Appeal No. UKEAT/0226/13/BA

# EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 3 February 2014

**Before**

**HER HONOUR JUDGE EADY QC**

**MRS M V McARTHUR FCIPD**

**MR P M SMITH**

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MS C McINTOSH — APPELLANT

THE GOVERNING BODY OF ST MARK'S PRIMARY SCHOOL — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR AYOADE ELESINNLA<br>(of Counsel)<br>Direct Public Access Scheme |
| For the Respondent | MR JAKE DAVIES<br>(of Counsel)<br>Instructed by:<br>London Borough of Merton<br>Merton Civic Centre<br>London Road<br>Morden<br>Surry<br>SM4 5DX |

**SUMMARY**

**VICTIMISATION DISCRIMINATION**

**Detriment**

**Other forms of victimisation**

The appeal is against the Employment Tribunal's findings that the detriments of suspension and referral to a disciplinary hearing were not on the grounds of the Claimant's protected act.

The appeal is dismissed; the Employment Tribunal's Judgment is to be read in its entirety; the conclusions on these issues were sufficiently reasoned and properly open to the Employment Tribunal given its findings of fact.

**HER HONOUR JUDGE EADY QC**

1. In this Judgment the parties are referred to as the Claimant and Respondent, as they were before the Employment Tribunal. This is a unanimous Judgment of this Court.

2. This is an appeal by the Claimant against a Judgment of the Employment Tribunal under the chairmanship of Employment Judge Lamb, sitting with members on 8-11 and 14 May 2012 at London (South) and sent with Reasons to the parties on 8 August 2012. The parties are represented today, as they were before the ET below.

3. The Claimant had made claims of direct race discrimination and victimisation under the **Race Relations Act 1976** and of unfair dismissal. Her complaints arose from her dismissal from the position of Headteacher of the Respondent primary school and she was unsuccessful in all her claims.

4. The complaints made by the Claimant in the proceedings before the Employment Tribunal gave rise to some 15 discrete issues, as identified by the Tribunal at paragraph 1 of its written Reasons. On this appeal, pursuant to the order of Keith J on the rule 3(10) hearing on 1 May 2013, we are concerned only with the Employment Tribunal's Judgment on the Claimant's victimisation complaint, in respect of:

(1) the Respondent's decision to suspend the Claimant; and

(2) the subsequent decision to subject her to disciplinary action.

**The background facts**

5. The Employment Tribunal's findings of fact are set out at paragraphs 2-41 of the Reasons, and the following summary is taken from that narrative.

6. The Respondent is a primary school. At the relevant time it was run by a senior leadership team, which included the Headteacher, Mrs Marion Standing; the Deputy Head Teacher, the Claimant; the Assistant Head Teacher, Ania Majewska; and a Finance Administration Officer, Mrs Sampson. Its chair of governors was the Reverend Coulson, who was hands-on and present at the school on most days.

7. The Claimant started her employment with the Respondent in September 2002. Mrs Standing arrived in January 2008. From the outset, Mrs Standing had concerns regarding the management performance of the Claimant. Further, there were discussions between Mrs Standing and the Claimant in March 2009, during which the Claimant made an unparticularised allegation of a lack of respect and discrimination on the part of Mrs Standing.

8. Going into 2009, the ET found that Mrs Standing's concerns regarding the Claimant continued and she had recorded that the Claimant had a propensity for talking to governors and staff about her relationship with the Headteacher; something seen as significant by the Employment Tribunal (see paragraph 6). Certainly the Claimant had been talking to Reverend Coulson, the Chair of Governors, about her relationship with Mrs Standing, although the Employment Tribunal found that she was not making allegations of race discrimination in this regard.

9. In December 2009 Mrs Standing began an informal capability procedure in respect of the Claimant. In January 2010, the Claimant met the Reverend Coulson in an informal setting and made it clear that she was unhappy about the process. Subsequent to that conversation, the Claimant decided to seek advice from her trade union about what to do next, and she drafted a

document - "PM1" - which she kept on her computer at the school. On the fourth page of PM1, the Claimant made what the Employment Tribunal considered to be a "throwaway" comment that "[Mrs Standing] is a bully and closet racist".

