EMPLOYMENT TRIBUNALS

Claimant: **Miss K Mortimer**

Respondent: **Cavendish School of English Limited**

Heard at: **Bristol** **On:** **30 July – 2 August 2018**

Before: **Employment Judge O'Rourke**
Members Mr H J Launder
Mr C Williams

Representation
Claimant: **In Person**
Respondent: **Mr Howson, Consultant**

JUDGMENT having been sent to the parties on 3 August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. The Claimant was engaged by the Respondent as a Teacher of English as a Foreign Language, at their school in Bournemouth on a short-term contract, between 23 of June to 1 September 2017. However, her contract was terminated early by the Respondent, with effect from 14 August 2017.

2. There have been three Preliminary Hearings in this matter.

3. At the Preliminary Hearing of 10 May 2018, Employment Judge Harper determined that the Claimant was in fact a worker and not, as asserted by the Respondent, a self-employed contractor and therefore was entitled to bring claims of protected disclosure detriment, age and religious discrimination and arrears of holiday pay.

4. The Claimant brings claims of direct age and religious discrimination, protected disclosure, victimisation on grounds of age and religion and failure to pay salary in lieu of untaken holiday. The issues in respect of those claims are set out in detail in the Case Management Summary of Employment Judge Pirani dated 10 July 2018 and are therefore not addressed here.

The Law

5. We referred ourselves to ss.13 and 27 of the Equality Act 2010 and s.43B of the Employment Rights Act 1996.

6. In respect of the claim for victimisation, we also referred ourselves to the cases of **Nagarajan v London Regional Transport [1999] ICR877 UKHL** and **O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615 EWCA**. These cases indicate that where there may be more than one motive in play for detrimental treatment, all that is needed is that the discriminatory reason should be "of sufficient weight" and that it may not be the only cause, or even the main cause.

The Facts

7. We heard evidence from the Claimant.

8. On behalf of the Respondent, we heard evidence from:

    - Mr Marcus Barber, the Managing Director, who sought to rebut assertions made in the Claimant's statement.

    - Mr Booker, the Director of Studies, who dismissed the Claimant.

    - Mr Archer, a fellow teacher, who witnessed an incident in the staff room, and

    - Mr Rynhart, Assistant Director of Studies, who gave evidence in respect of class sizes.

9. We were also provided with statements from Mr N Barber, Mr Rassi, Miss Skipp and Miss Williams. None of these persons attended to give evidence and to the extent that their evidence was relevant, we gave it little weight.

10. About a month or so into the Claimant's engagement, on 8 August 2017, there was an incident involving her and another teacher, Miss Skipp, in the staff room. There are differing accounts of this incident. Mr Archer said that the Claimant was involved in a private discussion with others on the theme of Christianity. She is a committed Christian. Mr Archer said that Miss Skipp intervened and commented that "*Christians were violent*". Mr Archer said that the Claimant "*flew across the room in a threatening manner*" to confront Miss Skipp, with two male members of staff interposing themselves. He said that she shouted or screamed at Miss Skipp. It was agreed evidence that Miss Skipp apologised, if she had caused any offence. The Claimant vehemently denies any such threatening behaviour,

stating that she had merely been defending her religion and accused Mr Archer of lying. We don't consider the facts of this incident to be relevant to our considerations, as the Claimant brings no claim specific to this incident and therefore we make no finding of facts in relation to it.

11. Sometime later on the same day, the Claimant approached Mr Booker and informed him as to the incident. She was concerned as to Miss Skipp's comment and said that Mr Booker responded that she should "*ignore them because she* (Miss Skipp) *is young*".

12. In his statement, Mr Booker denied making this comment, instead stating that he asked the Claimant "*if she wished to take the matter further*" In cross-examination, however, Mr Booker admitted that he had in fact made the comment.

13. On the same day, the Claimant emailed Mr Booker stating "*thank you for being very reasonable this morning when I mentioned what happened with the other teacher. I understand no doubt you would hear about it…. I taught my classes today as per normal and otherwise it was a pretty normal day for me. The rest of the day went peacefully and I don't feel it is going to happen again*". The implication being, as far the Claimant was concerned that the matter was at an end.

14. However, the next day, 9 August, Miss Skipp invoked the Respondent's grievance procedure against the Claimant. She, unlike the Claimant, was an employee.

