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## THE EMPLOYMENT TRIBUNALS

**Claimant**

**Respondents**

**Ms V Astor**

**v**

**(1) Ministry of Defence  
(2) Mr J Redman**

**Heard at:** London Central

**On:** 10-13 July 2017; 14 July 2017 in chambers

**Before:** Employment Judge Glennie

**Members:** Ms O Stennet  
Ms S Boyce

**Representation:**

**Claimant:** Mr T Sheppard, Counsel

**Respondent:** Mr J Chegwidden, Counsel

## JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is well founded against the First Respondent.
2. There was a 25% chance that if a fair procedure had been followed the Claimant would have been successful in applying for the permanent position as a year 3 and 4 teacher at St David's School commencing in September 2016.
3. The complaint of failure to provide a written statement of employment particulars contrary to Section 1 of the Employment Rights Act 1996 is well founded against the First Respondent.
4. The complaint of breach of contract (wrongful dismissal) is dismissed.

5. The complaints under the Equality Act 2010 of direct discrimination because of age; direct discrimination because of sex; harassment related to age; and harassment related to sex are all dismissed.
6. The complaint of detriment on the ground that the Claimant was a fixed term employee is dismissed.
7. Remedies in respect of the complaints that are successful (in relation to the First Respondent, the Ministry of Defence only) will be determined at a hearing on 3 November 2017, commencing at 10am with a time estimate of 1 day.

## **REASONS**

- 1 By her claim to the Tribunal, the Claimant made the following complaints:-
  1. Unfair dismissal.
  2. Wrongful dismissal (breach of contract).
  3. Failure to provide a written statement of initial particulars of employment or particulars of a change.
  4. Direct discrimination because of age.
  5. Direct discrimination because of sex.
  6. Harassment related to age.
  7. Harassment related to sex.
  8. Detriment on the grounds of being a fixed term employee.
- 2 The Respondents, the Ministry of Defence and Mr Redman (the latter being a respondent to the complaints under the Equality Act only) disputed those complaints.
- 3 The Tribunal is unanimous in the reasons that follow.

### **Interlocutory Application**

- 4 Mr Sheppard applied to amend the list of issues and/or the claim to add the following:-

“In addition to the issues identified at the CMO dated 5 January 2017, the following matter constitutes an act of direct discrimination and/or less

favourable treatment of the Claimant under the Fixed Term Employees Regulations 2002:-

The failure of the Second Respondent between 23 March 2016 and 31 August 2016 to notify the Claimant of the details of the vacant post identified at pages 508 – 514 of the bundle and the fact that it was open to applicants.”

- 5 Mr Chegwidden resisted that amendment on behalf of both Respondents.
- 6 The Tribunal had regard to the principles in the well known case of **Selkent**. The Tribunal concluded that this amendment added little, if anything, of substance to the allegations that were already pleaded to the effect that the decision to dismiss the Claimant was an act of discrimination in that, as will be explained, the issues about the advertising of the permanent post in question were closely related to those about the way in which the fixed term engagement came to an end. The same was true whether the amendment was to the claim form, or to the list of issues.
- 7 We concluded that there would be no evidential prejudice to the Respondents if the amendment were allowed as the Second Respondent, Mr Redman, would be giving evidence in any event and could give any necessary additional evidence in chief orally.
- 8 The Tribunal therefore allowed the amendment.

### **The Issues**

- 9 The issues were defined in Annex B to the Case Management Orders made on 5 January 2017. A copy of that annex is attached as an annex to these reasons and the list of issues should be read with the addition of the issue allowed by amendment, described above.

### **Evidence and Findings of Fact**

- 10 The Tribunal heard evidence from Ms Astor on her own behalf and read a witness statement from a former colleague, Mr Rodney Smith. Mr Smith did not attend the hearing and the Tribunal therefore gave his statement less weight that it would have done had he given oral evidence and been cross-examined.
- 11 On behalf of the Respondents evidence was given by Mr John Redman, the Head Teacher of St David’s School; Ms Julie Cope (by way of video link), a member of the MoD Defence Business Services Human Resources Team; Ms Rowena Redgwell, the Assistant Head Teacher at St David’s School; and Mr Colin Fleetwood, now retired but at the time Senior Principal for MoD Schools.

- 12 There was an agreed bundle of documents and page numbers that follow in these Reasons refer to that bundle.
- 13 The Claimant, who is a teacher, was born in December 1986 and so is now aged 30. She qualified in 2013, at which point she began work for the First Respondent, which will be identified as the MoD in these reasons. The Claimant's work for the MoD took place in Germany, where she worked in schools run by the MoD for the children of service personnel and civilian employees.
- 14 The relevant parts of the history of the Claimant's employment with the MoD will be explained further in these reasons, but the hearing was mainly concerned with her employment at St David's School in the academic year 2015/2016. As already indicated, the Second Respondent, who we will refer to as Mr Redman, was the Head Teacher of St David's School, joining in September 2015. This was a small school, educating children aged 3-11 years of age. There were five teachers in addition to Mr Redman.
- 15 In the academic year 2015/2016, the Claimant reached her 28<sup>th</sup> birthday. The other teachers were aged approximately 52 to 61 years at the relevant time. The Claimant was the only teacher working under a fixed term contract.
- 16 Part of the background to the matter was the withdrawal of British Army personnel from Germany, leading to the closure of the schools that were maintained in order to provide an education for their children. St David's School, however, was not directly affected by this as it served the families of personnel engaged as a part of the NATO presence in Germany, as opposed to that of the British Army as such.
- 17 In 2012 or early 2013 there appeared an advertisement (at page 81) for newly qualified teachers to join a pool to fill vacancies that were expected to arise predominately in Germany, working in MoD Schools. The advertisement said that the posts were time limited, with teachers initially working for 2 years with the possibility of an extension of up to one year if agreed by HQSCE. The Claimant applied and on 9 August 2013, by a letter at pages 91-92, was offered an appointment at Bruggen Primary School in Germany from 1<sup>st</sup> September 2013. This was stated to be for a fixed term of 2 years until 31 August 2015. Clause 8 of the letter (which was sent by Ms Cope) stated that details of the principal terms and conditions of employment were set out in an accompanying statement of particulars of employment. Clause 10 read: "if you wish to accept this offer of employment please sign and return to me the enclosed copy of this letter and the acknowledgement form at the bottom of the statement of particulars of employment".
- 18 When cross-examined about what she received at this point, the Claimant said initially that she only received this letter. She then agreed that she might have signed a copy of a statement of particulars. She was shown a form of standard particulars at pages 756 to 764, which was unsigned but had her

name typed on it, and which had been produced from the MoD's files. She was adamant that she had not received a document of that nature.