10. Although it had been prepared to send to her trade union representative, the Claimant accidentally attached PM1 to an entirely unrelated e-mail, which she sent to some 20 members of staff on 11 January 2009. When that was brought to her attention, the Claimant contacted and e-mailed the recipients asking them to delete the earlier message.

11. Meanwhile the attachment had been read by Miss Majewska, who telephoned Mrs Standing at home that evening and told her about it. On her return to school on 12 January 2010, Mrs Standing discussed the matter with the Claimant, who expressed contrition and asked what she could do about the matter. Her contrition was repeated in an e-mail to Mrs Standing later that day, albeit that she was apologising for the inadvertent sending of the e-mail and not for its contents. By that time, however, she had been asked to go home, and that evening she was suspended, that decision being communicated to her by telephone by the Reverend Coulson and confirmed by letter the following day. The Employment Tribunal considered that it was relevant and important to note what Mrs Standing had recorded in a document that she had created on 14 January 2010:

> **"17. […]**
>
> > **'I obtained a copy of the email and read it. It was clearly a record of Carol's perceptions of her experience of our management relationship and of the informal capability procedure that I had undertaken. She had previously accused me of discriminating against her (in the email she stated I am a closet racist). She had also recently verbally accused me of bullying her (in the email she also stated that I am a bully). However, on both previous occasions she was unable to substantiate the accusations and unwilling to pursue mediation. I am very upset about the accusations, not least because I believe them to be without substance and that given the circulation by the email are personally and professionally damaging and are libellous.**
>
> **And she went on to say this, additionally:**

> **'My fear after what has happened this week is that our working relationship is now terminally damaged. These events have caused a complete breakdown of trust and confidence between Carol and me and between Carol and other members of staff. The opinions recorded by Carol in the email were already known to me, but I had hoped to keep them confidential and to work through the difficulties privately and to be able to work effectively together in the future.'**
>
> **That is what she was saying at the time and indeed it seems to us that that set the tone for what happened subsequently. That was the view that she was communicating at the very beginning of an investigation by Reverend Coulson."**

12. The Reverend Coulson had first been told of this matter by Mrs Standing, who had telephoned him on the evening of 11 January 2009 after having been informed of the e-mail herself. The Employment Tribunal found that he was a very hands-on governor and it was unsurprising that he became involved in this matter as investigator.

13. The issues on which he focussed in his investigation are apparent from the record of his meeting with the Claimant and her trade union representative as part of his investigation on 3 January 2010, see paragraphs 21-24 of the ET Reasons:

> **"21. […] Reverend Coulson made the point that there was a breach of confidentiality by the attachment, confidentiality being about the performance management and the capability procedure. Ms McIntosh made the point that it was not intentional and therefore it was not a breach of confidentiality. He then asked her if she thought that the attachment seriously demeaned and undermined colleagues in school. She replied that she thought that the fact that it was unintentional, and colleagues were aware that it was unintentional, would mean that they would not think it was undermining but they would have to make their own judgment. ….**
>
> **22. Reverend Coulson then went on to make the point that the apology which had been given by Ms McIntosh to Mrs Standing was only for sending out the email and not for the sentiments expressed in it. Ms Mcintosh replied that she had apologised for sending the email and thought this would cover it. Reverend Coulson felt that she should have mentioned the content of the attachment. He thought that she had not retracted the substance of the email, just apologised for it going out. Ms McIntosh said the concern was the attachment was not for the public eye and she only apologised for the email going out. She went on to say that she thought that it was the best thing to do to send the apology and Mr Long pointed out that the whole thing had happened very quickly and Ms McIntosh was trying for damage limitation. Ms McIntosh had apologised to everyone and informed the Chairman of Governors of the situation.**
>
> **23. There was some reference to her dealings with Miss Sampson about the email passwords and it was alleged by Reverend Coulson, on the basis of information provided to him by Miss Sampson, that in the course of their discussion Miss Sampson had asked whether she should be providing such information Ms McIntosh had replied 'I won't tell if you won't tell'. Ms McIntosh strongly denied saying this. He went on to make the point that Miss Sampson had felt so uncomfortable and pressured that she had left the office and hidden in the car park to that she would not have to speak to Ms McIntosh, but Ms McIntosh denied that she used the terms alleged against her. He went on to put to Ms McIntosh that according to the material provided to him Ms McIntosh had been going to people asking them to delete the**

