



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Adrien  
**Respondent:** Bradford College  
**Heard at:** Leeds      **On:** 10-12, 15-17 May 2017 and  
(deliberations only) 5 June 2017  
**Before:** Employment Judge Maidment  
**Members:** Mr R Stead  
Mr J Simms

## Representation

**Claimant:** In person  
**Respondent:** Mr L McDevitt, Counsel

# RESERVED JUDGMENT

1. The Claimant's complaints of harassment related to race succeed in that
  - 1.1 the Respondent failed to deal with the racist conduct of the Claimant's students or failed to deal with them effectively, with the result that the Claimant continued to have to work in a hostile environment.
  - 1.2 the Respondent did not uphold his grievance about the way in which the College had responded to his complaints.
2. The Claimant's remaining complaints of harassment relating to race fail and are dismissed.
3. The Claimant's complaints of direct discrimination because of race fail and are dismissed.
4. The Claimant's complaints of victimisation arising out of his treatment by Ms Mollicone succeed in that
  - 4.1 On 20 September 2016 she unilaterally varied the Claimant's role, effectively demoting him from the role of acting deputy.
  - 4.2 On 20 September 2016 she excluded the Claimant from the teachers' office by moving his desk.

- 4.3 On some date before 30 September 2016 she deliberately omitted to inform him that he was able to apply for the substantive post of deputy head teacher.
- 4.4 On 20 September 2016 she removed the Claimant from teaching humanities and gave him a basic employability course instead and allocated him two large groups of students rather than the three smaller groups allocated to other teachers.
- 4.5 On a date after 20 September 2016 she gave the Claimant the task of searching people with a scanner on their entry to the building, a task previously allocated to support staff rather than teachers.
- 4.6 On a date after 20 September 2016 she fabricated a late fee in order to justify the Claimant's students not being given the qualifications they had worked for.
- 4.7 On a date after 20 September 2016 she falsely alleged that the Claimant's students were not given their qualifications because he had failed to register them for the course.
- 4.8 On 20 September 2016 she extended the Claimant's probationary period for three months to the end of November 2016 without giving him any notice that she intended to do this.
- 4.9 She did not provide the Claimant with the targets he needed to meet his extended probationary period until 1 November 2016, thereby setting him up to fail.
- 4.10 On a date in November 2016 she referred him for disciplinary proceedings in relation to his alleged unprofessional conduct at a meeting on 10 November 2016.
- 4.11 On an unspecified date, Ms Mollicone referred a complaint from a parent and pupil about the Claimant to the college's quality and standards team without further asking the Claimant or Mr Farooq, another teacher who had completed a report about the incidents, for their version of events.
- 4.12 In her management report for the purposes of the disciplinary proceedings that led to his dismissal, she recommended his dismissal and did so on the basis of a report that was deliberately misleading in that:
  - 4.12.1 It included material about complaints from a student and a parent that had never been put to the Claimant or discussed with him.
  - 4.12.2 It did not include any input from the Claimant about those incidents nor mention the contents of Mr Farooq's incident report.
  - 4.12.3 It stated that the Claimant had not met the probationary target of Level 2 maths and English when the Claimant had notified her that he had met that target.

5. The Claimant's remaining complaints of victimisation fail and are dismissed.

6. This matter shall be listed for a further hearing to determine remedy with a time estimate of 1 day.

## REASONS

### 1. The issues

- 1.1. The complaints in these proceedings are of race discrimination and victimisation. The Claimant is of black British/Afro Caribbean ethnicity. No claim of unfair dismissal is pursued in circumstances where the Claimant did not have the necessary qualifying service to bring such complaint. The Claimant's complaints were identified at and following a Preliminary Hearing on 25 January 2017 and those remain the issues for the Tribunal to determine save that the Claimant has since that hearing withdrawn a separate complaint of indirect discrimination.
- 1.2. The Claimant firstly complains of harassment related to race pursuant to section 26 of the Equality Act 2010. Such complaint was pursued against a background of the Claimant having been subjected to racist abuse by a pupil whom he taught. The Claimant alleges:
  - 1.2.1. That the Respondent failed to deal with the racist conduct of the Claimant's students or failed to deal with them effectively, with the result that the Claimant continued to have to work in a hostile environment [This was framed as a wide ranging complaint in essence that the Respondent failed to appreciate and take seriously, including in terms of how it was viewed as an institution, racist abuse which was having a detrimental effect on the Claimant].
  - 1.2.2. That the Respondent failed to deal at all with his complaints about students' behaviour until he raised a grievance in March 2016.
  - 1.2.3. That the Respondent did not uphold his grievance about the way in which the College had responded to his complaints.
  - 1.2.4. The Respondent failed to take sufficiently strong action in relation to the abusive student [This complaint is specifically about the failure to exclude Student A].
- 1.3. In the alternative, the above mentioned four limbs of the racial harassment complaint are brought as complaints of direct discrimination pursuant to section 13 of the Act i.e. less favourable treatment because of race. The Claimant relies on Ms Louise Mollicone, head teacher, who is white, as a comparator alleging that the Respondent acted more decisively to protect her from unacceptable student behaviour than it had done to protect him in that when a student threatened her, this student was excluded.
- 1.4. Finally, the Claimant brings complaints of victimisation pursuant to section 27 of the Act. In so doing he relies on the grievance he presented to the Respondent in writing alleging discrimination on 23 March 2016 and his complaint to the Employment Tribunal lodged on 6 July 2016 as protected acts. He alleges that because he has done those protected acts, the

Respondent and, in particular, through the head teacher, Ms Mollicone, subjected him to the following detriments:

- 1.4.1. On 20 September 2016 she unilaterally varied the Claimant's role, effectively demoting him from the role of acting deputy.
- 1.4.2. On 20 September 2016 she excluded the Claimant from the teachers' office by moving his desk.
- 1.4.3. On some date before 30 September 2016 she deliberately omitted to inform him that he was able to apply for the substantive post of deputy head teacher.
- 1.4.4. On 20 September 2016 she removed the Claimant from teaching humanities and gave him a basic employability course instead and allocated him two large groups of students rather than the three smaller groups allocated to other teachers.
- 1.4.5. On a date after 20 September 2016 she gave the Claimant the task of searching people with a scanner on their entry to the building, a task previously allocated to support staff rather than teachers.
- 1.4.6. On a date after 20 September 2016 she fabricated a late fee in order to justify the Claimant's students not being given the qualifications they had worked for.
- 1.4.7. On a date after 20 September 2016 she falsely alleged that the Claimant's students were not given their qualifications because he had failed to register them for the course.
- 1.4.8. On 20 September 2016 she extended the Claimant's probationary period for three months to the end of November 2016 without giving him any notice that she intended to do this.  
[The Claimant clarified before the Tribunal that his complaint was not about the extension of his probationary period itself but the way in which such extension was activated (and in particular the lack of notification given to the Claimant at the time).]
- 1.4.9. She did not provide the Claimant with the targets he needed to meet his extended probationary period until 1 November 2016, thereby setting him up to fail.
- 1.4.10. On a date in November 2016 she referred him for disciplinary proceedings in relation to his alleged unprofessional conduct at a meeting on 10 November 2016 when no action was taken in relation to other teachers behaving unprofessionally in meetings (the Claimant clarified that his complaint was being pursued indeed in relation to a 10 November meeting and not in addition a meeting he held with Ms Mollicone on 16 November 2016).
- 1.4.11. On an unspecified date, Ms Mollicone referred a complaint from a parent [and pupil] about the Claimant to the college's quality and standards team without further asking the Claimant or Mr Farooq, another teacher who had completed a report about the incidents, for their version of events.

- 1.4.12. In her management report for the purposes of the disciplinary proceedings that led to his dismissal, she recommended his dismissal and did so on the basis of a report that was deliberately misleading in that:
  - 1.4.12.1. It included material about complaints from a student and a parent that had never been put to the Claimant or discussed with him.
  - 1.4.12.2. It did not include any input from the Claimant about those incidents nor mention the contents of Mr Farooq's incident report.
  - 1.4.12.3. It stated that the Claimant had not met the probationary target of Level 2 maths and English when the Claimant had notified her that he had met that target.
  - 1.4.12.4. It stated that the deadline for meeting that target had been 30 November 2016 whereas she had informed him that the deadline was 2 December 2016.

## 2. The evidence

- 2.1. The Tribunal had before it a bundle of documents contained within two full lever arch files and numbering in excess of 863 pages. A small number of additional documents were produced on behalf of the Respondent during the course of proceedings without any objection from the Claimant and in circumstances where he was afforded an appropriate opportunity to consider such documentation before having to deal with it.
- 2.2. The Tribunal having identified the issues with the parties, spent the remainder of the morning until 2.25pm on the afternoon of the first day of hearing reading into the parties' witness statements and, where possible, relevant documentation. Where the Tribunal had not had an opportunity to read relevant documents it asked the parties to refer to relevant documents and pause to allow suitable reading time as they arose during cross-examination.
- 2.3. The Tribunal heard firstly from the Claimant whose cross-examination was completed at 11.15am on the third day of the hearing. The Tribunal then heard, on behalf of the Claimant, from Mr Peter Sheargold, learning support assistant.
- 2.4. The Respondent's witness evidence commenced at 1.30pm on day three with Louise Mollicone, head teacher of the Respondent's pupil referral unit ("PRU"). She was followed at 3.45pm on day four of the hearing by Mr John Kenyon, interim deputy principal of the Respondent. His evidence continued until concluded at 10.35am on day five. The Respondent next called David Hambleton, director of finance and corporate services, Anita Lall assistant principal for the sixth form and academic college, David Harwood, principal and Richard Thomas, higher education provost. Towards the end of the fifth day of hearing Ms Mollicone was recalled to deal with additional documentation disclosed. Day six of the hearing was taken up with hearing firstly the Respondent's submissions and then the submissions made by the Claimant in support of his complaints. The Tribunal's deliberations then commenced and

concluded after a further day when the parties were not required to attend the Tribunal.

- 2.5. Having considered all the relevant evidence the Tribunal makes the findings of facts as follows.

### 3. The facts

- 3.1. The Respondent operates predominantly as a sixth form college and further education institution. It also operates a pupil referral unit ("PRU") sub contracted from the Bradford District PRU. The PRU accommodates, on average, 30 14-16 year old pupils who have all been excluded from mainstream schools primarily because of behavioural issues. All of the referrals to the PRU come from the Bradford District PRU which retains ultimate responsibility for the pupils.
- 3.2. The PRU offers GCSE qualifications as well as functional and work skills' qualifications. The pupils within the PRU are not by any means necessarily incapable of achieving higher level qualifications but are there because, largely, their own behaviour within ordinary schools has inhibited their learning and development. Some more commonly have dysfunctional family backgrounds where they might have experienced past or continue to be at risk of various forms of abuse. Undoubtedly, the pupils within the PRU are prone to exhibit difficult and challenging behaviour towards their fellow pupils and any teaching staff which will commonly includes verbal abuse, threats and actual damage to property and threats of and, in extreme cases, actual assaults on teaching staff.
- 3.3. The pupils attend the PRU on a full time basis wherever possible although occasionally the PRU may ask to arrange bespoke timetables requiring pupils to attend only a reduced number of hours or indeed requiring their education to be provided in the home environment and not physically at the PRU.
- 3.4. The Respondent has available to it a number of policies and procedures aimed at managing student behaviour and complaints including an anti-bullying and harassment policy and procedures for students, a student positive behaviour policy, a separate student behaviour policy, and FE complaints procedure and a student's positive behaviour discipline policy.
- 3.5. The Claimant commenced his employment at the PRU on 1 September 2015 as a teacher of humanities. His employment was subject to a 12 month period of probation during which his suitability for the position was to be assessed. During his probation period, employment could be terminated by either party giving one month's written notice and the Respondent's disciplinary and capability procedures were disapplied during this 12 month probationary period.
- 3.6. The Claimant describes himself as being of mixed race (African-Caribbean and white British) and as self identifying as black. The Claimant is 51 years of age, a qualified teacher and had 20 years experience of working in education, training and employment. He described that most of his working life had focused on working with challenging and marginalised children and young people which had included service at a young offenders' institution and managing a re-settlement unit for young offenders.
- 3.7. The Claimant was appointed by Mr David Penny, the previous head teacher of the PRU and as well as teaching humanities was also asked to teach ICT

(functional skills). The Claimant described a discomfort in teaching this subject due to his own lack of subject knowledge and the IT equipment provided for pupils being, in his words, not fit for purpose.

- 3.8. Ms Mollicone's involvement with the PRU commenced in December 2015 when Mr Kenyon, interim vice principal, asked her to cover the PRU for a few hours a week to provide a senior leader presence in the absence of Mr Penny. Ms Mollicone had been with the Respondent for around 10 years starting as a trainer/assessor and then teaching in the Public Services Department and Motor Vehicles where she was the curriculum team leader. She then served on a temporary basis as the 14-19 co-ordinator before in January 2016 commencing, in replacement of Mr Penny, as interim head teacher at the PRU. This role was made permanent in May 2016.
- 3.9. Ms Mollicone described herself as being responsible for the day to day running of the PRU together with the staff within it. At all relevant times there were five teachers employed within the PRU, including the Claimant. The Claimant was the only black teacher, the other four comprising of an Asian male, an Asian female and two white British females. They were supplemented and assisted by 10 support staff of a range of ethnicities but including two black members of staff. Peter Sheargold as a learning support assistant was one of the black members of that support staff team.
- 3.10. Ms Mollicone's powers were limited in some respects by the responsibility retained by the District PRU. The exclusion of a pupil, for instance, could only be authorised at District PRU level where the relevant point of contact was its senior manager, Mr John Kane. Any incidents of particular poor or disturbing behaviour by one of the pupils in the PRU would routinely be logged on an incident report and, where felt serious enough, sent to District PRU together with a recommendation. Whilst the PRU might recommend expulsion, any decision rested with the District PRU. In the event that immediate action had to be taken, for instance, where a pupil was a potential risk to himself or others and no one from District PRU was available, Ms Mollicone might at times have to make a decision as to the appropriateness of an exclusion albeit this would only ever be for a usually brief temporary period pending discussions with and a decision issued from District PRU.
- 3.11. The placement of pupils within the PRU was already effectively a last chance for pupils to receive some form of education. Some pupils within the PRU will typically have been excluded from at least but often more than one school (and indeed a specialised exclusion unit within such a school) before arriving at the PRU. Whilst pupils expelled from the PRU may then potentially receive some education provision from the District PRU, an unavoidable reality is likely to be a pupil almost disappearing from education oversight and sometimes spending his or her time at home, often in an abusive or dangerous environment or effectively 'on the streets'. The Tribunal accepts that a determination to permanently exclude a pupil from the PRU therefore was one which the District PRU in particular would wish to avoid if at all possible.
- 3.12. Soon after the Claimant commenced his employment with the Respondent he became concerned at a lack of promotion of values of equality and diversity to the students and emailed Mr Penny on 8 October 2015 to that effect. Mr Penny considered the Claimant's comments to be sensible and a "necessary next step".

- 3.13. The Claimant told the Tribunal that on 31 October 2015, when referring to the pupils following each other's bad behaviour "*like sheep*", one of the pupils had "*squared up*" to him and said:

*"If I'm a white sheep, you are a fucking black ape"*.

Whilst the Claimant had experienced racial abuse during his employment prior to joining the Respondent he was shocked by such extreme behaviour. He said he had been assisted by two other members of staff who had completed incident reports albeit the Tribunal has not had the benefit of seeing any. The pupil in question was excluded by Mr Penny for a temporary period.