- 19 Mr Chegwidan submitted that the Tribunal should find on balance of probabilities that the statement of particulars was enclosed with the initial letter and that the Claimant had essentially forgotten that she received it, whether or not she ever signed and returned a copy.
- 20 The Tribunal found that it was probable that the Claimant had not received that document, for the following reasons:-
  - 20.1 Although she recognised that she might have received some other document with the appointment letter, the Claimant was clear in her recollection that this was not the set of standard particulars of employment to which she was referred.
  - 20.2 The MoD were unable to produce a signed copy of the particulars that should have been returned according to the terms of the letter of appointment. This meant that something had gone wrong with the intended process. It might have been that the particulars were not sent in the first place; or that the Claimant failed to sign and return them, in which case that had not been followed up; or that she had signed and returned them and they had become lost from the file. In any event the MoD could not point to the system functioning properly and the Tribunal could not infer that it had. Clearly on this occasion it had not functioned in some way or another, and it would not be safe to base a conclusion on an assumption that it had.
  - 20.3 The presence on the MoD's file of a copy of the particulars intended for the Claimant but not signed by her was as consistent with the particulars not having been sent by reason of an error, as with any other explanation of how that situation came to be. Given the Claimant's evidence on the point, the Tribunal concluded that this was the more likely explanation for the situation.
- 21 The Claimant worked at Bruggen School for 2 years as intended. On 8 June 2015, Ms Emma Goodall of HQSCE sent an email to the Claimant offering her a fixed term appointment at St David's School, commencing on 1<sup>st</sup> September 2015 to 31 August 2016, this being at page 128.
- 22 On 16 July 2015 Ms Cope sent to the Claimant an email at page 131 confirming her post rotation to St David's School, and saying "this appointment will effectively extend your fixed term appointment by a further 3 years until 31 August 2018". The letter attached to the email, at pages 132-133 gave the correct start date but a tour end date of "notionally 31 August 2018". There was also an MoD post rotation form at pages 125 to 127, showing the move from Bruggen to St David's with an effective date of 1 September 2015, but in which the expected tour end date was left blank.

- 23 Ms Cope's evidence, which the Tribunal accepted, was that she misunderstood the position initially, believing that the Claimant was effectively starting a tour of duty on that date, and that it was therefore intended that the appointment would be for a term of 3 years. That understanding was contrary to the position set out in Ms Goodall's email to the Claimant of 8 June 2015, which in itself was consistent with the term of 2 years with a possible further one year in the 2012/13 advertisement referred to above.
- 24 On 26 August 2015, at page 139, the Claimant sent an email to Ms Cope asking for a copy of her contract. Ms Cope replied on 28 August at page 138 saying that contracts were not issued but instead she would receive a statement of particulars up to 3 months after what was put as "the employee has been issued" but which was evidently intended to mean after the employment had commenced.
- 25 At some point in October 2015 there was a conversation between the Claimant and Mr Redman about the duration of the Claimant's appointment at St David's School. The Claimant's evidence was that she told Mr Redman that she had a contract taking her to 2018, which evidence Mr Redman disputed. At page 143 there was an email of 15 October 2015 from Mr Redman to the Claimant which read as follows:-
- "As we discussed, currently I cannot offer you further employment after the end of your contract at St David's. I will argue to keep you on however it might not be possible. Please see the attached advert – if you want to stay in Germany/SCE you may want to check in with these people to ensure that they know you will be redeployable from the end of the AY [Academic Year]. As you would not want to be overlooked for a job role you could potentially fill. Do you know if you have priority status?"
- 26 The Tribunal found this email, which was more or less contemporaneous with the discussion, to be inconsistent with the Claimant having maintained that she had an appointment that would keep her in post until 2018. Had she asserted this, one would have expected Mr Redman to comment on it. Furthermore, it was clear from his email that he understood the position to be that the Claimant would be redeployable from the end of the then current academic year (i.e. summer 2016) and it was unlikely that he would have referred to that in the way that he did if there were some doubt as to whether or not that was applicable. The Tribunal therefore concluded on this point that it preferred the evidence of Mr Redman and that as a matter of probability the Claimant did not at this stage assert that she had a contract taking her through to 2018.
- 27 On 27 November 2015 Ms Cope sent an email to the Claimant at page 180, saying that she had attached an amended post rotation posting letter, with the correct overseas tour end date. This was at page 182 and, referring to the rotation into the post of a teacher at St David's School, the letter gave a start date of 1<sup>st</sup> September 2015, an overseas tour end date of 31<sup>st</sup> August

2016, and a notional tour length of 3 years. Ms Cope's evidence was that at this stage she had realised the error that had previously been made in the documentation. The Claimant did not do anything to challenge what was said in the email and the attached letter. When asked about this in cross-examination she confirmed that she did not reply, and referred to an accident that she had suffered on 27 October 2015 and to which further reference will be made. The Claimant said that this accident caused her to be off work for several weeks and added that when she got back to work she was given an extensive list of jobs to complete.

- 28 The Tribunal found the Claimant's explanation for not challenging the matter unconvincing if, as she maintained, at the time she believed that she had a contract taking her to the summer of 2018. By the time of this email she had recovered sufficiently from her injuries to be back at work and, although she was no doubt busy, it seemed to the Tribunal implausible that she would not at least have queried the matter if she believed that the term of her contract was being reduced by 2 years, or that some mistake was being made.
- 29 The Tribunal therefore found on this issue that, at least by the autumn of 2015 and certainly after the 27<sup>th</sup> November, the Claimant knew that the term of her contract would end in August 2016, and must have realised that the reference made in the single email to a finishing date in 2018 was a mistake that had been corrected.
- 30 Continuing with this particular issue, on 23 March 2016, at page 211, Mr Redman passed to the Claimant a reminder letter confirming the end of contract date for her as the 31<sup>st</sup> August 2016. Mr Redman's evidence was that shortly after this he and the Claimant had a conversation in which the Claimant said that she could stay until 2018 if she wanted, as she had an email. This point was put to the Claimant in terms of a suggestion that she said this, and that it indicated that she did not in fact wish to stay in Germany; hence the words "I can stay if I want", implying that she did not want to do so. The Claimant denied saying that.
- 31 The Tribunal concluded that, as a matter of probability, the Claimant said something along these lines. She had an email that referred to 2018 although, as the Tribunal has found, she was probably aware that this email was a mistake. As for the significance of saying something like "if I want to", the Tribunal concluded that this could mean little more than that the Claimant did not at that time know whether she wanted to stay in Germany or not. If said, this was not necessarily an indication that she positively wished to leave Germany.
- 32 In any event, on 25 March 2016 at page 212, Mr Redman sent an email to the Claimant asking her to send "the actual contract that came with the email" and saying that once she had done that he would discuss the matter further with HQ. The Claimant did not in the event send anything more and Mr Redman took the matter no further.

- 33 Given the above findings of fact, the Tribunal concluded that the Claimant was aware that the August 2018 date that was given to her was a mistake and that the correct finishing date was August 2016. This was of course consistent with what she was initially told about the appointment in the original advertisement, namely that it would be for a period of 2 years with a possible extension for a further year, which would take it to an end in August 2016. That was the contractual term, and the Claimant was not entitled to be offered work or to be paid after the expiry of that term. The complaint of breach of contract (wrongful dismissal) therefore fails because the Claimant's employment came to an end in accordance with the actual contractual terms.
- 34 As indicated above, the Tribunal now turns to the individual allegations of harassment and/or discrimination and/or detriment as identified in the Preliminary Hearing and will give its findings of fact in relation to each of these. The numbered allegations that follow refer to paragraphs in the Particulars of Claim.