15. Mr Booker said that he had no option but to investigate the grievance. While the Claimant asserted that Mr Booker had encouraged Miss Skipp to bring this grievance, he denied that and there was no supporting evidence that he had done so.

16. Mr Booker wrote to the Claimant in a letter dated 9 August, but not actually sent until 17.22 on 10 August, a Thursday and a working day for the Claimant and she did not open it until later that evening. The letter states "*I am writing to inform you that a member of staff has invoked the grievance procedure relating to your conduct in the staff room on the morning of 8 August 2017. In line with the Company's grievance procedure I must inform you that no formal disciplinary action will be taken at this stage. An investigation has begun and accounts of staff involved and who witnessed this are being recorded. It has been claimed that you launched an unprovoked verbal attack upon a colleague to which that person felt physically threatened. I would like to invite you to a meeting on Saturday 12 August at 9.00am to discuss this allegation. You may be accompanied by a colleague if you wish. Finally, may I remind you of your professional obligation to refrain from openly discussing this matter at school whilst an investigation is being conducted*".

17. The Claimant took great exception to this letter, both because of its contents and its timing. She considered that she was in effect being disciplined for something she hadn't done and also that she didn't consider she had sufficient time to prepare for the proposed meeting.

18. She responded that same evening, stating, in summary, the following:

> *"You have handed the person the grievance and disciplinary procedure, but you have never handed it to me, either this week or since the outset of my contract with the School which began in the last week of June and goes on until 2 September. I believe this is required by law… I have felt disappointed as I have worked very hard for you at the School all summer. I have had a difficult timetable in teaching classes of sometimes seventeen, eighteen, nineteen and twenty students, which is higher than you have advertised in your website of fifteen and what I was told in my interview about you and Shane. I have frequently been forced by Shane and Josh to teach students who are at the wrong level and been kept down because you would not open another class, although I believe they are all individually paying £1,000 per week each to be here…. I feel that you and them are now conducting some witch-hunt because I have made it clear that I am a Christian and my involvement with the said teacher was in reference to my faith, which I had defended on that day. I am aware there are two other Christians which sit in that staff room with her but they are not the same kind of Christian as myself. I am a born-again Christian and tried to live up to the values of the Bible. For me it is a way of life rather than an ideology and I am not the first Christian to publicly defend my faith against a militant atheist. As I have always been accommodating with the School, fulfilling all the obligations of my timetable, never been late, never taking a day off and covering a double timetable, with no adequate breaks by law and sometimes for other teachers' classes, who have also not turned up for work, I have always done what you and Shane have asked….*
>
> *Secondly, as you are aware, the person in question was openly making detrimental remarks on a persistent basis about my faith, which I found personally hurtful. This was in a staff room mainly atheist and some Muslims, who supported her, including on the day when I spoke to her about her comments. On the day of the so-called attack she had made a public remark in front of other teachers, also about my faith and as I had taken advice from a church leader the previous Sunday about it, he had advised me to ignore her, as she was attempting to provoke a response. However, what I discovered by saying nothing is that she was getting more and more vocal and I told you this myself after the incident happened. I believe her attitude in provoking a response from me was because I had persistently attempted to ignore her, whom I have found to be a generally tactless person and I have wondered what she is doing in EFL, especially as she is working with young minors and she has no current DBS, which I believe is required by law. I am surprised that she is employed by the School at all, as, from our conversation, it appears she is not a qualified teacher and if she was, she certainly would have a current DBS certificate…*
>
> *The general response I get from your Assistant Manager Shane, who, I understand, is also very busy, as he is something like 'not my problem', which he says very frequently and I would not mention*

anything to your Assistant Academic Manager Josh, who have had something to do with the juniors, as myself and my class heard him shouting at the top of his voice, abusively, at students in the corridor outside my classroom one day. He was reprimanding them about something, but he was shouting very loudly at them which I can only say was abuse, particularly considering their age. I do not know what they had done, but whatever it was certainly did not warrant the abuse that had been firing at them in full earshot of myself and my class of young students, some of them very shy Chinese students who had only just arrived at the school….