> **email in an aggressive manner. She denied that she had been aggressive and said that she simply felt nervous.**
>
> **24. Reverend Coulson went on to say that the school was full of tension and staff had not wanted to be left alone with Ms McIntosh. The school was tense and uncomfortable. Ms McIntosh replied that she was surprised by this. She gone to Ms Majewska, the Assistant Headteacher, to discuss and rectify the situation. She said it was not possible that people thought her intimidating as she had not been aggressive. She had just wanted the email deleted."**

14. Having investigated matters concerning the e-mail, which included interviews with members of the senior management team and obtaining evidence from the 20 staff recipients of the e-mail, Reverend Coulson prepared a report, which concluded that there was a case that the Claimant needed to answer at a disciplinary hearing, he having taken the view that:

> **"The most common response to reading the PM1 attachment was shock that the DHT could speak about the HT in such a manner. Staff were deeply upset. They did not all know whether its sending had been accidental or intentional."**

15. Having summarised the various responses provided to Reverend Coulson, the Employment Tribunal did not consider that this report really reflected the difference in reaction between teaching staff (broadly, sadness and concern) and management staff (more in line with how the Reverend Coulson had summarised reactions). It was, however, certainly the case that Miss Seabrook and Ms Majewska, both members of the management team, gave a picture of the Claimant as "being very intimidating, moody, difficult to deal with" and Ms Majewska "doubted that there could be a trusted relationship with her again": see ET paragraph 25 (xviii).

16. In any event, the matter went to a disciplinary hearing, which ultimately took the decision that the Claimant should be dismissed. There was a subsequent appeal, but that was unsuccessful.

**The Employment Tribunal's conclusions**

17. The ET found that the Claimant's email of 11 January 2010 was a protected act for the purpose of section 2 of the **Race Relations Act 1976** and it had been made in good faith. Moreover the Claimant's suspension and the disciplinary action against her were acts of less favourable treatment. The issue, therefore, was whether those acts were performed by reason of the Claimant having performed a protected act.

18. The Employment Tribunal conclusions on this question are set out at paragraphs 64-66 of the written Reasons:

> **"64. We must then consider the 4th issue: were any of the acts set out in issue number 3 'by reason of the Claimant having performed a protected act'. This is the issue over which we have had the most difficulty, and over which we have agonised. It involves us considering whether, if the word 'racist' had not been used in the attachment, would the same consequences have still flowed from the claimant's actions. That would have included an allegation that the Headteacher was a bully and manipulative. Did the consequences flow from the dissemination to the twenty members of staff? We remind ourselves of the *Nagarajan* test: did the use of the word 'racist', which makes the attachment a protected act, have a significant influence on the consequences which we have identified as the less favourable treatment. We have to take account of all that the Claimant did to mitigate what had been done. None of it was apparently capable of causing the Respondents to deviate from the imposition of the disciplinary process and the eventual conclusion of the need to dismiss the Claimant.**
>
> **65. We have concluded, ultimately, that what caused the Respondents to take the disciplinary action, including the suspension was a combination of the following factors:-**
>
> > **(1) Her refusal to retract, or explain or follow-up the allegation of racism. She was willing to apologise for sending it but not its content, but at the same time, she was not willing to pursue it in any active way.**
> >
> > **(2) Her attitude that she was entitled to adopt that position, although it resulted in the allegation becoming, in effect, a running sore. The Claimant seems to have been incapable of recognising that position as it truly was.**
>
> **66. The protection afforded by the victimisation statutory provisions is not intended to allow people to throw up an accusation and then refuse to explain it or justify it in this way. Furthermore, the context in which we have to consider this situation includes the evidence of intimidation which was before the disciplinary panels; and the sensitivities of a small management team. Reverend Coulson at one point used the expression: 'put up or shut up.' We accept that that is the natural commonsense approach to the racism allegation made by the Claimant. It was that attitude which influenced the Respondents, to the exclusion of the protected act."**