### **Allegation 5.2**

- 35 As has already been mentioned, the Claimant suffered an accident during the October half term holiday when she suffered burns to her leg. She was unable to return to work until 17 November. On that date a meeting took place between the Claimant, Mr Redman and Ms Redgwell. At this meeting Mr Redman produced the document at pages 162-163 which, in substance at least, he had already prepared. Following the meeting, further elements including dates by which actions were to be taken were included and are shown on a version of the same document at pages 165-166.
- 36 By way of preamble, the document recorded that this was a meeting to "review where we are and focus on next steps". It referred to the Claimant's background and qualifications and experience and then recorded "current needs means limited opps [opportunities] for team teaching, or shared planning. Teaching in lower KS2 is a different context to FS, with more directed teaching". There then followed a series of matters under the headings of focus, discussion, and action. The points under focus were planning, organisation, reading, environment, drop in feedback, spelling, assessment week, target cards, handover meeting, and data. Under discussion, the documents set out what were effectively requirements in relation to each of these. So, for example, in respect of planning, the discussion recorded "collect planning folder from classroom" and "maths teach complementary objectives; consider groupings". Then alongside that, under action, the document read "meet to share planning later today". As another example under environment, the document recorded "policy shared – rethink room" and gave as action "changes to room in place asap" and "take ownership of room by first week of December".
- 37 As we have indicated, dates were added to the action section and according to a manuscript note on page 165 made by Ms Redgwell, a revised document was given to the Claimant on 23 November. It is the case that



some of the dates recorded there had already passed, so that for example, the action in relation to planning of “need to share planning later today,” had the date of 18 November 2015 added. Others were subsequent, so for example under environment, the changes to room in place had the endorsement “completed 4.12.15”.

- 38 The Claimant’s complaint about this document and the meeting was that the approach taken was harsh and excessive, particularly in the circumstances of her then returning from a period off sick as a result of her injury.
- 39 The Tribunal found that the document was not on its face excessive. It was the case that by the time the Claimant returned on 17 November, she had not planned her classes. Perhaps she had good reason for that, in that she could have been intending to use the half term holiday or part of it for that purpose and she had then suffered an injury that meant that she was not able to work without difficulty. Nonetheless, it would have been necessary for the classes to be planned as soon as possible. A locum teacher had been in place for two weeks, the class was not seen as having progressed particularly well in the half term that had gone before, and Mr Redman would, in the Tribunal’s judgment, reasonably want to take some action on the matter.
- 40 As part of the complaint about the harshness of the approach taken, it was said that this was not a formal return to work meeting after a period of ill health as it concentrated on matters of planning, the class needs and the Claimant’s teaching practices; as opposed to how she was, to what extent she had recovered, and whether any further assistance was needed. On this point, Mr Redman and Ms Redgwell said in their evidence that an enquiry was made as to how the Claimant was, but that according to Ms Redgwell it was not thought necessary to record this. The Tribunal considered that it must have been the case that some question was asked as to how the Claimant was, but that the document reflected that the main thrust of the meeting was indeed towards planning and similar matters.
- 41 So far as the question of dates is concerned, the Claimant complained that when she received the document it included dates that had already passed, so that it looked as though she had already failed in the actions that were required. The Tribunal concluded on this point that the dates that had already passed referred to matters that needed immediate attention, for example a meeting to share planning as already mentioned. We found it probable, as said by Ms Redgwell, that those immediate dates were discussed in the meeting on the 17<sup>th</sup> and were not sprung on the Claimant retrospectively, and that it was not right to say in respect of the dates that it appeared that the Claimant was being set up to fail.

**Allegation 5.3**

- 42 This allegation referred to a dip in performance (DIP) plan that was issued to the Claimant on 17 December 2015. Essentially the Claimant's case about this was that the plan itself was not necessary; that it should not have been open ended but should have been restricted, if required at all, to a short period of time; and that it failed to set measurable objectives.
- 43 The plan itself was at page 187 and referred to two points by way of desired outcome. The first of these was essentially that planning and preparation should be of high quality, the second that books should demonstrate the learning that was taking place. The document listed actions and support that would be provided. The Tribunal found that, apart from one particular point, which was the use of the "abacus" scheme for teaching maths, the remaining four actions all referred to planning, meaning planning of lessons. In terms of support, the document recorded that the Claimant would be allowed additional time by means such as allowing 1.5 hours per week that would otherwise have been spent on extra-curricular clubs or leadership responsibilities and three 30 minute slots at break or assembly times.
- 44 The Claimant's performance had been discussed at a meeting on 15 December 2015 with Mr Redman; essentially the Claimant accepted that there had been criticism of her work, although she did not agree with it. The Tribunal concluded that this DIP was essentially all about planning and that Mr Redman and the Claimant had different ideas about what level of planning was required. Mr Redman believed that this should be more detailed and prescriptive than did the Claimant.
- 45 As to the Claimant's specific complaints about the DIP, the Tribunal found that it was correct to say that this was "imposed" in the sense that Mr Redman was the Claimant's manager, he had prepared the plan in advance, and he required it to be followed. The plan did remain in force for longer than the DIP guide at page 678 envisaged, as it was made clear that this procedure was intended to quickly address and remedy a temporary dip in performance, as its name implies. The guide also said that the objectives should be SMART. In this regard, the Tribunal found that the objectives were measurable. It would be straightforward to ascertain whether the abacus scheme was being used. As regards medium term planning, the requirement was to send a hard copy to Mr Redman for 2 to 3 week teaching sequences, which would be simple to ascertain. The next requirement, that the Claimant should hand her planning to Mr Redman on a Wednesday for discussion on Thursday was clearly measurable, as was the action of a planning development session once a week on each Thursday, and similarly the weekly Friday session to review the planning and to ensure that it was in place for the following week. The Tribunal concluded that all of the objectives were in fact measurable.

**Allegation 5.5**

- 46 In January 2016 the Claimant was off sick suffering from flu for a period. It was common ground that, on her return, a meeting took place with Mr Redman. There was a dispute as to whether or not Ms Redgwell was also present: she and Mr Redman maintained that she was, while the Claimant said that she was not. In the event, the Tribunal found that Ms Redgwell's presence or absence made no difference to the conclusion that we reached about this meeting.
- 47 The Claimant's evidence was that she told Mr Redman that she would need to attend a follow-up medical appointment; that he said he would need more than a week's notice; and that when the Claimant said that she could not give that because of a personal medical condition, Mr Redman commented to the effect that she should be able to predict her menstrual cycle.
- 48 Mr Redman accepted that he probably asked for a week's notice of absences for medical appointments, and said that the Claimant told him that her appointments were unpredictable. She then said that her medical problem only occurred at certain times, which led him to comment that they were, then, predictable. He denied making any reference to the menstrual cycle.
- 49 The Tribunal found as a matter of probability that Mr Redman did not mention the Claimant's menstrual cycle or make any direct reference to that. We found that the probability was that the Claimant said that her medical problem, as to which she was not specific, occurred at certain points in the month and that Mr Redman replied along the lines that surely that meant that she could predict when it would occur, meaning that she should be able to organise appointments in advance. It was not clear to the Tribunal whether the Claimant herself was referring to her menstrual cycle, or to something else, in this exchange. We found, however, that Mr Redman did no more than reply to the Claimant said on the basis of what she herself had said, and that he did not mean to refer to her menstrual cycle.

