is defined in the ERA at Section 43A as a qualifying disclosure. That in turn is defined at Section 43B as:

> *"… Any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – …*
>
> *a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*

20. The disclosures need not be factually correct, nor amount to a breach of the law, provided that the claimant reasonably believed them to be so, see Babula v Waltham Forrest College [2007 IRLR 346.

21. The expression, "reasonable belief" must be considered having regard to the personal circumstances of the discloser, in particular their "inside knowledge", what they know about the field in which they work, about their employer, about the subject matter to which the disclosure relates, In other words, the test is subjective, see

Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.

22. The requirement is for the disclosure of, "information"; i.e. conveying facts. It is not enough to make an allegation, see Cavendish Munro v Geduld UKEAT/0195/09. The expression of an opinion does not tend to show that the Respondent is likely to be in breach of any legal obligation, see Goode v Marks & Spencer Plc UKEAT/0442/09. There is a need for care; information can be disclosed within an allegation and tribunals are warned not to be seduced by a false dichotomy between an allegation and information, we should focus on the wording of the statute at section 43B, "the disclosure of information tending to show…" (Kilraine v London Borough of Wandsworth UKEAT 0260/15/JOJ).

23. The claimant must also reasonably believe that the disclosure is in the public interest. In Chesterton Global ltd (T/A Chestertons) v Nurmohamed [2015] IRLR 614, the EAT held that the purpose of this provision is to exclude the possibility that a claimant may be relying solely on a breach of his own contract as a breach of a legal obligation, therefore a relatively small group may be sufficient to satisfy the public interest disclosure test and what is sufficient, will be fact sensitive.

24. If the question arises as to whether one of the situations listed in section 43B(1) is, "likely" to arise, the test is whether it is, "more likely than not" to arise, see Kraus v Penna Plc [2004] IRLR 260.

25. A protected disclosure must, (per section 43A) be made to one of a number of specified persons set out at sections 43C to 43H, which includes, for the purposes of this case, the claimant's employer, (section 43C).

***Detriment***

26. Section 47B of the ERA provides that a worker has the right not to be subjected to any detriment because she has made a protected disclosure. That does not apply where the detriment in question is dismissal, (because dismissal is covered by Section 103A see Melia v Magna Kansei Ltd [2006] IRLR 117).

27. A detriment may be inflicted by any act, or failure to act, (Section 47B(1).

28. The term, "detriment" is not defined in the ERA. We look to the meaning attributed to that phrase in the discrimination case law, in particular as defined in the seminal case of Shamoon v the Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285: a detriment is where by reason of the act or acts complained of, a reasonable worker would or might take the view that she has been disadvantaged in the circumstances in which she had thereafter to work. Detriment is not limited to some physical or economic consequence.

***Burden of Proof***

29. Where it is established that there has been a protected disclosure, in considering whether a worker has been subject to a detriment as a result, an Employment Tribunal

must ask itself:

29.1. Whether the worker has been subject to detriment; if so,

29.2. Whether that detriment has arisen from an act or deliberate failure to act by the employer, and if so

29.3. Whether that act or omission was done on the ground that the worker has made a protected disclosure.

See Harrow London Borough v Knight [2003] IRLR 140).

30. The burden of proof on the question of whether there was a legal obligation and that information provided tends to show that there may be a breach, lies with the claimant, see Boulding v Land Securities Trillium (Media Services) Ltd UEKAT/0023/06, (paragraph 24).

31. As to the link between the disclosure and the detriment, ("on the ground that") one has to analyse the mental process, (conscious or unconscious) which caused the employer to act. We should not adopt the, "but for" test sometimes utilised in discrimination cases. The Court of Appeal considered this in Fecitt & others v NHS Manchester [2012] IRLR 64, where it was held that there is a causal link if the protected disclosure materially influences, (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower. It is not the same test as that for a causal link in respect of dismissal; in considering whether there has been an unfair dismissal by reason of a protected disclosure, the disclosure must be the sole or principal reason before it is deemed to be automatically unfair.

32. It is the mental processes of the decision maker that are relevant, (CLFIS (UK) Limited v Reynolds [2015]IRLR 562, an age discrimination case).

33. The respondent then, must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the claimant had done the protected act i.e. that the protected act did not materially influence, (was not more than a trivial influence on) the respondent's treatment of the claimant, see Fecitt.

***Unfair Dismissal***

34. Mrs Begum resigned and claims that she did so because of the Respondents conduct, being the detriments relied upon. She says that she was therefore constructively and unfairly dismissed for making a protected interest disclosure. Section 103A of the ERA provides that:

> *"An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

35. In an ordinary case of unfair dismissal, the burden of proof as to showing a

potentially fair reason for dismissal lies with the employer. If the employer is able to show that potentially fair reason, then the burden of proof as to the test of fairness is neutral. The situation is slightly different where the reason for dismissal asserted by the employee is one which is automatically unfair, in such a case the claimant must produce some evidence to suggest that the reason offered by the respondent is not correct, see Kuzel v Roche Products Limited [2008] IRLR 530.

36. However, in Kuzel the Tribunal had jurisdiction to hear the Claimant's claim of ordinary unfair dismissal. It has been held that if the Tribunal does not have jurisdiction to hear a claim of ordinary unfair dismissal and the Claimant is therefore relying on one of the grounds of automatic unfair dismissal to bring into play the tribunal's jurisdiction, then the Claimant bears the burden of proving, on the balance of probabilities, that the reason for dismissal was the automatically unfair reason, (see Smith v Hayle Town Council 1978 ICR 996 CA and Ross v Eddie Stobalt Ltd EAT 0068/13).

37. It will be rare for there to be direct evidence of an employer dismissing an employee because of a disclosure. A tribunal may therefore draw inferences from findings of primary fact as to the real reason for the dismissal, (see Kuzel above).

38. An employee complaining of detriment and constructive unfair dismissal is entitled to rely on the statutory protection against detriment and the remedy available for such, up to the point of dismissal, at which point the provisions relating to dismissal apply, (Melia v Magna Kansei Ltd [2005] EWCA Civ 1547).

39. Where an employee claims constructive dismissal contrary to s103A, the question must be whether the disclosure was the reason that the employer committed the alleged fundamental breach that led to the resignation. Were the matters complained of as amounting to breach of the implied term of mutual trust and confidence on the ground that the employee had made the disclosure?

**Discrimination**

40. The relevant law is set out in the Equality Act 2010.

41. Section 39 (2) (d) provides that an employer must not discriminate against and employee by subjecting her to any detriment.

42. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

43. Race is one of a number of protected characteristics identified at s.4.

44. Race is defined at Section 9 and includes colour, nationality, ethnic and national origins.

***Direct Discrimination***

45. Mrs Begum says that she was directly discriminated against because of her race.

Direct discrimination is defined at s.13(1):

> *"A person (A) discriminates against another (B) if, because of a protected characteristic (A) treats (B) less favourably than (A) treats or would treat others".*

46. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real or hypothetical comparator.

47. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, "on the ground of" the particular protected characteristic. It was not the intention of Parliament to change the legal meaning of direct discrimination, as explained in the Explanatory Notes published with the Act at the time. In Amnesty International v Ahmed 2009 ICR 1450 in the EAT, Underhill P, (as he then was) referring to the Race Relations Act, suggested that, "because of" could be used as a synonym for "on the grounds of". Later in the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwiwu and Taiwo v Olaigbe [2014]IRLR 448 at paragraph 40 that there was no difference in meaning between, "because of" and "on the grounds of".

48. As Lord Justice Underhill explained when he was President of the EAT in Amnesty International and again more recently in the Court of Appeal in Onu v Akwiwu and Taiwo v Olaigbe, what constitutes the grounds or reason for treatment will vary depending on the type of case. He referred to the paradigm case in which a rule or criterion that is inherently based on the protected characteristic is applied. There are other cases, not involving the application of discriminatory criterion, where the protected characteristic has operated in the discriminator's mind in leading him to act in the manner complained of. The leading authority on the latter is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

> *"…in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator…*
>
> *I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim*

> *members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."*

49. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

***Burden of Proof***

50. S.136 deals with the burden of proof:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision.*

51. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was set out in Igen Limited v Wong and others [2005[ IRLR 258. That case sets out a series of steps which we have carefully observed in the consideration of this case and we will set them out-

51.1. It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant.

51.2. If the Claimant does not prove such facts, she will fail.

51.3. It is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit discrimination even to themselves.

51.4. The outcome, at this stage, of the analysis by the Tribunal will,

therefore, depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.

51.5. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an unlawful act of discrimination. At this stage the Tribunal is looking at the primary facts proved by the Claimant to see what inferences of secondary fact could be drawn from them.

51.6. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

51.7. These inferences can include, in appropriate cases, any inferences that are just and equitable to draw from evasive or equivocal replies to questionnaires.

51.8. Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so to take it into account. This means that inferences may also be drawn from any failure to follow a Code of Practice.

51.9. Where the Claimant has proved facts from which conclusions could be drawn, that the Respondent has treated the Claimant less favourably on the prohibited grounds, then the burden of proof moves to the Respondent.