## The appeal

19. The Claimant now seeks to challenge the Employment Tribunal's conclusions in respect of the less favourable treatments of her suspension and the commencement of the disciplinary proceedings. To the extent that paragraphs 64-66 of the ET's conclusions relate to the decision to dismiss and the decision to dismiss her appeal, the Claimant makes no challenge to those decisions. Her skeleton argument before the rule 3(10) hearing observes that she accepts those latter findings because cogent reasons have been given on the evidence and because they make sense chronologically. In contrast, it is objected that the conclusions cannot make sense chronologically in respect of the earlier two acts of less favourable treatment. The ET's conclusions in this regard, it is argued, are either perverse or inadequately reasoned.

## The legal framework

20. The relevant provisions of the legislation are to be found in the **Race Relations Act 1976**, sections 2, 3(4), and 54A(2). These are set out in the Employment Tribunal's Judgment at paragraphs 45 to 47:

> **"45. Victimisation is defined in section 2 as follows:**
>
> **'1. A person ('*the discriminator*') discriminates against another person ('*the person victimised*) in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has:**
>
> **(a) brought proceedings against the discriminator or any other person under this Act;**
>
> **(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or**
>
> **(c) otherwise done anything under or by reference to this act in relation to the discriminator or any other person; or**
>
> **(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this act; or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.**
>
> **(2) Subsection (1) does not apply to treatment of a person by reason of any allegations made by him if the allegation was false and not made in good faith'.**

**46. Section 3(4) provides:**

> **'A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) must be such that the relevant circumstances in the one case are the same, or not materially different in the other.'**

**47. In respect of the burden of proof, section 54A provides in subsection (2):**

> **'Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the Respondent:**
>
> > **(a) has committed such an act of discrimination or harassment against the complainant, or:**
> >
> > **(b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant, the Tribunal shall uphold the complaint unless the Respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act'."**

21. The Employment Tribunal directed itself by reference to the relevant case-law, in particular by reference to **Martin v Devonshires** and to the case of **Khan** at paragraph 50:

> **"In respect of the proper approach to the legal questions to be answered, we adopt what was set out in the judgment of the Employment Appeal Tribunal in the case of *Martin v Devonshires Solicitors* [2011] ICR, 367, paragraph 30. Having referred to the judgment of Lord Nicholls in the case of *Chief Constable of the West Yorkshire Police v Khan*, the Appeal Tribunal said:**
>
> > **'Although Lord Nicholls, following the structure of the statutory language, treated the question of whether the claimant has been treated less favourably than others as distinct from the question of the reason for that treatment, he subsequently pointed out in *Shamoon v. Chief Constable of Royal Ulster Constabulary* [2003] ICR 337 that those two questions – 'the less favourable treatment question' and 'the reason why question' – are 'intertwined' and 'essentially a single question'...**
> >
> > **Lord Hope described the reason why question as 'the primary question'. Elias P. in *Ladele v. London Borough of Islington* [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases – see at paras. 35-37 (p. 395). Other cases in this Tribunal have repeated these messages'."**

It also referred to the case of **Nagarajan v London Regional Transport** [1999] ICR 177 and stated at paragraph 53, "Race may be the reason for action whether the Respondent realises it at the time or not."

22. It has not been suggested by either party to this appeal that the Employment Tribunal erred in its self-direction on the law.