**Allegation 5.6**

- 50 The Claimant and Mr Redman were not far apart on their evidence on this allegation. The Claimant's account was that Mr Redman said that he could dismiss her but that he would not bother doing so. Mr Redman said that the Claimant said to him, "you are trying to dismiss me" and that he replied, "why would I, you are going anyway". The Tribunal found that there was no significant difference between these accounts of the exchange, and we found that there was essentially no dispute about the facts of this aspect.

### Allegation 5.7

- 51 The Claimant agreed that this allegation might in fact refer to a meeting that took place on 22 February 2016 rather than around 15 March. The complaint was that the Claimant felt isolated and upset as a result of a conversation in which she said to Mr Redman that she felt that she was being micromanaged and bullied and that this had been going on since her return to work in November 2015; and that Mr Redman said that he was angry because she had not completed her planning for the post-October half term period. The allegation continued that Mr Redman said that he had found an employment policy that he claimed would allow him to demand that work be completed while on sick leave, and that the Claimant later found out that he had made such a demand of a colleague.
- 52 Mr Redman's note of the meeting on 22 February at page 198 was broadly consistent with the Claimant's case as to what was said, except for the reference to a policy. He noted that they discussed a range of items of the agenda and that the Claimant said that she felt that all had changed when she came back from her leg burn, i.e. in November 2015. He wrote that he said that they had planned to have a meeting to shape support in the first week of the new term and that he was disappointed that she had given no steer in planning her terms or classes. All of this seemed to the Tribunal to be sufficiently close to the Claimant's case about this meeting as to amount to the same thing. However, we concluded that the conversation was in itself of little significance. The Claimant and Mr Redman were doing no more than telling each other how they felt about matters that had arisen since November 2015, in a way that a manager and a more junior employee might do if they were having a frank exchange of views.

### Allegation 5.9

- 53 This related to an alleged conversation between Mr Redman and the Claimant's teaching assistant Mrs F, who was a parent helper. The only first-hand evidence of any such conversation was that of Mr Redman, who said that he would ask for comments from teaching assistants on how classes were going and that he would have done so in the case of Mrs F. The allegation that Mr Redman suggested to Mrs F that the Claimant had no control of her class and asked her to comment on her professionalism and conduct was not the subject of any first-hand evidence, but only of a second-hand report that came from Mrs F via the Claimant. The Tribunal found that the conversation went no further than what Mr Redman described as what he would do in the normal course of events.
- 54 There is also mentioned in allegation 5.9 positive feedback that the Claimant received for her work and the suggestion that she had become a member of the "outstanding teacher" programme in April 2016. The Respondents disputed that this was the case and said that she went on to the SCE Scheme concerned at the level of an "improving teacher" rather than a

potentially outstanding one, and this that was designed to assist her in areas where her performance needed improvement.

- 55 The Tribunal found that what in fact occurred here was that Mr Redman cherry-picked items from the SCE programme that he thought would assist the Claimant, and that it would not be right to say that she was, strictly speaking, in either the improving teacher or the outstanding teacher category. It was never expressly defined which, if either, was applicable, and so the Tribunal found it was quite possible that Mr Redman and the Claimant had different perceptions of the level at which they believed she had entered that programme. What is perhaps more relevant is that it is apparent from the reference given for the Claimant in May 2016 at page 469 that the consultant who conducted the programme with her, perceived her as being in the category of a good teacher, aspiring to outstanding. The significance of this is that Mr Redman agreed that, whatever had been the position previously, the Claimant's performance was satisfactory at least by May 2016, and this is borne out by the reference given by the consultant.

#### **Allegation 5.10**

- 56 This allegation concerned a staff meeting that took place on 10 May 2016. Mr Redman's evidence was that before the meeting took place he had a conversation with the Claimant in which he said that recruitment was going to be discussed at the meeting, by which he meant recruitment of someone to take up in September 2016 the role that the Claimant had until then been performing. His evidence continued that the Claimant said that she was keen to return to the United Kingdom and that the school should recruit someone experienced to fill the role.
- 57 The Claimant's account was that Mr Redman did not mention recruitment to her in advance of the staff meeting, and that she did not say that she was keen to return to the UK or that the school should recruit someone experienced. These matters were not directly in issue, in that the complaint was about what was said at the staff meeting. That said, the Tribunal found it probable that Mr Redman mentioned to the Claimant that recruitment was going to be discussed, as this related to her position, and probable that the Claimant would have expressed positive feelings about returning to the UK (which is her home and where her partner is stationed). There seemed little significance to an observation that an experienced person should be recruited, as all concerned agreed that by this point at any rate, the Claimant should be regarded as experienced.
- 58 The evidence from Mr Smith in his witness statement about this particular point was that Mr Redman discussed this role at the staff meeting and said that the intention would be to recruit "a proper teacher". The Claimant herself did not allege that this was said, but rather that Mr Redman said that they would be recruiting someone who "knew what they were doing". Her case was that she was offended by what was said on the grounds that it involved an implied contrast with her. Somewhat later, on about 15 June

2016, the Claimant sent a letter to Mr Redman, at page 261, complaining of his behaviour, which she said amounted to bullying, and raising this as the first incident relied upon, stating that Mr Redman said that the aim was to recruit someone who “knows what they are doing”.

- 59 Mr Redman replied to this letter in an email of 23 June 2016 at page 267. He wrote this: “For the first I must apologise for your understanding of what was being discussed. It was never my intention to upset you or cause you distress from the subject matter, I was simply referring to the fact that in a small school an experienced teacher is in a better position as support from colleagues is much harder to come by.”
- 60 On this allegation, the Tribunal found that Mr Redman did not make reference to “a proper teacher” as suggested by Mr Smith. The Tribunal had little doubt that, if this had been said, the Claimant would have taken it up with Mr Redman and would have complained of it in the present proceedings. We found, however, that Mr Redman did make a reference along the lines of “someone who knows what they are doing”. We find that in saying this he was not meaning to suggest any adverse implication against the Claimant, but more probably seeking to reassure the existing members of the staff that the person to be recruited would be sufficiently experienced, perhaps putting it in a somewhat clumsy way. This was the explanation that he gave to the Claimant in his letter of 23 June. It seemed to the Tribunal that, unfortunately, the way in which he put that explanation could be taken as suggesting by way of a contrast, that the Claimant was not an experienced teacher, and that if he was trying to soothe the Claimant’s feelings, he did not achieve that.
- 61 Those then were the specific allegations of discrimination and/or harassment, beyond the dismissal itself and, related to that, the issue added by amendment concerning the failure to draw the Claimant’s attention to the available permanent post. By May 2016, the Claimant was applying for jobs in the United Kingdom and from the 10 May meeting she knew that there would be a vacancy at St David’s School for a teacher filling the role that she had filled for the past year. There was, the Tribunal found, nothing to stop her applying for that role if she wished to do so.
- 62 Beyond this however, the Respondents accepted that, given her fixed term contract was coming to an end and that the permanent role would cover the same duties, they should have drawn to her attention this specific vacancy and asked her whether she wished to apply for it. It was on that basis that the MoD made the concession as to unfair dismissal.
- 63 The position was advertised online between 23 and 30 June. The Claimant’s evidence, which the Tribunal accepted, was that she was in the UK at this time and was not checking the relevant website for vacancies. It was common ground that nothing was done by Mr Redman or anyone else to draw the advertisement to the Claimant’s attention or to suggest that she

could apply for it. The allegation added by way of amendment was therefore factually correct.