I am afraid Saturday and Sunday are my days off and I would prefer to see you during paid hours at the School, as this does constitute school business and I am afraid I have not agreed to work on Saturday mornings this week. I also would like opportunity to take advice from ACAS and possibly other legal representatives and need time to do so, if you do not mind and I can't say how long this will take. I know them to be generally very busy people. I already have your schedule to work for next week and if you would like to see me during a free period which is paid and I can get an ACAS representative to come with me on that day or possibly my solicitor, but I cannot promise I am able to secure this. I am scheduled to work at the School until 2 September and would like the opportunity to continue my work with you…

As I have mentioned, my desire is to work my contract until 2 September. If you do not wish me to do so then I would appreciate that you pay me in full until that day, at an average pay of what I have been earning for some time now, which is averaging around 34 contact hours per week. I would also like to have a written reference that you said I could take with me to Los Angeles in the US, where I am working at the end of my contract at the School, which, by the way, is my fourth contract with Cavendish School".

19. Mr Booker did not respond to that email, stating that he was away from the School at this time.

20. The Claimant did not attend for work on Friday 11, or in fact thereafter.

21. Mr Rynhart wrote to her on 11 August, stating:

"*Dear Kathleen*

Given the situation, we understand why you may not have come to work today. We arranged cover for your class this morning and have provisionally arranged cover for your class this afternoon as well. Please let us know should you be planning to come in this afternoon, so that we can update the timetable accordingly. If you could also advise us of your plans for next week that would be greatly appreciated".

22. The Claimant didn't respond to Mr Rynhart's email and Mr Booker wrote again to her on Saturday 12 August, stating:

> *"Dear Kathleen*
>
> *You were scheduled to teach on Friday 11 August… however you were absent that day and we received neither a phone call nor an email relating to your absence, so cover had to be found. Please let us know if you are unable to teach the scheduled classes which you agreed to teach week commencing 14 August".*

23. Mr Booker said that despite what the Claimant had said about the proposed investigatory meeting on Saturday, he had nonetheless expected her to attend and phoned her when she didn't. The Claimant denied receiving any such call, or having a missed call. We preferred the Claimant's evidence on this point, as Mr Booker's account was sketchy, initially, as to whether he had got through to her and then, when asked why he had not left a message, seemed uncertain, belatedly stating that there was no message service. We note also he does not make that point in his statement.

24. The Claimant wrote again later on Saturday 12 August - this and her previous email being referred to hereafter as the "complaints emails". The relevant contents of this email are as follows:

> "*The complaint was sent to you as my line manager on Thursday evening, which you have not acknowledged. It was also copied to other management staff, including Shane Rynhart, Mr Rassi and Josh Lock, who also did not acknowledge it. I have sent you a complaint against a staff member who has victimised me in the staff room with regards to my faith and other personal matters, which I was forced to respond to on Tuesday morning, in front of other staff members. The same staff member made a formal complaint against me, aided by yourself, using a grievance procedure. You have had plenty of opportunity to talk to me about it but failed to do so…*
>
> *I feel that you have shown favouritism to a teacher who has persistently been offensive to me in the staff room and I feel, with yours and your manager's endorsement, this would only continue…*
>
> *Josh Lock has insisted, in your name that I formally answer to the charges against me. However, I do not see how you can enact a complaint from a teacher who is illegally employed at the school with no valid DBS certificate to teach children under the age of 18…*
>
> *It seems callous and obscene and lacks respect for myself as a teacher and my health which has been under great strain. You have failed to acknowledge my complaint in entirety, although you have accepted the complaint of the other person and even aided the person by handing her a copy of the grievance procedure….*
>
> *I wish to be treated fairly and would like the name and contact details of the person I sent my complaint to, obviously not now yourself. I*

> *am seeking the full working hours of my contract until 2 September, whether I am working for the Company or not*".

25. Mr Booker's only response to these communications was his email of Monday 14 August, which stated:

> "*I am writing to confirm receipt of the email below, in which you make several allegations towards the staff and academic management of the School. For the record, you have a self-employed status, to which you signed a letter of agreement, where you agreed to provide the Company with your services as an English Language Teacher for an agreed length of time. According to the ACAS website a "self-employed person will run their own business and take responsibility for the success of the business. Self-employed people are more likely to be contracted to provide a service for a client. They will not be paid through PAYE and don't have the same employment rights and responsibilities as employees or workers".*
>
> *On Friday 11 August, you agreed to teach at the School, but did not, you neither informed us via phone nor email that you would not be able to teach on that day, thus infringing the terms of the agreement. According to that letter of agreement, the Company reserves the right to evaluate the effectiveness of the services you provide and take whatever action is necessary, including the summary termination of this agreement for your services. It is with regret that as at 14 August, we terminate the agreement made. A breakdown of the hours of work completed by yourself will be sent to you shortly. Once we have received your completed invoice up until the last day you provided your service to the school (Thursday 10 August) you will be paid in full*".