51.10. It is then for the Respondent to prove that it has not committed the act.

51.11. To discharge that burden of proof it is necessary for the Respondent to prove, on the balance of probabilities, that the prohibited ground in no sense whatsoever influenced the treatment of the Claimant, (remembering that the test now is whether the conduct in question was, "because of" the prohibited ground – see Ahmed v MOJ UKEAT/0390/14).

51.12. The above point requires the Tribunal to assess not merely whether the Respondent has provided an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question.

51.13. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

## Facts

52. The Respondent is an academy secondary school in Brentwood, Essex with approximately 1,700 pupils.

53. In 2007 the Respondent was Ofsted rated, *"good"*. Mr O'Sullivan was appointed headmaster in 2010 and in 2013, the school was rated, *"outstanding"* in all four areas of inspection. It has a higher than national average standard of attainment at GCSE.

54. Mr Miles for the Respondent described the Respondent and in particular Mr Goddard, as zealous and evangelical in pursuit of standards of teaching.

55. The Respondent manages teachers' performance by the application of three policies:

55.1. The first is the, *"getting to good"* policy. At the time Mrs Begum was employed by the Respondent, this policy was not in writing. It has now been reduced into writing and the Respondent says that its written policy reflects what was informally understood at the relevant time. Relevant excerpts from this policy are:

> *"The policy is designed to support teachers whose teaching has consistently been graded 'requires improvement' in both scheduled and unscheduled observations. The policy provides a supporting framework to assist colleagues with the planning and delivery of lessons. The aim of the policy is to ensure teaching throughout St Martin's School is always graded consistently 'good' or 'outstanding'. …*
>
> *If teaching falls below expectations (consistently 'good' or 'outstanding') and interventions from line managers have failed to make the desired impact, a teacher will be automatically placed on the 'getting to good' programme. A teacher who has received three observations graded 'requires improvement' is deemed to be consistently falling below the expectations of the school."*

The policy provides that when it is implemented, the teacher will meet a member of the senior leadership team once every half-term to discuss their progress, will be formally observed by a member of the senior leadership team (SLT) once a half-term, will be included in learning walks and will be subjected to an initial period of monitoring of between six and ten weeks, although that monitoring will be as long as is necessary to allow a reasonable time for improvement. A teacher is expected to attain a grading of *"good"* within six to ten weeks and will continue to be monitored for a further two terms. If, after two terms of support, the required standard is still not reached, the teacher will be placed upon the formal capability procedure.

55.2. The second policy is the performance management policy, (page 768). This policy provides for a continuous process of observation and

performance review. As to unsatisfactory performance, paragraph 8.1 of the performance management policy reads:

> *"If at any point in the cycle, evidence emerges that an employee's performance has fallen below the minimum standards expected of them, the appraiser will:*
>
> - *Explain the nature and seriousness of the concerns;*
> - *Detail any previous discussions/support;*
> - *Give the employer the opportunity to comment and discuss concerns.*
>
> *The appraiser will normally…set a monitoring period. This will involve:*
>
> - *The setting of targets for a future performance (in addition to existing performance management targets);*
> - *Agreeing any further support with the employee;*
> - *Making it clear how, and by whom progress will be monitored and when it will be reviewed;*
> - *Explaining the consequences and process if no, or insufficient, improvement is made."*

The period of monitoring is said to normally be four to eight weeks depending on the seriousness of the issues and the individual circumstances. Such monitoring period may exceptionally be extended, not normally by any more than four weeks.

55.3. The third policy is the capability policy at page 679. This policy refers to the performance management policy and replicates its provisions as to a monitoring period set out above. It goes on to provide that where there has been insufficient improvement, the performance management process will be suspended and the formal capability procedure invoked. The policy contemplates at paragraph 5.3, page 683, that an employee will be invited to a formal capability meeting at which the potential outcomes, (paragraph 6) are a written warning with further monitoring, a final written warning with further monitoring or in the most serious cases, dismissal with notice where:

> *"There has been:*
>
> - *No progress following a previous warning/period of monitoring.*
> - *Insufficient progress following a final written warning"*

56. The Respondent has high standards and expects its teachers never to teach lessons that are less than *"good"* on the nationally recognised standards of teaching assessment, which are:

56.1. Outstanding;

56.2. Good;

56.3. Requires improvement; and

56.4. Inadequate.

57. These standards are set out in a form which the Respondent uses in a process of lesson observations and assessment. There are a number of these forms in the bundle and the following is a summary of their content:

57.1. Protocols and procedures for the observations are set out, which include that the observer should both observe the lesson, talk to pupils and look at their work; the teacher should provide a lesson plan, relevant assessment data and a class progress map; honest and fair feedback should be given with clear guidance both on strengths and areas for improvement, such feedback should take place within three working days.

57.2. The form sets out eight areas of focus which include progress, assessment for learning, teaching, students' knowledge and skills, behaviour, prior learning, student attributes and use of resources.

**57.3.** There are two columns alongside each of the areas of focus. In the first is set out the key evidence to look for in respect of each. In the second column is a section of the form for the observer to write in their commentary**.**

57.4. There is a section of the form for the observer to record the feedback given to the teacher under headings of, *"what went well"* and, *"even better if"*.

57.5. There follows a tick box section for grading the lesson, which as indicated above, could be, "*outstanding*", "*good*", "*requires improvement*" or "*inadequate*".

57.6. Next is set out detailed guidance from Ofsted on how to decide what grade should be given.

57.7. There follows two pages for assessing and tick boxing as either "*outstanding*", "*good*", "*requires improvement*" or "*inadequate*". What is required is a tick in the relevant box under 14 separate characteristics, taking as an example the first, which is for the characteristics of an

outstanding lesson, *"learners make exceptional progress (90%)"* compared to the characteristic of an inadequate lesson, *"learners do not make the progress expected of them"*. Another example would be the last characteristic in each case, which for an outstanding lesson would be, *"attitudes to learning are excellent and behaviour is exemplary"* as compared for an inadequate lesson, *"behaviour is inappropriate or too passive and sometimes impacts on the learning"*.

57.8. Lastly the form gives some prompts for discussion during the feedback session.

58. Before 2012, the third score in the heirarchy was described as, *"satisfactory"*. In a government led change of policy by Ofsted in 2012, satisfactory was no longer to be regarded as acceptable, a teaching standard of *"good"* was to be expected of every teacher. Thus the descriptor for a score of three ceased to be *"satisfactory"* and became *"requires improvement"*. It is this change in policy that led schools to adopt a, *"getting to good"* policy such as that adopted by the Respondent in this case.

59. Another government led change in policy, in 2013, was to refocus on computer programming in information technology teaching and qualifications.

60. Mrs Begum is of Bangladeshi ethnic origin. She is a teacher who at the time that she was recruited by the Respondent, had six years' post qualification experience. She had taught ICT (Information and Communications Technology) as opposed to IT (Information Technology), a significant difference being the focus on programming. She has a Bsc degree in Computing and Information Systems taken between 1998 and 2001 and a PGCE.

61. In interview for her post with the Respondent in mid-2013, Mrs Begum was asked if she knew about programming. She confirmed that she did, it had been part of her course at university. When asked if she had experience of teaching programming, she said she had not. When asked if she was prepared to teach it, she said that she was.

62. In her offer letter dated 12 June 2013, Mrs Begum was told that she would be subject to regular assessments.

63. Mrs Begum accepted the offer of employment and her employment began on 1 September 2013.

64. All lesson observations were carried out by senior teachers who had been trained to conduct such observations and they were allocated at random. The first observation of Mrs Begum's teaching in the Respondent school, was conducted by a Mr Camy on 9 October 2013, page 109. The overall grading was, *"requires improvement".* His comments were broadly positive, although he did suggest a more authoritative approach. As to behaviour generally, he said that behaviour overall was good. In the, *"even better if"* feedback column, he suggested greater clarity during explanations, that Mrs Begum exert her authority more to increase her presence and challenge all so that they are completing work that they are capable of. When one looks at the characteristics box ticking, she has seven boxes ticked for a good lesson, five boxes ticked for a, "*requires improvement"* lesson and none for, "*inadequate"*.

65. The next observation was on 15 January 2014, conducted by a Ms Nichol. The story was very different. The observation is at page 134. The overall score is, "*inadequate"*. Four boxes are ticked for, "*requires improvement"* and seven boxes ticked for, "*inadequate"*. Some aspects of this observation are disputed by Mrs Begum. Ignoring those, in her comments Ms Nichol referred to the students being well behaved but that there was evidence of low level disruption and some talking over the teacher. She referred to some of the students not being challenged enough. The box ticked for, "*behaviour*" is that in the, "*requires improvement"* section, (which reads *"behaviour overall is appropriate"*).

66. On 28 January 2014, a student during a class, demonstrated to Mrs Begum that he had discovered a way to access the C drive on the Respondent's IT system. That is a drive to which a student ought not to have had access. She wrote an email to IT support that day to state:

> *"I just had a student showing me he can access the C drive. He was able to open the teachers' phone number database. You really need to look into securing the network urgently."*

67. She went on to explain in that email, how the student had achieved this.

68. Somebody in IT Support spoke to the student concerned and established that he had been able to access the S drive reporting, *"thankfully, he only made the shortcuts last thing yesterday, in front of Reba* [that is Mrs Begum] *to show her what he had managed to get hold of, but apparently he has known about this for a few weeks"*.