- 64 Mr Redman held an end of engagement meeting with the Claimant on 19 July 2016, the result of which was that she was dismissed by way of her fixed term appointment coming to an end. The meeting notes at pages 303-304 record that the Claimant asked why her time at the school was not being extended or why she was not being redeployed, and that Mr Redman said that hers was a fixed term appointment; that the permanent position had to be advertised in order to ensure fair and open competition; and that in order to be considered for that position, the Claimant would have to have applied for it.
- 65 Mr Redman confirmed the position in a letter of 20 July 2016 at pages 305-306. The letter referred to the Claimant's contention that her contract should be ending in 2018. It also referred to the right to appeal the decision.
- 66 The Claimant raised an appeal by a letter dated 2 August 2016 at page 312. Mr Fleetwood wrote to the Claimant on 31 August 2016 (pages 319-320) inviting her to a meeting on 9 September. The Claimant was unable to attend on that date and sent written representations, at page 321. Mr Fleetwood wrote to the Claimant on 16 September, at pages 325-326, dismissing the appeal. He referred to the issue about the end date of the fixed-term appointment and said that he found it difficult to believe that the Claimant was not genuinely expecting to leave on 31 August 2016. Mr Fleetwood referred to the permanent post at the school, saying that the Claimant failed to respond to the advertisements, and said: "You have been dismissed because your fixed term has come to an end and you have failed to apply for a permanent post."
- 67 So far as the permanent position is concerned, the MoD's case was that the rules on open recruitment into public sector jobs meant that once a decision had been made to create a permanent position at St David's School, that position had to be advertised for the purposes of open competition. Had they wanted to do it, the MoD would not have been permitted to simply slot the Claimant into the new role. If she was interested in it she would have had to apply and be considered alongside any other applicants who presented themselves.
- 68 In the event, there were two applicants, one of whom was found to be unsuitable. The other was offered the job but ultimately declined it and the result was that a locum (who happened to be Mr Redman's wife) filled the vacancy for two terms. Subsequently a teacher was appointed to the role on a permanent basis, being a woman in her early thirties.
- 69 The Tribunal accepted the Respondents' evidence on these points, and indeed the recruitment rules and the subsequent history of the post were not challenged by the Claimant. The Tribunal found that these matters meant

that it was inescapable that the Claimant would be dismissed, once a decision had been made that a permanent post should be made available or created. The Respondents had no option but to make that post open to fair competition, which could of course include the Claimant. This was not Mr Redman's decision, whatever his view of the Claimant.

- 70 The Claimant had made a complaint of bullying and harassment against Mr Redman. It was not necessary for the Tribunal to consider this in any detail, as it was not in itself the subject of any complaint or allegations on the present proceedings. However, this too was dealt with by Mr Fleetwood, who wrote to the Claimant on 10 October 2016 rejecting the complaint. One point that the Tribunal noted, however, was that when on page 339 Mr Fleetwood referred to the staff meeting on 10 May 2016, he wrote: “[Mr Redman] talked of recruiting an experienced teacher as there were difficulties supporting to young developing teachers in remote locations”, an observation to which we will refer again later in these reasons.
- 71 One other matter that arose concerned the end-of-year reports for the Claimant's class. The Claimant sent the reports that she had prepared to Ms Redgwell for approval. On 11 July 2016 Ms Redgwell sent the Claimant a memo (at page 276) stating that there were serious issues with the quality and content of the reports, including such matters as comments that did not relate to the child in question and references to events that had occurred in an MoD school in Brunei. At the time, the Claimant amended the reports and put them into a form that was acceptable. In her evidence, she stated that another colleague (evidently Mr Smith) had passed her some reports on children in the school in Dubai in order to help her with the format and language expected: in error she sent Ms Redgwell what she described as “the wrong file”, and when she realised the error, she told Ms Redgwell what had happened and sent the correct versions. There were then some further minor amendments required by Ms Redgwell, referred to in an email of 14 July 2016 at page 299.
- 72 It was common ground that the reports ultimately sent out were in an acceptable form, and that this incident was unknown to the parents and children. Mr Redman's evidence was that this raised serious concerns about the Claimant's conduct and could have resulted in disciplinary proceedings had she remained in the MoD's employment. In his oral evidence he said that he had wanted staff to use blank templates from the school in Dubai, and that he took the view that what had happened was an attempt at plagiarism, rather than an error.
- 73 The Tribunal did not reach a conclusion on precisely what had occurred in relation to these reports. The matter has not been the subject of an investigation, and had no bearing on the decision to dismiss the Claimant, although as we will explain, it has some relevance to the question of what would have occurred had the Claimant not been unfairly dismissed.



## The Applicable Law and Conclusions

74 The Tribunal postponed its consideration of the potential jurisdictional issues until after it had determined the complaints on their merits.

75 The Tribunal first considered the complaints under the Equality Act 2010.

76 Section 13 of the Equality Act includes the following provision about direct discrimination:

*(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.*

The list of protected characteristics in section 4 includes sex and age.

77 Section 26 of the Equality Act provides as follows in relation to harassment:

*(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.*

78 So far as effect is concerned, section 26(4) of the Equality Act requires the Tribunal to take into account:

*(a) the perception of [the Claimant];*

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

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

79 The burden of proof is provided for in section 136 of the Equality Act in the following terms:

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

80 In Igen v Wong [2005] ICR 931 and Madarassy v Nomura [2007] ICR 867, both decided under the previous anti-discrimination legislation, the Court of Appeal identified a two-stage approach to the burden of proof. The Tribunal would first ask whether the facts were such that, in the absence of an explanation from the Respondent, it could properly conclude that discrimination had occurred (there being a need of something more than a mere difference in treatment and difference in status). If the facts were of that nature, the burden would be on the Respondent to disprove discrimination.

81 In his submissions Mr Sheppard relied on only the comment about the Claimant's menstrual cycle (allegation 5.5) as an act of discrimination because of, or of harassment related to, her sex. The Tribunal has essentially found against the Claimant on the facts of that allegation. The facts as found by the Tribunal do not fall within the definition of harassment in section 26 of the Equality Act. Mr Redman's comments might amount to unwanted conduct. The comments did not, however, have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment (hereafter abbreviated to "a harassing environment") for her. They were at most a slightly sharp response to what she had said about when her problems occurred.

82 On the facts found by the Tribunal it was the Claimant who had referred to her medical problems occurring at particular times of the month: Mr Redman was doing no more than replying on the basis of what she had said. Even if the Claimant believed that Mr Redman thought she was referring to her menstrual cycle and thus perceived his conduct as violating her dignity or as creating a harassing environment for her, it was not reasonable for his conduct to have had that effect: as the Tribunal has found, Mr Redman was simply responding to what the Claimant had said in the course of an exchange about whether it was possible for her to give advance notice of her need to attend medical appointments.

83 The Tribunal also found that the comments were not related to the Claimant's sex. They were simply a response to the Claimant's own statement that her medical problem occurred at certain times of the month: although it may be less likely that a man would make the same statement, Mr Redman's reaction would have been the same if a male teacher had said the same thing in the circumstances.