- 3.14. From around January 2016 the Claimant experienced difficulties with Student A who used racist language in his presence, specifically the term "*nigger*". The Claimant described the continued use of racist language by Student A and other pupils.
- 3.15. By email of 26 January 2016 the Claimant reported concerns for his safety from pupils found to be in possession of dangerous weapons. Ms Mollicone responded positively to the Claimant the following day referring to her hope that the use of a security "*wand*" to detect metallic items would help build up staff confidence and thanking the Claimant for his hard work. At this point Ms Mollicone was clearly anticipating that she would be more involved and present within the PRU.
- 3.16. On 1 February 2016 Ms Mollicone was herself threatened by Student O. Student O was one of only two special needs students within the PRU. Ms Mollicone said that by this point in time Student O had already accumulated a very thick file containing reports of incidents in which he had been involved. He had exhibited a history of threatening behaviour towards female members of staff and the most recent incidents of such behaviour had occurred on 19 January 2016 involving a teacher, Vanessa Phillimore.
- 3.17. Ms Mollicone, accompanied by Mr Sheargold, arranged to meet with Student O and a grandparent on 1 February. However, the meeting came to an abrupt end as Student O made threats of violence towards Ms Mollicone in particular threatening to "*rip my fucking head off*". Ms Mollicone described Student O's behaviour towards her as exceptionally aggressive and menacing with him appearing to be out of control, baring his teeth at her. Mr Sheargold also gave evidence regarding this incident and his own intervention when Student O went to kick a door. He described Ms Mollicone as saying that she was not going to be threatened in her place of work. Student O was temporarily excluded pending the sending of incident reports to John Kane at District PRU. He decided that Student O be permanently excluded from the PRU.
- 3.18. Mr Sheargold himself was subjected to threatening behaviour on 8 February 2016 by Student E. He was the other special needs student in the PRU. On the day in question he had called Mr Sheargold a "*black cunt*", had thrown a fire extinguisher towards him and had threatened that his father would "*batter*" Mr Sheargold. Student E had to be restrained by other students before an administrative assistant assisted in leading Mr Sheargold away from him. Again, incident reports were completed and sent to District PRU. In his case there was no decision to permanently exclude. Ms Mollicone's understanding was that there were safeguarding issues posing a risk to Student E if he was at home. Following a period of temporary exclusion, Student E returned with his



father for a restorative meeting with Ms Mollicone. She observed that Student E's father was drunk at their morning meeting. Student E said he was sorry about his behaviour and he was allowed to return to the PRU. Ms Mollicone noted in her summary of the meeting the temporary nature of the exclusion and any permanent exclusion decision resting with District PRU only. They did not action a permanent exclusion.

3.19. Mr Sheargold had not been invited to this restorative meeting which, in her note of meeting, Ms Mollicone described as an oversight albeit with hindsight she was not convinced that she had made the wrong decision *"as there was still tension regarding the incident due to the racial abuse Pete had experienced"*. Ms Mollicone apologised to Mr Sheargold for her omission.

3.20. On 25 February 2015 the Claimant challenged Student A about his continued use of the word *"nigger"*. The Claimant's evidence was that Student A said that if he didn't:

*"Shut the fuck up, nigger's gonna get knocked the fuck out ... keep chatting shit and I'll bang you"*.

Student A then threw a table over in the Claimant's direction and stormed out of the room. The Claimant maintains that he recorded this incident in a log entry. The Tribunal does not have a copy of such log before it but the Respondent does not contend that the Claimant is inaccurate in his account. The evidence before the Tribunal is also that Ms Mollicone appraised herself on an ongoing basis of all such incident logs such that, whilst she has no specific recollection, it is likely that she read the Claimant's entry regarding this incident with Student A.

3.21. Student A continued to attend the PRU and no specific steps were taken by the Respondent to discuss his behaviour with him. Student A was, however, removed from the Claimant's form class and placed on a reduced timetable. Nevertheless, Student A's behaviour and, in particular, his use of racist language continued.

3.22. On 15 March 2016 the Claimant completed an incident report where he described Student A as continuing to make negative racist comments which the Claimant found to be abhorrent and very offensive.

3.23. On 17 March 2016 Ms Phillimore completed an incident report where she noted Student A referring to another student as *"a chimp"*. On the same day another teacher, Ashiq Hussain reported that Student A *"playfully called"* another pupil a *"black bastard"*. An incident report of 17 March from Amar Farooq recorded another pupil shouting *"monkey bastard"* when he saw the Claimant pass by. That pupil and Student A and others were noted separately by one of the support staff, Lisa Donoghue, on 17 March using racist language.

3.24. The Claimant's evidence is that at a staff meeting on 17 March 2016, Ms Mollicone said that if his racist language continued he would either be excluded or home schooled. Ms Mollicone had no recollection of having made such a statement but in circumstances where the Claimant's account was very specific and detailed and Ms Mollicone's recollection much less certain (and also given concerns regarding her evidence and its reliability more generally as set out below), the Claimant's account is accepted. The Tribunal has seen a chain of email correspondence which included the District PRU regarding the possible adaption of a home schooling agreement albeit without reference to any

specific student. Ms Mollicone's position is that there was no move to introduce home schooling for Student A but again the Claimant's evidence is preferred to the extent that he was given the impression, including by Ms Mollicone, that such steps were being taken.

- 3.25. On 18 March 2016 the Claimant emailed Ms Mollicone saying that he had felt compelled to raise with her "*the racism I have experienced at work*". He recounted a number of the names used by pupils towards him and said that on only one occasion had there been a restorative meeting leaving him feeling that the sanction was not strong enough and that no clear message was sent out to pupils that this behaviour was unacceptable. He said that some of the pupils involved had gone on to further racially abuse him. Whilst recognising that there would be challenging behaviour within the PRU he said he felt the level of racism should not be tolerated and referred also to the treatment of "*another black staff member*" (Mr Sheargold) where a student who had threatened him (as described) was allowed back after a short exclusion.

- 3.26. The Claimant went on to say:

*"My concern is further exacerbated by some of the attitudes to racism from some of the staff. At the staff meeting on Tuesday I told the group about the racist language I heard from one of the students. One of the staff members started laughing (Harriett). I felt compelled to challenge her about this. But I fear that this in itself is not enough. Later in the meeting another staff member (Emma) basically said I should ignore the racist language as the student was "trying to wind me up". I do not feel that we should ever turn a blind eye to bigotry and it is part of our role within the school to challenge negative attitudes when we are aware of them"*.

- 3.27. He said that he felt that his experiences had affected his health and well being, going on to say:

*"It has affected my morale, I am feeling stressed and have recently experienced chest pains which I find worrying"*.

He said that he thought he should contact Ms Mollicone about the matter first rather than going to human resources so that she was able to tackle the issue.

- 3.28. On receipt of this email Ms Mollicone emailed Susan Ibbitson, interim HR manager, and Helen Taylor, HR business partner, to ask for their assistance. Ms Ibbitson advised her of the process which would usually be followed when an employee raises a complaint in terms of an attempt to resolve the issue informally. In an email from Ms Mollicone to Ms Ibbotson and Ms Taylor of 21 March 2016 she noted the Claimant's concern regarding "*racial comments being disregarded*". She noted that Student A had received a temporary two day exclusion due to the racial comments but that he had attended school that day and was refusing to have a restorative meeting with the Claimant. She referred to the Claimant being going to apparently contact his union and suspecting that *he "will go off sick"* as he had been asking staff to write reports regarding her decision to allow Student A back. She noted that she was not prepared to exclude Student A "*so close to his exams, but will do an internal exclusion in the hope of addressing this ongoing issue*". She ended the email asking if there was anything else she should be doing "*to protect myself*".

- 3.29. The Claimant was in fact absent due to sickness from 22 March 2016 feeling "*run down, full of cold and really stressed*". This had in part been triggered by

the Claimant seeing Student A in the PRU premises during the day of 21 March 2016.

- 3.30. The Claimant had received an email response to his complaint from Ms Mollicone on 18 March saying that she had taken advice and wanted to assure him that the matter was being dealt with.
- 3.31. On 23 March Ms Mollicone had emailed Assia Hussian, curriculum diversity co-ordinator and Operation Prevent lead. to ask if she could deliver a session on how to deal with racial comments to ensure that staff felt supported. She received a response from Ms Hussain on 14 April seeking to progress this. Ms Mollicone also made arrangements to speak to Student A's mother. She described his mother as being supportive in terms of additional steps to ensure that Student A corrected his behaviour. An amended timetable was agreed whereby Student A would come in from 2-4pm only and would be enrolled only on the core courses of maths, science and English in order to avoid the Claimant's classes. Given these steps which could be taken and again the proximity of Student A's GCSE examinations, Ms Mollicone did not feel permanent exclusion to be appropriate.
- 3.32. The Claimant was not aware at the time of all of these steps which Ms Mollicone was taking. Having, in particular, seen Student A back at the PRU he believed that his concerns were being either not listened to or totally ignored and had no confidence that they were being addressed. He informed Dawn Tucker-Brown, director of human resources, of his view attaching to an email to her of 23 March his written grievance which she confirmed in response she would ensure was dealt with at stage two of the Respondent's grievance procedures.
- 3.33. The Claimant's grievance commenced stating that he wished to raise a grievance against the Respondent *"for the breach of its own equality and diversity policy"*. He described the racist behaviour directed at him from pupils and said that he did not feel there had been a response that had *"either been proportionate or adequate or has served to ensure students reflect and learn from their behaviour and realise that their actions are illegal"*. He stated:  
*"Indeed, I feel recent actions have served to show that students can be racist and escape formal sanction"*
- He referred to Student A and his view that insufficient sanction had been imposed with, he said, Ms Mollicone informing a team meeting on 21 March that nothing could be done in terms of a permanent exclusion commenting that the *"schism"* between the Respondent and District PRU has been used as a constant excuse for no action being taken. Again he said this was in direct contravention of the equality and diversity policy. He referred to being put under unnecessary exposure to racism and to the toll on his health.
- 3.34. Dawn Tucker-Brown forwarded the Claimant's grievance to John Kenyon, interim deputy principal, stating that it seemed to be a very serious allegation and questioned the relationship between the Respondent and the District PRU. Helen Taylor formally acknowledged the Claimant's grievance by email of 29 March saying that she would be supporting Mr Kenyon who had been asked to investigate it. She said that due to the Easter break the Respondent was unlikely to meet the 10 day timetable for discussing his grievance with him. It was then proposed that the Claimant attended a meeting to discuss his

grievance on 11 April 2016. Whilst Ms Taylor was present to take a note of this meeting, these notes cannot be located by the Respondent.

- 3.35. The Tribunal accepts that the Claimant was given an opportunity to explain his key concerns and that he did explain to Mr Kenyon concerns regarding Student A's behaviour and the racist comments he had made. Mr Kenyon accepted the veracity of the Claimant's account of Student A's behaviour and considered that Student A had both been acting inappropriately and was also trying to provoke a reaction from the Claimant. He considered that the "*other issue*" to determine was what needed to be done following the incident in terms of the sanction to be applied to Student A.
- 3.36. Mr Kenyon's consideration was that whilst the PRU might recommend exclusion, the District PRU and it alone had the power to permanently exclude pupils. He thought that it would be highly unlikely if not impossible to put forward a successful proposal for permanent exclusion based upon the facts the Claimant had provided. Exclusion he considered would be more likely in the case of violent physical attacks particularly those persistent in nature. He considered that the focus of the PRU would always be on a restorative process to provide an opportunity for pupils to learn. Mr Kenyon explained that he would be making arrangements to meet Student A and his parents and would come back to the Claimant with a decision. He sought to explore with the Claimant whether he would find an apology from Student A to be a satisfactory resolution. He explained to the Tribunal that effectively he was appealing to the Claimant's better nature hoping that he would understand the consequences for Student A and that this was very much Student A's last chance.
- 3.37. Mr Kenyon met with Ms Mollicone on 12 April 2016 explaining that he was considering a complaint of a breach of equality and diversity principles. Ms Mollicone explained that since September Student A had refused to go to the Claimant's classes and said that he did not like him. That was not accurate. Student A had been a member of the Claimant's form since the Claimant's commencement of employment and had certainly attended the Claimant's humanities classes completing a portfolio on the topic of slavery. She explained a difficulty in undertaking a restorative process and explained a reduction in Student A's timetable recently implemented to avoid contact with the Claimant. Ms Mollicone said that John Kane of District PRU had agreed with her on one exclusion in the past, but was not keen on it. She said that they did within the PRU pick up on the use of language but the problem was that there was "*a lot of banter*". Ms Mollicone, on being asked whether she had completed her stage 1 actions, said she had been still dealing with the matter when the Claimant had elevated his grievance to stage 2. She reiterated that Student A wouldn't engage in restorative meetings. Mr Kenyon expressed the view to her that there was a need to insist on the restorative meeting now taking place and for Student A to apologise to the Claimant. He said that Student A needed to engage with the Respondent on this.
- 3.38. Mr Kenyon met with Student A and his mother on 19 April 2016 on an informal basis to try to find a solution. He described Student A as surly and not actively engaging in the meeting, albeit he did not view this reaction as unexpected. Mr Kenyon explained that he would expect Student A to apologise. Student A initially refused to do so. Mr Kenyon then saw Student A's mother on her own to explain that it was highly unlikely that Student A would be excluded, but it was imperative that his behaviour improved and that he took restorative steps

otherwise he could face expulsion. He explained that this would require Student A to apologise for his actions and attend a meeting with the Claimant as well as a hate crime course to appreciate the seriousness of his actions. It was explained that the alternative timetable would stay in place to avoid contact between Student A and the Claimant.

- 3.39. Mr Kenyon was of the view that the restorative meeting would be best facilitated by a person who had a relationship with both parties and who could be seen as neutral. He therefore did not feel it was appropriate to be involved in the meeting himself and thought that the matter could be dealt with within the PRU.
- 3.40. The restorative meeting attended by the Claimant and Student A took place on 25 April 2016. Ms Mollicone said that she was unable to attend as she was observing another teacher's lesson. Humar Ahmed, a science teacher in the PRU and Liane Moore, pastoral manager, attended the meeting instead. The Claimant was disappointed at Ms Mollicone's lack of attendance. His evidence, uncontradicted by any evidence on behalf of the Respondent, was that Student A refused to fully apologise saying that he was "30% sorry". He also made it clear that he could not promise not to make any further racist comment. The Claimant said that he tried to get Student A to understand the effects on people of racism but felt that Student A wasn't interested and was hostile throughout.
- 3.41. The Claimant's lack of satisfaction at the restorative meeting was in fact echoed in an email from Ms Mollicone to Mr Kenyon on 26 April which she opened with the statement:
- "The restorative meeting did not go as planned yesterday ... whilst [Student A] did mutter an apology he would not apologise to Roger and Roger left the meeting saying it wasn't working".*
- 3.42. Mr Kenyon's view was that perhaps the Claimant had been "expecting a little too much" from Student A in terms of the likely extent of an apology. He said that he thought that the level and manner of apology Student A gave would have been within reasonable expectations under the circumstances.
- 3.43. Ms Mollicone was able to update Mr Kenyon by email of 3 May 2016 to the effect that Student A had signed a behaviour contract and confirming that his timetable had been finalised so that he would not have direct contact with the Claimant. She reiterated that Student A was aware that any further behaviour of this nature could result in his permanent exclusion from the PRU.
- 3.44. The Claimant emailed Ms Mollicone on 9 May 2016 having seen Student A back at the PRU and querying whether Student A had met the criteria prescribed in order to allow him to return. He asked Ms Mollicone to let him have the rationale behind the decision to allow Student A to return as he stated he felt very uncomfortable by his presence. Ms Mollicone said that she contacted human resources who advised not replying to the Claimant's email as the Claimant was continuing to progress his grievance "through the formal channels".
- 3.45. In fact, by this stage Mr Kenyon had already written to the Claimant and indeed on 20 April 2016 before the restorative meeting to give his effective outcome on the Claimant's grievance. This referred to the informal meeting he had held with Student A and his mother. It said that he had formally requested of Student A a full apology to the Claimant and for him to sign the behaviour

agreement. He said that failure to agree or undertake this restorative stipulation would result in Student A being removed from mainstream learning at the PRU and in home school arrangements being put in place. He said he was reluctant to fully exclude Student A so close to his GCSE exams. He concluded that Ms Mollicone's actions in response to the Claimant's raising of his concerns were appropriate in that she had implemented Student A's removal from the Claimant's class and sought a restorative process. Student A's refusal to comply was being dealt with but was superseded by this stage 2 grievance. The Claimant considered, as is clear from his email of 9 May, that Student A had not satisfied the conditions Mr Kenyon said he would have to be allowed back into mainstream learning at the PRU.

- 3.46. The Claimant was further concerned that Mr Kenyon's letter did not state whether or not his grievance had been upheld. Further he was disappointed that Mr Kenyon had not addressed, as he put it, the broader issues he had complained of in respect of the Respondent breaching its own equality and diversity policy. He viewed the outcome as focusing solely on Student A's behaviour and Ms Mollicone's response which was not what his grievance was all about. He felt that Mr Kenyon had acted so as to minimise his complaint. When being cross-examined Ms Mollicone was referred to the statement of Ashiq Hussain and the reference to a pupil "*playfully*" being called a black bastard. Again she confirmed that she would have read that incident report at the time it was submitted on 17 March 2016. She accepted that in her view Mr Hussain had "*minimised*" the seriousness of the comment. She also accepted that she had not spoken to either Harriett or Emma regarding their attitude towards racist behaviour as set out in the Claimant's original complaint to Ms Mollicone.
- 3.47. It is clear from Mr Kenyon's evidence that he did not consider such aspects of the reaction of staff within the PRU to racist behaviour. He did see the grievance as focusing on the behaviour of Student A and when it was put to him in cross-examination that he expected the Claimant to accept the outcome and move on he responded that "*possibly, yes*" that was his expectation including in circumstances where he thought it was very difficult for students to make a full apology. When pointed now to the reaction of other teachers towards racist incidents he accepted that the reference to the aforementioned comment being made "*playfully*" was perhaps not appropriate but could be explained by the racism displayed "*not being malicious*". The wording was he described "*injudicious*" but effectively Mr Hussain was trying to say that the comment was "*not malicious*". He thought that the fact that Mr Hussain had recorded it at all was evidence of racism being challenged.
- 3.48. Because Mr Kenyon had not, in the Claimant's view, taken the matter as seriously as he had hoped, he decided indeed quickly to escalate his grievance to stage 3 and emailed the Respondent's chief executive officer, Andy Welsh, on 26 April 2016 with a further stage 3 grievance statement. He accompanied this by a copy of his stage 1 grievance i.e. his email to Ms Mollicone of 18 March as well as his stage 2 grievance statement. This was acknowledged the following day. The Claimant's grievance statement went into some detail giving examples of racist comments to which the Claimant had been exposed and clarifying at the outset that his grievance was fundamentally based on Mr Kenyon's failure to fully investigate his initial grievance for a breach of the Respondent's own equality and diversity policy. Again, the Claimant's

statement gave some graphic examples of racist language used by pupils both towards him or in his presence or to other pupils. The Claimant recognised that he had experienced racism from young people in the past but felt that he had never experienced this level of racism anywhere whether in his private or working life. The Claimant referred also to Mr Sheargold being racially abused and to abuse levelled at a black female member of staff who had now left.