69. When asked for more information about what had happened in an email from Mr James, (Deputy Head responsible for IT systems) Mrs Begum confirmed that the student had showed her how he could gain access to the C drive. She was asked to comment on what the young student had said. Set out below are quotes in the email of what the student had said, with Mrs Begum's reply following the hashtag, (#):

> *"RB* [that is Mrs Begum] *asked him what other drives he could access so he asked which letter led to the teacher drive and RB suggests he tried the S drive # Yes…*
>
> *He managed to access the S drive and open a database containing staff home and mobile numbers # I didn't instruct him to open this file. He showed me he is able to open Microsoft Access File Open with teachers number. At this point I said he must not explore and closed the program…*
>
> *He assures me he had never heard of the S drive before RB mentioned it # True."*

70. From this, it appeared that the student had tried to access the S drive at the suggestion of Mrs Begum. Mr James therefore reported to the Deputy Head Teacher responsible for HR issues, Ms Corbett:

> *"It was when he showed Ms Begum that he could access the C drive that*

> *she challenged him to access the staff drive. She told him the staff drive is the S drive – something the boy could not have guessed. It was at her bidding that he did so…"*

71. In response to this, Ms Corbett wrote on 29 January 2015 that this would need to be investigated and taken forward as a disciplinary, which she would pick up.

72. On 4 February 2015, Mrs Begum was therefore invited to an investigatory meeting to consider an allegation that she had identified an area of the network, the S drive, to a student, where confidential information was kept.

73. The investigatory meeting took place on 10 February 2014. Mrs Begum explained how the student had demonstrated that he was able to access the C drive and so she asked him to go into the S drive. She said that she did not know what the S drive held, that she had just picked this letter. She acknowledged, *"perhaps I did the wrong thing in this situation, but at the time I did not think"*. Ms Corbett said that she needed to know for certain Mrs Begum understood that she should not have done what she did, to which Mrs Begum replied *"I agree I did the wrong thing and next time I would not do that"*.

74. The outcome of this investigation was that by letter dated 14 February 2014, Mrs Begum was issued with words of advice. The letter explained that whether or not she was aware that the S drive was where confidential information was held, it was inappropriate to invite him to try to access it. The letter acknowledged Mrs Begum's assurance that she understood that this was an error of judgment and Ms Corbett therefore stated that she would not be recommending that the matter go forward to a formal hearing. The words of advice are to the effect that if any attempt is being made by a student to access the network, that should be stopped immediately, any breach reported to IT support and no investigation with the student to be entered into.

75. In the meantime, there had been a third lesson observation on 6 February 2014, this time conducted by Mr Goddard, (page 175). In this observation, Mr Goddard makes many criticisms in his commentaries including:

> *"Pace and challenge limited…*
> *Some children are not challenged and no time span is issued…*
> *More systematic checking of progress needed!...*
> *Teacher later logging on…*
> *Lack of focus and concentration as pupils start discussing things on their own despite teacher continuing the introduction…*
> *Some pupils are drinking in the classroom…*
> *Children do not listen to initial teacher's instruction…*
> *Failure to follow up with late, - weak…lack of respect…*
> *Planning is weak due to lack of detail and structure…*
> *No real focus…*
> *Students seek help when needed but fail to try to work out for themselves."*

76. In the, *"even better if"* section of the feedback Mr Goddard referred to feeling as if the children were in charge of the lesson and queried whether with this highly

intelligent group, the learning was challenging enough.

77. In the characteristics tick boxing section, Mr Goddard ticked four characteristics as, *"requiring improvement"* and eight as being, *"inadequate".* Mrs Begum later takes issue with Mr Goddard, remarking on one particular student wearing headphones, but that really is a very minor part of the overall lesson assessment.

78. The feedback by Mr Goddard was not given to Mrs Begum until 11 February, five days later rather than the stipulated three.

79. Also on 11 February 2014, Mr Goddard told Mrs Begum that she was to be put on performance management. There is no note of this meeting. That it took place and what was to happen, was confirmed by letter dated 14 February 2014, which is at page 186. His letter explained that, (*"as discussed"*) concerns about Mrs Begum's performance arose as a result of her receiving two inadequate lesson observations in that term. The letter stated that the monitoring period was to run until 21 March, during which time there would be four lesson observations, of which one would be unscheduled. Work would be checked, documents reviewed and there would be regular meetings with Mrs Begum. They were then to meet again on 24 March for a review. Mrs Begum was warned that if at the end of the monitoring period, significant progress towards targets had not been achieved, the capability procedure would be commenced and a formal meeting convened, which could result in a formal warning. Mr Goddard's letter set out as a target, that Mrs Begum was expected to deliver lessons of a good standard and he then set out the 13 characteristics of a Good lesson lifted from the lesson of observation form.

80. In a subsequent email dated 25 February 2014, Mr Goddard encouraged Mrs Begum to look at the last two inadequate lesson observations and in particular, look very carefully at the, *"even better if"* sections and the characteristics of a *"good"* lesson. He stated that it was very important that Mrs Begum make rapid improvement in the quality of her teaching over the next four weeks.

81. On 27 February 2014, Mrs Begum raised a grievance in writing addressed to the head teacher, Mr O'Sullivan. She complained that in her entire career, she had never before received an inadequate observation. She complained that she had asked for a copy of the observation policy, because she was aware that a colleague, (she was referring to Ms Hale) had been graded satisfactory for a lesson observation and had been put on the *"getting to good"* programme, whereas she herself had received a satisfactory lesson observation before the inadequate. she did not therefore understand why she was not also given the opportunity to go onto the getting to good programme.

82. She complained that her Head of Faculty, (that is Ms Nichol) during the lesson observation on 15 January 2014, was also in the classroom with her Head of Department (that is Ms Curtis-Thomas) and that they were talking to each other all through the lesson, disturbing the children. She also complained that Ms Curtis-Thomas, due to her, *"lack of programming skills"* gave incorrect information to a pupil and that these matters impacted on the observation assessment, (which was unsatisfactory). Because of this and other matters she complained of, she asserted that the lesson observation was not a genuine outcome of the observation. She called

for the performance monitoring to be suspended. She asked for a review of her lesson observations.

83. Mr James was appointed to deal with the grievance, he informed Mrs Begum of that on 4 March 2014.

84. On 5 March 2014, Mrs Begum attended a monitoring meeting with Mr Goddard. Minutes of this meeting are at page 199. In this meeting, Mr Goddard confirmed that the four week monitoring period would be until 21 March, during which there would be four lesson observations, three scheduled and one unscheduled. He reiterated his recommendation that Mrs Begum review the *"even better if"* comments on her observations forms. He explained that the school's protocol was that whenever a teacher received an inadequate lesson observation, a second lesson observation was triggered. He confirmed that if at the end of the monitoring period, significant progress had not been achieved, the capability procedure would commence. He confirmed that if the school had to go down the capability route, this could lead to dismissal. He explained to Mrs Begum that she had four periods of *"slack"* and that she should use that time to observe some outstanding teachers. He provided her with a list of teachers regarded as outstanding. He provided her with the Respondent's CPD (Continuing Professional Development) calendar and highlighted three particular courses he recommended she attend, which were on 25 March, 15 May and 10 June. He also recommended that she read a book, "How to Teach Behaviour" and a particular chapter therein. Mrs Begum asked Mr Goddard to prioritise her targets and he said that the three most important targets for her would be (1) overall behaviour, (2) 75% of pupils making good progress and (3) having a high expectation for the majority of learners. He confirmed that the four week monitoring period would run from 24 February to 21 March. He also explained that there were six after school teaching and learning meetings each year, that the fourth was rapidly approaching and he strongly recommended Mrs Begum attend that.

85. The next lesson observation, the first under the performance management process, took place on 6 March 2014. The lesson was observed by Mr Camy and the outcome was, *"requires improvement".* The observation form begins at page 203. In his commentary, Mr Camy noted that by and large, the students had made satisfactory progress, but he did note that not all students complied with her call for silence and that some talked over her. Some of her explanations were said to lack clarity. Some students were uncertain what to do. There was some minor off task behaviour and Mrs Begum was said to be not consistent in picking up on this and that it is often ignored. In the *"even better if"* feedback, he suggested that she should have high expectations and insist on silence, she should pick up on minor off task behaviour and should differentiate more by tasks to challenge the more able. In the characteristics tick box section, he gave her two ticks in the good section, (for imaginative use of resources and learners being aware of their progress by feedback) he gave her 11 ticks in the, *"requires improvement"* section. None were, *"inadequate".*

86. A second observation took place on 10 March, this time by a Mrs Howells. The form is at page 217. The overall assessment is, *"requires improvement".* Amongst Mrs Howells' commentary was that a self-assessment process at the end of the lesson was rushed, so that students were unable to demonstrate their progress, students were said to be unsure of certain tasks, two particular students were noted to continue

talking while the teacher was talking, not all students complied when asked to turn their screens off. In the feedback section, Mrs Howells said that behaviour on the whole was adequate, but that Mrs Begum needed to intervene where students were continually talking, suggesting the lesson would be better if there was a better understanding of why tasks were being completed and there should be differentiation to help enhance, challenge and progress. In the characteristic tick box section, two boxes were ticked for, "good", (learners know what they need to do to sustain progress and have opportunities to demonstrate independent learning) 11 boxes are ticked for, *"requires improvement*", none for, *"inadequate".*

87. That was followed two days later, by an unscheduled monitoring conducted by Mr Goddard, who gave an overall assessment of, *"inadequate".* The observation form starts at page 226. In his commentary, Mr Goddard remarked on pupils drifting along with their tasks, no pupils aware of their target grades, tasks being easy and having limited challenge, pupils speaking over Mrs Begum during her introduction, silly behaviour being the norm, inappropriate noises and language, pupils not being corrected with regard to uniform issues, on many occasions the teacher being ignored completely. He queried whether the lesson was suitably challenging. He quoted the learning support assistant commented to him that behaviour is very poor normally. In the *"even better if"* section he commented on the pupils not being aware of their target grades, no timescale being given for tasks and therefore poor pace achieved, that she should ensure differentiation by task taking place and she should insist on pupils following the uniform code. In the characteristics tick box section, he gave Mrs Begum two ticks in the, *"requires improvement"* section and nine ticks in the, *"inadequate"* section.