- 84 For essentially the same reasons, the Tribunal found, in relation to the complaint of direct discrimination because of sex, that Mr Redman did not in this regard treat the Claimant less favourably than he treated or would treat others, and that the facts were not such that the Tribunal could properly find that he said what he did because of the Claimant's sex.
- 85 Although in the list of issues allegation 5.6 was advanced as harassment related to sex, and all 8 individual allegations were listed acts of direct sex discrimination, Mr Sheppard did not advance any arguments in support of these. If it is necessary to decide the point, the Tribunal found nothing in the facts as set out above that could properly form the basis of a finding of discrimination because of, or harassment related to, sex, absent the alleged comment about the Claimant's menstrual cycle,
- 86 The complaints of discrimination because of, and harassment related to, sex therefore fail.
- 87 Mr Sheppard gave much greater prominence to the complaint of discrimination because of, and/or harassment related to, age. The Tribunal considered what facts had been established in this regard and whether these were such that it could, in the absence of an explanation, properly find that discrimination and/or harassment had occurred.
- 88 The Tribunal first considered its findings of fact in the context of the test for harassment, having reached the following conclusions on the individual allegations:
- 88.1 Allegation 5.2 was essentially not made out on the facts, as we found that the approach taken by Mr Redman on the Claimant's return in November 2015 was not unduly harsh or excessive.
- 88.2 The same was true to a considerable extent of allegation 5.3, as the Tribunal found that the objectives of the DIP plan were measurable, and the Claimant accepted that there were criticisms of her work: whether the plan was "necessary" was, we concluded, a matter of judgment or opinion. The Tribunal has found, however, that the plan remained in force for a longer than normal period.
- 88.3 Allegation 5.5, concerning comments about the Claimant's need for medical appointments, has been discussed extensively above: Mr Redman did no more than respond to what the Claimant on the basis that she herself had advanced.
- 88.4 Allegation 5.6 (Mr Redman commenting to the effect that he was able to dismiss the Claimant) was essentially made out on the facts.

- 88.5 Again, the Claimant's factual case on allegation 5.7 (Mr Redman expressing anger or disappointment about the Claimant's perceived failure to plan her classes) was essentially made out.
- 88.6 Allegation 5.9 was not made out on the facts.
- 88.7 Allegation 5.10 was made out to the extent that at the staff meeting Mr Redman made a reference to recruiting "someone who knows what they are doing".
- 88.8 The Claimant was in fact dismissed.
- 88.9 The Respondents did not specifically draw the Claimant's attention to the available permanent post.
- 89 The Tribunal then turned to the issue whether the matters that had been made out, or any of them, violated the Claimant's dignity or created a harassing environment for her. The Tribunal did not consider that this was a case of violation of the Claimant's dignity. We accepted that the Claimant perceived that her environment was hostile and/or humiliating. Taken as a whole, we considered that the facts we have found in relation to allegations 5.6 and 5.10, and the failure to draw the Claimant's attention to the permanent post, reasonably had that effect. Mr Redman had referred to the fact that her appointment would be coming to an end in any event in the context of not needing to dismiss her; had made a reference in front of the other staff members to needing someone who knew what they were doing; and had failed to ask the Claimant whether she wanted to apply for the permanent post.
- 90 The Tribunal then considered whether, in the absence of an explanation from the Respondents, the facts were such that we could properly make a finding that this conduct was related to the Claimant's age.
- 91 The material factors in this regard were, we found, as follows:-
- 91.1 The Claimant was by some way the youngest of the teachers at the school.
- 91.2 As we have said, in his email of 23 June 2016 Mr Redman, seemingly contrasting this with the Claimant's position, said that an experienced teacher would be in a better position in a small school, as support for colleagues was much harder to come by. On the Claimant's behalf it was suggested that the reference to experience could be understood as equating to a reference to age.
- 91.3 This point was somewhat more explicit in Mr Fleetwood's appeal outcome letter at page 339, where in connection with the same

meeting and Mr Redman's explanation, he wrote "he talked of recruiting an experienced teacher, there were difficulties supporting young developing teachers in remote locations". This made a clear link between experience and young teachers. Mr Fleetwood said that these were his words and not Mr Redman's, although that is not what is said in the letter as he purports to be reporting what Mr Redman said when he spoke to him.

- 92 Mr Chegwidden submitted that the case on age discrimination or harassment depended on a false equation between age and experience and asserted, as is undoubtedly the case, that it was perfectly possible for older teachers to be inexperienced if they had joined the profession later in life. Thus, he said, age and experience could not be equated. The Tribunal agreed with this submission in principle, while noting that it would be possible in a particular case for an individual to use the term "experience" as a euphemism for age.
- 93 The Tribunal found that the facts of this case were close to the borderline of being sufficient to justify a finding of discrimination if no explanation were given. Although the Claimant was younger than the other teachers on the school staff, there was no evidence to suggest that they thought any the less of her because of that, or that in some way she did not fit in because of her age, although that was something that Mr Sheppard suggested. As we have said, Mr Fleetwood's letter suggested some connection between a teacher being inexperienced and being young, but that might not have been any more than a slightly casual reference. (In the same connection, the Tribunal noted that the consultant who reported on the Claimant in May 2016 and who described her as a good teacher aspiring to outstanding, also described her as "a hard working enthusiastic young teacher").
- 94 That said, the Tribunal decided that it should approach the matter on the basis that the facts were such that, in the absence of an explanation, it could properly find that Mr Redman's conduct was related to the Claimant's age. The burden was therefore on the Respondents to prove that this was not the case.
- 95 With reference to the material aspect of allegation 5.3 and allegation 5.7, the Tribunal found that Mr Redman acted as he did because he had a genuine belief that there was a need for improvement in the Claimant's performance with her class. (The same was true, although this was not a necessary finding given our conclusion on the facts, in relation to Mr Redman's actions in respect of allegation 5.2). The Tribunal found that Mr Redman's belief was genuine primarily because he acted in a way that was consistent with this. Not only did he hold the meeting on 17 November 2015 and institute the DIP (about which the Claimant complained) but also he arranged for her to attend the SCE programme (of which she did not complain). As we have found, the Claimant and Mr Redman had differing views about planning, and as Head Teacher Mr Redman was able to prevail on the point. The Claimant's age, however, was irrelevant to these considerations. To the extent that the Claimant's perceived deficiencies may have arisen from inexperience, the

Tribunal found that this was not to be equated with age, for the reasons advanced by Mr Chegwidden.

