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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Baafour-Kyei

**Respondent:** London Borough of Waltham Forest

**Heard at:** East London Hearing Centre

**On:** 15-17 November 2017,  
3-4 January 2018

**Before:** Employment Judge Prichard

**Members:** Ms J Hartland  
Mr M L Wood

## Representation

**Claimant:** Miss N Prempeh (consultant, Nas & Griffith Legal Associates, Seven Sisters, London N15)

**Respondent:** Mr B Amunwa (counsel, instructed by Ms S Alrahi LBWF Legal)

## RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (1) The claimant was not constructively dismissed. His claim for constructive unfair dismissal is therefore dismissed.
- (2) The claimant's claim of racial harassment fails and is dismissed.
- (3) The claimant's claim of direct race discrimination fails and is dismissed.

## REASONS

1 The respondent is a directly maintained local authority school in Leyton. It is an all-through school teaching children, from 3 to 16 years i.e. to GCSE.

2 The claimant, Mr John Baafour-Kyei is 49. He worked for the school from April 2013 until 2 January 2017 when his resignation with notice took effect. He worked there in the maths department of the secondary part of the school. This was a department of 5 comprising himself Alina Enache, Mohammad Hussain (AKA Umar), Maya Lad, and George Osei-Frimpong who was the department Head. The claimant originally qualified in Ghana, his country of origin. He since worked in many UK schools and has built up substantial post-qualification experience which was reflected in his salary - £42,250.

3 Unlike others whom we have heard of in this case the claimant did not have a teaching and learning responsibility (TLR) pay supplement of any sort. TLR's are given for management roles, e.g. head of year, subject department head, or deputy head.

4 The present case, which is most specific, arises from unfavourable lesson observations, one in particular on 16 June 2016 where the claimant was given a marking of 4 - meaning "inadequate". The potential grades are: (1) outstanding, (2) good, (3) requires improvement and (4) inadequate. There are sub-degrees within each grade.

5 The George Mitchell school had improved greatly during the currency of the claimant's employment there. It moved in 3 years 2013 - 2016 from being an OFSTED "requires improvement" to being OFSTED "good" in 2016. We were helpfully referred to the OFSTED reports and the methodology for OFSTED's assessment showing that the emphasis now is on "learning". The emphasis has shifted from course material to the business of communicating learning to children, also known as "student-centred learning".

6 To quote from the latest "good" OFSTED report 14/15 January 2016, the school was "good" because:

"... Leaders make frequent checks on the quality of teaching on the primary and second phases teaching learning and assessment is good across the school because leaders identify where teaching needs to improve and provide training and coaching that secure swift improvement."

7 All members of staff, including senior staff with TLR, have to have a lesson observation 2 or 3 times a year. If you were good / outstanding you would normally only be assessed twice a year – i.e. in 2 terms. Others, on grades 3 or 4, might be required to have one every term. We have seen nearly the full run of the lesson observations the claimant had. The observations are usually carried out by two teachers / managers who then moderate each other's markings and views. They then work together to produce a grading and a descriptive written statement for the person observed.

8 The school does not have totally mixed ability sets but grades the sets. Overall the claimant had some good outcomes. It is fair to observe that he achieved his best outcomes with the most able children. We have seen the report of an observation carried out by George Osei-Frimpong. The claimant had a grade 3 on 26 February 2014 from Ian Marshall the Assistant Head of Maths. On 13 March a joint observation with George Osei-Frimpong and Ian Marshall resulted in a 2. On 10 October he had a

3c from George Osei-Frimpong, 3c is as low as you can get in grade 3 before being marked 4. On 21 January 2015, again with Mr Osei-Frimpong, he had a 2. On 26 June 2015 it was taken over by non maths-specialists Joanne Gibbs and Belinda Chapple who marked him as a 3.

9 However by contrast on 9 October 2015 he was given a grade 1, i.e. outstanding, by Joanne Tiddy the Assistant Head Teacher for Teaching & Learning and Maya Lad, a maths teacher, observing together. On 4 March 2016 he had a grade 3 from Joanne Tiddy alone.