26. There was then ongoing correspondence thereafter (pages 178 – 184 and 187 – 189). The latter correspondence is clearly an attempt by the Claimant to bring an appeal against the dismissal decision.

27. On 15 August, Mr Booker wrote to the Claimant.

> "*Please be advised that the grievance procedure that began was due to a formal written complaint being issued to the management. Although an investigation into the allegation began it could not be concluded due to lack of evidence. It must also be noted that these actions did not influence the decision to terminate the agreement. Your services as a self-employed teacher were withdrawn, as the Company had evaluated the effectiveness of the services which you provide and concluded that they are no longer required in the interest of the Company*".

28. In cross-examination, Mr Booker accepted that the grievance had actually been withdrawn and not, in fact, dropped for lack of evidence.

29. Mr Barber became involved at this point, writing to the Claimant on 15 September:

> "*You are claiming worker's status, however you have a letter of agreement that clearly defines your status. According to this agreement, you are not entitled to any of the statutory rights extended to an employee, as defined by s.230 of the Employment Rights Act 1996 and set out in that Act as a whole. Self-employed staff are paid for all work completed, on receipt of an invoice at the end of each month. According to our records the last day you completed any work for the Company as a self-employed teacher was Thursday 8 August 2017. A breakdown of the hours you completed from 26 July – 10 August 2017 was sent to you on 14 August. The total amount for that period is £1,359.17. As soon as we receive your invoice for the figure previously stated then we shall forward this payment to the bank account on the invoice you submit. Please let me know if you would like this breakdown of the work you did to be re-sent….*
>
> *Finally, with regard to a reference, it is Company policy not to provide employed teachers or self-employed teachers open letters of reference. However, you may offer the following contact address info@Cavendishschool.com to potential future employers, who can contact us directly for a reference. This request will be forwarded to the appropriate department member*".

30. After a great deal of further correspondence from the Claimant, Mr Barber wrote again on 3 October:

> "*In addition to my previous email, I would like to point out again that you do not fall under the statutory employment rights and therefore do not qualify for any holiday payment. That's also specifically pointed out in the contract/agreement which you have signed. However, a self-employed teacher always charges £1 more per hour for their service than an employed teacher, to counteract the lost holiday pay. You simply didn't turn up to provide your promised service, in the middle of the summer, our busiest time, without notice and therefore forced us to terminate our agreement and replace you immediately. You have not been discriminated. A grievance against you is filed and that means you cannot file a grievance against the person who filed a grievance against you. However, you didn't even file a grievance yourself. Without a written grievance no grievance procedure can be started. The grievance filed against you could never be investigated, as you decided not to turn up to provide your service, without even telling us. You simply didn't turn up. That was the only reason our agreement was terminated by us.*
>
> *Please be assured that we of course pay a substantial amount per year for copy license fees and CLA. Your calculations as to how much money you have "earned" the school makes me laugh. You, as your own boss, should know a lot better, lessons cost the student £5.00 and that's not profit, but turnover. After paying all offsets, including your service fee, a mere 50p will be left.*

> *Your threat that the British Council will be notified makes be laugh as well. Little do you know about the British Council. They won't be interested at all, but please don't hesitate to notify them. Please feel free to take us to Court. I am very confident at the outcome, our contract/agreement with self-employed teachers have been created by employment specialists to make sure its "bullet proof". This will be my last email to you, everything has been said*".

31. These proceedings commenced in October 2017. For reasons known only to himself, Mr Evans, the Respondent's General Manager wrote to the Tribunal two weeks ago, addressed to 'Dear Judges', stating:

> "*I feel I must respond in person to the wild accusations in the email from the Claimant and feel that it is my right, as the Claimant has been asked to communicate only with our representatives, as she has ignored your orders, as she has all others. Miss Kovaks is no friend of the Claimant, rather, she is a very slight woman, who is living in absolute terror of her. She has indirectly told the Respondent to leave her alone as she is afraid of having been witness to previous other violent outbursts. I have had the sad task of seeing this fine teacher shaking fearfully on a number of occasions and I have had to convince her to stay in the job and not move from Bournemouth and I have tried to convince her she is safe. Miss Kovaks has contacted the police and been told not to respond to Miss Mortimer.*
>
> *Now Miss Skipp is living in a state of fear, more so when she found out that the Claimant is trying to use personal photographs of her in the trial. She is afraid to appear, or give a witness statement to the Respondent, lest the Claimant find out her address and no this young and fine teacher was the victim of one of the Respondent's most violent and aggressive outbursts, a situation where she had to be physically restrained by male teachers, who thought the Respondent would seriously damage the victim who had suffered this outburst, simply for disagreeing Miss Mortimer's very stringent and widely discredited views…*
>
> *I write this message without consultation with our legal representatives, as I simply cannot stand by and see these innocent teachers driven into this situation and willingly by the false accusations of the overbearing and aggressive Claimant. I have heard in the past this trial will go ahead in the interests of justice - what justice to be found if innocent people are being forced to live in fear by an aggressive claimant, whose claims are anyway entirely false. Indeed, and has been mentioned in previous hearing, although seemingly unheard by the Judge, a serial claimant who has made numerous unfounded cases against language schools in Bournemouth. In fact she is black-listed by most schools - a black-list we were not aware of, as we would take no part in such a practice*".

The Claims

32. Direct Age Discrimination. We turn now to the claims brought by the Claimant. Firstly, she claims direct age and religious discrimination. The claim in respect of age is focussed purely on Mr Booker's "*she is young*" comment. There is no further reference to this issue in the two 'complaints emails', prior to the Claimant's dismissal. It is clear, therefore that at the time prior to her dismissal, the Claimant was not focussing on this issue, but instead on potential religious discrimination. As it was not raised with Mr Booker, it cannot have played any part in his decision-making. Accordingly, we dismiss that claim.

33. Direct Religious Discrimination. Turning to direct religious discrimination, the Claimant said that she had been less favourably treated than Miss Skipp, who, she considered an atheist and that this was because of her religion. The less favourable treatment was that Miss Skipp's grievance was being considered and the Claimant's was not. However, we disagree, as there is a clear and convincing alternative explanation, which is that as Miss Skipp was an employee, she was entitled to avail herself of the grievance procedure, whereas in the Respondent's view, at the time, the Claimant was not, as she was a self-employed contractor - similar, as Mr Barber said, rather dismissively, to a "*self-employed plumber*".

34. We are entirely confident that had the Claimant been, in the Respondent's eyes at the time, an employee, she too would have had her grievance investigated. We conclude, therefore that while the Claimant was less favourably treated than Miss Skipp, it was not because of her religion. Accordingly, her claim of direct religious discrimination is dismissed.

35. Protected Disclosure. In respect of the claims of protected disclosure, the Claimant has to show that she made disclosures of information to the Respondent that she reasonably believed tended to show, in her case, breach of a legal obligation.

36. The disclosures related to:

    (1) Class sizes were being exceeded.

    (2) Students were placed in classes at the wrong ability level.

    (3) Miss Skipp was not qualified and did not have a current DBS certificate.

    (4) A fellow teacher shouted at pupils.

37. In respect of class size and student grading, the Claimant sought to rely on the British Council's accreditation scheme [95–110]. Firstly, we saw no reference in this document to class sizes and only a general reference [107] to "*efficient procedures for the correct placement of students, appropriate to their level and age and assessment of starting level*".

38. Both Mr Barber and Mr Rynhart said they complied with this requirement and apart from the Claimant's assertions on this subject, she provided no

evidence to the contrary. In any event, it is clear that the British Council document is merely, as stated, a "*Voluntary Quality Assurance Scheme*" and therefore not legally binding. It cannot, therefore, form the basis for a breach of legal obligation.

39. The Claimant then sought to argue that these alleged failures amounted to breach of contract with the pupils' parents. However, the evidence of Mr Barber was that there was no direct contract with the parents, but instead with agents, in which contracts no maximum class-size or form of pupil grading was specified. The Claimant provided no evidence to the contrary and there can't therefore be breach of a legal obligation in that respect.

40. In respect of a teacher allegedly shouting at a pupil, Mr Barber said that on occasions it might be unavoidable to do so, for safety or safeguarding reasons and in any event it cannot be a breach of a legal obligation for this to occur on one single occasion.