88. Also on 12 March 2014, Mr James met with Mr Goddard to discuss the grievance. He also met with Ms Curtis-Thomas. He then met with Ms Nichol the following day, 13 March.

89. On 21 March 2014, Mr James wrote to invite Mrs Begum to attend a grievance meeting on 2 April 2014.

90. On 24 March 2014, a further scheduled lesson observation took place, this time the teacher was Mr James, (the Deputy Head teacher dealing with the grievance). The lesson observation form is at page 251 and his assessment was, *"requires improvement".* In his commentary, Mr James remarks that very few students were on or above target, the lesson was of limited challenge, the brighter pupils could have been stretched. He acknowledged that marking and feedback was good, subject knowledge was good, there was an effective PowerPoint and the lesson was structured well. Mrs Begum was criticised for arriving into the lesson after the children. On behaviour, he commented that the class was generally good, but observed that when she asked for quiet she continued to give instruction to the class even though a small number of pupils were still talking and that also after pupils had been told to switch monitors off, three had not done so and she did nothing about it. He remarked that three particular pupils were very poorly behaved and were not sufficiently challenged. In his feedback, he said that the lesson would have been, *"even better if"* she arrived on time, gave the children data to show who was on target, gave a greater challenge during the lesson and behaviour managed more assertively and definitively. In his lesson characteristics grading, he gave Mrs Begum two ticks in the, *"good"* section,

(imaginative use of resources and learners aware of their progress through detailed feedback), she had eight ticks for, *"requires improvement"* and two ticks for, *"inadequate".*

91. On 25 March 2014, Mr Goddard held a second monitoring meeting with Mrs Begum, page 261. Mrs Begum confirmed that during the observation period, she had observed four of the outstanding teachers. She also confirmed that she had read the chapter in the recommended book, regarding behaviour. Mr Goddard pointed out that in respect of the three scheduled lesson observations, they had showed that she, *"requires improvement"* and in the one unscheduled observation by himself, had showed that she was, *"inadequate".* He stated that she had made insufficient progress. He explained that he now had to make a decision as to whether to proceed to formal capability. If he did so, the Head Teacher would make the final decision, but if he agreed, she would be subject to a further formal monitoring period of four to eight weeks. Mrs Begum was reminded that if the matter moved to formal capability, she would receive a warning letter, which would then be reflected on any future request for references. He also explained that if there was still insufficient improvement during the formal monitoring period, this could lead to dismissal for lack of capability. Mrs Begum queried that she had moved from Grade 4 to Grade 3, did this not show improvement? Mr Goddard reminded her that she had also received one inadequate lesson observation and had not reached, *"good"*. Mrs Begum protested that she needed more time. Mr Goddard retorted that the children needed a good education now and that Mrs Begum needed to get to *"good"* quickly. He acknowledged that there had been some improvement, but said that the students deserve a good education. He said that Mrs Begum's lesson observations showed her to be a weak and inadequate teacher. He explained that Mrs Begum would be called to a formal capability meeting either in the following week or after the Easter holidays.

92. Mr James met with Mrs Begum to give her feedback on her grievance on 2 April 2014. Much of what is discussed does not matter, because Mrs Begum's complaint is not about the outcome of the grievance, but that it was not investigated promptly. However, there is some discussion about matters relevant to the issues. She protested that she had not been put on the getting to good programme. It was explained to her that merely getting one Grade 3, *"requires improvement"* is not sufficient to get her onto the getting to good programme. She protested about being told that she could be dismissed and it was explained to her that it was important that Mr Goddard explained to her, *"the whole process"*. The following passage at the conclusion of the minutes of this meeting at page 278 – 279 is important:

> *"SM 'what do you want as a resolution to this meeting'*
> *RBE 'to postpone or freeze the monitoring is what I wanted but it is too late for that now'*
> *SM 'but what would you like now as a resolution'*
> *RBE 'the only reason I raised a grievance was because I wasn't being listened to in my lesson observation feedback meetings and I feel the monitoring period is being rushed. My monitoring was only four weeks and it could have been up to eight weeks. I was off for one week of this with my son so it was really only three weeks so that should be extended'*
> *TKO 'the policy says more than four weeks can be granted. RBE had three observations graded requires improvement so has improved'*

> *SM 'would you like the monitoring period extended'*
> *AGA 'this can be put to DGO'*
> *RBE 'yes that is what I would like'"*

93. AGA is Mr James, SM is Ms Sylvia Mitchell, HR advisor, and TK is Mr Trevor Knowles-Olowu, Mrs Begum's trade union representative.

94. Mr James followed up this meeting by making some further enquiries of Ms Curtis-Thomas, this relates to Ms Curtis-Thomas having suggested that she would attend a performance monitoring meeting with Mrs Begum in her capacity as a trade union representative. This is not relevant to the issues other than explaining a further delay in the final grievance outcome.

95. More importantly, on 3 April 2014 Mrs Begum met with Mr Goddard. The minutes of that meeting are at page 281A. During this meeting, they discuss an extension to the monitoring period. Mr Goddard put to Mrs Begum that she had mentioned in her grievance meeting that she wished to extend the monitoring period and that if the Respondent was to do so, she would cease the grievance process. Mrs Begum denied that was the case. Mr Goddard went on to explain that the monitoring period would be extended, from Tuesday 22 April to Friday 16 May 2014. He reminded Mrs Begum she should not confuse grievance with capability. Mrs Begum reiterated she was not prepared to drop the grievance and Mr Goddard is minuted as responding with an expression of disappointment, given that there was a four week extension to the monitoring period.

96. That was followed by a letter dated 4 April 2014, confirming that the monitoring period was extended for a further four weeks. This letter stated that Mrs Begum would be observed four times during that period; two scheduled and two unscheduled observations. A meeting was set for 16 May to review the monitoring period. The target set was for Mrs Begum to reach, "good" during these observations, with the same three priorities as before: overall behaviour to be good, 75% of pupils to make good progress and there being high expectations for the majority of learners.

97. On 22 April 2014, Mrs Begum attended an introduction to Python, (that is a computer programming course). Other teachers taught her lessons for that day, including Ms Hale. Mrs Begum subsequently protested in an email dated 24 April 2014, that students had been given a hardware and logic exam paper to complete, which she felt was unfair as they had not been taught logic yet. She went on to say:

> *"I spotted someone put the binary conversion table on the wall. Was the binary conversion table on the wall during the…exam?"*

98. Ms Curtis-Thomas replied that she did not know if the binary conversion table was on the wall. This becomes the subject of the second protected disclosure upon which Mrs Begum relies. She wrote in a letter addressed to Mr O'Sullivan dated 6 May 2014:

> *"I would like to point out wrongdoing in the ICT department…*
> *She gave my class hardware and logic exam papers. She deliberately gave the logic exam paper instead of software paper, so my class can*

> *fail…*
> *My concern is how the class completed the paper on logic without covering the topic. On 23/4/14 I spotted someone put the binary conversion table on the wall in room 208, where the exam for class…took place the day before…*
> *Having binary conversion table during the exam, will be a concern to the OCR exam board. I want you to investigate the issue I have raised…"*

99. We heard from Mr O'Sullivan in his oral evidence, what he did to investigate this allegation. He told us that he went and spoke to Ms Curtis-Thomas, who told him that there had been no table on the wall. He did not ask Ms Hale, or the supply teacher that she was working with. He commented that the status of the exam in question was that it was entry level, extremely simple, no one ever failed it. He said that there was no evidence the binary table was on the wall, the school would never cheat and he said, in terms, that he therefore chose to ignore what Mrs Begum had alleged and treated it as a malicious allegation. He made no written record of his enquiries. He said that he reached his judgment based upon what the Head of Department, Ms Curtis-Thomas, had told him.