- 96 The facts of allegation 5.5 were not obviously related to the Claimant's age. In any event, however, the Tribunal accepted Mr Redman's explanation that he said what he did because of the need to have advance notice where possible of absences for medical appointments. That was necessary in order to arrange locum cover for the Claimant's absence, and the Tribunal accepted that this was not related to the Claimant's age. The same consideration would arise whatever the age of the teacher who was to be absent.
- 97 Similarly, what Mr Redman said under allegation 5.6 was not obviously related to the Claimant's age: the more natural link was to her fixed term status. The Tribunal found that what was said on this occasion was a straightforward exchange in which (whether or not the Claimant accused Mr Redman of trying to dismiss her) he made the (perhaps somewhat unattractive) point that he was not considering dismissing the Claimant, or would not consider doing so, because she would be leaving in any event. The Tribunal found that this comment was related to the Claimant's fixed term status, and to her perceived performance, but that the Respondents had demonstrated that it was not related to her age. There was nothing to give rise to such a link.
- 98 In relation to allegation 5.10, the Tribunal has found that Mr Redman referred at the staff meeting to recruiting someone who knew what they were doing, and that this was a reference to a sufficiently experienced teacher. The Tribunal could understand that the Claimant could have interpreted this as implying that she was not someone who knew what she was doing, as the new recruit would effectively be replacing her. The Tribunal also, however, found that Mr Redman's comment related to experience rather than to age, and that as previously observed, these should not be equated. This was underlined by Mr Redman's subsequent attempt to explain what he had said, by reference to the benefit of experience for a teacher in a small school. Again, the Tribunal found that the Respondents had shown that this comment was not related to the Claimant's age.
- 99 By May 2016, Mr Redman believed that the Claimant would be returning to the United Kingdom, he knew that she had accepted a job there, and the Tribunal has found that the Claimant had referred to those aspects of returning to the United Kingdom about which she felt positive.
- 100 The Tribunal found, therefore, that Mr Redman did not draw the vacancy at St David's School to the Claimant's attention because he believed that she was already committed to return to the United Kingdom. He knew that the Claimant had accepted a job, and he also knew that the Claimant was aware that the position at St David's would be becoming available and that she could apply for it if she wished. With regard to the allegation added by amendment, therefore, the Tribunal found that the Respondents had shown

that Mr Redman's conduct in this regard was not related to the Claimant's age.

- 101 Given the Tribunal's findings about the inevitability of the Claimant being dismissed once a decision had been made to create a permanent position, this could not be an act related to her age. It would inevitably have occurred whatever the Claimant's age.
- 102 The Tribunal has therefore found, in respect of each of the relevant complaints of harassment, that the conduct concerned was not related to her age. We also considered whether, taking all of the relevant conduct as a whole, rather than looking at the individual acts, we would make any different finding. We concluded that we would not. Viewing matters in the round, the Tribunal found that the Respondents had shown that the matters complained of were not related to the Claimant's age. At most, they (or some of them) may have been related to experience, but that is not to be equated with age.
- 103 The complaints of harassment related to age were therefore unsuccessful.
- 104 The Tribunal's reasoning about the issue as to whether the conduct concerned was related to the Claimant's age inevitably led it to conclude that the complaints of direct discrimination because of age also failed. The finding that the Respondents had shown that the relevant conduct was not related to the Claimant's age meant that they had also shown that the acts concerned were not done because of the Claimant's age.
- 105 The complaints under the Equality Act were therefore unsuccessful on the merits. It was not therefore necessary to determine the issues as to time limits in respect of those complaints.
- 106 Regulation 3 of the Fixed-Term Employees (Prevention of less favourable treatment) Regulations 2002 provides that:
- (1) *A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee -*
- (b) *by being subjected to any detriment by any act, or deliberate failure to act, of his employer.*
- 107 The only specific allegation relied on by Mr Sheppard in submissions under this cause of action was allegation 5.6. The Claimant's fixed term status was relevant to Mr Redman's comment, but the Tribunal agreed with Mr Chegwiddden's submission that this did not amount to less favourable treatment. The comment itself was of very little significance and could not be regarded as sufficiently serious to amount to any form of detriment. Mr

Redman took no action adverse to the Claimant: in fact, he arranged further training to assist with her development.

- 108 If the other allegations were relied upon as acts of less favourable treatment contrary to the 2002 Regulations, the Tribunal refers to its findings as to why these events occurred, as set out above. For the same reasons, the Tribunal finds that Mr Redman would have treated a hypothetical comparable employee in the same circumstances in the same way.
- 109 The complaint under the 2002 Regulations therefore failed.
- 110 Unfair dismissal as such is accepted by the MoD. The substantial point in relation to unfair dismissal is whether or not the Claimant would have applied, and if so with what prospect of success, for the permanent position at St David's School. The question that we have identified arises potentially as a matter of substantive unfair dismissal as argued by Mr Sheppard, or potentially as a matter in respect of the principle in **Polkey** as submitted by Mr Chegwidan, but the practical position is the same however it is regarded. The Tribunal has to consider what prospect there was of the Claimant successfully applying for the position, had it been drawn to her attention in the way that the MoD admits should have been done.
- 111 The Tribunal had in mind the psychologist's report of 4 May 2016 at page 228-229. This stated that the Claimant had been feeling sad and overwhelmed, and was very distressed by the expectations at work. She had also been feeling very lonely. By May 2016 she had recovered her self-confidence with regard to teaching, having received very positive feedback, and by that point had adjusted to life in Germany and was "more positive about her remaining time [there]." This did not suggest that things had changed to the extent that the Claimant was positively enthusiastic about any prospect of remaining in Germany in the long term.
- 112 That is not to say that it is certain that the Claimant would not have applied for the post at St David's School had it been drawn to her attention. There were reasons why she would be happy to return to the United Kingdom, including that her partner was stationed in the United Kingdom, and that she had experienced some problems with life in Germany. Conversely, there was no doubt that the package of benefits offered by the MoD in terms of pay, accommodation and allowances was more attractive than that which the Claimant could expect working in a school in the United Kingdom. The Claimant said, and we accepted, that she had enjoyed her work with the children at St David's School, and as we have indicated Mr Redman's view was that her performance had improved in the course of the year. That was borne out by the measured results for her class.
- 113 The Tribunal also had to consider what might have happened in relation to the issue about the reports had the Claimant applied for the permanent position. It seemed to us that the MoD would have had to investigate this,



and that it was difficult to predict what the outcome of that investigation might have been. Presumably the MoD would have interviewed Mr Smith, and it is not possible to say what he would have said that he did, or that he told the Claimant. The Tribunal did not find it very significant that Mr Smith himself had not been disciplined in the matter. He was nonetheless a more senior colleague, and it might have been that he would have said that he indeed told the Claimant that she could use the content of the reports from Dubai as a template or skeleton for the way in which she should construct the reports for her class.

- 114 It seemed to the Tribunal that the result of investigating the point could have been a finding that the Claimant had committed fairly serious misconduct, or that she had made an honest error that would nonetheless have involved a degree of negligence, as she had somehow imported the contents of the Dubai reports into the templates that were intended to be used at St David's School. Conversely there had been no serious consequences of this because Ms Redgwell had realised what had happened and had taken the matter up with the Claimant.
- 115 Apart from this, it seemed that, had the Claimant applied, she would have been one of two appointable candidates, the other of whom turned down the position when offered it.
- 116 Doing the best that we could with all of the uncertain factors that are involved in this equation, the Tribunal concluded that overall there was a 25% chance that the Claimant would have made a successful application for the permanent position if this had been drawn to her attention during the period that it was advertised. This figure is intended to reflect uncertainty as to whether the Claimant would have applied in the first place; and uncertainty as to whether her application would have been successful if she had done so.
- 117 The finding therefore on the complaint of unfair dismissal is that this is well founded and that there is a 25% chance that if a fair procedure had been followed the Claimant would have been appointed to the permanent position that existed as from 1 September 2016.
- 118 It is also the case that the complaint of failure to provide a written statement of employment particulars is well founded.
- 119 The complaints that are well founded succeed against the MoD only. The complaints against Mr Redman personally are all unsuccessful. It was not therefore necessary to determine the issue as to territorial jurisdiction as regards the complaints against Mr Redman.
- 120 There remained the question of territorial jurisdiction in respect of the complaints against the MoD. This was not addressed in any substantial way by the parties. Mr Chegwiddden only stated that the Respondents did not

actively contest the Tribunal's jurisdiction to hear the claim, but that it was for the Claimant to establish that there was jurisdiction. In a single sentence in his written submissions, Mr Sheppard referred to territorial jurisdiction under the Equality Act, and relied on **Lawson v Serco Limited [2006] ICR 250**.