- 3.49. Student A's return to learning within the PRU did not prove to be successful. He racially abused and assaulted a black pupil, Student I on 12 May 2016. The Claimant's evidence was that Liane Moore had told him that Student A had called Student I a "nigger" and a "black cunt" whilst assaulting him. Mr Hussain completed an incident report noting a racist comment but stating:

*"Although it seemed as if the remark was not intended to be racist or stereotypical the effect definitely was as the school has strict policy on these remarks".*

When Ms Mollicone was referred to this statement regarding the comment not being intended to be racist she agreed with the Claimant that Mr Hussain again had minimised the comment and agreed with the Claimant stating:

*"Yes – your concerns are well founded looking at it now"*

- 3.50. Student A continued to attend the PRU and the following day walked into the Claimant's classroom and put his finger in a gun pose pointed at the Claimant and "fired". Later on 13 May a meeting was held with Student A regarding his breach of the behaviour contract in terms of the racist language he had used towards Student I. Ms Moore recorded Student A as becoming verbally abusive and making threats of violence against Mr Kenyon who was in the building meeting with Ms Mollicone at that time. He refused to move from the reception area until Mr Kenyon came down, Student A saying that he was going to knock him [Mr Kenyon] out. Security was contacted and eventually the police were called to achieve Student A's peaceful removal. Further to this incident Ms Mollicone spoke to Student A's mother again and Student A only returned to the PRU for his planned GCSE exams – he had no further lessons to attend in any event beyond 13 May.
- 3.51. On 16 May 2016 the Claimant met with David Hambleton, group finance director and Dawn Tucker-Brown head of human resources to discuss his stage 3 grievance. The Claimant was accompanied by his union representative, Mr Chris Webb. The Claimant explained at length his experiences of racism and threatening behaviour including his witnessing of such behaviour directed at other pupils. He also gave Mr Hambleton an additional submission prepared by a solicitor from whom he had started seeking legal advice. Mr Hambleton undertook to conduct a thorough investigation but explained to the Claimant that this might take a little longer than the 10 days stipulated in the Respondent's grievance policy. The Claimant was content with this as he felt that Mr Hambleton was taking the matter seriously.
- 3.52. In the meantime the Claimant was, at his own request, temporarily transferred out of the PRU to work in another department located in a separate building, the David Hockney building, and where the Claimant fell within the management of Rita Lall. The Claimant worked there on an adult education course developing course materials and conducting student guidance. The Claimant continued to pop into the PRU on around a weekly basis to, he said,

catch up with work or any necessary administration. On occasions he met and spoke with Ms Mollicone and perceived that she had become increasingly hostile towards the Claimant. Given Ms Mollicone's seeking of advice from human resources and determining to seek to stay removed from the Claimant's grievance issues which were ongoing, the Tribunal can accept that the Claimant's perception in this regard was genuine.

- 3.53. The Claimant had a brief sickness absence from work from 21-26 June 2016.
- 3.54. The Claimant became concerned regarding a delay in receiving any outcome to his stage 3 grievance from Mr Hambleton. Mr Hambleton was absent for periods of scheduled annual leave but also subsequent to a family bereavement. He described that he had fully returned to work on 11 July 2016 and then considered his findings. He considered that Student A's behaviour had been inappropriate and it was perfectly understandable that the Claimant had raised complaints regarding it. However, the PRU's focus had always been on educating and developing its students which is why it placed an emphasis on a restorative process in the first instance rather than exclusion. He felt that Ms Mollicone and Mr Kenyon had taken steps to safeguard the Claimant including by making changes to Student A's timetable, investigating home schooling opportunities, agreeing a behaviour contract and, by this point, recommending his expulsion following the further incident involving Student A's conduct towards Student I. He considered the Respondent had acted in accordance with this policy. On that basis he decided not to uphold the Claimant's grievance, but did make a recommendation to the Principal that a working group be established to review the policies and procedures that were in place to deal with student behaviour on a wider level. He thought that it was key to consider the broader picture and what steps could be put in place to safeguard staff going forward. He sent to the Claimant his outcome letter confirming the decision at stage 3 on 18 July 2016. He confirmed that the Claimant had now exhausted the Respondent's grievance process.
- 3.55. The Claimant's view was that Mr Hambleton's investigation had not been as thorough as he had promised. There was no reference to interviewing anyone and the outcomes did not, in the Claimant's view, address the safeguarding and safety concerns which he had raised. Further he felt that, like Mr Kenyon, Mr Hambleton had focused his attention solely on the issues with Student A rather than dealing with the broader issues the Claimant felt he had clearly raised. He considered that Mr Hambleton had missed the point of a restorative process which was supportive also of the victim as well as a learning process for the perpetrator. Shortly after receiving the grievance outcome the Claimant commenced the Respondent's summer break from 22 July 2016.
- 3.56. When questioned about his handling of the Claimant's grievance Mr Hambleton said before the Tribunal that he considered Student A to be the dominant theme but that he had arrived at an outcome which was to have a fundamental review of policy. He felt that the Respondent was now starting to adopt the more detailed policies of the District PRU which were aimed at ensuring a more secure learning environment. He referred to there being a new form of induction put in place for students from September which dealt with diversity issues and a positive behaviour group established at the beginning of December 2016.



- 3.57. He said that he was aware of the Claimant's wider concerns, but at his stage of the grievance the emphasis again was on Student A and he thought his role was to look more at the stage 2 outcome rather than any prior concerns raised by the Claimant. He agreed that he had not looked into the incidents of racism the Claimant was describing and that, within his recommendations and the adoption of new policies he was recommending, there was *"nothing specific on racism"*. Indeed he said he was not aware if the new policies deal with racism.
- 3.58. Prior to receiving Mr Hambleton's stage 3 outcome letter dated 18 July 2016, the Claimant had in fact lodged with the Employment Tribunal on 6 July 2016 an application alleging race discrimination which focused upon alleged inaction in the face of the behaviour of Student A and the Respondent failing to take adequate steps to prevent discrimination. The Claimant recounted his bringing the issues to the attention of Ms Mollicone and then to Mr Kenyon at stage 2 of the grievance process and alleged that they had failed to address his issues. He referred to Mr Hambleton's outcome of his stage 3 grievance being awaited. The Respondent in due course on 19 August 2016 submitted its response to the Claimant's complaints and in particular denying any aspect of race discrimination. There is no evidence and no assertion on their behalf of any lack of knowledge of the Tribunal complaint of the Respondent's witnesses including Ms Mollicone. She was inevitably involved in providing information for the response and knowledge within the Respondent is corroborated by the view expressed by Ms Mollicone and Ms Phillimore that they did not expect the Claimant's return to work. This expectation is unlikely to have arisen solely from the Claimant's brief sickness absence and period away from the PRU.
- 3.59. As already referred to the Claimant's core teaching duties were in respect of a humanities qualification which consisted of two distinct projects resulting in portfolios of written work. The first was on the subject of slavery and was completed by the pupils from September 2015 to January 2016. The second was on the topic of the Vietnam War and was undertaken by pupils from February to May 2016.
- 3.60. On 24 June 2016 Vanessa Phillimore emailed Ms Mollicone raising concerns about a lack of awareness of students having been registered with the examination board for the humanities award. Ms Mollicone sought to investigate what was required for these awards. She emailed the Claimant on 27 June asking him, if he was back at work following a period of sickness, to call into the PRU so that she could complete his back to work interview and book him his appraisal. She also asked if he was able to assist with the emails she forwarded relating to the humanities qualifications saying:
- "I'm concerned that it would appear that our PRU students haven't been registered for your course?"*
- The Claimant replied asking if he could come in the following morning.
- 3.61. It is accepted by Ms Mollicone that she met with the Claimant on 28 June – indeed she conducted a probation review with him on that date. The Claimant's evidence was that when they met he clarified that the pupils had completed their work on both of the humanities units and that there was no requirement with the examinations board for students to be registered in advance. Their work could still be submitted for validation and the issuing of exam board certificates. Ms Mollicone did not address such conversation in her witness statement and her evidence before the Tribunal was vague as to what had

been discussed. She referred to having been told by the Respondent's examinations office that there was a requirement to register pupils, albeit she accepted that that advice turned out to be mistaken. There is no evidence as to when that advice was given but it could certainly have been around this time and before the Claimant's discussion with her. The Claimant's clear and convincing evidence is to be preferred when allied with the aforementioned corroborating evidence that Ms Mollicone wanted to discuss the issue with the Claimant and the Claimant had met with her indeed on 28 June. It is more likely than not that the topic was discussed between them. Furthermore, the Claimant emailed Ms Mollicone on 29 June 2016 to say that he had gone through the completed portfolios and had started completing the check lists although there was still some more work to be done. He then stated that he had liaised with the examination board, AQA, and that they could verify the portfolios but not until September. He stated that the portfolios could be submitted through the AQA gateway saying that: "*Vanessa knows about this process, so can be of assistance*". This email supports the Claimant's account that there was no difficulty with the pupils being submitted for the AQA humanities qualification and that his expectation was that those still working within the PRU, in particular Ms Phillimore, would arrange for the online submission of the portfolios.

- 3.62. On 28 June 2016 Ms Mollicone undertook what was the Claimant's first formal probationary review at the eighth month point of his service. She accepted that earlier reviews ought to have been undertaken by her predecessor but the Claimant was by no means alone in having missed out on earlier reviews.
- 3.63. The Respondent's probationary process is conducted through an electronic system called I-Trent. Whilst probationary review meetings can take place the documented results of the review meeting are published online with any teacher being notified by an automatically generated email if changes were made to the documentation. It was then the Respondent's expectation that the teacher would log back on to the I-Trent system and appraise him or herself of the updates or changes made to the review documentation.
- 3.64. Ms Mollicone told the Tribunal that "*even at this stage*" she had some concerns about the Claimant's performance saying that he had failed to take on board some very basic information, giving as an example a lack of awareness about the pupils' college email addresses. She said she also had concerns about his level of absence. Nevertheless she said that at this stage she assessed that certain aspects of his performance should be rated as "*good*" including his timekeeping, teamwork and lesson observation. Other elements would be rated as "*improvement required*" for example his attendance and teaching and learning. She explained that as part of her routine observation of the Claimant's teaching she had previously rated him as requiring improvement after viewing one of his lessons on 23 February 2016. This resulted in the Claimant being observed within a two week time frame again and indeed on 11 March 2016 the Claimant achieved a higher rating as there had been an improvement although Ms Mollicone maintained before the Tribunal that there were still aspects where improvement was required. Ms Mollicone recounted that the Claimant had expressed some concerns during her meeting regarding sanctions for student behaviour and had also expressed concerns about the requirement that he teach ICT in circumstances where he had a lack of subject knowledge.

- 3.65. Ms Mollicone's evidence before the Tribunal is that on 19 July 2016 she undertook the Claimant's 10 month review. The Tribunal has been referred to multiple copies of review documentation where comments and information appear to have been added at various stages but without any clarity as to when or in what circumstances. This further review documentation includes a requirement, which the Claimant accepts was a requirement of his successful completion of the probationary period, that he achieved a level 2 qualification of his own in English and Maths. It was also accurate to record that as at June/July 2016 the Claimant had not made any progress towards those qualifications.
- 3.66. However, the Tribunal notes that, whereas at the June review timekeeping was straightforwardly recorded as being good, in the review documentation purportedly completed in July while that rating is retained it is stated that "*there were a couple of times that I had to remind Roger that he needed to inform me if he was leaving the building for meetings etc*". As the Claimant pointed out this made no sense in that in-between the completion of the June review and the purported completion of the July review the Claimant had not actually been working within the PRU and therefore there could not have been any criticism made by Ms Mollicone during this period of his disappearing to attend external appointments. She certainly had no examples from this period. Ms Mollicone in answer to questions before the Tribunal said that she could only explain that she was summarising the whole 10 month period and perhaps the Claimant's disappearance and appointments should have been mentioned in the June review. Ms Mollicone on questioning agreed that the review documentation also referred in critical terms to the Claimant carrying out 'one to ones' but accepted also that he was not required to do these until he returned to work after the summer break in September 2016. Finally, the review documentation recommends that the Claimant's probationary period is extended by six months "*which would allow Roger to address the areas of concern*". Ms Mollicone then said that having double checked the position with human resources she was informed that under the Respondent's probationary policy she was only permitted to extend the probationary period for three months.
- 3.67. The Claimant was not told in or around July of an extension of his probationary period by either six or indeed three months. It is noted that the Claimant's 12 month period of probation expired at the end of August. The Respondent was unable to explain to the Tribunal, whether through Ms Mollicone or otherwise, why the Claimant had not been explicitly informed of the probation extension.
- 3.68. The Tribunal accepts that the Claimant did not indeed see these probationary review documents until October 2016 and no evidence has been provided that the Claimant was alerted to any changes in the probationary review documentation.
- 3.69. Ultimately, the Tribunal is faced with a number of similar but not identical probationary review documents purporting to date from July albeit in the case of one review document with a handwritten date of 28 June and in circumstances where at least some of the comments regarding the Claimant can only have been made at a later date. Ms Mollicone has been unable to provide a coherent explanation for the compilation and sequencing of the performance review documents and changes made to them such that the Tribunal cannot rely on those documents and their accuracy. When it was put to her by the

Claimant that the probationary review documents had been fabricated, Ms Mollicone's response was that they *"were not completely fabricated"*.

- 3.70. The Respondent through its HR department wrote to the Claimant on 22 September stating that:

*"Following your last review with your manager, it has been agreed that your probationary period has been extended for a further three months. This has been effective from 1 September 2016"*.

The Tribunal concludes that this is the earliest occasion the Claimant was aware of any extension to his probationary period.

- 3.71. The Respondent was unable to give any explanation as to why the Claimant had not been told of any extension to his probationary period at an earlier stage. There was no suggestion that it was sufficient or part of the Respondent's normal practice to simply include an extension of a probationary period within the I-Trent system rather than specifically notifying any affected employee.
- 3.72. Following on from the Claimant's discussions with Ms Mollicone, his June probationary review and his communication to Ms Mollicone regarding submitting the humanities portfolios through the AQA gateway, Ms Phillimore and Ms Mollicone undertook the Internal Verification (IV) of the portfolios. The purpose of the IV process is to ensure that there is consistency in the marking of the students work but also in the level of feedback being given. It also gave the PRU the opportunity to assess how many of the pupils were at a level of attainment sufficient to achieve the awards. Usually, the examination body would undertake its own external verification process (EV) to spot check the IVs already carried out internally.
- 3.73. Ms Mollicone and Ms Phillimore IV'ed the work of 29 students undertaking the humanities award from 18-20 July 2016. The IVs were limited to the Vietnam War module. As will explained no IV ever took place of the slavery module.
- 3.74. Their assessment was that out of 29 students only seven had completed sufficient work in order to attain the qualification. However, in the period up to the end of the summer term the Respondent, with the aid predominantly of the PRU's support staff, was able to work with the pupils to increase the number of pupils who might attain the award from 7 to 14.
- 3.75. The Claimant maintains that he had told Ms Phillimore where she could find the humanities portfolios. She certainly located the Vietnam War portfolios in a duffle bag in the Claimant's classroom but the slavery portfolios were not located. Ms Mollicone said to the Tribunal that they had no idea where the slavery portfolios were. She however agreed, on the Claimant's questioning of her, that she did not contact the Claimant in July about the location of those files. In terms of an explanation, she said she *"had lots of work"* and *"did not have 100% time"*. She couldn't say why the Claimant was not asked about the location of the files.
- 3.76. As will be explained, the Claimant returned to the PRU in September 2016. Ms Mollicone accepted that she did not raise with the Claimant on his return the location of the slavery portfolios. When asked why she had not raised this she said: *"it could have been because of the grievances"*.