10 Finally we come to 16 June 2016. This was the observation which gave rise to these tribunal proceedings, an observation by Belinda Chapple the Deputy Head Teacher, and Annabel Rook, the Teaching & Learning coach. Annabel Rook, far from being a maths specialist, is an English and drama teacher. This time the claimant received a grade 4. He was teaching year 9. It was set number 5, denoting lower ability students.

11 The move to non-specialist observers was in keeping with the change of focus from curriculum to learning-based teaching. Teaching and learning are seen as generic skills. It has been a major theme of this hearing that the claimant stresses the complementary side, i.e. the mathematical material used, which needs the input of mathematics specialists. Two different educational views of the process have come up against each other in these proceedings. It is not the duty of this tribunal to make an educational judgment on the validity of the current approach. We have seen enough documentation to see that it comes from OFSTED. Good OFSTED ratings are essential to the school's success.

12 The comments in this observation feedback were such as:

“Objectives were shared on board and 1 of the 3 were read out to the class and repeated the other 2 were only copied from the board. Key words were displayed and the students asked that they should copy these. The teacher made an attempt to explore the objectives through a starter activity but the intentions here were confused as, for most part, the teacher asked for the answer to the questions (which were very easy) rather than pursuing the process required. There was no questioning to explore the thinking or methods that students needed to meet the objectives.”

Later:

“Therefore the students were required to carry out incredibly simple maths e.g.  $3 + 5 =$ , and  $15 - 9 =$ ... Some EAL [English as an additional language] students struggled to explain their thinking when questioned although they could do the maths. Teaching of the key terms may have helped these students to explain what they were doing. A number of the class were EAL and were able to do the simple maths but were not necessarily able to quickly verbalise the rule or system they were following. Students did not find this work challenging.”

13 During the hearing the claimant insisted that the children had not written 2 of the objectives off the board but only 1. That may well be so. What the tribunal could not accept is that this single (marginal) error of fact (as it may well have been) somehow undermined the credibility / reliability of the entire assessment.

14 The observation itself is relatively short and was apparently very thorough, judging from the written report. The tribunal was impressed by the credentials of Ms

Chapple. She has been teaching for 25 years has worked in teaching and learning as a consultant for 8 years, reviewed practice in other schools for a scheme called the "Challenge Partners" scheme. That team includes a working OFSTED inspector, who has previously validated Ms Chapple's judgments on lesson observations.

15 Although more newly qualified, in 2008, Ms Rook also has credentials in Teaching & Learning. As a teacher she has always received grade 1's in her observations and has done coaching at George Mitchell and other schools. She is a special leader in education (SLE) and also works with newly qualified teachers (NQTs) and PGCE trainees.

16 The summary to the feedback from Ms Chapple was:

"Main areas of the development:

- (1) Use assessment and knowledge of prior understanding and skills of students to ensure that the pitch of the work is sufficiently challenging to engage and promote excitement and secure progress.
- (2) To develop marking that is informative and meets the expectations of the school policy.
- (3) Have high expectations of all students so that they acquire knowledge quickly and can thereby demonstrate good progress."

17 Triangulating this with the OFSTED report of January 2016, there is one section which explains why the school is good, there is another section which explains why the school is not yet an outstanding school and these include:

"Teachers do not always follow the school's marking policy consistently enough to make sure the pupils know how to improve their work."

and:

"Pupils are not consistently clear about their individual academic targets because leaders have not made sure that pupils understand the school's assessment measures effectively."

18 Reverting to the comments:

"Because of the simplicity of the work, most students in the class did not show progress beyond simple addition and subtraction. The pitch was inappropriate to this year 9 class especially given their target grades. There was a lack of challenge, expectations were not sufficiently high, there was a misreading of a range of ability in the class, and appropriate materials to challenge and engage. The activities were not sufficiently matched to the needs of the students so that they made inadequate progress."

19 An important part of the process is the feedback which follows a lesson observation. It is a particularly important part when the grade is not so good.

20 The tribunal realised during the hearing that this process is very different from an appraisal process. It may be that the claimant has been projecting his expectations of appraisal into the lesson observation process. It was clearly his strong belief, reiterated throughout the hearing, that the first step should be for the observer to

discuss the lesson with the teacher observed, before setting a grade, and before undertaking written feedback.