41. Finally, there is the allegation that Miss Skipp was not qualified, or did not have a valid DBS. Mr Barber said that there was no strict legal requirement for the School's teachers to be DBS checked, but, as the British Council Scheme required it, they did so. Miss Skipp did have a valid DBS certificate [254], but that was dated 27 July, a couple of weeks after she had started work. Mr Barber said that it was perfectly acceptable to allow somebody to work, provided a certificate had been applied for. In respect of her qualifications, Mr Barber said that all teachers at the School were qualified, but, in any event, there was no legal requirement that they be so.

42. The Claimant, on whom the burden of proof rests in this respect, failed to provide any evidence as to the alleged legal requirement for qualifications and DBS checks, merely asserting "*that it was the law of the land*" and that we, '*as a Tribunal should know that'*. We do not, however, without evidence, know that to be the case.

43. Turning finally as to whether it was reasonable for her to believe these disclosures to be breaches of legal obligation, we conclude that it was not, for the following reasons:

    (1) She consistently and seemingly deliberately failed to accept that the British Council Accreditation Scheme was just that, an accreditation scheme, not a legal obligation. It was clear that despite this being explained to her on several occasions in this Hearing, she simply refused to accept it, indicating unreasonable behaviour on her part.

    (2) We note that despite being an experienced professional teacher, she could provide no corroborative evidence to support her beliefs in respect of DBS. We would have expected somebody in her position, with a high level of knowledge, to be able to validate what she asserts is a reasonable belief. While a lay person, without her experience, may not be expected to meet that threshold, we consider that she should, before making these allegations. It is significant, we think that she has still failed to do so nearly a year later, indicative we consider of her reliance on "*good feeling*" in this respect. We conclude therefore that the

Claimant's disclosures were not qualifying and a claim of protected disclosure is dismissed.

44. Victimisation. We turn now to the claim of victimisation. In respect of age and referring to the two complaint emails, there is no 'protected act' in either of those emails, related to age. Therefore, the Claimant cannot successfully plead victimisation on that ground.

45. In respect of her religion, however, the Respondent accepts that the complaint emails contained 'protected acts'. Those emails were followed within three days by her dismissal - a clear detriment. We ask ourselves therefore whether that dismissal was because of the protected act. We conclude that it was, for the following reasons:

    (1) In direct contradiction to what Mr Booker said in his statement, namely "*the only reason I had in mind when terminating the agreement*" was the Claimant's refusal to turn up for work and failure to confirm her continued attendance, he in fact, in cross-examination, agreed, when asked if the protected acts formed part of his rationale for dismissal, that "*they were in the back of my mind*". Applying **Nagarajan** that is sufficient to support a claim of victimisation. It was certainly not, as Mr Howson asserted, a "*trivial factor*".

    (2) Secondly, the coincidence in time between the complaint emails and the Claimant's dismissal, which, even Mr Booker accepted, could look suspicious to an outside observer and indeed it does. Instead, he could have simply allowed her contract to expire, a couple of weeks later, but was clearly driven to expedite her departure.

    (3) Thirdly, the existence of a troubling and no-doubt time-consuming grievance from Miss Skipp, which could be swiftly side-stepped by the Claimant's dismissal, particularly as the Respondent believed that there were no legal consequences to doing so.

46. Accordingly, therefore, the Respondent victimised the Claimant on grounds of her religion.

47. Finally, the Respondent concedes that holiday pay is due to the Claimant, but the parties cannot agree this figure and that will therefore be determined at the remedy hearing.

Remedy Judgment

REASONS

48. We heard evidence from the Claimant, who had also provided a schedule of loss and associated documentation in the bundle.

49. We turn first to the issue of loss of earnings and consequential losses. We do not consider that the Claimant is entitled to any loss of earnings, for the following reasons.

    (1) Despite her protestations in this Remedy Hearing that she didn't know whether she would go back to work or not, we are satisfied that she had no intention of doing so, particularly as she said, in her letter [173] that "*I am seeking the full working hours of my contract until September 2, whether I am working for the Company or not*".

    (2) She provided no direct written explanation for her refusal to attend work, or provide sick notes.

    (3) By the nature of her contract, she would only be paid if she attended for work.

50. In terms of consequential loss, the Claimant asserted that she was unable to pursue her writing career and particularly by travelling to the United States. However, apart from that assertion, she provided no supporting evidence of:

    (1) Her career;

    (2) Her intentions to go to the US;

    (3) What may have occurred if she had gone there;

    (4) What alleged loss of income she suffered as a consequence.