- 3.77. By 26 September 2016 there had however been some discussion between Ms Mollicone and the Claimant about the humanities portfolios. The Claimant on that date sent an email to Ms Mollicone saying that he had asked if he could see the portfolios but was awaiting an answer. He referred to Ms Mollicone saying to him that the portfolios were “*thin*” but that he had explained that the evidence for the outcomes was fairly simple. He went on to say that he believed in excess of 80% of students did well enough to achieve both the slavery and Vietnam War unit awards and struggled to believe that not one student did enough work – the implication is that the information being given to the Claimant at that stage was that none of the pupils had achieved the unit awards. The Claimant sought to provide spreadsheets for both slavery and Vietnam War units to try to show that the pupils had reached the required level of attainment. Ms Mollicone accepted that she did not respond to these queries. She said that she took advice from human resources as to whether or not she should respond. However, she said that at that point in time the Claimant was submitting grievances and she was receiving copious emails, describing herself as “*being inundated*”.
- 3.78. Ms Mollicone’s evidence was that at this stage she took the decision not to register the pupils for the humanities unit awards saying that she did not wish to incur the “*late fees*” associated with this. It is now accepted by her that there was no possibility of any late fee being charged for submission of the pupils’ work in September 2016. Indeed, on the Tribunal’s findings Ms Mollicone knew as far back as 28 June that the students work could be submitted without the need for any registration. Her expressions of concern regarding a need to register and the incurrance of late fees makes no sense against that background.
- 3.79. Ms Mollicone put forward to the Tribunal that her decision did not negatively affect the students as they would still receive a college certificate for the work they had done. A number of statements from pupils are within the Tribunal bundle where students effectively complain at the lack of receipt of a certificate or the quality of an internal college certificate which was provided. Ms Mollicone doubted that the students would have raised these issues for themselves without prompting saying that the majority of students wouldn’t know the difference between an AQA examination board certificate and an internal college one. She said that the students they had within the PRU would simply “*not be interested*” in the certificate as they “*lack the enthusiasm*”.
- 3.80. It is clear that, whilst a significant number of pupils had certainly been assessed as attaining the level required to receive a unit award from the examination board in respect of the Vietnam War, Ms Mollicone despite on her own account certainly understanding by September 2016 there to be no need to register or pay late fees, had no intention to take steps which would have resulted in the students attaining the examination board award.
- 3.81. On his return to work the Claimant did locate the slavery portfolios but decided to keep them in his possession at home to safeguard them. He did not bring to the Respondent’s attention that he had the pupils work nor take any steps himself to allow the pupils to attain the examination board unit award. In fact on 17 November 2016 a communication from him to Ms Mollicone queries whether the Vietnam War portfolios could now be submitted through the gateway and going on to ask for the IVs for the slavery files in circumstances where he knew that these could not be provided by the Respondent.

- 3.82. When the Claimant returned to work in the PRU on 21 September 2016 after a two week absence due to sickness at the start of the new academic year he was told that the Respondent would no longer be delivering the humanities course and instead this was being replaced by an employability award granted through a qualification body known as ASDAN.
- 3.83. Ms Mollicone was unclear as to when a decision was taken to cease humanities with the knock on effect that the Claimant would instead be teaching the ASDAN qualification. Firstly, her indication given to the Tribunal was that the decision had been taken in June but on questioning Ms Mollicone said it was not necessarily in June but could have been in July after the IVs had been undertaken of the Vietnam War humanities unit.
- 3.84. Ms Mollicone's evidence was that the driving force behind this change came from District PRU. She said that they were concerned that the humanities course did not carry any SCATT points which can help pupils in terms of progression into further education and also in terms of how a school's results are assessed. The District PRU considered that the ASDAN course was therefore more value to the pupils and the Respondent and also that it was more relevant in terms of getting the pupils ready for future employment.
- 3.85. Ms Mollicone understood that lesson plans had already been devised by the District PRU which would be provided to the Respondent for its own use.
- 3.86. When asked by Ms Lall at a grievance investigation hearing on 9 November 2016 Ms Mollicone also gave as a reason for the decision to do ASDAN her thought that the Claimant was not coming back to work. Her evidence before the Tribunal however is more to the effect that this influenced her lack of subsequent contact with the Claimant about the decision to change the curriculum rather than the decision to deliver the ASDAN course itself which would require specific teaching resource which the Claimant at that time provided. If the Claimant could not teach the course then another teacher would have had to have been recruited.
- 3.87. Indeed, Ms Mollicone accepted that she had not informed the Claimant of her considerations regarding ceasing to teach humanities in circumstances where indeed it is likely that this was under consideration before she met with the Claimant on 28 June to conduct the probationary review. When asked otherwise why she had not contacted the Claimant she said that he could have been absent due to sickness or was not in the department. She said she simply could not recall. Her view was that she didn't have to contact the Claimant and that she was within her rights to change the course he was to deliver in circumstances where, as already indicated, the lesson plans had been prepared at District PRU level and there was anticipated to be a period of two weeks from the Claimant's return to work before the commencement of teaching of this course.
- 3.88. The Claimant has produced evidence from ASDAN to the effect that SCATT points are not awarded for this particular course of study. However the Tribunal has heard in particular from Mr Kenyon and Ms Lall that, whilst SCATT points were not awarded for attainment of this qualification in ordinary schools, they were available within the PRU environment. The Tribunal accepts such evidence which the Claimant could not contradict and in circumstances also where it was clear that there was some flexibility in whether the award attracted

SCATT points, indeed it did in mainstream schooling in Wales and Northern Ireland.

- 3.89. Ms Mollicone returned to the PRU on 5 September 2016 following the summer holidays. The Claimant was not at work and Ms Mollicone was unsure as to his status at that time and indeed whether or not he was returning to the PRU. She was told shortly afterwards by human resources that the Claimant was absent due to sickness. Ms Mollicone says that she was also told by the four other teachers within the PRU that they had been appointed by Mr Kenyon as deputy head teachers for another interim period. As the Tribunal will explain, it is far from satisfied by the Respondent's account of these appointments.
- 3.90. On 20 September 2016 Ms Mollicone was copied into an email from the Claimant to Mr Kenyon saying that he was returning to work at the PRU the following day.
- 3.91. On the afternoon prior to the Claimant's return to work Ms Mollicone released the four other teacher/deputies from enrichment work which would otherwise have been carried on that afternoon and involved them in moving the Claimant's desk from what had been the teachers' room (and was now to become the deputy head teachers' room) to another location.
- 3.92. When the Claimant returned to work, he walked into what had been the teachers' office and asked where his desk was. Ms Phillimore explained that Ms Mollicone had moved his desk. Ms Mollicone's evidence is that the Claimant became angry and shouted and swore at Ms Phillimore who reported what she regarded as unacceptable behaviour to Ms Mollicone.
- 3.93. In circumstances where Ms Mollicone took no action and never referred to such incident again, it is difficult to accept that Ms Phillimore was subjected to any serious abuse. On the other hand, the Tribunal can conclude that the Claimant was angry and agitated. That would not have been an unexpected reaction from someone returning to work after an absence from the PRU and a period of sickness to find that he was no longer sitting with his teacher colleagues.
- 3.94. As regards the deputy head teacher roles, the Claimant and his four teaching colleagues had acted up as deputies from 10 February 2016 until the start of the summer holidays in July 2016. The evidence was that all of the teachers had been involved in putting together a proposal that they take on deputy head roles for the period from February i.e. the second half of the academic year for the payment of an honorarium of £2,000 each.
- 3.95. The Respondent's witnesses' evidence on how it came to be decided that all of the teachers other than the Claimant would continue from September 2016 in deputy roles was confused and unclear.
- 3.96. Ms Phillimore emailed Mr Kenyon, copied into Ms Mollicone, on 8 June 2016 asking if it would be possible for the four teachers to meet with him and Ms Mollicone to discuss the continuation of the deputy roles from September and for the rest of that 2016/17 academic year. Ms Mollicone admitted she was aware of that communication which was indeed copied into her but said that she was only aware in September 2016 about the appointment of the four teachers as deputies when they told her that they had been approved. She said that the decision had been made by Mr Kenyon and human resources and that she couldn't recall if she discussed the deputy role at any meeting. She said that Mr Kenyon and human resources did not involve her in the decision.

- 3.97. When asked whether she recognised that the Claimant had been excluded from the proposal by Ms Phillimore and his other teacher colleagues, she said that she did not give it much thought and just took the view that the teachers would discuss the matter with the Claimant.
- 3.98. Ms Mollicone then said that she was involved in discussions about whether the deputy roles could continue or whether it was better to have one single deputy head teacher appointed. She said that the answer arrived at was that there should be the four deputy positions and she thought this discussion had taken place before the academic year end or at latest during the summer of 2016. She said that before Ms Phillimore's communication of 8 June 2016 she had fed back to Mr Kenyon that the arrangement was working and eased her workload.
- 3.99. When Mr Kenyon gave evidence he was pointed to an email of 31 August 2016 from Helen Moss of human resources asking whether the Claimant would be continuing with deputy duties and receiving the honorarium payment. She said that she had contacted the others, the implication being that certainly by the end of August 2016 the other four teachers knew that they were continuing as deputies with the honorarium payment which was to be £4,000 each for the full academic year. Mr Kenyon responded to Ms Moss on 1 September stating:
- "My thinking is no However could that cause more problems he did not fulfil the duties last year. Louise [Ms Mollicone] what is your view?"*
- On its face this email from Mr Kenyon was not copied to Ms Mollicone and she said that she had no awareness of it.
- 3.100. Mr Kenyon was questioned to the meaning of his 1 September email. He sought to explain that he believed that the Claimant could carry out the deputy role but in order to be able to be paid an honorarium he would need to have attained his level 2 qualifications in Maths and English. He accepted however that his email did not in terms distinguish between the possibility of the Claimant taking the post of deputy and his receipt of an honorarium for taking such a post. Indeed, the Tribunal can only conclude that Mr Kenyon did not as at 1 September 2016 see the Claimant as carrying on a deputy role.
- 3.101. Mr Kenyon's evidence was that he had met with the other teachers and there was a discussion in June as to whether the teachers acting up as deputies worked. It was felt that it had been successful although he thought the arrangement needed some tweaks and specific allocations of responsibility. He said that it was agreed that the arrangement would carry on. He, however, said that no responsibilities were decided on and allocated amongst the deputy teachers until September and that when the Claimant did not apply for a deputy role arrangements were only then made to share out responsibilities. This is a reference to Ms Mollicone telling the Claimant on his return to work that he could apply for a deputy teacher position. However, that was told to the Claimant only upon him raising a number of concerns and complaints and in circumstances where, quite understandably, the Claimant did not feel this to be a genuine invitation.
- 3.102. In any event, the Tribunal straightforwardly cannot and does not accept Mr Kenyon's version of events regarding the appointment. He said that the Claimant was not asked if he wished to carry on as a deputy in June because he was *"not there"*. However, the Claimant had a one week period of absence



in late June but otherwise was continuing to work at the Respondent albeit in another building to the PRU. Mr Kenyon purported that there was no question and it was never raised that there would not be five deputies going forward, his understanding being that the Claimant would be asked if he wished to continue. Again, the Tribunal cannot accept that to have been Mr Kenyon's understanding. Mr Kenyon said it was his understanding that the Respondent was prevented from contacting the Claimant when he was sick and that he had objected to being contacted at home. Again the Claimant's absence was for a period of one week prior to the end of the summer term. On being pressed, Mr Kenyon said that he agreed that it would have been more appropriate to contact the Claimant earlier on, stating that they would then have had to consider if they could justify an honorarium given that he had not passed his probationary period albeit that was a conversation for another date.

- 3.103. Ms Lall when she gave evidence said that when she dealt with the Claimant's grievance on this point she assumed that he had had the same opportunity as the other deputies and that he had not been part of Ms Phillimore proposal because he was not there at the time, she assumed because of sickness. She said she was unable to say when the decision regarding the deputies' appointment had been taken but she assumed it had been at the end of July. She agreed that it was very odd if Ms Phillimore and the other teachers had approached Mr Kenyon without first approaching and understanding that they had the approval of their direct line manager, Ms Mollicone. She said that she would have been displeased to be circumvented in such a way if that indeed is what occurred.
- 3.104. Ms Phillimore's evidence to Ms Lall when being interviewed in connection of the Claimant's subsequent grievance was that the teachers had put in a new proposal to continue as deputies saying: *"we did not include [the Claimant] in the process as we thought he had left"*.
- 3.105. The Tribunal must conclude that the Claimant indeed was never part of the proposal and that the Respondent through Mr Kenyon and Ms Mollicone were proceeding on the basis that only the four other teachers would continue in the deputy role. There was not going to be any consideration of the Claimant as an additional deputy. There was indeed a rush to move his desk out of the teachers' room so as to create a deputy head teachers' room (without him) before he returned to work.
- 3.106. Reverting to the office moves, the Claimant's desk was moved on the afternoon before his return to work and placed in a separate office which already had a spare desk available and sharing with two members of the PRU's support staff, a behavioural manager and a teaching assistant. Within the PRU the Tribunal has a picture of a sense of some panic about the Claimant's return to work and of a rush to move him out of the teachers' room. The Tribunal cannot accept that there was such an urgent need to reconfigure the teachers' room. Ms Mollicone sought to explain the removal of the Claimant's desk as part of a desire to make more room in the new deputy head teachers' office and also to have a dedicated deputy head teachers' office. She maintained that deputy head teachers would be privy to more confidential and sensitive matters and that it would be difficult for there to be an open discussion amongst deputies if an ordinary teacher was in the room. Ms Mollicone then struggled to give any examples of the types of conversations which would take place which would be of such a sensitive nature. Indeed it appeared that the more sensitive matters

to be discussed were likely to be around individual pupils which were matters which would be routinely discussed on a confidential basis amongst all teaching staff of whatever level in any event. She agreed that meetings of deputies could be held in her own office if something of a confidential nature did indeed need to be discussed and she conceded that deputies did sometimes meet with her in her own office. Ms Mollicone did say that she was not sure if the Claimant was returning to the Respondent at all saying that that was based on the fact of the grievances he had submitted, that he did not seem to be happy and that he had been working in another department.

- 3.107. The Claimant therefore returned to work at the PRU on 21 September. As has been seen it was confirmed to him in writing on 22 September that his probationary period had been extended for a further three months effective from 1 September 2016. He had arrived back to find that the four other teachers had been re-appointed as deputies but he had not and he had been moved out of his previous office shared with all the other teachers to work in an office with two support staff.
- 3.108. The Claimant went to speak to Ms Mollicone who told him that she had taken the decision to move him out of the office to be occupied by the four deputy teachers. She also told him that none of the students had passed the humanities course describing the portfolios as a bit thin and that she had not registered them with the exam board and did not wish to incur a late fee in doing so.
- 3.109. As already noted the Claimant queried the assessment of the pupil's performance and asked to see the portfolios. In evidence before the Tribunal the Claimant said that Ms Mollicone said that she did not want any of his "*a-tti-tude*" which she spoke in what he described as a cod West Indian accent. Ms Mollicone denied that method of talking to the Claimant and indeed the Tribunal cannot accept that she did seek to in some way mimic or disparage the Claimant by use of any form of West Indian accent particularly in circumstances where the Claimant has never previously raised such matter which is raised for the first time in his witness statement in these Tribunal proceedings. The Tribunal finds it incredible, if the Claimant received such treatment, that he had not sought to raise it or complain about it beforehand.
- 3.110. The Claimant was also told of the replacement of humanities with the ASDAN qualification. Ms Mollicone wanted the ASDAN course to be taught by the Claimant alone (rather than with other teachers taking some groups) and had timetabled it to be delivered on afternoons whereas the other teachers usually taught on the mornings. In view of a decline in attendance levels on afternoons she considered that the pupils could be taught in two separate (nominally) larger groups than would normally be allocated. The Claimant said that he was also told verbally by Ms Mollicone of the extension by another three months of his probationary period. He said that he was not totally shocked by this because of his periods of sick leave and the fact that he had not completed the level 2 in maths and English as he was required to do as part of his contractual arrangements with the Respondent. He said however that he would have expected to hear about the extension prior to it starting and not nearly a month into the three month extension. Two larger than usual groups of pupils were to be taught by the Claimant, but the Tribunal accepts the Respondent's evidence of a drop off in attendance on afternoons and that other teachers were already engaged on their core teaching duties on mornings. The Respondent did not

wish the course to have to be delivered by more than 1 teacher, not least in terms of another teacher having to take on more responsibilities and to become acquainted with a new subject.