100. It is convenient to note at this point, the information Mrs Begum received from OCR on 19 May 2014, at page 390B, which was that the exam should be held in exam conditions with no material available to the candidates to support them. This is to be contrasted with the information to which the Respondent referred us, at page 507. This is an email from OCR, (OCR stands for Oxford, Cambridge and RSA Examinations) dated 13 September 2016, (i.e. a couple of months ago). The passage to which we were referred to reads:

> *"Displays within classrooms does not fall under OCR's remit and have no controls or guidance over what can be displayed or what not. It is entirely up to the centre's classroom teachers and departments to make their decision on what teaching and learning posters and information is shared with candidates…"*

101. However, what appears to be the case is that the author of this email is referring to assessments in the classroom and not to the tests in question, which were to have been conducted under exam conditions. We do not have the original letter or enquiry sent to the OCR which resulted in the response quoted above.

102. On 24 April 2014, Mrs Begum sent an email to Ms Curtis-Thomas to complain that she had been told about a deadline to complete certain work for her year 9 classes. That email had been copied to Ms Nichol, who wrote the next day to ask Mrs Begum what strategy she was putting in place to help her students gain the relevant qualification and Mrs Begum replied to say that she did not have any lessons with the relevant class before the deadline. Ms Nichol replied to enquire whether she could meet with the children at lunchtime or after school for catch up sessions and Mrs Begum replied asking that a message be passed to the class that she will be available every lunchtime over the next two weeks to help them.

103. On 25 April 2014, Ms Corbett conducted an unscheduled observation, the form is at page 315. The overall grade was, *"inadequate".* In her commentary, Ms Corbett

referred to a lack of pace and repetition, many children being off task and generally chatting, the children having no idea of where they were or what they were working towards and the teacher herself seeming to be confused, no children were able to say what they needed to do to improve, able students had not been challenged and had sat around for long periods of time waiting for others to catch up, the work had been dull and unchallenging and there was off task behaviour such as pen jabbing and pushing off seats. She said the teacher had allowed chatting to go on and had spoken over the same. She did comment that student behaviour was on the whole good, they were polite and when challenged to stop talking, most did. However, she said that, *"these incredibly bright students were let down by a complete failure to ascertain their starting points and then move them forward"*. In her feedback, Ms Corbett said the lesson would have been, *"even better if"* it had been planned to meet the needs of very able learners, the teacher knew what course she was attempting to deliver, students had to know their starting point and more thought had to go into the planning. In the tick box section, Mrs Begum was given two ticks in the, *"requires improvement"* section and seven ticks in the, *"inadequate"* section.

104. A further observation was conducted by Mrs Howells on 29 April 2014, page 338. The overall assessment was, *"inadequate".* In the commentary section, Mrs Howells referred to four students who when asked about their current levels, were unable to answer. There was no evidence of in-class assessment. There was no differentiation provided. Some were able to get through their tasks quickly, some students were not challenged if they did not move on. She had observed a lot of copying, one student completing the work for two others. She said that the students were, *"incredibly noisy and disrespectful on entry and took time to settle"*. She said the children did not fall silent, there was ongoing chat and silly noises and that interventions Mrs Begum had made, moving one student and taking another one outside to talk to, were unsuccessful as noise and disruption continued. She referred to a student wearing headphones and girls on a shopping website, not being challenged. She said there were eight students underachieving. There was no lesson plan. In the, *"even better if"* feedback section, she referred to a need for more differentiation or challenge, that the students' behaviour was poor, referring to a lot of talking, shouting out, being disrespectful and she made further reference to the online shopping and wearing of headphones. In the characteristics tick box section, Mrs Howells gave Mrs Begum one tick in the, *"good section", "learners have many opportunities to demonstrate independent learning"*, 3 ticks for, *"requires improvement"* and seven, *"inadequate".*

105. On 8 May 2014, Mr Goddard conducted a scheduled observation, the overall assessment of which was, *"inadequate",* the form is at page 358. This was a lesson in which the pupils were to take an exam, in fact three exams each, which were to take 15 minutes as stipulated by the examination board. Mr Goddard criticises Mrs Begum in his commentary for the fact that most students had finished the exam within six or seven minutes and that it was therefore not challenging or long enough. That seems to be unjustified, given that the time allowed for each exam was as stipulated by the examination board. Similarly, his criticism that the pupils seemed to be able to answer the papers extremely easily seems to be unwarranted. However, his observation that there appeared to be discussion amongst the students, despite there being examination conditions and pupils talking over the teacher's instructions, returns to a previous common theme. He also observed that there had clearly been a lot of copying amongst the pupils during the exam. In his feedback, Mr Goddard records in

the, *"even better if"* column that Mrs Begum should insist on silence in exam conditions, spread the pupils around the room, not allow students to chat whilst she is talking to them and to insist on the students keeping their eyes on their own papers. It seems a little odd that there should be tick box scoring of characteristics in a lesson that was focused on exam papers, but nevertheless Mr Goddard does so and gives Mrs Begum two ticks in the section for, *"requires improvement"* and 11 ticks in the section for, *"inadequate".* Although we have made reference to Mr Goddard's feedback comments on the form, in fact Mrs Begum refused to attend the feedback meeting with Mr Goddard and wrote on 8 May to say as such and suggest that he left his written observations in her tray.

106. On 13 May 2015, Mr Camy conducted the final observation on Mrs Begum, an unscheduled observation. The form is at page 373. The overall assessment was, *"inadequate".* In his commentary, Mr Camy noted that progress was inadequate and that assessment during the lesson and throughout the year demonstrated that the students were not reaching anywhere near their potential. He noted that marking did not inform planning and there were a number of students with incomplete work, the students did not know their levels or what qualification they were working towards. He remarked that this was a very bright group, many of whom were underachieving because of a lack of stretch and challenge. He said that there was no evidence of any guidance for students who achieved the very top marks. He said that Mrs Begum relied too heavily on students just getting on with it and that those students who opt for the quiet life are able to do so. On behaviour, he commented that on the whole, they were well behaved and mostly keen to get on, but that some admitted not working to their full potential because they are left to their own devices. The comments in the, *"even better if"* feedback section reflect those remarks. In the characteristics tick box section, Mrs Begum was given one tick in the, *"good"* section, *("behaviour overall is good and learners are keen to get on with their work"*) one tick in the, *"requires improvement"* section and ten ticks in the, *"inadequate"* section.

107. Also on 13 May, Mr James provided his written outcome to the grievance. He upheld the grievance in three respects:

107.1. Mrs Begum has asked for a copy of the school's lesson observation policy but one was not provided. He commented that the school did not have a lesson observation policy, but that whilst all policies are available on the school's network, it would have been good practice if, when asked to attend a meeting about her performance, she had been provided with a copy of the school's performance management policy.

107.2. That she had received emails on 14 February seeking confirmation of lesson observation dates before she had in fact received the letter of 14 February informing her of the performance monitoring period. Apologies were offered in this respect.

107.3. That Mr Goddard had suggested that there should be some quid pro quo and that Mrs Begum should withdraw her grievance in return for his extending the monitoring period. This was acknowledged to be inappropriate and apologies were offered.

108. In other respects, the grievance was not upheld, which includes:

108.1. On Mrs Begum's complaint that she should have been put on the Getting to Good programme, Mr James explained this was an informal support mechanism for those who often score, *"good"* but have the occasional, *"requires improvement"* and Mrs Begum did not fit that category.

108.2. With regard to the complaint that Ms Nichol and Ms Curtis-Thomas had spoken during an observation, they had denied the allegation, although they accepted that they have made the occasional comment to each other and would have spoken to one or two of the pupils.

108.3. Ms Curtis-Thomas categorically denied giving students an incorrect code.

108.4. It was not unreasonable of Ms Nichol to ask for class data, the progress map, which was not in the room.

108.5. Mrs Begum complained that she was at a disadvantage because she had no training on how to deliver programming lessons. The response to this was that Mrs Begum had been appointed because of her computer programming expertise, (something of an overstatement) and that ICT teachers were looking to learn from her.

108.6. With regard to security concerns about errors in macro's, these appear to be minor matters.

108.7. Mrs Begum had said that she felt she had been verbally harassed by Mr Goddard and Ms Curtis-Thomas. Complaint here was about the potential outcome of the formal capability process, (dismissal) being explained to her. The conclusion was that statements were made to make sure Mrs Begum understood the worst case scenario and an apology was offered if this had made her feel verbally harassed.

108.8. As to the complaint that Ms Curtis-Thomas had suggested she would attend a performance monitoring meeting, (as trade union representative) this was said to arise out of a misunderstanding on the part of Ms Curtis-Thomas as to the nature of the meeting.

108.9. Mrs Begum had complained that she had not known that Ms Nichol and Ms Curtis-Thomas would jointly be attending the lesson observation on 15 January 2014. Ms Curtis-Thomas had assured Mr James that she had made Mrs Begum aware of that, but he concluded that even if she had not been made aware, there was no particular detriment to Mrs Begum arising out of it.

108.10. With regard to the complaint that no written targets were set after the observation on 15 January 2014, Mr James referred to the, *"even better if"* box and commented that it was not usual to set defined targets after

a lesson observation.

108.11. Mrs Begum felt she had not been listened to during the lesson observation feedback meeting. Mr James concluded the evidence showed that Mrs Begum had been given proper, timely feedback and an opportunity to respond.

108.12. With regard to Mrs Begum's complaint about the accuracy of the gradings, Mr James commented that it was not for the grievance process to re-evaluate lesson observations.