**Submissions**

*For the Claimant*

23. The submissions for the Claimant were foreshadowed by the skeleton argument on the rule 3(10) hearing. On suspension, it was argued that the decision to suspend the Claimant could not be for the reasons set out at paragraph 64-66 because those matters all occurred after 12 January 2010, i.e. when the decision to suspend was taken. Logically, the Claimant's posture after her suspension could not have been a reason for her suspension. Moreover the ET's findings of fact (paragraphs 16, 21 and 22) would only support the conclusion that the proximate cause of the Claimant's suspension was her sending the e-mail attachment, PM1. Therefore the ET's conclusions, at paragraph 65 to 66, must be perverse or, if not perverse, simply inadequately reasoned. The Claimant was left not knowing why the ET concluded that her suspension was in no sense whatever on the ground of victimisation.

24. As for the decision to subject the Claimant to disciplinary action, similarly the Claimant relies on the ET's findings of fact at paragraphs 21-22 of the Reasons in challenging the conclusions as to the reason for this decision at paragraph 65-66.

25. More generally, the ET's conclusions on the disciplinary process, including the suspension, could only be seen as finding that the Respondent was informed by the Claimant's sending of the e-mail attachment. That was a protected act, and so tainted the Respondent's decisions in this regard and any other conclusion would be perverse.

*For the Respondent*

26. For the Respondent it was noted that the Claimant did not seek to challenge the applicability of the Tribunal's conclusions to matters occurring after 12 February 2010 nor did

the appeal raise any issue as to the ET's application or understanding of the correct legal test and its general terms. The real issue was one of perversity.

27. The Respondent summarised the competing contentions arising on this appeal at paragraph 5 of its skeleton argument as follows:

> **"In short, if the EAT finds that (a) the ET's conclusions on the reasons for the relevant decisions are confined to the contents or paragraphs 65-66 of the Judgment and (b) the findings of fact indicate that the said reasons cannot logically have applied at the relevant time, it is accepted that there is a need for the Tribunal to further explain its conclusions on the relevant issue or for it to be reconsidered at a fresh hearing. For the avoidance of doubt, the Respondent does not accept that the ET's conclusions on the reasons for the relevant decisions are limited to the said paragraphs or that the findings of fact did not permit the ET to conclude as it did."**

28. On the question of suspension, the Respondent observed that paragraph 65 explained the ET's conclusion that disciplinary action, encompassing the suspension, was caused by a combination of factors related to, but separate from, the protected act. The Respondent accepted that the refusal to pursue the allegation of racism cannot have been a relevant factor regarding the decision to suspend, as the ET had found that the Claimant had not referred to race before (see paragraphs 4 and 10 of the Reasons). On the other hand, the Respondent contended that the ET had found the Claimant had previously failed or refused to actively pursue complaints of "discrimination" and this had influenced Mrs Standing's response to the e-mail (see paragraph 17), as had the fact that the Reverend Coulson had previously taken the view that the Claimant should be making her complaints through the proper channels (see paragraph 9). Moreover the other factors relied on at paragraph 65 plainly did apply to the decision to suspend: for example, the fact that the Claimant was willing only to apologise for the sending of the email not its content (see paragraphs 16 and 22). Further, the factors at paragraph 66 were already apparent at the time of suspension: for example, the interaction on 12 January 2010 between the Claimant and Mrs Standing; and Reverend Coulson had also obtained a statement from Miss Majewska, which would have evidenced that interaction (see

paragraphs 15 and 17) and this set the scene for the issues regarding intimidation and sensitivities of the small management team. This was also evidenced by the Tribunal's conclusions on direct race discrimination at paragraph 67-68 and 69.