- 3.111. Shortly after his return to work the Claimant was put on a rota for the searching and scanning of pupils for weapons and other prohibited items as they entered the PRU building. Whilst from time to time teaching staff and Ms Mollicone herself had become involved in such activity, the Tribunal accepts that the Claimant unlike other members of teaching staff was put on a rota to carry out this duty two mornings a week. Ms Mollicone maintained that it was essential that available to carry out this scanning were a male and female member of staff and the other male teacher was expected to teach at 9am which would have overlapped with the period of scanning from 8.30 to 9.30am. The Claimant, it is accepted, did not have a teaching timetable for morning. However, the Tribunal notes also that the scanning duties which the Claimant had carried out might instead have been carried out by giving additional slots to members of the support staff for whom scanning was a core and accepted part of their responsibility.
- 3.112. The Claimant emailed Ms Mollicone on 22 September expressing concern that the role he carried out had changed in terms of his loss of the deputy position and his effective exclusion from consideration for that. He complained about being moved out of the teachers' office without being given a satisfactory reason. He said that he felt humiliated "*by what is in effect a demotion*". He also referred to comments regarding the humanities award. He said that when he had asked to see the folders the previous day he did not do it with an "attitude" albeit again making no reference to the way in which that was said or any racist overtones.
- 3.113. The Claimant sent a further email to Ms Mollicone on 26 September which has already been referred to in the context of his contentions regarding the humanities award. Also within such email he listed eight questions which he said he needed answering. Ms Mollicone responded by an email of her own on 30 September. She denied that the Claimant's role had changed and stated that he was still a humanities PRU teacher but that a curriculum review took place prior to the summer holidays and that the Claimant was off sick and therefore not contacted. No other member of teaching staff was contacted throughout the summer holidays either. As regards him no longer being a deputy Ms Mollicone said that this was only ever a temporary position but the four teachers submitted a new proposal which was accepted and approved. She stated that if the Claimant felt he could fulfil the role "*please do outline this and submit as the teachers did*". As already indicated the Claimant's evidence was that he did not think this was a genuine invitation. Ms Mollicone explained that the teachers office no longer existed as the four teachers were appointed deputies and therefore it became a deputies' office and the desk was moved to create more space. She referred to their work involving matters of a confidential nature and said that "*to ensure that you had a warm welcome back and to help you feel settled in your new office environment (upon receiving the notification email outlining your return), the decision was made to move the desk*". As regards the removal of the humanities course Ms Mollicone explained that this was evaluated during a curriculum review and based on the higher risk in terms of attainment rates and the lack of SCATT points and value added. She made the decision to remove the course from the curriculum. She

said without the assistance of others only seven students would have achieved the required level of attainment and *“as with any high risk course, a decision has to be made based on the evidence of success”*. She said that an EV was not required for the humanities modules as students had never actually been registered with the examination board and the decision was made not to pay the late registration fee. Again, it is already noted that this was inaccurate and indeed that Ms Mollicone knew at an earlier date of the ability to submit the humanities units for the AQA awards. When the Claimant requested to see Ms Phillimore’s IVs she was told that Ms Phillimore was an experienced assessor and did look at the content of the work. The Claimant was told that whilst he remained a teacher of humanities he would now be teaching the ASDAN course as this is a requirement of the PRU.

- 3.114. Dissatisfied with this response, the Claimant decided to raise a stage 2 grievance against Ms Mollicone, Ms Phillimore and the Respondent stating that he believed he had been victimised for making a complaint about racial discrimination. As regards Ms Mollicone, he said he believed *“she has purposefully sought to discredit me as a teacher, humiliate me in front of all staff and marginalise me within my workplace”*. He described Ms Mollicone’s denial of learners *attaining the humanities award as a “ham-fisted attempt to discredit me”*.
- 3.115. On 1 November 2016, Ms Mollicone in consultation with human resources drew an action plan of attainments to be met by the Claimant by 30 November 2016 when his extended probationary period was due to expire.
- 3.116. In terms of action to be taken, the first was the Claimant attaining level 2 in English and maths. It was envisaged that he would book within the Respondent to undertake the examinations around 5 November to allow the results to be back in time for 30 November. The Claimant again was aware of the need to complete these qualifications. Indeed, whilst the Claimant had had periods of difficulty in terms of his health and issues arising at work, there is no evidence that he had been at all proactive in satisfying these essential contractual requirements as indeed he understood them to be. The evidence was that the Claimant, around the time of this review, had enquired regarding his ability to undertake the examinations within the Respondent but had been given an indication that he would need to attend some teaching sessions prior to taking the exams for which he did not have the time. Mr Kenyon had, the Tribunal accepts, been proactive in finding a solution to this problem, had found a way of the Claimant taking the exams quickly and had passed the message on to Louise Mollicone who indeed, the Tribunal accepts, told the Claimant to enrol for the examination. However, when the Claimant sought to do so it appears that the person he spoke to was not aware of the effective agreement whereby his taking of the examinations could be expedited such that the Claimant did not progress the taking of the examinations within the Respondent. Indeed this was in circumstances where the Claimant was starting to lose trust in the Respondent and where he had taken a decision in any event to enrol with an alternative education institution and made arrangements to take the exams independently.
- 3.117. In terms of further actions, the Claimant was targeted to have no sickness absence up until 30 November and was to liaise with District PRU regarding the new ASDAN course.

- 3.118. The Claimant was next targeted with working in a professional manner and exhibiting a professional mode of behaviour with colleagues and students. This was to be measured by his engagement in team meetings which had never been previously in question. Also, there was a reference to mobile phone usage being limited during working hours – there was no evidence that this had ever been raised previously with the Claimant. Against this target of working professionally and under the heading of “Training/Support/Resources” was the statement “prior notice to be given”. On its own and without any context this makes no clear sense although at an update meeting, which will be described, it was said that the Claimant was aware of notice to be given of his appointments as soon as possible. The Claimant was further to ensure that one to ones with students occurred and that he amended the ASDAN scheme of work to adapt it for the Respondent.
- 3.119. The Tribunal notes that on 2 November 2016 the Claimant had emailed Ms Mollicone copied into, amongst other people, human resources raising a incident of racism. He recounted a student intentionally playing a rap record as the Claimant walked into the room which contained the repeated use of the word “*nigger*”. Two pupils had both laughed when challenged about this. The Claimant referred to the use of the word as “*a vile racist slur*” stating that he hoped there would be a more proactive and zero tolerance approach to racism within the PRU. When questioned about this communication Ms Mollicone agreed that she had not replied but could not explain why. She said to the Claimant on his cross examining her that “*it’s about you taking responsibility*”.
- 3.120. The Claimant emailed Ms Mollicone on 3 November with his reflections on the action plan. He noted that, whilst he had been given an extended three month probationary period, all of the targets he had to achieve had been set within a timeframe of only one month. He complained about difficulties in arranging to sit the maths and English exams within the Respondent. He also asserted that he had made regular contributions to team meetings and that his use of the phone had not previously been an issue.
- 3.121. The Claimant complained that he had not been invited to one teachers’ meeting since he returned in September. He said that he felt that he was being set up to fail and could only surmise that this was because of the stance he had taken against racism. He said that all of his complaints had been made in good faith and based on evidence. He said he was not a trouble maker and had no agenda.
- 3.122. As regards the Claimant’s complaint of exclusion from teachers’ meetings, Ms Mollicone said on questioning that she did not know why no other teachers’ meetings had taken place since the Claimant’s return to work in September 2016 and suggested that perhaps none were needed. The reality, however, was that the Claimant was the only teacher who was not also a deputy and deputy meetings had effectively replaced the teacher meetings such that the Claimant did indeed feel excluded and was not privy to the same information he would have been as a teacher prior to the end of the 2015/2016 academic year.
- 3.123. A meeting of all teaching and support staff took place on 10 November. Ms Mollicone had arranged a parents’ evening to take place after this which the Claimant had previously indicated he would be able to attend. At the team meeting she reminded the teachers of the parents’ evening and Ms Mollicone’s perception was that the Claimant immediately raised his voice telling her that

he didn't know anything about it. She said that he shouted at her in front of their colleagues and then stormed out of the room. She referred to a couple of members of staff staying behind after the meeting to check she was alright. After the meeting Ms Mollicone went to see the Claimant and she said he accused her of preventing him from sitting his maths and English exams which he had arranged to do that evening. She told him it was imperative that he obtain the qualifications and that he should go ahead and she would cover the parents' evening.

- 3.124. Ms Mollicone wrote up an incident report at the time. Within that she referred to the Claimant saying that he did not know if he was a teacher and complaining about lack of involvement in any teachers' meeting. She referred to a colleague, Cheryl, staying behind and commenting on the Claimant's behaviour as being "*disgusting*". She referred to the Claimant having met with a parent that evening as had been the original arrangement prior to leaving the building, she assumed, to attend his examination. Lisa Donoghue separately completed an incident report of 10 November. She noted the Claimant complaining about a lack of teachers' meetings. She described his voice as being raised throughout with an aggressive stance and that he made comments about not being part of the team anymore and being put in another office.
- 3.125. On 16 November the Claimant met again with Ms Mollicone to review how he was progressing against the action plan discussed with him on 2 November. The Claimant was able to report that he had undertaken the maths and English examinations at Kirklees and the results were due within the next two weeks. He had had no absence. A note was made that the Claimant was aware of notice to be given for appointments. It was recorded that the Claimant had found students refusing to engage in one to ones. During the discussions, the Claimant repeated concerns about a lack of teacher meetings.
- 3.126. Following the meeting Ms Mollicone wrote up her own note. In this she referred to the need to give notice and the Claimant conceding that he had forgotten about the parent's evening on 10 November. Ms Mollicone also in the note referred to the Claimant as continuing to "*rant*" about how the Respondent had set him up to fail. She also recorded that he "*sniggered, smirked and talked over me throughout the meeting trying to get his point across as to how unfairly he had been treated ...*" As regards a lack of teacher meetings, Ms Mollicone explained what was taking up her time which she recorded as amongst other things "*... sending out bills for repair to the building (caused predominantly as students vent their frustration and anger at Roger's confrontational manner). A great deal of time has been spent attending grievances/support meetings etc to try and support me to manage him. Information is requested practically on a weekly basis, which consumes a huge amount of my time to compile in a bid to defend the actions of the school/college*".
- 3.127. In the light of Ms Mollicone's view regarding the Claimant's behaviour at both the 10 November staff meeting and the action plan review on 16 November, she considered it appropriate to raise the concerns with human resources with a view to the commencement of a disciplinary investigation.
- 3.128. By a letter of 17 November 2016 the Claimant was invited to attend an investigatory meeting as regards both the 10 and 16 November meetings before Hayley Lomas, head of service industries. The Claimant requested clarification of the aspects of misconduct being investigated against him and

this was provided from human resources by letter of 21 November. As regards the team meeting on 10 November there was an allegation that the Claimant had raised his voice and continued to speak loudly to his line manager and team members. As regards the 16 November meeting reference was made to Ms Mollicone's reporting of the Claimant sniggering and smirking and talking over her for the duration of the meeting.

- 3.129. The investigation meeting before Ms Lomas was ultimately re-arranged and held on 25 November. As regards the 10 November meeting, the Claimant expressed his frustrations. He said that he had apologised to staff for what had happened at the meeting, but not to Ms Mollicone. He accepted he had behaved unprofessionally but said that Ms Mollicone had put him in that position. He was asked whether he thought it was right to express how he was feeling in such an open forum and the Claimant accepted this was unprofessional and could have been done better stating however that "*there is no forum to have an open and frank discussion*". The Claimant denied that he had behaved inappropriately in his one to one meeting with Ms Mollicone on 16 November.
- 3.130. Following this meeting Ms Thomas wrote to the Claimant stating that as regards the 16 November meeting she had found "*there is no evidence to conclude there is a case to answer*". However the Claimant's behaviour at the team meeting on 10 November was to move to a disciplinary hearing. This was ultimately not progressed prior to the termination of the Claimant's employment.
- 3.131. The Claimant had met with Ms Mollicone, Helen Moss of human resources and his own union representative Chris Webb to complete the probationary review on 30 November. At this meeting Ms Mollicone said that he had not reached the targets and had not shown evidence of completing his level 2 in English. He told her that he had sat the exam the day before and had been told by an individual from the Link Academy that he had passed the exam easily. He said that he didn't have proof of this but would be able to produce it very soon. The Claimant had previously emailed Ms Mollicone confirming that he had passed maths level 2 and one of the three English exams. He had forwarded an email from the Link Academy confirming that on 23 November 2016. She also told the Claimant that he had failed his target of behaving professionally with students and staff due to the outcome of the disciplinary investigatory meeting. The Claimant struggled to understand this in circumstances he said where he had been told there was no case to answer in respect of one allegation and he had not been given the opportunity to answer the second. She also said that there were issues with students but did not expand on that.
- 3.132. Ms Mollicone also told the Claimant that he had not given sufficient notice of a meeting he attended. The Claimant referred to the meeting in question on 29 November as being confidential and one in respect of which he had given two hours notice and was not teaching at the time. The Claimant was told that Ms Mollicone will be recommending his dismissal.
- 3.133. Ms Mollicone indeed decided to make a recommendation to terminate the Claimant's employment on the basis that he had failed to satisfy the action plan. Whilst the Claimant had taken the maths and English examinations Ms Mollicone had not been given evidence that the Claimant had passed them all. The Claimant had separately also failed to complete some mandatory online training modules which were to be completed by 2 December 2016. She also

considered that the Claimant's conduct and behaviour had not been acceptable. In evidence she referred in this connection to a complaint from a student and separately from a parent regarding the Claimant's conduct which she had passed on to the Respondent's Quality and Standards team. She said that normally she would speak to the individual concerned about the complaint being passed on to them but she was not comfortable to address the issue with the Claimant directly given his behaviour at the previous review meeting.

3.134. The student complaint had been made on 11 October 2016 and was that the Claimant *"started mouthing off at me and he expected me to just sit there but I retaliated and started mouthing back off at him. Then Roger started walking towards me trying to intimidate me so I said "you best off backing up out of my face or I'll take your head clean off your shoulders"*.

3.135. The complaint referred to the presence of Mr Farooq, one of the Claimant's colleagues. Ms Mollicone did not speak to him to see what he had witnessed and indeed had no recollection of considering an incident report which he had submitted dated 12 October 2016. The Claimant's view that Mr Farooq's report showed that he had acted with restraint despite being subjected to abuse and physical threats is justified on a reading of that incident report. Mr Farooq recounted that the student in question had walked into a staff room without permission and that the Claimant had asked him to leave politely. The student then became aggressive and verbally abusive also making threats towards the Claimant calling him amongst other things a *"dickhead"*, threatening to slap him *"in the fucking face"* if he came near him and saying:

*"Come near me and I'll knock your fucking head off, thinking you're a big man".*

Mr Farooq recounted that Ms Mollicone had then walked into the room and explained to the student that he must leave. The student had said he wished to make a complaint against the Claimant and she replied that if he wanted to do so then he needed to make a statement. The student left the room with Ms Mollicone. It is undisputed that Ms Mollicone had not raised the complaint with the Claimant at the time or shortly after it was made.

3.136. The separate parent complaint was emailed to Ms Mollicone on 7 November. The parent recognised that whilst the pupil in question was always the first to moan, especially when he was in trouble, she felt that the Claimant was constantly getting at him and trying to make him flip and lose his temper. The pupil had suggested that the Claimant had on one occasion blocked his way out of a room. Again Mr Farooq was said to have been present.

3.137. Again Ms Mollicone did not speak to Mr Farooq or take any account of an incident report he had prepared relating to the day in respect of which the complaint was made, 1 November 2016. Mr Farooq recounted that the pupil had been asked by him to stop and talk but he had walked away from him. The Claimant had then asked what he was doing and challenged his behaviour in response to which the pupil was recounted as saying amongst other things:

*"Open the door you dickhead. Open the fucking fucking door before I break it. Who the fuck do you think you are you prick. Your just a cunt, now open the door or I'll kicking it down".*

He recounted that the Claimant had asked the pupil to calm down and speak with respect but he had continued to be verbally abusive and threatening. He recorded the pupil as continuing to kick the door and being verbally abusive



towards Mr Farooq himself, trying to grab hold of his ID card and then grabbing hold of his arm.

- 3.138. Before the Tribunal Ms Mollicone asked why the incidents which were the subject of the student and parent complaints were used against the Claimant. She replied:

*"I can't explain. I can only assume because they were a parent and a student complaint".*

Ms Mollicone accepted that her report recommending the termination of the Claimant's employment was meant to be limited to the achievement or non achievement of his goals and the parameters set in respect of the period from 1 to 30 November. She agreed that in including the student complaint made on 11 October she had referred to a matter outside of the period. In the same vein, the report she prepared criticised the Claimant for failing to attend a networking event on 8 December at District PRU. She said that she could not say why she had made any reference to that particular event.