51. The burden of proof is on the Claimant in this respect and which she has categorically failed to discharge. While she said that if given the opportunity now to provide documents, she may be able to prove these matter, she was referred to three previous case management orders on the issue of prior disclosure, which she had clearly ignored. She was not therefore given leave to produce any further documents at this stage, as doing so would clearly have prejudiced the Respondent.

Holiday pay

52. Mr Howson provided calculations for holiday pay at the conclusion of the liability hearing, in the sum of £416.07, calculated at £100.50 as a day's gross pay, for 4.14 days entitlement, which calculations the Claimant did not dispute. The Claimant contended, however that she should be awarded holiday pay for the period from her dismissal to 1 September, but, as we have concluded that she was not entitled to loss of earnings for that period, she cannot, as a matter of logic, have accrued holiday entitlement in the same period.

Expenses

53. The Claimant sought unspecified and unevidenced expenses for her attendance at various hearings. Rule 74 of the Employment Tribunal's

Rules of Procedure permits the possibility of, in this case, of the Respondent being ordered to pay the Claimant's expenses, but that is only in the case where the Tribunal also makes a 'preparation time order' or costs order, having found the Respondent to have acted unreasonably in resisting these claims. Clearly, as the majority of the Claimant's claims were dismissed, the Respondent was perfectly entitled to resist them and cannot therefore be considered to have behaved unreasonably. No expenses order is therefore made.

Injury to Feelings

54. We note at the outset that while the Claimant undoubtedly suffered injury to feelings, much of that was in relation to elements of her claims which have failed. It is clear to us that she first was shocked at the incident in the staff room, but, having spoken to Mr Booker, she was at that point willing to let it rest. What we consider really enraged her was the taking of the grievance against her by Miss Skipp and which was then compounded by Mr Booker's refusal to accept any counter-grievance from her.

55. In that light, her subsequent dismissal was of a lesser degree of gravity and she said herself that if they had paid her the balance of her projected pay to 1 September, she would have simply left. Nonetheless, it is clear that she did suffer injury to feelings by being dismissed in those circumstances, feeling, as she said, shame and embarrassment, in what is no-doubt a close-knit professional community. She felt anger also, very evident in her conduct of these proceedings and this Hearing. The tone used by the Respondent in its latter correspondence, both from Mr Barber and Mr Evans, was dismissive and patronising, wrongly asserting legal protections not available to the Respondent and attempting to browbeat her into dropping her claims. Mr Evans' somewhat wild and unsupported assertions, combined with what we consider effectively veiled threats about 'black-listing', can only have exacerbated the Claimant's feelings about how she had been treated. It seems likely, too that her desire/ability to teach in the future may be adversely affected. Her medical evidence [233 and 235] is conclusive that within days, she was diagnosed with a depressive illness. She has very strong Christian beliefs and takes them very seriously. The Respondent is obliged to 'take the victim as they are' and therefore to take account of the particular sensitivities of any potential victim of discrimination and they clearly did not in this case. It is irrelevant whether they consider the Claimant to be oversensitive, or otherwise, as her feelings must be taken at face-value. All of these factors indicate to us that the lower band is inappropriate in such a case.

56. Having decided therefore that the lower band is inappropriate, we set this claim in the lower end of the middle band, in the figure of £9,500 and applying the Employment Tribunal's Presidential Guidance in this respect, our reasons for doing so are as follows:

    (1) The act of discrimination is limited to one event, her dismissal and even the alleged acts which we found against still only span seven days. This was not a case of a prolonged campaign of discrimination by the

Respondent which might, if it had occurred, have moved the injury to a level higher in the middle band.

(2) There is no medical evidence of any continuing depression beyond November 2017.

(3) We are conscious, as advised in **Vento** that Tribunals should have regard to the Judicial College's guidelines for assessment of general damages in personal injury claims and having done so do not consider that this award is out of proportion to awards in such cases. For example (and such comparisons are always difficult), awards of up to £9000 are possible for damage to hair caused by negligent hairdressing and which may result in embarrassment or depression.

57. Therefore, our judgment is that the Respondent is ordered to pay the Claimant the total sum of £10,650.31, calculated as follows:

(1) Injury to Feelings £9,500. Interest on that award at 8% for 353 days, at £2.08 per day = £734.25.

(2) Arrears of holiday pay of £416.07.

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Employment Judge O'Rourke

Date: 29 October 2018