29. On the decision to discipline the Claimant, the Respondent submitted that the chronology was less helpful to the Claimant. By 12 February 2010, the Claimant had refused to apologise for the e-mail (see paragraph 22) and at paragraph 27 of the ET Judgment it was shown that the refusal to withdraw the relevant allegation was a relevant factor after 3 February 2010. Moreover, paragraphs 23-24 of the Tribunal's Judgment show that, by 3 February 2010 at the latest, the Reverend Coulson was also influenced by the Claimant's reactions with Miss Sampson and Miss Majewska. This was also apparent from the content of his investigation report (see paragraph 15). Further, by 12 February 2010, the Claimant had the opportunity to make a dignity at work complaint, so if that was a relevant factor (albeit that the Respondent contends paragraph 65 is in more general terms) then that was also permissible for the Tribunal to take into account. In any event (see paragraph 27 of the Judgment) none of the allegations made by the Reverend Coulson in his report relied on the mere fact that the Claimant had referred to racism in the PM1.

**Discussion and conclusions**

30. The first issue for us was whether the Employment Tribunal's reasoning was limited to paragraphs 65 and 66, and we observe that it is common ground that, on the Employment Tribunal's own reasoning, one has to look at paragraph 66 as well as 65.

31. We do not ignore the fact that the ET specifically identified in paragraphs 65 and 66 the operative reasons in respect of the disciplinary action taken against the Claimant. On the other

hand, we note that elsewhere the ET does not limit its consideration of an issue to the paragraph in its Judgment where it is first addressed. For instance, in identifying the protected act, the ET at paragraph 61 refers to the Claimant's email of 11 January 2010, but then, at paragraph 64, when turning to the question of whether the act of detriment were on the ground of the protected act, the ET is more specific, observing that it was the use of the word "racist" that made the attachment a protected act, and that there were other parts of the document which would not be seen in the same way.

32. It is trite to say that a Judgment needs to be read in its entirety. That is perhaps particularly the case where an ET, under time and resource pressure, has to deal with factually and legally complex cases, often raising a plethora of issues. We certainly think that is true in the present case, where the ET was obviously addressing disciplinary issues in the round and sought to address what it found to be operative in terms of the Respondent's thinking at various parts of its Judgment. We therefore see as relevant to the ET's reasoning on these matters, other parts of the Judgment, such as paragraph 69, which address the Reverend Coulson's thinking at the time. Having heard him give evidence, the Tribunal concluded:

> **"Everything he said and did, and which caused the exaggeration and distortion which we have identified, was attributable to his view of the very serious consequences of the Claimant's actions, as he saw them, in undermining the Headteacher. He honestly believed that there had been a breakdown in the relationship between Deputy and Headteacher which was irretrievable and which would be very seriously damaging to the school. That was the sum total of the considerations which influenced what he said and did."**

33. More specifically, however, paragraph 66 itself makes reference to the sensitivities within the small management team. It does not do so in a way limited to what was before the disciplinary panel. Indeed the use of the semi-colon in the paragraph makes it clear that the Employment Tribunal was expressing separate thoughts in this regard; referring to the evidence

of intimidation before the disciplinary panels, and then, separately, to the sensitivities of a small management team.

34. That reference - the reference to the sensitivities of the small management team – was, in our view, referring back to the ET's findings as to the background history; that is, to the Claimant's earlier indiscretions regarding her relationship with the Headteacher, her raising of those issues with other members of the senior management team and other staff, and with the Reverend Coulson, and to the sensitivities that arose from that.

35. The Reverend Coulson had been in the school on the day before his decision to suspend to the Claimant. He had already obtained statements from the Headteacher and from Miss Majewska (see paragraph 18). What troubled them was apparent from the Reverend Coulson's statement at his meeting with the Claimant and her trade union representative on 3 February and his subsequent investigation report. In particular, we note the Tribunal's finding that he had raised the issue with the Claimant about the tensions at the school and the fact that he had the impression staff did not want to be left alone with the Claimant. Some of those points may have been derived from his post-suspension investigations, but it would be almost impossible to separate out all the elements of the investigation and we do not criticise the ET for not doing so.

36. Suffice it to say that we see findings of fact throughout the Tribunal's decision that justify the conclusion at paragraph 66 that the sensitivities facing the small management team were the material reason for the suspension.