21 Ms Chapple was explicitly asked about this argument that the claimant advanced during the hearing. She responded: “that is not the process”. The wording of the OFSTED reports on this point supports that view of the process. The appraisal is generally not graded in the same way. Appraisal is explicitly a 2-way process, the aim of which is usually to identify any training needs. Ms Chapple said that a lesson observer would never discuss the observation with the teacher observed before setting the grade and writing the feedback. Talking about that feedback is part of the process, not discussing what the feedback should be.

22 The process is in fact to have an oral discussion first before presenting the teacher with the written feedback. The observation took place on Thursday 16 June. Monday was not a normal school day and was allocated for sexual health education. Ms Chapple therefore discussed the observation with the claimant on Tuesday 21 June.

23 The Tribunal needs to make a finding on this and we consider that the claimant’s argument was wrong. We accept Ms Chapple’s and Ms Rook’s evidence that the feedback is first composed and a grade is set by the two observers, before contact is made with the teacher observed.

24 The feedback session on Tuesday 21 June was not at all easy. Ms Chapple gave oral feedback at around 12:30pm. She remembers that she was on lunch duty which means the feedback session would have had to stop at 1:30, and it did. We accept her evidence on that despite the claimant strenuously arguing that the feedback session only took 10 minutes. It is hard to see how the claimant gets his certainty over this timing. Ms Chapple’s certainty is based on the timings and how it meshed in with the school timetable. The feedback lasted for the duration of one normal lesson.

25 The next conflict of evidence is about the conduct of that feedback and what happened. Ms Chapple is in no doubt that the claimant was aggressive, and accused her of making up her mind before she even observed the lesson. She says she tried every way to speak to him and explain the grade but he was speaking over her and would not let her explain. He also left it that he would complain about her conduct to Mr Hussain the Head Teacher.

26 The claimant also stated that she “threw” the typed observation feedback sheet on to the desk in front of him, which she completely denies. His recollection of this seems to have become more certain as the proceedings developed because elsewhere he stated that she had simply placed the feedback from in front of him. Again it is hard to see how the claimant gets this later certainty that she threw it. Ms Chapple is quite certain that she did not and would not have done such a thing. Even if she felt exasperated she would have remained professional. Subsequently, just before lunch duty, she went to Mr Hussain to make him aware that he was likely to get a visit from the claimant, and what it was about.

27 The claimant took 2 days absence on sick leave on 22 and 23 June.

28 It is Ms Chapple's clear recollection that she had discussed, with Joanne Gibbs the Assistant Head Teacher and Joanne Tiddy Assistant Head Teacher for Teaching & Learning, giving feedback to the claimant. Both of those individuals had, at different stages, given the claimant grade 3's. They both reported that the claimant had been aggressive, upset, and upsetting. Ms Gibbs had contemplated taking out a grievance against him because of his aggressive demeanour.

29 The claimant's next step was to "appeal" against the observation feedback. He did it by an open letter to the school dated 30 June. It was primarily addressed by email to Mr Saeed Hussain Head Teacher cc. Belinda Chapple, Annabel Rook, Clare Kirwin (Deputy Head) and George Osei-Frimpong the Head of Maths.

30 It appears a matter of practice rather than written policy, but firmly entrenched practice, that there is no "appeal" against a grading or feedback from a lesson observation.

31 The appeal ran to 8 closely typed pages. He cited law (as he often does). (At this time the claimant was studying part-time in the evenings, for an LLB). Citing law was not at all apposite in the context of this "appeal". He stated:

"I tried to exercise the opportunity to correct the factual errors during the verbal feedback however one of the observers who came to me denied me such opportunity. She placed [sic] the written feedback on the table and told me this is your feedback take it. I will see the head teacher for the next action. That comment indicated that the observers had some hidden agenda against me... the comments and the actions of the observers were just to victimise, intimidate, harass and de-motivate the work I do in the school rather than feedback that could bring development into the teacher's teaching strategy. The feedback was not balanced constructive and developmental rather it showed a clear indication that the observers had [a hidden agenda]."

And in summary:

"The observation feedback was inaccurate and unfair. It contains a lot of fabricated comments. It also lacked professionalism, integrity and courtesy and I am appealing to the head teacher that the feedback should be considered as misrepresentation and should be declared void" [sic].