109. On 14 May 2014, Mr Goddard wrote to Mrs Begum to encourage her to take part in the monitoring process and to attend the meeting on 16 May 2014, which she had said she would not attend.

110. By letter dated 20 May 2014, Mrs Begum was formally invited to attend a further meeting on 23 May as she had not attended that on the 16th.

111. On 23 May Mrs Begum completed a form that indicated that she wished to appeal the grievance outcome.

112. On 30 May 2014, away from the school, Mrs Begum had an accident in which she fell over and as a result of which she suffered considerable back pain.

113. On 31 May 2014, Mrs Begum resigned her employment, page 393. The letter reads:

> *"I regret to inform you that I am resigning from my position at St Martin's School. It has been a privilege working with you and representing St Martin's School. Thank you for the support and the opportunities that you have provided me during my tenure with St Martin's School."*

114. This of course is not the end of Mrs Begum's employment, in the ordinary course of things she would continue in employment until the end of the academic year, on 31 August 2014.

115. On 2 June 2014, Mrs Begum was certified as unfit to work by her doctor. There is no copy of the fit note in the bundle, but we see from a copy occupational health referral, (page 404) that the Respondent understood that Mrs Begum was suffering from low back pain following a fall, asthma and a chest infection. This accords with an email Mrs Begum sent Ms Corbett on 6 June, (page 399).

116. A capability meeting was then scheduled for 2 June 2014, but that was postponed and rescheduled for 17 June, when it went ahead.

117. The Respondent had made its occupational health referral as quoted above, but had not received a response. A response was not received until 2 July 2014. The nature of the response was that Mrs Begum would be unlikely to return to work for at least the next two weeks from that date and that when she returned to work, adjustments should be considered such that she avoid lifting, the chair that she uses

should be fully adjustable, she should be allowed to remain as active as possible so as not to stiffen up, there should be a risk assessment and a phased return to work. With regard to any formal meetings, recommended adjustments were that she be accompanied by a suitable person, that information should be sent to her in advance so that she can prepare, that comfort breaks should enable her to regain composure, meetings should be held in a neutral location, consideration should be given to allowing third party representation and she be allowed to present written statements.

118. The 17 June 2014 capability meeting went ahead in Mrs Begum's absence. Mr O'Sullivan told us in his oral evidence that he decided to proceed on the basis of human resources' advice that she was capable of attending the hearing. He referred to Ms Corbett as a human resources expert who was able to tell him whether or not Mrs Begum was fit to attend. In his view, it was acceptable to go ahead in Mrs Begum's absence, notwithstanding that she was ill, because the procedure said that once there had been one postponement, no further postponements need be allowed. He commented that all she had to do was sit there, (her problem was of course, lower back pain).

119. The outcome of the capability meeting was that Mrs Begum was issued with a final written warning dated 18 June. The warning letter explained that ten observations had been conducted during the monitoring period and that seven of those had been judged inadequate, the remaining three requiring improvement. Mr O'Sullivan had taken into account: Mrs Begum's apparent unwillingness to engage with the process in the later weeks, she had been provided with support during he monitoring period and that period, which would normally only be four to eight weeks, had continued for a period of five months. The letter explained that when Mrs Begum returned to school, she would be subject to a further monitoring period of four weeks, when she would continue to receive, *"the same level of support"* which Mr Goddard would discuss with her upon her return. The letter explained that if she failed to achieve an acceptable level of performance, she would be dismissed.

120. Mrs Begum's grievance appeal was dealt with on 8 July 2014 by a panel of three governors, including Mr Plume, a Mrs Carr and Mr Hawkins. Mrs Begum was accompanied by her trade union representative. An outcome to that appeal was provided by letter dated 15 July; the appeal was unsuccessful.

121. On 16 July 2014, Mrs Begum appealed against the written warning. That appeal was dealt with on 17 July before a panel of three governors, (a Mrs Sproul, Mrs McPherson and Mrs Issitt). Once again, Mrs Begum was accompanied by her trade union representative and the appeal was not upheld, as confirmed by a letter dated 25 July 2014.

122. Mrs Begum relies upon Mrs Hale as her named comparator. It is therefore relevant to consider the lesson observations which she had. Overall, Mrs Hale never had an, "inadequate" lesson and did have some, "good" lessons. Her lesson observation forms were in the bundle before us and a summary of them is as follows:

122.1. 9 June 2010 scored under the old system a, "2/3", (the equivalent of a, "good/requires improvement");

122.2. 14 July 2011, “satisfactory”, (which under the new system, would be, “requires improvement”);

122.3. 25 January 2012, “satisfactory with some good”;

122.4. 26 October 2012, “satisfactory”;

122.5. 30 January 2013, “requires improvement”, (now under the new system);

122.6. 19 April 2013, “requires improvement”.

123. Ms Hale was placed upon the Getting to Good programme in October 2013 and thereafter her lesson observations were:

123.1. On 27 November 2013, “requires improvement”, (an observation by Mr Goddard);

123.2. On 13 March 2014, “good”;

123.3. On 12 June 2014, “good”;

123.4. On 13 January 2015, “good”.

124. Lastly, we analysed the statistics with which we were provided. At page 802 we had a list of the names of people placed upon the capability process with their ethnicity. During the hearing, it had been indicated to us that these names covered a five year period, but when he gave his evidence, Mr O’Sullivan was less certain that was the case. He was unable to tell us how precisely this information had been put together and he thought it might be over just a three year period. In any event, if one adds the Claimant to this information, 20 people were subject to the capability process during the relevant period, all of whom moved on to other employment except one, (Ms Hale) who remained in the Respondent’s employment and another, a gentleman of Bangladeshi ethnic origin, who was dismissed. Six out of those 20 people placed on the capability process were non-White, that is 30%. When we were first taken to these figures during evidence, I remarked that they were meaningless without statistics on the overall ethnicity of the Respondent’s workforce. We were then told by Ms Chan that actually, the Claimant had requested that information and the Respondent had refused to provide it. I expressed some surprise at that. The following day, we were presented with some statistics about the ethnic composition of the Respondent’s workforce, page 847. This showed that 3.79% of the workforce is non-White.

125. Mr O’Sullivan told us that the catchment area for the school is predominately White British. We have no other evidence on that, but the Tribunal’s own local knowledge suggests that is probably correct.

## Conclusions

### *Whistleblowing*

*Protected Disclosures*

126. The first question we must ask ourselves is whether the Claimant has made qualifying protected disclosures. There are two relied upon.

127. The first alleged protected disclosure is the email to IT support of 28 January 2014, quote above. In this email, Mrs Begum reported that a student had been able to access the C drive, (which he ought not have been able to do) and that he was able to open the teachers' phone number database, the S drive. Neither party has referred us to any legislation to assist us with the issue as to whether or not this is a breach of a legal obligation.

128. The Respondent did not accept that this was a protected disclosure. When asked to explain why, Mr Miles' submission was that the Respondent accepts that there may be a legal duty on a data holder to control and protect sensitive data however, the sensitive data accessed here only came about as a result of the Claimant encouraging the student to access it. It is not that the Respondent had failed to safeguard the data. He said that there is a duty to take reasonable steps, but that one cannot, "prevent the burglar".

129. The student ought not to have been able to gain access to the C drive however, the Respondent's unchallenged position was that the C drive contained programs relating to its operating systems, but not sensitive data. Nevertheless, by the same method by which the student had gained access to the C drive, he was able to gain access to the S drive, which did contain confidential data. Thus a student, (we do not think we were ever told his age or year group) was able to gain access to any drive on the Respondent's IT system. If he had not been prompted by Mrs Begum to attempt the S drive, he could have worked his way through the alphabet until he gained access to other drives, including the S drive, where confidential information was held. Thus, Mrs Begum was providing information to the Respondent that its confidential data was not secure, in that a child was able to access it. That in the Tribunal's view, was information which tended to show that the Respondent was likely to be in breach of its legal obligation to keep confidential data secure. If that is so in the Tribunal's view, then it was most certainly a reasonably held belief on the part of Mrs Begum.

130. It is also the Tribunal's view that it is in the public interest that it should be known that a school holds data, (such as the telephone numbers of teachers) that is not secure from access by pupils. If it is in the Tribunal's view that such is in the public interest, it is certainly in the reasonably held belief of Mrs Begum.

131. It matters not for the purposes of the definition of a protected disclosure, that Mrs Begum herself may have been at fault in encouraging the child to access the S drive.

132. The email of 28 January 2014 was a protected disclosure. It is surprising that the Respondent argued otherwise.

133. As to the second protected disclosure; the list of issues identifies that Mrs Begum relies upon her letter dated 6 May 2014 to Mr O'Sullivan. Two aspects to this are relied upon:

133.1. Firstly, that those teaching her class had subjected the children to an

examination which counted towards their grades on the topics of hardware and logic, rather than hardware and software. In her letter of 6 May, she suggested this had been done on purpose.

133.2. Secondly, that the exam had been conducted in a room which displayed a binary chart, which would have been an aid to the children taking those exams. In her letter of 6 May, Mrs Begum calls upon Mr O'Sullivan to investigate this.