37. Reading the Judgment as a whole, we consider that there are sufficient reasons for the Claimant to be able to understand the Tribunal's conclusion that the protected act was not the ground of her suspension. Moreover, taking into account the findings of fact made by the Employment Tribunal, we see no basis on which it could be contended that that conclusion was perverse.

38. To the extent that paragraph 65 has to be read as laying down factors relating to the suspension, we would equally not see that as perverse. True it is that, if the only reference was to the Claimant's specific refusal to retract the "closet racist" comment in the e-mail, then that could not have been the reason for the suspension having become a running sore within one day. But the fact the Claimant had previously made allegations - unspecific, but relating to her relationship with the Headteacher - and had declined to use the proper channels to do so, could be seen as a relevant factor in the narrative. We consider that was all part of the background, based on the Employment Tribunal's findings of fact, that explains paragraph 65 so far as the decision to suspend is concerned.

39. As for the decision to refer the matter into the disciplinary process, we think that the reasoning at paragraphs 65 and 66 is all the more obvious.

40. By 12 February 2010, the Claimant had refused to apologise for the e-mail (see paragraphs 22 and 27). Although we note that paragraph 27 is setting out what took place at the disciplinary hearing, it sets out the presentation of the management case by the Reverend Coulson and reflects his understanding at the time. That included, as set out at paragraph 27(2), that the undermining and demeaning behaviour had been exacerbated by the fact that the statements were not withdrawn either on the morning of 3 February or during the

hearing before the disciplinary panel. He had obviously been influenced by the fact that the Claimant had not withdrawn the statements, and it is not plausible to read the Tribunal's Judgment as suggesting he had only taken that view at some point during the disciplinary hearing itself.

41. Moreover paragraphs 23 and 24 of the ET's Judgment show, by 3 February 2010 at the latest, the Reverend Coulson was also influenced by the Claimant's interactions with Miss Sampson and Miss Majewska on 12 January 2010. That is also apparent from the content of his investigation report (see paragraph 15).

42. Furthermore, we accept the Respondent's submission that by 12 February 2010 the Claimant had had an opportunity to utilise the correct procedures, such as the dignity at work policy, to make a complaint. That, too, could be a relevant factor, which the Employment Tribunal was entitled to take into account.

43. In dealing with the allegation of perversity, again we find that the Claimant does not meet the high threshold to justify such a ground of appeal. None of the allegations made by the Reverend Coulson in his report relied on the mere fact that the Claimant had referred to racism in PM1. We do not accept that any reference to the e-mail or its attachment necessarily included a reference to the "closet racist" remark. That was, as the Tribunal found it, a "throwaway" comment in a long document.

44. As the ET correctly set out, at paragraph 64, there were other aspects of the attachment that might have been objectionable, and the Tribunal was plainly saying, on our reading of its Reasons, that it was the pattern of the Claimant's informing others of her poor relationship with

the Headteacher, even if inadvertent, and the difficulties that that caused that was the reason for the action in question.

45. Reaching that conclusion, given its findings of fact on the history of this matter, was not perverse. Here, it seems to us, the ET was clear in its reasoning. It had in mind the suspension and the decision to refer the Claimant's case into a disciplinary hearing and it saw that as part of the complete disciplinary process. It considered the reasoning that had led the Respondent to those decisions and was satisfied that this was not because of any protected act. To try to de-construct the reasoning further is, in our view, unfair to the Employment Tribunal and misses the overall picture to be derived from this Judgment. For those reasons we dismiss this appeal.

46. Having given our Judgment, an application was made to us for permission to appeal to the Court of Appeal. Such an appeal can only be made on a point of law. We do not consider that that has been demonstrated and we consider the application fails to engage with the entirety of our reasoning and the overall picture to be derived from the Tribunal's Judgment. Moreover to have accepted, as the Claimant has done, the Tribunal's findings in relation to the decision to dismiss and the refusal of her appeal, it is inconsistent to seek to challenge them as the application would appear to seek to do. The application in our view has no real prospect of success and there is no other compelling reason for this factual issue to take up the scarce and valuable resource of the Court of Appeal.