32 Most of the 8 pages were taken up with mathematical material about sequencing and the detail of the lesson. Given the tenor of the comments in the feedback sheet it was not apposite. It only reinforced the claimant's difference of perspective. The claimant did not understand that the whole process is more about teaching and learning than about maths.

33 Mr Hussain did not respond to the email but met with the to have another observation with him, the Head Teacher, carrying it out. The claimant never took him up on this offer. Mr Hussain is aware of the claimant's tendency on receiving adverse feedback. He had met with him after he received grade 3 from Joanne Gibbs, the Assistant Head Teacher. On that occasion he simply asked the claimant to meet with the observer to discuss it. He clearly told the claimant on 30 June, categorically, that he was unable to reverse the grading on that lesson observation.

34 The claimant's next step was to bring a formal grievance under the school's grievance policy procedure. It is dated 11 July. Once again it was addressed to

Mr Hussain cc Belinda Chapple, Annabel Rook, Clare Kirwin and George Osei-Frimpong. He stated:

“The root of this unfair treatment occurred initially on 26 June 2015 [Joanne Gibbs’ observation] and was reported informally to the Head Teacher who told me he would speak to the people concerned. This issue of unfair treatment from lesson observation has surprisingly occurred again on 16 June 2016 and this time by Belinda Chapple and Annabel Rook. I want to know detail with supporting evidence of what the observers thought I should have done in the lesson but failed to do so so that such things would not occur again in my lesson... I would very much like us to address the problem internally... Any type of behaviour that makes me feel uncomfortable, intimidated or offended is construed as harassment and is unlawful under the Equality Act 2010.”

Three things are of note:-

- 30.1 First, the claimant was taking this back a whole year to the grade 3 from Joanne Gibbs. He was trying to demonstrate a pattern. It is curious that he did not mention the other grade 3 from Joanne Tiddy on 4 March 2016.
- 30.2 Second, he explicitly relies upon the Equality Act 2010 without explaining how harassment, which we understand as employment law experts, comes about, and what protected characteristic he relies upon. It stretches anyone’s powers of inference.
- 30.3 He stated he would like to deal with the problem internally, as if he was contemplating an alternative way of dealing with the problem.

35 The Head Teacher replied promptly thanking the claimant for his email and the attached letter, and asked him to clarify who the grievance was against and what form of resolution he was looking for. He was obliged to respond to this promptly under the terms of the school’s own grievance procedure. The claimant responded quickly to that, on 14 July:

“Thank you for your email the grievance is against the feedback from the lesson observation held on 16 June by Belinda Chapple and Annabel Rook who want a fair judgment resolution. I want to have detailed information with supporting evidence of what observers... thought I should have done in the lesson but failed to do so that such things would not occur again in my lesson. I also want clarification of every comment made in the feedback with supportive evidence from Belinda Chapple and Annabel Rook.”

36 By this time it was getting close to the end of term. It was a particularly fraught end of term. There was about to be a major programme of building works starting in the summer holidays. They were going to decant the children into different class rooms and portacabins in the grounds. The works lasted until shortly before this hearing started i.e. 15 months in duration. At this time the children and teachers were boxing up equipment and books ready to be moved.

37 Nothing further was done on the claimant’s grievance until the next term which was understandable. The school closed from 18 July to 1 September.

38 The email thread was not resumed until 17 October when the claimant restarted it. Once again the claimant cited law. He cited John Rawls. He stated:

"I have not seen any attempt to ensure justice is being done to the appeal and grievance I submitted to you in the last academic year. They are now in the seventh week but I haven't heard anything about the grievance."

The Head Teacher replied instantly taking up the thread where it had left off on 14 July:

"... just an observation you can only take a grievance out against a person, which you haven't done, hence no investigation. As for the judgment to be explained I did in fact do this myself at length in a meeting with you. You didn't agree but I made every effort to try to explain to you the reasons for the judgment. I had assumed we had all moved on. You have been smiling and professional at all times and I assume that you are ready to put this behind you and focus on the new academic year. Come and see me tomorrow so we can chat things through."

39 But the claimant was not satisfied with that:

"In the email it shows that you are still not clear about whom the grievance I sent you was against. The grievance I sent to you is against Belinda Chapple and Annabel Rook. I want to know details with supporting evidence of what Belinda Chapple and Annabel Rook thought I should have done... I smile and behaviour [sic] professionally everywhere I go because that is how I have been trained to do. Do not take my smile and professional behaviour as if everything is fine with me and the school."