- 3.139. By a letter of 7 December 2016 the Claimant was invited to a hearing before Richard Thomas, Provost, to consider whether in the light of Ms Mollicone's recommendation his employment should be terminated. The grounds for termination were stated to be firstly the Claimant's failure to produce evidence of the full level 2 English qualification (speaking and listening), unprofessional conduct and behaviour and thirdly insufficient notice (if any) given for appointments/prior events. The Claimant was given the right to be accompanied by his trade union representative. Together with this letter was enclosed Ms Mollicone's investigation summary which she said had been completed around 7 December and was her work assisted by human resources. Attached to it were multiple appendices which included the notes of the action plan and the aforementioned student/parent complaints.
- 3.140. In the report it was noted that the Claimant had not evidenced his passing level 2 English and maths. It was said that whilst he had produced confirmation that he achieved his maths award and part of his English award he had not by the probationary meeting on 30 November 2016 been able to produce evidence of success in the full English award.
- 3.141. Ms Mollicone referred then to the aforementioned student and parent complaints noting that he was currently under investigation by quality and standards.
- 3.142. She noted that there had been incidents of unprofessional behaviour referring to the 10 November staff meeting and her meeting with the Claimant on 16 November which were referred to a disciplinary investigation the outcome being that one of the incidents would be progressed to a disciplinary hearing.
- 3.143. Ms Mollicone noted that the Claimant had not completed the online training modules he was required to complete along with other staff.
- 3.144. She then referred to him providing insufficient notice of appointments/prior events. The first example relied upon was where the Claimant had emailed Ms Mollicone on the early afternoon of Thursday 24 November regarding a need to sit the English speaking and listening assessment the following Monday at 3pm. The Claimant asked if he could leave a little earlier, around 2.15pm.

3.145. The second example was where the Claimant had emailed Ms Mollicone at 7.46am on 25 November saying that he needed to attend a confidential meeting on site at 9.30am. This was a reference to the investigatory meeting he had to attend into the disciplinary charges against him conducted by Ms Lomas. The third instance of late notification of appointments was the one already referred to where the Claimant had given two hours notice on the morning of 29 November 2016 of a need to attend another meeting on site. This was in fact a meeting relating to the Claimant's further grievances as will be referred to. Again, as already referred to, the Claimant was criticised for not being organised to attend a networking event planned for 8 December as well as the parent evening where, as already recounted, the Claimant was concerned that he might be late for one of his level 2 examinations. In conclusion in recommending the termination of the Claimant's employment Ms Mollicone stated:

*"He hasn't met all the actions that were drawn up for the extension of his probation period and his unprofessional behaviour and some of his actions have impacted negatively on staff and students within the PRU"*

3.146. The Claimant duly attended the probationary hearing chaired by Mr Thomas on 14 December. Ms Mollicone was in attendance and summarised her recommendations which the Claimant had an opportunity to challenge and raise any representations he wished to Mr Thomas. After an adjournment Mr Thomas confirmed that he had decided to accept Ms Mollicone's recommendations on the basis that the Claimant had known of the requirements necessary for the successful completion of his probationary period.

3.147. Mr Thomas in arriving at his decision looked firstly at the alleged failure to provide evidence of qualifications. He noted that the Claimant had by this point provided satisfactory evidence that he had met the maths and English level 2 qualifications in their entirety albeit some of the evidence had been still awaited at the time of the final probationary review. Mr Thomas considered that there had not been any real effort on the Claimant's part to achieve the necessary qualifications during the course of his entire employment/probationary period but that there was towards the end of the extended probationary period an attempt to complete the requirements within the timescale. However, whilst the Claimant had technically failed to meet the criteria set, he felt that to uphold this particular point of concern against the Claimant would be following the letter of the law rather than its spirit. He understood Ms Mollicone's view that the Claimant had not done what he needed to do within the time limit but felt that it would have been "*mean spirited*" to come to a decision to terminate employment if this had been the only issue.

3.148. As regards unprofessional conduct and behaviour, Mr Thomas noted the complaints made by a student and parent. He considered a statement from a colleague stating that she had not been perturbed by the Claimant's behaviour at the 10 November meeting and other supportive statements but considered that this did not mean that Ms Mollicone and others would not have been perturbed by the Claimant's behaviour. Mr Thomas accepted the account of Ms Mollicone in respect of the 10 November meeting and saw it as an incidence of unprofessional behaviour. Before the Tribunal, Mr Thomas explained that he had taken no account of the student and parent complaint on the basis that no outcome had been reached in terms of the substance of those

complaints. He accepted that the allegation in respect of the 10 November meeting was “*just an accusation*” as well at that point but he had felt he said able to take it into account because it had been determined that there was “*a case to answer*”. Mr Thomas agreed that there was no sustained pattern of the Claimant behaving aggressively and the only instance he found against the Claimant in that regard related to the allegation regarding the Claimant’s behaviour at the 10 November staff meeting.

- 3.149. Mr Thomas included his concern regarding lack of notice of appointments in his conclusion that the Claimant had shown unprofessional behaviour. As regards the appointments he had felt that insufficient notice had been given and that this might cause a problem in a teaching establishment. Whilst the Claimant maintains before the Tribunal that he had arranged cover for himself when absent attending the aforementioned internal meetings, this was not a case he put forward prior to his dismissal.
- 3.150. During the probationary meeting the Claimant raised his experience of racism and other complaints regarding his treatment including the moving of his desk. Mr Thomas did not consider these to be of fundamental relevance.
- 3.151. On 20 December the Claimant appealed Mr Thomas’ decision to Andy Welsh, group chief executive officer attending an appeal hearing on 9 January 2017. Ultimately, Mr Welsh rejected the Claimant’s appeal.
- 3.152. The Tribunal referred previously to the Claimant on 30 September 2016 having raised through human resources a stage 2 grievance against Ms Mollicone, Ms Phillimore and the Respondent saying that he believed he had been victimised for making a complaint of race discrimination and that Ms Mollicone had subjected him to various disadvantages as a result.
- 3.153. Anita Lall, assistant principal for the sixth form and academic college, was asked to hear this stage 2 grievance. Ms Lall’s knowledge of the Claimant came from but was limited to the period from June 2016 when the Claimant had been relocated to the humanities department which she oversaw.
- 3.154. On 2 October 2016 Ms Lall was copied into an email from the Claimant to Ms Mollicone which referred to his concerns regarding the pupils’ portfolios for the humanities award he had been teaching within the PRU.
- 3.155. Ms Lall convened a hearing with the Claimant on 21 October at which he was accompanied by his union representative. Ms Lall’s view was that the Claimant spent a considerable amount of time talking about background issues particularly racist incidents he said had occurred within the PRU. At the end of the meeting Ms Lall explained that she would need to speak to Ms Mollicone and Ms Phillimore and would then write to him with an outcome. She explained that due to the proximity of the half term her response might be slightly delayed.
- 3.156. On 9 November 2016 Ms Lall met with Ms Mollicone. She discussed with her the Claimant’s role and the role of deputy head as well as the moving of the Claimant’s desk. There was then a discussion regarding the cessation of the humanities qualification and issues regarding the requirement or not to register students for the previous humanities award and the lack of completion, in Ms Mollicone’s eyes, of the relevant portfolios.
- 3.157. As regards the decision to replace the humanities award with the ASDAN course Ms Mollicone explained that the District PRU had carried out a quality

assurance review and had said that the ASDAN course was of more value in terms of it carrying SCATT points. She said she had decided to accept District PRU's recommendation to in future deliver the ASDAN course including as it seemed to be a more appropriate course for students within the PRU.

- 3.158. Later on 9 November Ms Lall met with Ms Phillimore. When discussing the new deputy head roles Ms Phillimore said that Ms Mollicone was not aware that the existing deputies apart from the Claimant had submitted an application initially but that when she heard about it she was comfortable with the proposal.
- 3.159. Ms Lall subsequently decided to review some of the pupils' portfolios and concluded that a few students had completed sufficient work to pass the overall qualification prior to interventions made in the Claimant's absence.
- 3.160. Ms Lall wrote to the Claimant by letter of 16 November breaking his concerns down into seven areas and addressing each in turn. Firstly as regards a change in role and lack of consultation she confirmed that the Claimant remained a teacher of humanities, however now teaching the ASDAN qualification in replacement of the humanities award. Ms Lall accepted Ms Mollicone's explanation for lack of contact as being the Claimant's absence due to sick leave. Secondly as regards the deputy head position, she again concluded that the Claimant was not given the opportunity to submit a proposal because he was absent due to sickness. She recounted that there was also some confusion as to whether or not he would be returning to the PRU and she felt that he had since been given an opportunity by Ms Mollicone to submit a proposal.
- 3.161. As regards thirdly the desk move and fourthly the prioritisation of this over teaching she concluded that teaching and learning was not compromised to undertake this task. However, Ms Lall thought that it had not been entirely necessary to physically move the Claimant's desk as there would have been a desk already in place in the office he was being moved to. Fifthly, as regards the cancellation of the humanities course she said that she had reviewed the Vietnam War portfolios and believed that there had not been an impressive success rate amongst the students. She said that the decision to remove the course had been taken based upon that and the advice given by District PRU regarding ASDAN being the more relevant course and one which carried SCATT points and value added. Sixthly, Ms Lall recognised that the Claimant had provided confirmation that there was no need to register students for the humanities award or to pay late fees. She concluded that Ms Mollicone had made enquiries from staff in the FE registry and had acted upon advice she had been given. This advice may have been erroneous, but her position was put down to a genuine mistake.
- 3.162. Finally, in response to a request to see the evaluation reports of the portfolios, Ms Lall said that Ms Phillimore had offered to go through these with the Claimant.
- 3.163. Ms Lall concluded that there was no evidence to substantiate a claim that he had been victimised by Ms Mollicone or that she had purposefully sought to discredit him as a teacher. The Claimant was informed of his right to effectively raise an appeal against her decision by way of a stage 3 grievance.
- 3.164. The Claimant duly raised a stage 3 grievance which was heard by David Harwood, Principal of the Respondent on 29 November 2016. The

Claimant's issues in particular regarding his alleged role change, the deputy head role, the desk move, the humanities award ceasing and the IV and EV verification for such award were discussed. Following a meeting Mr Harwood met with Ms Mollicone to understand her viewpoint and he also reviewed some of the IVs which had taken place.

- 3.165. Following that further investigation, he felt satisfied that he was able to respond to the Claimant's concerns and an outcome letter was sent to the Claimant on 8 December 2016.
- 3.166. Mr Harwood concluded that whilst the Claimant's role had changed in terms of him having to teach the ASDAN employability course, his day to day role was unchanged. This was simply part of curriculum development particularly in the light of the effect on the college's SCATT scores. He said that he would not expect a manager to consult with an employee in relation to such changes although with the benefit of hindsight he felt it might have been possible for Ms Mollicone to have addressed the issue a little earlier with the Claimant at the commencement of the academic year. He understood that that was difficult for her in practice however as the Claimant was absent due to sickness.
- 3.167. As regards the deputy head role, he concluded that the Claimant had not put forward any proposal of his own and could see no evidence that he had not been given the same opportunities. He said that he appreciated that the reason the Claimant had not put forward any proposals was because he was absent due to sickness but noted that when he returned to work he was told that he was still welcome to put forward a proposal in the same way the other teachers had done, but chose not to do this. Before the Tribunal he said that the decision as to the deputy role going forward rested with Mr Kenyon and himself. He said that his understanding was that Mr Kenyon had spoken to Ms Mollicone in June. He said there had never been a discussion to reduce the number of deputies from five to four. On being pressed he said that he could understand in the circumstances why the Claimant had thought on his return to work in late September 2015 that there was no point in him applying.
- 3.168. As regards the desk move he agreed with Ms Lall that it had not been entirely necessary to move the Claimant's desk and that he felt the Claimant should have been informed of the move as early as possible. He felt on reflection that this was a poor judgment call but the reason for the decision had nothing to do with the Claimant's previous complaints.
- 3.169. As regards the removal of the humanities award Mr Harwood was comfortable that this was a wider decision which had been reached with advice from the District PRU and was down to an attempt to increase SCATT scores and ensuring that alternative curriculum plans were offered to the students.
- 3.170. As regards the EV process he noted that Ms Lall had concluded that there had been a miscommunication already. He agreed that this did not appear to be deliberate.
- 3.171. Mr Harwood gave evidence more widely regarding the Respondent's attempts to tackle behavioural problems with students. He referred to the issue by Mr Welsh of a joint statement regarding stopping intolerance. The Tribunal has seen such statement which encouraged the reporting of acts of intolerance or inappropriate language. It is clear from the preamble that this arose in part out of reminders which had arisen of the dangers of intolerance in, for example, the

murder of Joe Cox MP. He considered that this joint statement was not a direct result of the behaviour the Claimant complained of.

- 3.172. He also however referred to a revised induction given to students to encourage respect and to training given on 7 February 2017 relevant to behavioural issues. This was a reference to training regarding the Prevent Programme and a “United Values Programme”.
- 3.173. Mr Harwood explained the setting up of a behaviour strategy group which had met on 5 December 2016. He said that the purpose of the group was to discuss what, if any, immediate actions or “*quick wins*” they could take in order to improve behaviour. He also said that he was currently looking to try and achieve a positive behaviour group which focused on the top 10 behaviours they were trying to address as a college. This top 10 had been put together following an analysis of reports of poor behaviour. He said that racist behaviour did not appear on this top 10 list albeit behavioural issues such as students spitting or failing to wear identification badges had.
- 3.174. Mr Harwood said that he had been advised that the Claimant’s complaints of racism had been dealt with fully in Mr Hambleton’s July outcome of the other stage 3 grievance raised by the Claimant. Mr Harwood wished to pick up on questions raised already regarding the prevalence of and attitude towards racist behaviour within the Respondent. He expressed the view that pupils in fact found it hard to differentiate between for instance Afro Caribbean and Asian individuals and that they “*just see light skin and dark*”.

#### 4. Applicable law

- 4.1 The claimant complains of direct discrimination and harassment.
- 4.2 In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: “(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.”
- 4.3 “Race” is one of the protected characteristics listed in Section 4. Section 23 provides that on a comparison of cases for the purpose of Section 13 “*there must be no material difference between the circumstances relating to each case*”.
- 4.4 The Act deals with the burden of proof at Section 136(2) as follows:-
- “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions”.
- 4.5 In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language.
- 4.6 The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**. There it was recorded that Mr Allen of Counsel had put forward that the correct approach was that as Ms Madarassy had established two fundamental facts, namely, a difference in status (e.g. sex)

and a difference in treatment, the Act required the Tribunal to draw an inference of unlawful discrimination. The burden effectively shifted to the respondent to prove that it had not committed an act of discrimination which was unlawful. Mummery LJ stated:-

*“I am unable to agree with Mr Allen’s contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in treatment of her. .... The Court in Igen Ltd v Wong [2005] ICR 139 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent committed an unlawful act of discrimination. ...*

*57 “Could...conclude” .... must mean “a reasonable tribunal could properly conclude” from all evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only the statutory “absence of an adequate explanation” at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like .....; and available evidence of the reasons for the differential treatment*

*58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.”*

- 4.7 It is then permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

- 4.8 The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. There it was recognised that in practice Tribunals in their decisions normally consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds (termed as the “reason why” issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in the favour of the claimant. The less favourable treatment issue therefore is treated as a threshold which the claimant must cross before the Tribunal is required to decide why the claimant was afforded the treatment of which he/she is complaining. Lord Nichols went on to say:-

*“No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question; did the claimant on the prescribed ground receive less favourable treatment than others? But, especially where the identify of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.”*

Later, he said:-

*“This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former there will be usually no difficulty in deciding whether the treatment afforded to the claimant on the proscribed, ground, was less favourable than was or would have been afforded to others.”*

- 4.9 More recently the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. The Tribunal's task is not straightforward in this case of starkly disputed facts such that the application of a two stage test remains helpful and appropriate in providing the necessary illumination.

- 4.10 The complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which states:

*“(1) A person (A) harasses another (B) if -*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect of—*

*(i) violating B's dignity, or*



(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

(4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

(a) *the perception of B;*

(b) *the other circumstances of the case;*

(c) *whether it is reasonable for the conduct to have that effect.”*

4.11 Section 136 is again relevant to establishing that the unwanted conduct in question related to the relevant protected characteristic. In order to shift the burden of proof, there is a need for the Claimant to adduce evidence to suggest that the conduct could be related to the protected characteristic, i.e. the Tribunal could reasonably conclude the detrimental treatment to be race related. There was no suggestion that the Claimant did not as a matter of fact suffer the required effect nor that if there was the requisite unwanted conduct it was not reasonable for the conduct to have had that effect on him.