134. As to the first aspect of the second alleged disclosure: no one has referred us to any legislation or any other legal provision which it might be said the Respondent was potentially in breach of, because children were set an exam in logic rather than software. This aspect to the alleged disclosure was ignored by both parties during the evidence and Ms Chan made no reference to it in her closing submissions. We are of the view that it cannot reasonably be believed that setting the children a test in logic rather than software was a breach of a legal provision, nor in the public interest.

135. However, with regard to the second aspect to this alleged disclosure, whilst we have again not been referred to any legislation or legal provision, it must be the case that schools are under a legal obligation to conduct examinations in exam conditions as prescribed by the relevant examining board, so that exams are conducted fairly and children have an equal and fair opportunity to perform, regardless of which school they attend. In our view therefore, Mrs Begum could and did reasonably believe that conducting these tests with the binary table displayed on the wall, which would have assisted the children, was a breach of a legal obligation.

136. It is in the public interest that children's examinations are conducted on a level playing field and Mrs Begum reasonably believed that the information disclosed was in the public interest.

137. We therefore find that the second aspect to the second disclosure is a protected disclosure.

*Detriments*

*Being subject to an investigation into the matters she had reported on 28 January 2014:*

138. Mrs Begum was subjected to such an investigation and that clearly amounts to a detriment. The question is, was she subject to that investigation because of the protected disclosure? If Mrs Begum had let matters rest once the child had shown that he could access the C drive, that would have been an end to the matter. However, she went one step further and encouraged the child to try and access another drive. It is not plausible for Mrs Begum, an IT teacher, to assert that she chose the S drive at random, having no idea there was such a drive or what was on it. However, the Respondent accepted her assurance that she did not. Nevertheless, at the outset, Mrs Begum acknowledged in the information she provided to Mr James, (point four of her email 29 January 2014, page 159) that she had suggested the S drive to him. That being so, Mrs Begum had done something which warranted an investigation. In the course of the investigation, she acknowledged that she had suggested the S drive to

him and that she was wrong to do so, see the bottom of page 183, the notes of the investigatory meeting on 10 February. That being the case, Ms Corbett's response as an outcome to the investigation was measured and appropriate; she gave words of advice.

139. In the circumstances, we are satisfied that the reason for the investigation was that Mrs Begum acknowledged that she had suggested the S drive to the student, not because she had made the disclosure.

*She received negative feedback leading to performance management:*

140. Mrs Begum did receive negative feedback and that amounts to a detriment in that she will have felt disadvantaged moving forward, because of the criticism she was receiving.

141. However, the fact of the matter is that the negative feedback started before the protected disclosure, with the lesson observation by Ms Nichol on 15 January 2014. The troubling themes of that feedback were repeated throughout the subsequent observations, which over the next five months were conducted by five different people. The feedback provides a lot of detail, which is cogent and credible. In the circumstances, we are satisfied that the reason for the negative feedback was the negative perception of Mrs Begum in her teaching and not because she had made a protected disclosure, which was a matter which would undoubtedly have been of genuine concern to the Respondent, but not something that would or did cause the Respondent or anyone in its employment, to bear any ill will towards Mrs Begum.

*Being subjected to a performance management procedure:*

142. Mrs Begum was subject to a performance management procedure and that she was, is clearly a detriment to her.

143. Was the performance management because of the protected disclosure? For the reasons explained in respect of the previous point, we find not. Mrs Begum had triggered the performance management policy by having two inadequate lesson observations in succession on 15 January and 6 February 2014. Whilst the performance management policy does not expressly state that two unsatisfactory observations are required to trigger the monitoring, clause 8 of the policy, (page 771) merely speaks of the teacher's performance falling below the minimum standard expected of them at any point, so in theory, performance management could be triggered by a single inadequate observation.

*Her grievance was not investigated promptly:*

144. The date of the grievance is 27 February 2014, Mr James confirmed to Mrs Begum that he had been appointed to investigate the grievance on 4 March 2014, he met Messrs Goddard, Curtis-Thomas and Nichol on 12 and 13 March, invited Mrs Begum to a grievance outcome meeting by letter of 12 March, that meeting taking place on 2 April. The grievance would have been completed on 2 April, had Mrs Begum not raised further matters which Mr James went on to deal with, providing a final outcome on 13 May 2014. In our judgment, using our industrial experience, that is

not an unreasonable time frame and criticism of the Respondent for not dealing with the grievance promptly is not justified. Our conclusion is therefore, that was not a detriment.

145. If it had been a detriment, we would nevertheless have found that any lack of promptness in dealing with the grievance had nothing to do whatsoever with the protected disclosure. Whilst we would acknowledge that Mr James was the Deputy Head teacher responsible for the school's IT system, the protected disclosure did not cause him any personal embarrassment or irritation and had no impact on his thought processes in dealing with the grievance at all.

*Not being offered the "getting to good" programme.*

146. Mrs Begum was not placed on the getting to good programme, but she was not entitled to be placed upon it. It is not a programme designed for teachers in her situation. It is a programme designed for teachers who are falling a little short of, *"good"* in order to help them make that relatively small amount of improvement to reach *"good"* on a consistent basis. Not being offered the *"getting to good"* was not therefore a detriment.

147. If we had decided otherwise, we would nonetheless have found that the decision to place Mrs Begum on the performance management programme, rather than getting to good, was not because of the protected disclosure, it was because her teaching was of such a low standard as to cause serious concern to the Respondent, requiring the more urgent intervention of the performance management process.

*That Mrs Begum received inadequate support during the monitoring process:*

148. We thought that the support provided to Mrs Begum was inadequate. The support provided was:

148.1. She was directed to read a chapter on behaviour in a book called how to teach;

148.2. She was encouraged to observe other teachers;

148.3. She was provided with access to a CPD catalogue of courses, (none of which were being run during the monitoring period);

148.4. She was provided with documentation including a sample lesson outline planning form, a copy of the Department of Education Teacher Standards, a lesson observation check list, two books on teaching and learning;

148.5. She was shown how to access online resources;

148.6. On 22 April she did attend a course on Python programming;

148.7. She would have been present at half-termly learning and teaching meetings, and

148.8. She was provided with oral feedback following her lesson observations.

149. In the Employment Tribunal's experience, one would have expected to have seen a teacher in this situation receive the following additional support:

149.1. Mentoring by a senior teacher who would talk to Mrs Begum on a regular basis about her lessons, the problems she was encountering, providing assistance with planning;

149.2. Allocated co-tutoring work with another experienced teacher, so that the two together would teach in class with feedback from the experienced teacher, both during and after the lessons, giving the Claimant practical classroom support and help with identifying her areas of weakness;

149.3. Learning walks, that is accompanying a member of the senior learning team on walks, visiting other good teachers and holding discussions with the Claimant about how those teachers were performing and how she might learn from what she saw.

150. A teacher in Mrs Begum's situation ought to be given time to improve albeit, we acknowledge that has to be balanced with the need to provide the children in the Respondent's charge at that particular time, with proper and adequate teaching.

151. A timescale of four to eight weeks is typical of an initial time frame but one would expect the assessments to take place spread over those four to eight weeks, not be concentrated within a matter of a few days as here. It is common place for such monitoring periods to be extended for many a reason, as it was in this case. In particular, it is unrealistic to expect an underperforming teacher such as Mrs Begum to leap from *"inadequate"* to *"good"* in a short period of time. Having regard to the foregoing, had Mrs Begum the required two years' service, there was certainly the makings of a constructive unfair dismissal claim, or a claim for unfair dismissal, had the Respondent continued to deal with Mrs Begum in the way that it was.

152. However, whilst the lack of support was a detriment, we do not think that it was because of the protected disclosure. We have already explained, the protected disclosure was a very minor matter which did not give rise to any feeling of ill will towards Mrs Begum. The school and in particular Mr Goddard were, in their own words, evangelical and zealous in their pursuit of teaching standards and it is that which led the Respondent to place Mrs Begum under the pressure to improve without, in our view, adequate support.

*A threat of dismissal on 25 March 2014:*

153. This was in the second monitoring meeting between Mrs Begum and Mr Goddard, at which he confirmed to her that at the conclusion of the monitoring period, having undergone four lesson observations, the assessments were three, *"requires improvement"* and one, *"inadequate"* which meant that she would be moving forward to a formal capability meeting and application of the capability policy, a consequence of which was that she would be likely to receive a written warning and a potential

outcome of the process, if the required improvement was not attained, was dismissal. We find that Mrs Begum was not, *"threatened"* with dismissal but that it was explained to her, quite rightly, that a potential outcome of the process going forward, if she did not improve, would be dismissal. That is not a detriment, it is good employment relations practice.

154. Mr Goddard's actions and interactions with Mrs Begum were not motivated in any way by the protected disclosure.

*Mrs Begum was put under pressure to withdraw her grievance:*

155. We accept that the suggestion that Mrs Begum would withdraw her grievance if her monitoring period was extended, came initially from Mrs Begum herself. That said, it was of course quite wrong of the Respondent through Mr Goddard, to allow that link to be made, which is why Mr James upheld that aspect of Mrs Begum's grievance in due course.

156. We have read the transcript of Mrs Begum's recording of her meeting with Mr Goddard on 3 April 2014 and we do not read that transcript as suggesting that Mr Goddard was placing pressure on Mrs Begum; he accepts it when Mrs Begum tells him that she is not dropping the grievance. He nevertheless extends the monitoring period.