40 There is some background to this, and also to the timing of it. The claimant had not taken it up immediately at the start of the term. On 14 October, a Friday, the claimant was absent from school. He told the school that his child was sick. The absence record confirms one day's absence for "family reasons" but it is not as simple as that. The claimant had in fact attended an interview at Skinners Academy; a school more local to where he lives in Waltham Abbey. Mr Hussain became aware of that because he was contacted on 19 October by Skinners asking for a reference with a view to making the claimant an offer of employment. It seems that the claimant knew that he was being offered another job. The respondent's case theory is that this was the reason he resurrected the grievance, in the mistaken belief that a live grievance would avert an unfavourable reference from the Head.

41 The claimant's evidence to the tribunal on this, and how it related to a sick child, or as he said a child in hospital, was hopelessly inconsistent. The account did not hang together at all. The tribunal cannot accept that you simply turn up or don't turn up as you feel like it for an interview appointment. It does not work like that. The interview, as teachers' interviews often do, had included a demo lesson where he would take a class at least for part of a lesson. The irony is that the respondent has a policy on teachers attending interviews at other schools. They positively encourage it. A teacher can attend an interview on paid time and get a full day off for the interview without losing any annual leave.

42 Mr Hussain was curious as to why the claimant had resorted to what appeared to be a deception to attend an interview secretly. The tribunal wondered whether the claimant's intentions were to avoid the humiliation he might have felt if the respondent had known that he had attended an interview and was not offered the job. The claimant started the job at Skinners the following term. He was paid in full up to the end of the calendar year 2016. The respondent did not insist on him sticking to his contractual notice period and released him early. He has suffered no loss of earnings. In fact he is paid more at Skinners Academy. He spends less time out of the house.



The journey time is much better; he has been able to start now on the Legal Practice course in his spare time. He implied, tellingly, the workload was rather greater than it had been in George Mitchell.

43 All that was at stake in an unfair dismissal claim is a basic award which would have been £2,155.50.

44 The claimant met with Mr Hussain on 18 October. The claimant continued in accusatory mode accusing even Mr Hussain of trying to get rid of him. The Head Teacher explained the true background to this. To get rid of the claimant would be to do wilful damage to the school as 2 of the 5 maths teachers we mentioned were due to go on maternity leave - Alina Enache and Maya Lad. Ms Enache's pregnancy was complicated by her having had a car accident. We got to hear about this in another connection when dealing with the question of race discrimination comparators because she had been the assistant head of maths to George Osei-Frimpong. She was relinquishing her TLR gradually as we accept. Those responsibilities were being picked up by Mohammed Hussain, known as Umar.

45 It had been an informal meeting with the Head. Mr Hussain's approach, which was quite sensible, was to attempt at every stage to resolve this by friendly talking. Mr Hussain had the helpful idea that George Frimpong might be able to help here because in the past the claimant had accepted a poor marking from him (the 3c in October 2014). Generally the claimant, too, seemed keen to involve Mr Frimpong. This is all confirmed in the email of 19 October from Mr Hussain to the claimant:

"Hi John

Thank you for meeting with me yesterday.

As discussed I asked Belinda to go through your lesson observation with you highlighting key points leading to the judgement made.

Having looked at timetables the best time for all is Tuesday 1 November at 9:05am in my office. I will also speak to George about joining the observation.

Have a good holiday"

46 The email is confusing because if one reads it carefully George was going to join the observation, but not the proposed feedback in the Head Teacher's office on 1 November. We are talking about a separate, new, observation. If the claimant believed that Mr Frimpong would have been there on 1 November it was not an unreasonable misreading of that mail. The tribunal initially read it like that. It would have been quite a reasonable idea to have George Frimpong present there as a moderating, and calming, influence.

47 Ms Chapple very much regarded it as her duty to see through her feedback on her assessment. She was protective of Annabel Rook who was considerably younger. She did not want to let her be exposed to the sort of behaviour which had previously upset her, and both the Joannes.