4.12 Mr McDevitt on behalf of the Respondent, in terms of the complaints of harassment, conceded that if the Tribunal found there to be unwanted conduct in the Respondent's response to the Claimant's complaints that he was subject to racist behaviour, that must be conduct which relates to race. The Tribunal had pointed out to Mr McDevitt that in this context unwanted conduct can (but not necessarily will) include inaction, the Tribunal drawing on the EAT authority of **Conteh v Parking Partners Ltd [2011] ICR 341**.

4.13 The Tribunal, despite Mr McDevitt's effective concession, was mindful that section 26 does require there to be unwanted conduct related to a protected characteristic. This is wider than the predecessor legislation which required the conduct to be "*on the grounds of*" the protected characteristic, but the breadth of the current section 26 must have limits. The Tribunal notes Langstaff J's hesitation in the **Conteh** case in concluding that the creation of the necessarily hostile etc environment is apt to include a case where all that can be said against an employer is that he has failed to remedy a situation brought about by the action of others for whom he is not responsible. He said within that case:

*“Thus, if inaction occurs because, for instance, the relevant person in the employment of the employer is ill, or for instance because the office is so completely inefficient as to fail to deal with something, or for various other reasons which can easily be imagined which have nothing to do in themselves with race or ethnic or national origin, then the inaction, however regrettable it may be, is not on the grounds of race or ethnic or national origin”.*

4.14 Harassment will be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

4.15 A claim based on "*purpose*" requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw

inferences as to what the true motive or intent actually was. The person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

- 4.16 Where the Claimant simply relies on the “*effect*” of the conduct in question, the perpetrator’s motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant’s point of view. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect. The fact that the Claimant is peculiarly sensitive to the treatment accorded him does not necessarily mean that harassment will be shown to exist.
- 4.17 Harassment and direct discrimination complaints are mutually exclusive. A Claimant can not claim that both definitions are satisfied simultaneously by the same course of conduct – ‘*detriment*’ does not include harassment (Section 212(1) of the 2010 Act).
- 4.18 The Claimant complains of victimisation pursuant to Section 27 of the Equality Act 2010 which provides:-

*“(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-*

- (a) B does a protected Act, or*  
*(b) A believes that B has done, or may do a protected act”*

- 4.19 Subsection (2) defines what a protected act may be which includes “*making an allegation (whether or not express) that A or another person has contravened this Act*”. A ‘*bad faith*’ exclusion from protection is provided for in subsection (3). Victimisation claims also are subject to the shifting burden of proof contained within Section 136 of the Act. Mr McDevitt accepts that his grievance of 23 March 2016 and Employment Tribunal claim lodged on 6 July 2016 were both protected acts.
- 4.20. Applying the above legal principles to its findings of fact, the Tribunal reaches the following conclusions.

## 5. Conclusions

- 5.1. The Tribunal deals firstly with the Claimant’s complaints of harassment pursued also in the alternative as direct discrimination. The Claimant complains firstly regarding his being the subject of racist abuse by a student whom he taught. The Claimant cannot have any complaint that the Respondent has harassed him in the sense that it might in some way be liable for the behaviour of the student. It is not.
- 5.2. The primary thrust of the Claimant’s complaint is instead that the Respondent failed to deal with the racist conduct of students or at least deal with it effectively including in not addressing the concerns raised within his grievances such that the Claimant continued to have to work in a hostile environment.

- 5.3. This complaint is effectively one of inaction on the part of the Respondent.
- 5.4. One of the strands of this complaint relates to the Respondent failing to take stronger action in respect of Student A and in particular to exclude him from the PRU. The Claimant maintains that the Respondent's failure to do so was unwanted conduct related to his race or alternatively that it amounted to an act of less favourable treatment in that when a pupil was abusive and threatening towards Ms Mollicone, a white employee, the pupil in question was excluded.
- 5.5. In terms of a complaint of direct race discrimination, the Tribunal is satisfied that the Claimant has shown primary facts from which it could reasonably conclude that he was treated less favourably because of his race. The Tribunal does not conclude that Ms Mollicone was a true comparator in the sense that here we have the victim of the abuse, Ms Mollicone, suggested by the Claimant as also being the decision maker in terms of the exclusion from the PRU of the pupil who abused her. Instead, as regards the abuse suffered by the Claimant from Student A, Ms Mollicone was said to be the person who made the decision not to exclude Student A for abusing another person, i.e. the Claimant. Also, Ms Mollicone was employed in the role of head teacher rather than in the more junior position held by the Claimant.
- 5.6. The Tribunal has further heard evidence regarding the conduct of Student O towards Ms Mollicone where he has been described as snarling with his teeth bared and acting in a menacing fashion making a defined threat towards Ms Mollicone. This does contrast with the type of behaviour of which the Claimant was complaining which was of serious racist abuse but was still different in its character from the conduct of Student O.
- 5.7. However, that is not to say that the instance of the behaviour of Student O towards Ms Mollicone is of no value in terms of a comparative exercise. Indeed, Student O was one of only two pupils classified as special educational needs within the PRU and therefore an individual who might be expected to have been given some greater leeway in terms of sanction. Nevertheless he was quickly and permanently excluded from the PRU.
- 5.8. In contrast, Student A could be regarded as very lucky indeed in terms of the lesser sanction applied to him and the continuing chances afforded to him. Whilst Student A was temporarily excluded he was allowed quickly back to the PRU albeit on a restricted timetable not attending any class taught by the Claimant. The Claimant's stage 2 grievance was successful to the extent that Mr Kenyon thought it appropriate that Student A's continuance within the PRU be dependant upon his apology and engagement in a restorative process. Nevertheless, ultimately something less than a full apology was accepted from Student A who did not seriously engage in any form of restorative process albeit he did sign a behavioural contract giving an undertaking regarding his future behaviour. The Claimant continued to express and feel disquiet at Student A's presence within the PRU. A further incident of violent and abusive behaviour by Student A towards another pupil occurred in May but even then there was no exclusion from the PRU, but an allowance of Student A to attend to complete his GCSE examinations.
- 5.9. Furthermore, the case of the abuse and form of assault to which Mr Sheargold was subjected (another black teacher) was illustrative of a more lenient approach which the Respondent might take than that taken in respect of Student O when he abused and threatened Ms Mollicone. The behaviour of the

pupil towards Mr Sheargold was in fact closer perhaps to the behaviour to which Ms Mollicone herself was subjected, it involving indeed the throwing of a fire extinguisher in Mr Sheargold's general direction.

- 5.10. These factors are sufficient to shift the burden to the Respondent and to require it to provide an explanation.
- 5.11. The Tribunal however accepts that Ms Mollicone, whilst she might make recommendations to District PRU, had no power herself to permanently exclude. The Tribunal further accepts that exclusion from the PRU was an absolute last resort in circumstances where any pupil being excluded would already have been excluded perhaps multiple times from mainstream education and exclusion units within ordinary schools. Their attendance at the PRU was effectively a last chance saloon in circumstances where expulsion could and was likely to amount to a significant removal of any opportunities for the young person's future development. Certainly, the District PRU expected the PRU to seek to use exclusion as a very last resort and its focus was on keeping children within the education system wherever at all possible. Furthermore, cases were viewed individually on their particular circumstances. The Tribunal has heard and accepts that the pupil who abused and threatened Ms Mollicone had a very thick file in terms of his history of abuse and had exhibited a pattern, in particular, of threatening females.
- 5.12. Student A, whilst having significant behavioural issues which hampered his learning, was a bright pupil and the Respondent was keen to allow him to complete his education up to the point of taking his final examinations which were fairly imminent. Also, removing Student A from the PRU, whether then introducing any form of home schooling arrangement or not, was likely to place him in a position of further safeguarding risk in him remaining in the home environment.
- 5.13. Fundamentally, neither Ms Mollicone nor anyone else within the Respondent possessed the authority to permanently exclude and whilst incident reports were provided to the District PRU in all of the above mentioned cases, it was District PRU's decision to exclude the pupil who had threatened Ms Mollicone but not to advise and effect the exclusion of Student A.
- 5.14. The Tribunal accepts that within this explanation there was no consideration consciously or otherwise of the Claimant's race. The Tribunal cannot but conclude that if a white employee had suffered abuse and threats of a similar level to that experienced by the Claimant, Student A's continued attendance within the PRU would have been managed in exactly the same manner and for the same reasons as set out above.
- 5.15. Nor did Ms Mollicone's and the Respondent's response to Student A represent a disregard for the racist aspects of Student A's behaviour. Student A was regarded as having behaved inappropriately but again for the reasons set out above the Respondent sought to retain him within the PRU to allow him to take his examinations and in circumstances where it thought it would be safeguarding the Claimant. In hindsight, given the racist abuse and assault on another pupil by Student A, the Respondent might well have acted differently but that indeed is a judgment with the benefit of hindsight and does not alter the Tribunal's conclusions that the decisions made in respect of Student A were unrelated to the Claimant's race or the racist behaviour of Student A. The Claimant's complaint at paragraph 1.2.4 therefore must fail.

- 5.16. The Claimant's complaint, however, is significantly wider in that he complains to Ms Mollicone in March 2015 not only about racism suffered by and from pupils but that such racist conduct was not treated, including by the Claimant's colleagues, as seriously and attributing the due level of severity to such behaviour as ought to have been the case.
- 5.17. The Tribunal has no doubt whatsoever and has heard convincingly from the Claimant regarding his upset and distress at being subject to racist behaviour and has similarly no doubt that the Claimant's perception was that the issues he was raising in this regard were not being addressed by the Respondent so as to give him no confidence in terms of his personal safety and welfare at work (and indeed that of others).
- 5.18. Was there, however, unwanted conduct in any inaction on the Respondent's part to address the Claimant's grievances and was such conduct related to race which caused this offensive/intimidating/offensive environment for the Claimant? The Tribunal must on balance conclude that this aspect of the Claimant's complaint of harassment is well founded, certainly, from the Claimant's raising of his issues with Ms Mollicone on 18 March 2015 until his employment ended. The evidence of the Claimant's raising of issues before that point and/or the attitude of others towards his treatment is significantly limited such that the Tribunal can not conclude there to have been inaction on Ms Mollicone's part earlier than 18 March 2016. It follows that the Claimant's complaint at paragraph 1.2.2 must also fail whether as one of harassment or direct discrimination.
- 5.19. However, when he raised his issues with Ms Mollicone on 18 March, she can have been in no doubt regarding the Claimant's view that other members of staff did not treat racist behaviour towards him as a matter of seriousness. He mentioned two individuals who had been dismissive of his issues. Ms Mollicone did not at any stage pick up on those or seek to address the issues with those individuals. She said to the Tribunal that she did pick up on the Claimant's description of the use of language, but that "*there was a lot of banter*" in the PRU.
- 5.20. Ms Mollicone was aware of incident reports logged by the Claimant's colleagues where, whilst they appreciated that racist comments had been made, had felt it appropriate to term such comments as made either in a playful manner or not maliciously or not with the intention of being racist. In cross-examination Ms Mollicone recognised that looking now at those incident reports it was clear that the Claimant's concerns were well founded and that other members of staff had "*minimised*" the treatment to which the Claimant had been subjected of a racist nature.
- 5.21. At stage 2 of the grievance process Mr Kenyon gave evidence as to his view of the incident reports describing racism which, whilst inappropriate, perhaps was not malicious. He considered that the fact that it was being recorded at all within the incident reports showed that such behaviour was being challenged. He accepted that some of the wording used was "*injudicious*" but thought that in reporting the instances the members of staff were simply trying to say that the conduct displayed had not been malicious.
- 5.22. Mr Kenyon did not seek to explore any further a culture which the Claimant was seeking through examples to illustrate to him of a tolerance or downplaying of racist behaviour.

- 5.23. At stage 3 of the Claimant's grievance the matter came before Mr Hambleton. By this stage Mr Hambleton thought his role was to focus on Mr Kenyon's decision rather than go back and understand the wider scope of the Claimant's concerns as expressed initially to Ms Mollicone. From his point of view Student A was the dominant theme and he focused quite tightly on understanding that to his mind the Claimant had been protected by ultimately being taken out of the situation of abuse by Student A.
- 5.24. He felt his outcome recommending a fundamental review of the PRU's policies and the completion of the Respondent's adoption of the more detailed policies of the District PRU provided a solution. However, again in questioning he recognised that he knew of nothing specific on the topic of racism within any of the new policies and he admitted that he had not sought to understand the wider picture in terms of the environment within the PRU or to for instance examine the incident reports.
- 5.25. Mr Hambleton was keen to emphasise the steps that had been taken in terms of promoting better behaviour and an environment of mutual respect. Mr Harwood's evidence continued along that theme but, again, the training on behavioural issues, whilst this might have had an element of equality and diversity within it, was not at all focused upon the type of conduct of which the Claimant was complaining. There was, to the Respondent's credit, a review of the induction given to students with greater emphasis on promoting equality and diversity. However, the Respondent's actions in respect of the Prevent programme had nothing to do with the behaviour of which the Claimant was complaining. Mr Harwood was of the view that he had been advised and had accepted, when he dealt with the Claimant's later grievances at stage 3, that the Claimant's complaints of racism had been effectively dealt with by Mr Hambleton.
- 5.26. He told the Tribunal about the behavioural group and the 'quick wins' identified for the Respondent to achieve in identified key aspects of poor behaviour. However, again, racist abuse was completely missing from this list and his evidence was that the Respondent had focused on what might be termed 'low level' aspects of poor behaviour where positive results could more easily and quickly be achieved and demonstrated.
- 5.27. There had been an enquiry by the Tribunal as regards the ethnicity of both staff and students, it being a statement of the obvious, given the location of the PRU, that one would perhaps expect to see a significant representation of those of Asian ethnicity when compared to those of black Afro Caribbean ethnicity. It was queried by the Tribunal how the Respondent might have dealt with instances of racism directed at those of Asian ethnicity or how those might have been dealt with by teachers/support staff of that ethnic background. The Claimant and Mr Sheargold, as two out of only three black members of staff in the PRU at material times, appeared to have suffered in a way which others, on the evidence, had not. Any such potential differential of treatment was rejected by the Respondent. Mr Harwood in particular sought to proactively address such proposition by maintaining that the students themselves would not recognise and appreciate the difference between someone of black Afro Caribbean ethnicity and someone of Asian ethnicity, differentiating only between light and dark skin thus implying that all those with darker skin would be identified effectively as part of the 'same group'. Whilst Mr Harwood will

know his pupils better than the Tribunal can, it found his assertion to be difficult to accept.

- 5.28. In essence, for many months and over repeated grievance hearings the Claimant was raising and demonstrating by his genuine concern and failings in his health that he was being significantly affected by racism to which he was subjected which was of a different character to which he had ever experienced. Indeed, the context here is of a mature individual used to working with young people and who would be expected to have a significant degree of tolerance not least out of past bad experiences, not that there is any reason why he should be tolerant. Nevertheless, the Respondent appeared to have something of a blind spot in terms of his wider concerns.
- 5.29. There was unwanted conduct in terms of the Respondent's inaction in that the Respondent did at no stage during the grievance process seek to grapple with the Claimant's concerns or to provide any assurance to him regarding any likely change in the working environment or means of providing him with protection. The Tribunal has to conclude also that such inaction was related to the Claimant's race. In reaching his conclusion it does so not on the basis that the complaints of the Claimant were of race discrimination. The Tribunal's conclusions are very specifically that the Respondent failed to deal with complaints of race discrimination and an environment where the Claimant was fearful of racist abuse (and a tolerance of such abuse) in circumstances where the Tribunal cannot accept that this would have been the ordinary, standard or expected reaction of the Respondent to complaints of abuse. The Respondent's inaction again was characterised and influenced by a specific blind spot and lack of appreciation of the seriousness of the racist abuse and tolerance of it which the Claimant was raising as a black man. Certainly, the Claimant has shifted the burden of proof and the Respondent has failed to provide an adequate explanation for its treatment of him that the inaction was in no sense whatsoever because of race. There is no argument from the Respondent that the Claimant did not suffer the necessary hostile, offensive etc. environment or that it was not reasonable for him to view the unwanted conduct (if found by the Tribunal) in such way.
- 5.30. The Claimant's complaint of racial harassment in respect of the Respondent's failure to deal effectively with racist conduct of students and uphold his grievance about the way the Respondent responded to his complaints (paragraphs 1.2.1 and 1.2.3) is therefore well founded and succeeds. In such circumstances it is not necessary to analyse such complaint, in the alternative, as one of direct race discrimination.
- 5.31. The Tribunal then turns to the Claimant's various complaints of victimisation. In this regard it is of course accepted that the Claimant by his grievance of 23 March and his subsequent Employment Tribunal application of 6 July 2016 made protected acts. The Respondent's witnesses and in particular Ms Mollicone have not maintained that they were unaware of the Tribunal application – indeed, she must have been involved in the content of the response. In terms of shifting the burden of proof, the Claimant has adduced facts from which the Tribunal could reasonably conclude in respect of all the specific/individual allegations of victimisation that the detrimental treatment, as found to have been suffered by him, was because of his protected acts. Overarching all of the detriment complaints are findings in terms of the Respondent's attitude which could lead the Tribunal to infer unlawful treatment

without an adequate explanation. Ms Mollicone when asked by the Claimant by email of 9 May 2016 why Student A was on site was advised not to reply to the Claimant as the Claimant's grievance was being progressed through the formal channels. She therefore did not reply. When Ms Mollicone was asked about the lack of effort to locate the slavery module portfolios, she said that this "*could have been because of the grievances.*" By September 2016 Ms Mollicone received information from the Claimant about pupil attainment but described herself as "*being inundated*" at the time given the Claimant's grievances and copious emails. As regards his office move and lack of teacher meetings she said that, based on his grievances, she was not sure if he was returning to work. When the Claimant on 2 November 2016 raised the playing of an offensive rap song in his presence, Ms Mollicone did not reply but said in evidence before the Tribunal that it was about the Claimant himself having to take responsibility. It is correct that when Ms Mollicone first received the Claimant's clear concerns on 18 March 2016 she did act, but the Claimant's lack of forbearance and satisfaction, on the evidence, irked her and the effective repetition and elevation through the Respondent's procedures of his complaint that she had failed to act. In time, Ms Mollicone also was faced with accusations against her being pursued in the Employment Tribunal. The Claimant's concerns which she found challenging to deal with in the context of his determination to pursue a grievance against her and an Employment Tribunal claim influenced her behaviour and changed her attitude towards the Claimant and the way in which she would ordinarily have interacted with him. Whilst there was no immediate or quick attempt to remove the Claimant from his employment, the Respondent can not have been unaware of the likelihood of a discrimination complaint resulting, particularly if there was a total disregard of procedure.