157. Even if it were the case that one thought that Mr Goddard was applying pressure on Mrs Begum, we would not have found that it was because of the protected disclosure, for reasons explained above.

*Mrs Begum was given unrealistic targets during the monitoring process:*

158. We agree that it was unrealistic to expect Mrs Begum to get from, *"unsatisfactory"* to, *"good"* within four to eight weeks. Setting an unrealistic target was a detriment. However, as we have explained, Mr Goddard was not motivated by the protected disclosure.

159. The second aspect to this detriment is Mrs Begum's complaint that she was expected to complete her year 9 classes' ICT course within too short a time frame. It is surprising the Respondent did not call Ms Curtis-Thomas to deal with this allegation. We saw from the email exchanges on 25 – 29 April 2014, (page 327/328) that Mrs Begum had to make herself available to her class at lunchtime. However, Mrs Begum has presented no evidence to suggest that Mrs Curtis-Thomas or Mrs Nichol, who appear to be the decision makers in this respect, would in any way have been motivated by the protected disclosure which, as we have already noted a number of times, was of such a minor nature as not to be something which caused irritation to the Respondent generally and would not have played any part in any of its management's decision making.

*Mrs Begum received negative feedback following observation on 29 April 2014:*

160. It is puzzling why Mrs Begum focused on this particular observation. There is negative feedback and that is properly described as a detriment. However, the feedback is consistent with that given in other previous observations. This particular

observation is by Mrs Howells, who had given one other previously on 10 March 2014. The comments and remarks are consistent with those which had gone before in the previous observations. There were some positives. For reasons previously explained, in particular the consistent nature of the negative feedback throughout these 11 observations and the fact that they were carried out by five different people and the fact that the protected disclosure is such a minor matter that would not have motivated the actors in any way, we find that this was not a detriment inflicted because of a protected disclosure.

*The above matters intensified after the second protected disclosure of 6 May:*

161. I should perhaps explain that this expression was used in the list of issues because when I asked Mrs Begum's counsel at the Preliminary Hearing what detriments she says were inflicted on her because of the second protected disclosure he was, on instructions, unable to say other than to comment that the foregoing had intensified. So we must quickly review what the foregoing was and how that might have been said to have intensified after the second disclosure:

161.1. She had already been subjected to the investigation arising out of the first protected disclosure.

161.2. She was subjected to two further negative feedbacks in performance management following observations, by Mr Goddard on 8 May and Mr Camy on 13 May. The content of these observations are consistent with the nine which had gone before, that of Mr Camy was now an assessment of, *"inadequate"* whereas previously on 9 October 2013 and 6 March 2014 his overall grading had been, *"requires improvement".* The assessments appear to be part of a continuing trend of deteriorating performance. There is no reason to see why Mr Goddard or Mr Camy should be motivated to be even more negative because Mrs Begum had written to Mr O'Sullivan on 6 May. The feedback of those last two observations was because of Mrs Begum's performance and not because of the second protected disclosure.

161.3. Mrs Begum was already being subject to performance management.

161.4. Mrs Begum's grievance had already been dealt with, the final outcome just a couple of days later on 13 May.

161.5. The decision had already been made not to put Mrs Begum on the getting to good programme.

161.6. The decision about the amount of support to provide during the monitoring process had already been made.

161.7. The threat of dismissal so-called, on 25 March, had already happened.

161.8. The so called pressure to withdraw the grievance had already taken place.

161.9. Targets for the monitoring process had already been set.

161.10. Negative feedback had already been given on 29 April.

162. Thus, the only matter which could relate to protected disclosure is the second, the continuing negative feedback and as we have explained, we find that is not because of the second protected disclosure.

*Automatic Unfair Dismissal*

163. As none of the detriments complained of were because of the protected disclosures, Mrs Begum's resignation, if it had been because of the detriments, was not because of the protected disclosures.

164. We find that in fact the reason for Mrs Begum's resignation was that she was moving forward to the capability procedure, she knew that she would receive warnings and wanted to resign before she was dismissed in order to improve her prospects of finding new employment.

***Race Discrimination***

165. We remind ourselves that there are three specific detriments relied upon:

165.1. Not being placed upon getting to good;

165.2. Withholding feedback following lesson observations;

165.3. Being subjected to a more intense regime of assessment.

166. Mrs Begum says that the foregoing amounts to less favourable treatment than the way in which Ms Hale was treated, or in the alternative, a hypothetical comparator.

167. Ms Hale was a colleague IT teacher. We set out her observation assessments in our findings of fact. We also set out that she was placed upon the getting to good programme in October 2013.

168. Ms Chan has not focused upon these detriments in her closing submissions, she seems to have set out the Claimant's case as that the 11 protected disclosure detriments were in the alternative, less favourable treatment because of race. That is not how her case was identified before me by her counsel at the Preliminary Hearing on 5 September 2016. Both parties specifically confirmed at the outset of this case they agreed we could rely upon the list of issues as set out in my hearing summary of 5 September 2016.

169. There is a difference in treatment between Ms Hale and Mrs Begum, in that Ms Hale was placed upon the getting to good programme.

170. We do not understand the reference to, *"withholding feedback"* following lesson observations. Feedback was not withheld.

171. Mrs Begum was subjected to a more intensive regime of assessment than was Ms Hale.

172. Has the Claimant proved facts from which we could conclude, absent an explanation from the Respondent, that the reason for the difference in treatment was her race?

173. We considered the following:

173.1. 3.79% of the Respondent's workforce is non-White and yet 30% of the 20 teachers subject to the capability procedure were non-White. That is a statistic which suggests that there is a greater chance of being subjected to the capability process if one is a non-White employee.

173.2. The Respondent sought to avoid providing these statistics. Correspondence on the Tribunal file shows that Mrs Begum asked for the ethnicity of the Respondent's workforce over the last five years. This request was met with the following response from the Respondent, *"the Respondent does not compile this data and it is not in their possession"*. As a consequence, no order for disclosure was made. As we have observed above, when I commented during the evidence that the statistics on employees subject to capability were meaningless without the overall ethnicity of the workforce and when I expressed surprise upon being told that this information had been requested of the Respondent and they had not provided it, the Respondent was then able within 24 hours to provide the information. The Respondent had therefore been evasive and indeed probably not truthful, in its response to Mrs Begum's request. We may raise inferences from that, such as that the Respondent knew that the information requested would not be helpful to its case and/or that the Respondent does not take equal opportunities and diversity seriously or that it does discriminate and is prepared to take steps to hide the fact that it does so.

173.3. Had it been the case that the Respondent did not keep statistics on the ethnicity of its workforce, (and indeed of other protected characteristics) that may be indicative of an employer that does not take equal opportunities and diversity seriously, giving rise to the potential inference that discrimination may be allowed to take place.

173.4. We also witnessed unseemly vitriol and ill will on the part of Mr O'Sullivan toward Mrs Begum when he was giving his evidence.

173.5. The fact that the Respondent through Mr O'Sullivan was determined to proceed with a capability hearing and issue a final written warning against Mrs Begum in a situation where she was plainly unwell, when an occupational health report had been requested but not yet received, is remarkable and does them no credit.

174. These are matters from which we think inferences may be drawn that the apparent ill will towards Mrs Begum is because of her Bangladeshi ethnic origins,

sufficient to shift the burden of proof to the Respondent to satisfy us on the balance of probabilities, that race played no part whatsoever in the three matters complained of.

175. In respect of the getting to good programme, the evidence was that Ms Hale was a teacher whose observations were consistently assessed as, *"requiring improvement",* with the occasional elements of, *"good".* She had not been assessed as, *"unsatisfactory".* She was a teacher at the level of ability at which the getting to good programme was specifically aimed. In contrast, Mrs Begum was a teacher whose observations were consistently either, *"requires improvement"* or, *"unsatisfactory"* and was precisely at a level at which the performance management process is aimed.

176. There were 11 assessments carried out by five different people and there was a consistent, (and degenerating) theme throughout, of a lack of discipline and challenge in the lessons. The Respondent's school sets very high standards for its teachers.

177. We are satisfied that the reason for the difference in treatment between Ms Hale and Mrs Begum in respect of the getting to good policy was their difference in ability as perceived by the five people who assessed Mrs Begum.

178. As we have explained, we do not understand the reference to withholding feedback. We are not aware of any feedback being withheld.

179. Mrs Begum was subjected to a more intense regime of assessment because that is what is required by the performance management policy, as compared to the getting to good policy. That is reflective of the seriousness of the situation of moving a teacher up from being almost good to good and getting a teacher who is unsatisfactory, (a much more serious situation) up to good. That is why the getting to good programme provides for monitoring over a six to ten week period, with observations by a member of the senior leadership team once a half-term, as compared with the performance management policy which has a monitoring period of four to eight weeks.

180. A hypothetical comparator would be a teacher of Mrs Begum's experience, newly employed with the same length of service, displaying the same abilities during lesson observations. Such a teacher, a White hypothetical comparator, would have been subjected to the same process as was Mrs Begum.

181. For these reasons her complaint of race discrimination fails.

Employment Judge M Warren

22 March 2017