48 The meeting on 1 November took place as scheduled. It was a 3-way meeting between Belinda Chapple, Saeed Hussain and the claimant. According to Mr Hussain

it was difficult as the claimant insisted on complaining about Ms Chapple and did not want to hear Ms Chapple explaining how she had arrived at the grade and her assessment of the lesson. She persisted for about an hour and finally became visibly upset and left. Even at this hearing she described the claimant as “phenomenally aggressive”. She was visibly upset as she related this to the tribunal.

49 As before, the claimant talked over her. Mr Hussain threatened to terminate the meeting if the claimant did not moderate his behaviour. At that point he made the suggestion that perhaps George Frimpong would be better placed to explain this feedback to the claimant. Ms Chapple kept on the case and made it her business to contact Mr Frimpong. On 2 November she emailed Mr Hussain:

Dear Saeed

1. FYI with regard to the action point from our meeting with John Yesterday I went to find George at lunch time but he and John were together so I felt it best not to interrupt.
2. I was unable to meet George after school because of CPD12 and George was not well and left immediately after the session.
3. George is absent through illness today Wednesday 2 November.”

It appears that George Frimpong was then absent and come back the next day. It was proving hard to get this organised.

50 In the meantime it was proposed that there be another lesson observation. That was scheduled for 7 November which was a Monday. The observation was to be carried out again by Belinda Chapple but this time accompanied by George Frimpong as fellow observer.

51 Mr Amunwa generously conceded the wisdom of that decision was open to question. One can see that in the circumstances to have removed Ms Chapple from the assessment process might have been more tactful. The fact remained that the claimant’s belief - persistently held - was that non mathematicians cannot assess the lessons of mathematicians. Grading, however, would be moderated by having Mr Frimpong’s input. The claimant had historically always trusted and apparently respected Mr Frimpong.

52 In the end, this observation never took place. Why not? The claimant reported sick and remained off sick for 3 days. He told the tribunal that he was stressed out. It never happened.

53 Subsequently a week later, Monday 14 November, the claimant resigned. The letter was anodyne, even positive, in its terms given the fraught situation that the claimant was leaving:

“I am writing to formally notify you I am resigning from my position as maths teacher with George Mitchell School effective from 2 January although I have enjoyed working with you personal reasons necessitate that I vacate my position and focus on my improving my family situation at home. I feel it would be in my best interests to resign from my position. I would like to thank you and the rest of the teachers at George Mitchell School for the support you have given me throughout my time here. I much enjoyed working as part of this team and appreciate the opportunities that I have had for personal and professional development.”

54 The reference from the Head to Skinners Academy was more than adequate. He was asked to grade the teachers' ability on a 5 point range; 0 unable to comment, 1 weak, 2 average, 3 good, and 4 outstanding. The claimant got a 3 on all of the criteria except for initiative when got a 2. To the question of: "Were you looking to fill a similar post would you a) go out of your way to appoint, b) be happy to appoint, or c) not appoint". Mr Hussain took the middle option "be happy to appoint".

### Unfair Dismissal

55 That is the story (and thus the facts found): it is the narrative for the unfair dismissal claim.

### Race Discrimination

56 There is another narrative for the discrimination claims. In the context of discrimination, the claimant complains of less favourable treatment of him by the respondent. As stated before this was a troubled time at the school with building work starting in the claimant's last term. He says that he was allocated too many classroom moves compared to other people who were not, like him, of black African origin.

57 George Frimpong also has Ghanaian heritage, just like the claimant. A significant number of the staff group are Asian, Indian, or Pakistani. In particular he seeks to compare himself to Mohammed Umar Hussain. Each teacher nominally has 50 lessons to teach per fortnight. Timetables are worked out in a fortnightly cycle. The cycle and timetable repeats every 2 weeks.

58 In the academic year 2016/2017 the claimant had 42 hours allocated. Mr Mohammed Umar Hussain had 30 hours allocated, so there was a discrepancy. Umar is Pakistani origin. The explanation, however, was not hard to find. We have mentioned half of it already. Umar was acquiring TLR responsibilities from Alina Enache, even if he was not paid officially for those responsibilities until the autumn term of 2017. He was steadily acquiring them *de facto* during the previous terms because of her pregnancy and because of the car accident.