- 5.32. As detriments because of his protected acts the Claimant firstly complains about him being removed from the acting deputy role and (in a related complaint) to Ms Mollicone deliberately omitting to inform him that he was able to apply for the post. Again, the background to the appointment of deputies for the new academic year from September 2016 is one where the Claimant had already, together with the other four members of teaching staff, served as a deputy without any evidenced criticism of his performance as such and in circumstances where the Respondent had determined and was content not to make an appointment of a single individual to a deputy role but to continue with teachers sharing the responsibilities of a deputy head teacher. Indeed, Mr Kenyon and others gave evidence to the effect that they had no issue regarding five individuals continuing as deputies rather than only four. The Claimant, however, had been affected by the abusive and racist behaviour of students towards him and had raised his grievances to Ms Mollicone and then pursued/repeated the same grievance through the various stages of the Respondent's procedures. Even by the end of such procedure it was clear that the Claimant was not satisfied with the Respondent's treatment of his complaint. Of course, in July the Claimant had raised an Employment Tribunal complaint alleging victimisation and harassment.
- 5.33. Against that background the Tribunal's conclusion is that the Claimant was deliberately excluded from consideration for the continuing role of deputy and that he was given no genuine opportunity to apply for such position. The Claimant has made out a prima facie case of discrimination. Again the Respondent's evidence by way of explanation on this was wholly



unsatisfactory. The Tribunal did not believe that Ms Mollicone had so little knowledge of an application by all her teachers (apart from the Claimant) for the deputy role. It is not credible that neither the teachers who put together a proposal to continue as deputies nor their line managers who then considered the proposal did not register that the Claimant was being excluded. Mr Kenyon's evidence that he still considered that the Claimant might apply and become a deputy albeit there was an issue regarding whether he could be paid an honorarium is rejected. The closest the Respondent's witnesses have come to an explanation for the lack of consideration is that it was not believed he was returning to the PRU or continuing in the Respondent's employment. Suggestions that the Claimant missed out because he was absent due to sickness at the time have no basis in fact given that the Claimant was absent from work for only one week in June and, whilst not within the PRU, was working in a nearby building throughout the period until the start of the summer holidays. The Claimant was absent for the first two weeks of the new summer term but it is absolutely clear that the decision had been taken by that stage to run with the other four teachers as deputies and the payments of their honorariums had been agreed. When Ms Mollicone said that the Claimant could put forward a proposal this was not a proactive move by her but a response to the Claimant's legitimate complaints that he had been excluded.

- 5.34. If indeed the Respondent omitted to consider the Claimant for the deputy roles because it thought he was not coming back to the PRU or to the Respondent then such conclusion was without any tangible basis but also must be inextricably linked to a view that because the Claimant had raised his grievance, was clearly not satisfied with the outcomes and was now pursuing Employment Tribunal proceedings, he might not be returning.
- 5.35. The Respondent has failed to provide a satisfactory explanation for its exclusion of the Claimant such that the Tribunal must conclude that its decision not to consider him for the role was because of his protected acts. The complaints are paragraphs 1.4.1 and 1.4.3 succeed.
- 5.36. The Claimant next complains regarding the move on 20 September 2016 of his desk from the teachers' office. This was a move which took place in some considerable haste upon the, to the Respondent, shock announcement that the Claimant would be returning to work the following day. There was in the Respondent's mind an urgent need to ensure that the Claimant could not return to work and sit with the other teachers who were now, in contrast to himself, also the continuing deputy head teachers. There was no need to move his desk. An alternative office had been identified for the Claimant where there was already a spare desk. The move of the desk can only have been to remove any possibility whatsoever of the Claimant returning to his normal workstation.
- 5.37. The Tribunal does not accept that the desk was moved to make more room in the office. Again the desk move happened in circumstances of some urgency two weeks into the new term where had there been such a genuine and pressing need to create more space such move could have happened at a significantly earlier stage. The timing, the Tribunal considers, is not coincidental.
- 5.38. Further, the Tribunal rejects the explanation that the Claimant had to be placed in an alternative room so that the deputy teachers could discuss deputy teacher

level matters of a confidential nature, i.e. matters which it would not be appropriate for the Claimant to hear. Given the Claimant had previously performed the role of deputy and given the nature of the discussions and in circumstances where the Tribunal has not had explained to it how deputy level discussions could be so confidential, such explanation is roundly rejected. Furthermore, there was no impediment on the deputies meeting, if they needed to meet as deputies, in Ms Mollicone's own office as indeed had in the past and continued to take place.

- 5.39. The Tribunal cannot believe that Ms Mollicone thought that in taking the actions she did, she was ensuring that the Claimant received 'a warm welcome'. In reality she was (and she and all the other teachers knew they were) effectively isolating the Claimant as a member of teaching staff. It was clear that the Claimant being placed in an office away from the other teachers and with two support staff would consider and be perceived as having been demoted.
- 5.40. Again, no explanation has been provided for the desk move which might allow the Tribunal to accept that the move was in no way related to the Claimant's protected acts. Indeed, the Tribunal concludes that the disquiet and concern raised by the Claimant's allegations and pursuance of his grievances was in substantial part responsible for him being moved out of the teachers' office. The complaint at paragraph 1.4.2 succeeds.
- 5.41. The Claimant next complains regarding the replacement of his humanities course with the ASDAN qualification and his allocation of two larger groups of pupils. Again, all the above factors cause the burden to shift and require the Respondent to provide an explanation for the Claimant no longer teaching the humanities award. The Tribunal, however, on the evidence before it accepts that this change came about due to a District PRU audit and recommendation, which the Respondent accepted, that it should instead teach a course which the District PRU thought to be more relevant to pupils within the PRU but more importantly one which also carried with it SCATT points which would potentially benefit the students but also the Respondent itself in terms of showing added value. Ms Mollicone's view was that the humanities qualification had not been a success in terms of pupil attainment. Whilst she came to that view without sight of all the work undertaken by the pupils it was indeed her genuine view.
- 5.42. The Tribunal would have viewed the lack of consultation and prior notice given to the Claimant as an act of victimisation in circumstances where the Tribunal cannot accept that a teacher would ordinarily be kept in the dark potentially from June until a return to work in late September that the course of study he was required to deliver had fundamentally altered. However, that is not one of the Claimant's pleaded complaints.
- 5.43. The introduction of the ASDAN qualification cannot on the evidence be seen as an attempt to remove the Claimant or to unsettle but was genuinely driven by purely curriculum based decisions and the Claimant's complaint of victimisation in this regard must therefore fail. The complaint at paragraph 1.4.4 fails.
- 5.44. Whilst not significantly explored by the Claimant with the Respondent's witnesses, the Tribunal concludes that the allocation of two larger groups to teach the ASDAN course to was an organisational and resource issue only and nothing to do with the Claimant individually or to make life difficult for him as an act of victimisation.

- 5.45. The Claimant next complains that after 20 September 2016 he was given the task of searching pupils arriving into the PRU with a scanner. Effectively, the Claimant regards himself being given such duties as a continuation of his isolation as a teacher and him being demeaned in that he was being treated as a member of support staff. The Respondent maintains that the Claimant was asked to carry out this role due to the need for a male member of staff and no other male teaching staff being available at appropriate times. However, this fails to address the fact that the Claimant was put on a rota to routinely carry out this task in circumstances where no other teacher was or had been and in circumstances where this was a support staff role and where it has not been shown that it was not possible to straightforwardly increase the involvement of support staff in scanning, rather than to allocate the Claimant as an additional scanner. The Tribunal is therefore unsatisfied by the Respondent's explanation and sees the Respondent's actions as indeed a further isolation of the Claimant as a member of teaching staff which it must conclude, given the lack of adequate explanation, was a further detrimental act because of the Claimant's protected acts. The complaint at paragraph 1.4.5 succeeds.
- 5.46. The Claimant next complains that after 20 September Ms Mollicone fabricated a late fee being necessary to be paid to stop the Claimant's students getting their qualifications. In a related allegation it is said that she falsely alleged that the Claimant's pupils were not given their qualifications because he had failed to register them.
- 5.47. The evidence, the Tribunal accepted, is that whilst there had been a concern regarding student registration, the Claimant on 28 June 2016 had clarified the situation and had made provision so that the pupils' portfolios could be uploaded through the AQA gateway. The Claimant expected this to happen. The Tribunal notes from the evidence no attempt on the Respondent's part to take action to ensure that the students or at the very least those who had attained the necessary level were awarded the qualification they had worked towards and merited. In circumstances where a whole unit's worth of work on slavery could not be located, there was no attempt whatsoever to ascertain with the Claimant where that might be or how the pupils had been assessed. Even if the circumstances were such that Ms Mollicone mistakenly believed there was a need to register students and pay late fees, there seems to have been no genuine interest in pursuing any course which would have allowed again the students to have gained the qualifications they had achieved. If there had been an issue of a late fee, then it was not the pupils fault that this had arisen but there was no care or consideration on the evidence given to what the pupils might be missing out on. In the circumstances again the Tribunal is not satisfied with the Respondent's explanations regarding the failure to ensure that the students achieved these qualifications, such that it is compelled to conclude that the Claimant was further treated to his detriment in the Respondent's failure to understand and ensure that the qualifications were attained. The Tribunal can only but conclude that Ms Mollicone saw the results of the pupils as an indication of the Claimant's lack of performance which might be used against him. Such matters were not taken forward as points of criticism of the Claimant, but in circumstances where Ms Mollicone was effectively put right by the Claimant regarding there being no need to register pupils or pay late fees. If he had not done so then the Tribunal cannot but conclude that this would have formed another point of criticism of the Claimant in terms of his failure to

attain the standards required to confirm his employment as permanent. The complaints at paragraphs 1.4.6 and 1.4.7 succeed.

- 5.48. The Claimant next complains regarding the way in which his probationary period was extended to November 2016 and him not being told in good time. His complaint is not about the extension of the probationary period itself which the Claimant accepts was inevitable in circumstances where he had still not attained level 2 in maths and English. Rather, again, the Claimant maintains that had he not made protected acts and had he been treated as an ordinary employee with issues regarding his probationary period, he would not have had to wait until he returned to work on 20 September 2016 to be told that there had been a three month extension to his probation effective in fact from 1 September. Indeed, there is no evidence that the Claimant was ever told of Ms Mollicone's initial decision to extend probation by six months and then subsequently to extend it by three months when she realised that was the only permissible extension available. The decision on balance is likely to have been made in July 2016 and there is no explanation why it was not communicated to the Claimant when the decision was made, nor even at the start of the new academic year. Him being told of the extension of his probationary period appears as an afterthought or an action which the Respondent thought it might not be required to take in circumstances where there was some thought that the Claimant would not be returning to work. Again, that is inextricably linked with the Claimant's grievances and Tribunal proceedings and the Respondent has provided no adequate explanation to the Tribunal that the failure to advise the Claimant at an earlier point was in no way because of his protected acts. The complaint at paragraph 1.4.8 succeeds.
- 5.49. The Claimant next complains that he was only set the targets he needed to meet on 1 November 2016 therefore giving him only one month out of the three month extended probationary period in which to achieve those targets. He maintained that this was an example of him being set up to fail. Again, the burden of proof in respect of the above acts has shifted to the Respondent to provide an explanation for the failure to give the Claimant his targets at an earlier stage. No explanation has been provided such that the Tribunal again must conclude that this was because of the Claimant's protected acts. The complaint at paragraph 1.4.9 succeeds.
- 5.50. The Claimant next complains of Ms Mollicone referring him for disciplinary proceedings in respect of the one to one meeting he had with her on 16 November. He makes no complaint in respect of the referral for disciplinary action in respect of the team meeting. On the face of Ms Mollicone's note of her discussion with the Claimant on 16 November it is clear that she was influenced in her view towards him by her view that she was being inundated with complaints and concerns raised by the Claimant and having to spend a significant amount of time on them and including indeed in dealing with his grievance issues. The Claimant acting in the way she maintained he had at that meeting would have been unlikely in ordinary course to result in a referral for disciplinary proceedings, but was rather a matter which Ms Mollicone might be expected to deal with at source as the Claimant's line manager. She clearly by this stage was cautious and even fearful of her dealings with the Claimant in terms of possible repercussions such that she both did not wish to deal with the matter directly with the Claimant and also thought that the matter ought to be elevated whereas in other circumstances it would not have been. Again, the

referral of the Claimant for disciplinary proceedings in respect of this meeting was an act of victimisation. The complaint at paragraph 1.4.10 succeeds.

- 5.51. Ms Mollicone next referring the parent and pupil complaints to quality and standards before speaking to the Claimant is viewed as further detrimental treatment. Again the evidence was that it was the standard practice of the Respondent to speak to an individual concerned about the issues. Indeed Ms Mollicone showed no interest in either speaking to the Claimant or indeed understanding what these complaints were about in circumstances where there was, in both complaints, another member of staff who had witnessed the incidents. Ms Mollicone appeared to wish quickly to elevate such matters and indeed to use them (in circumstances where certainly the pupil's complaint was somewhat stale) in the case she was putting together to recommend the Claimant's failure of his probationary period. This constitutes a further act of victimisation. The complaint at paragraph 1.4.11 succeeds.
- 5.52. Finally, the Claimant complains that Ms Mollicone recommended his dismissal and deliberately misled the decision maker in her report. Again the Tribunal has already made significant findings of fact to the extent that Ms Mollicone was looking for matters to criticise the Claimant about. She went outside the period of review to do so. The student and pupil complaints were raised in circumstances where they had not been investigated and where no decision had been taken upon their validity in any event. The disciplinary matter regarding the 16 November meeting was raised against the Claimant again in circumstances where the matter was to proceed as a disciplinary issue but had not yet been determined. Her representation that the Claimant had not complied with the condition of completing his level 2 maths and English qualifications by 30 November was, as Mr Thomas found, certainly at the very least not within the spirit of the probationary review in circumstances where the Claimant had evidenced his passing of all but one module and was straightforwardly awaiting the result of one final module which he had already taken before 30 November and where he was able to say that he had received feedback to the effect that he had passed. Criticisms of the Claimant regarding failing to keep appointments were of some legitimacy but of a much diminished legitimacy in circumstances where all of the meetings were internal meetings within the Respondent and indeed one of them related to the investigation into his disciplinary issues and another related to his attendance at a grievance hearing. It is absolutely clear that a head teacher's recommendation of dismissal would carry significant weight with any person making a decision and the report was deliberately constructed to exaggerate the seriousness of matters and to make a case against the Claimant.
- 5.53. Ultimately, most of the criticisms she made ought to have fallen away on their proper analysis at the probation hearing stage.

5.54. By her recommendation that the Claimant be dismissed the Tribunal can only again conclude that Ms Mollicone treated him detrimentally because of his protected acts. Certainly, the Claimant has shifted the burden of proof and there has been no adequate explanation that the detrimental treatment was in no way whatsoever because of the protected acts. The complaints at paragraph 1.4.12 succeed to the extent described above.

**Employment Judge Maidment**

Date 9 August 2017