121 The latter authority concerned a complaint of unfair dismissal under the Employment Rights Act. The Tribunal recognised that the three categories of employee described by Lord Hoffman in **Lawson v Serco** should not be regarded as definitively prescribing the totality of the circumstances in which the Tribunal would have jurisdiction in the case of an employee working abroad. That said, however, the Tribunal concluded that the present case was an example of Lord Hoffman's third category where an expatriate employee working abroad might exceptionally be entitled to claim unfair dismissal. The strong connection with Great Britain and British employment law arises from:

121.1 The employment being for the purposes of educating the children of British service personnel based abroad;

121.2 (Although the statement of particulars was not in fact sent to the Claimant) the Mod's evident intention that the Employment Tribunals should have jurisdiction, as clause 9.2 of the particulars states that employees who have suffered "unfair discrimination" have the right to take their case to an Employment Tribunal, and clause 14 refers expressly to the requirements of section 1 of the Employment Rights Act.

122 Finally, as arranged at the hearing with the parties, a further hearing on remedy, if required, will take place for one day on 3 November 2017.

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Employment Judge Glennie  
14 September 2017

ANNEX

TO REASONS

Case No. 2404378/2016

**ANNEX B**  
**Complaints and Issues**

**Jurisdictional Issue**

1. Does the Tribunal have territorial jurisdiction over the complaints pursued by the claimant under:
  - (a) The Equality Act 2010;
  - (b) The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002;
  - (c) The Employment Rights Act 1996; and/or
  - (d) The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994?

**Equality Act 2010**

Harassment related to age

2. Can the claimant establish facts from which the Tribunal could conclude that in the respects identified in paragraphs 5.5 and 5.6 of the particulars of claim the respondents:
  - (a) engaged in unwanted conduct;
  - (b) related to age;
  - (c) which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
3. If so, can the respondents nevertheless show that they did not contravene section 26?

Harassment related to sex

4. Can the claimant establish facts from which the Tribunal could conclude that in the respects identified in paragraphs 5.5 and 5.6 of the particulars of claim the respondents:
  - (a) engaged in unwanted conduct;
  - (b) related to sex;
  - (c) which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

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5. If so, can the respondents nevertheless show that they did not contravene section 26?

Direct age discrimination

6. Can the claimant establish facts from which the Tribunal could conclude that in relation to the following matters the respondents, because of age, treated the claimant less favourably than the respondents treated Mrs G [REDACTED] and Mrs B [REDACTED]:

- (a) The matters in paragraph 5.2 of the particulars of claim;
- (b) The matters in paragraph 5.3 of the particulars of claim;
- (c) The matters in paragraph 5.5 of the particulars of claim;
- (d) The matters in paragraph 5.6 of the particulars of claim;
- (e) The matters in paragraph 5.7 of the particulars of claim;
- (f) The matters in paragraph 5.9 of the particulars of claim;
- (g) The matters in paragraph 5.10 of the particulars of claim;
- (h) By dismissing the claimant?

7. If so, can the respondents nevertheless show that they did not contravene section 13, whether because the treatment was a proportionate means of achieving a legitimate aim or otherwise?

Direct sex discrimination

8. Can the claimant establish facts from which the Tribunal could conclude that in relation to the following matters the respondents, because of sex, treated the claimant less favourably than the respondents treated Mr S [REDACTED]:

- (a) The matters in paragraph 5.2 of the particulars of claim;
- (b) The matters in paragraph 5.3 of the particulars of claim;
- (c) The matters in paragraph 5.5 of the particulars of claim;
- (d) The matters in paragraph 5.6 of the particulars of claim;
- (e) The matters in paragraph 5.7 of the particulars of claim;
- (f) The matters in paragraph 5.9 of the particulars of claim;
- (g) The matters in paragraph 5.10 of the particulars of claim;
- (h) By dismissing the claimant?

9. If so, can the respondents nevertheless show that they did not contravene section 13?

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Time Limits

10. In so far as any of the conduct for which the claimant seeks a remedy occurred more than three months prior to the presentation of her claim, allowing for the effect of early conciliation, can the claimant show:

- (a) That it formed part of conduct extending over a period which ended less than three months before presentation of her claim; or if not
- (b) That it would be just and equitable for the Employment Tribunal to extend time?

**Fixed-Term Employees Regulations**

11. Were the other teachers at St David's School comparable permanent employees for the purposes of regulation 2?

12. If so, did the first respondent subject the claimant to a detriment by any act or deliberate failure to act as identified in the following paragraphs of the particulars of claims:

- (a) Paragraph 5.2;
- (b) Paragraph 5.3;
- (c) Paragraph 5.5;
- (d) Paragraph 5.6;
- (e) Paragraph 5.7;
- (f) Paragraph 5.9;
- (g) Paragraph 5.10?

13. If so, can the first respondent show that the less favourable treatment or detriment was not on the ground that the claimant was a fixed-term employee?

14. If not, can the first respondent nevertheless show that the treatment was justified on objective grounds?

Time Limits

15. In so far as any of the matters for which the claimant seeks a remedy occurred more than three months prior to the presentation of her claim form, allowing for the effect of early conciliation, can the claimant show that:

- (a) The act or failure to act formed part of a series of similar acts or failures, the last of which occurred less than three months before presentation of the claim; or if not
- (b) That it would be just and equitable to consider the complaint?

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**Employment Rights Act 1996**

Unfair Dismissal

16. Can the respondent show a potentially fair reason for the dismissal of the claimant, namely the expiry of a fixed-term contract, which amounts to "some other substantial reason" under section 98(1)(b)?

17. If so, was the dismissal fair or unfair under section 98(4)?

**Breach of Contract**

18. Can the claimant establish that she was employed under a contract due to expire after 31 August 2016?

19. If so, was the first respondent in breach of contract in terminating her employment on 31 August 2016?

**Written statement of terms – Employment Act 2002**

20. When proceedings began on 18 October 2016 was the first respondent in breach of its duty under section 1(1) or section 4(1) of the Employment Rights Act 1996 to give a written statement of initial employment particulars or of particulars of a change?

**Remedy Issues**

21. If any of the above complaints succeed, what is the appropriate remedy? Issues which may arise include:

- (a) The appropriate award for injury to feelings under the Equality Act 2010 and/or the Fixed-Term Employees Regulation;
- (b) The appropriate award for financial losses;
- (c) Whether any award for unfair dismissal should be reduced by reason of contributory fault;
- (d) Whether any award for unfair dismissal should be reduced pursuant to the principle in *Polkey v A E Dayton Services Ltd* [1988] ICR 142, and
- (e) Whether compensation should be subject to an increase because of an unreasonable failure by the first respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.