59 The second major explanation is that Umar was teaching 12 lessons in the primary school. All the timetables produced by the claimant in support of his case, apart from the fact they were draft timetables and work in progress, were purely for the secondary school. The secondary and the primary divisions of the school are treated separately for these purposes. When you add in the fact that Umar Hussain was teaching 12 lessons in primary in addition he in fact had the same number as the claimant. He also had a number of difficult inter-period movements between different rooms on different sites.

60 The hours worked by the teachers are as follows:

Lesson 1	09:05-10:05
Lesson 2	10:05-11:05
Break	11:05-11:25
Lesson 3	11:25-12:25

Lesson 4	12:25-13:25
Lunch	13:25-14:15
Lesson 5	14:15-15:15.

It can be seen from the full timetable that there are some lessons where a movement has to be made with no break time at all. You have to do it as quickly as you can. It is more complicated when it is raining or when there is a lot to carry. The timetables were drafted to avoid excessive movements particularly movements when there was no break. By and large it succeeded.

61 It is well known in teaching circles that drawing up of timetables is a massive jigsaw in which not everyone ends up happy with the outcomes. It invariably generates controversy.

62 We accepted Mr Amunwa's contention that the proper comparators would be what are called main-scale teachers without TLR. He identified 3 from the list of teachers we saw which is Sonia Khan, Dante Vilca and Adriana Uko-Eninn. They had respectively 42, 41 and 43 lessons. TLR makes a substantial difference. TLR represents a "material difference" under section 23 of the Equality Act 2010, which legally invalidates the comparison for the purpose of section 13 (direct discrimination).

63 As far as room allocation is concerned, again we agree with Mr Amunwa's careful analysis. There is no valid comparator within the claimant's own maths department. Umar Hussain had a tougher deal than the claimant did because of his TLR and the significant moves to the primary site. George Frimpong being the Head of Department and with all the administration that involved needed more of a fixed classroom. He, however, was rightly never named as a comparator as he is of the same heritage as the claimant, and he had a substantial TLR, Head of Maths.

64 There was then something a mystery. Mr Hussain insisted that the claimant should have taken classroom allocation up with the Head of Maths George Frimpong, yet in his witness statement for this hearing Mr Frimpong says he had no control on classroom allocation. The tribunal was unable to form a view on this. (We should add that Mr Frimpong was one of witnesses from whom we had written witness statements who were not called to give oral evidence at the tribunal).

65 Another one was Lorraine James, Head of Geography. The other one was Joanne Gibbs who provided a supplementary statement in response to some of the late disclosures of draft timetables made by the claimant.

#### List of issues

66 The so-called agreed list of issues, has not been a helpful document at all. For instance issue number 13 is "If so, what is the final straw relied upon?" The parties should be telling us what the answer is, not asking us. It is not our constructive dismissal case; it is supposedly the claimant's. Doing the best we can a major dissatisfaction was the claimant was given a grade 4 lesson observation by Belinda Chapple and Annabel Rook, where there was allegedly no proper explanation and opportunity to improve.

67 The evidence is all one-way on this. The grade was perfectly proper; it was a

detailed reasoned feedback form explaining why that grade had been decided upon. The claimant disliked it intensely and has never to this day accepted it as valid, he has his own reasons for that but he has not persuaded the tribunal that his objections have any validity.

68 As stated that judgment certainly is in line with the educational philosophy of the whole school, and it is in line with OFSTED best practice.

### Grievance

69 Did the respondent persistently refuse to apply their grievance policy? In the tribunal's view they did not. The claimant raised a grievance. That had to be taken up in some way. Procedurally there is no mechanism to make a grievance under the grievance procedure against an observation marking. It is a judgmental process from which there is no appeal. A teacher can be re-observed. There was never any question of any sanction being imposed on the claimant as a result of the grading, although training might have been advised.

70 Finally, resolution of the grievance. Mr Hussain proposed that Ms Chapple be given another opportunity to explain to the claimant to his satisfaction the rationale behind the grading so, in the claimant's own words, "such things would not happen again in my classroom". The claimant asked the right question but he was not prepared to hear Belinda Chapple's answer.

71 In one sense it is true that the respondent did not apply their grievance policy to a challenged observation marking. That was because they did not consider that to be within the scope of their grievance policy. Mr Hussain had to persevere to find out the person against whom the grievance lay. This illustrates that the grievance process is not the most appropriate way to complain about an event.

### Harrassment

72 These are all complaints under section 26 of the Equality Act 2010 which is harassment [sic]. During her lengthy submissions Miss Prempeh described the respondent's treatment as "debasing, undignified, disrespected and disregarded". But that is only 1 element of harassment in section 26(1)(b). Under 26(1)(a) it also has to be "related to a relevant protected characteristic"

73 Section 26(4)(c) provides:

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

74 Given the facts as we have found them, anyway, we cannot regard Ms Prempeh's submission as anything but hyperbole. The claimant's claim about having to teach 42 lessons per fortnight being harassment is hopelessly unfounded. There was nothing exceptional or out of the ordinary in the claimant's timetable.

75 Umar had the same work load as the claimant with more movements and transfers and TLR. To say the claimant was the only teacher without a fixed classroom is demonstrably false. Several other main-scale teachers had no fixed classroom including Umar Hussain.

76 This is before we get to the next issue of was this conduct related to the claimant's protected characteristic i.e. we are told, his race. It is an extraordinary submission. The tribunal by no stretch of the imagination could even begin to infer that it was "related to a relevant protected characteristic". If the claimant felt violated, intimidated, degraded that was what he felt. Subjective perception of that nature does not satisfy necessary preconditions in s 26(4) for a successful claim of racial harassment. The perception has to be objectively reasonable.

### Direct Discrimination

77 So far as direct discrimination is concerned issue 4 asks if any of the above acts of harassment instead amount to acts of direct discrimination i.e. "Less favourable treatment .... because of race" (s 13(1)). It is true that a grade 4 marking is "Less favourable treatment" than a grade 2. However, the tribunal cannot begin to see that it was "because of race". The burden is upon the claimant to establish a *prima facie* case of race discrimination. There are no facts at all from which we could infer that.

### Dismissal

78 Issue 5 suggests the claimant's constructive dismissal claim is also an act of direct discrimination as well as being a constructive unfair dismissal.

79 We conclude on the whole question of constructive dismissal that if there had been a constructive dismissal we certainly would not have found that it related at all to the claimant's Ghanaian African origins. The claimant was not treated any worse than a real comparator and we have tried our best to outline better more appropriate comparators helped by the analysis of Mr Amunwa. We cannot conceivably find a hypothetical comparator as the respondent's treatment of the claimant was wholly unexceptional. It was not "less favourable"

80 This does not satisfy the well-established test in *Nomura*. There has to be more than less favourable treatment and a difference in race.

### Implied Term of Mutual Trust & Confidence

81 The next section of the so-called agreed list of issues is breach of the implied duty of trust and confidence. What is the breach of contract alleged by the claimant? Doing the best we can at the end it seems that the breaches and the final straw were the were the Belinda Chapple's grade 4 marking and the failure by Saeed Hussain to deal with his grievance formally (despite the fact that the claimant resigned in the middle of the whole process).

82 There is considerable force in the respondent's contention that the only purpose he brought the grievance back to life in the autumn 2016 was he might mistakenly have

thought it would ward off an unfavourable reference. It was strange thinking and wrong-headed too.

83 The claimant has failed to show any breach let alone a last straw. The tribunal cannot see that the implied term of trust and confidence was damaged in any way whatsoever for the purpose of a constructive dismissal claim. The case has not been well put by the claimant (who is after all a law graduate now).

#### Grievance

84 A complaint is made about the delay in handling the grievance. We find it was fair of Mr Hussain to think that the original "appeal" was not being pursued and that the subsequent grievance of 11 July was not being pursued by the claimant and the claimant did not follow it up until 7 weeks into the autumn term after he had been offered a job by Skinners Academy, which is a telling fact.

85 The reasoning overlaps almost totally. The tribunal cannot possibly find that this was a constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act, ignoring the claimant's protected characteristic of race.

#### Constructive Dismissal

86 The respondent was not in breach even singly let alone cumulatively in any way arising out of the handling of the grievance (which was not the appropriate procedure for a lesson observation marking) and the Chapple grade 4 marking. For all those reasons the claims are dismissed.

#### Race Discrimination

87 For the reasons given above, the tribunal cannot possibly uphold the complaints of direct race discrimination or harassment, either.

Employment Judge Prichard

6 March 2018