



EMPLOYMENT TRIBUNALS

Claimant: Mr M A Nadeem

Respondent: University Academy Keighley

Heard at: Leeds **On:** 15, 16, 17 and 18 January 2019
10 April 2019 (reserved decision)

Before: Employment Judge Licorish
Mr T Downes
Mr M Taj

Representation

Claimant: Mr P Morgan, Counsel
Respondent: Mr A Scott, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claimant's complaint of direct race discrimination succeeds.
2. If the parties are unable to agree the amount of compensation the claimant should be awarded, by no later than 28 days after this Judgment has been sent to the parties they must provide to the Tribunal any dates on which they will be unable to attend a further hearing in the next six months, a time estimate for that hearing and a list of issues which remain in dispute. A further remedy hearing will thereafter be listed.

REASONS

1. The claimant started to work for the respondent secondary school Academy as a newly qualified teacher (NQT) in September 2016. The claimant contends that during his induction year he was given a heavy workload with minimal support or guidance, and his performance as an NQT and a fully qualified teacher was unfairly criticised and/or badly managed because of his race. By a claim form presented on 4 June 2018, following a period of early conciliation from 20 April to 8 May 2018, he complained of direct race discrimination. Further complaints of indirect race discrimination and harassment were subsequently dismissed on withdrawal by a Judgment dated 22 September 2018.

2. The respondent denies the claimant's claim. Most importantly, it contends that the claimant was treated no differently to other NQTs, and it had genuine concerns about his performance as a teacher.

The hearing

3. During the hearing the Tribunal heard evidence from the claimant and Chris Dring (a former colleague and NASUWT representative). For the respondent we heard from Mark Turvey (assistant principal, achievement and data), Eilidh Barker (head of faculty of social sciences) and Duncan Slater (assistant principal and, at the time, NQT support coordinator). The respondent also submitted a witness statement by Helene Mason (HR manager), who was not called on the basis that her evidence about the declared ethnicity of the NQTs in the claimant's cohort was uncontested. All the witnesses' written statements were read by the Tribunal before the claimant gave evidence.
4. The Tribunal was also provided with an agreed bundle of documents, initially comprising 396 pages. At the beginning of the third day of the hearing and prior to Duncan Salter's evidence, a short summary investigation report dated June 2018 was added to the bundle by consent at pages 397 to 399. This report was disclosed by the respondent following the claimant and Chris Dring's evidence about the perceived treatment of black and minority ethnic (BME) teaching staff by the respondent's senior leadership team (SLT). The report was commissioned following a collective grievance raised by the NASUWT. Although that report was marked private and confidential, the respondent confirmed that it understood that it could be referred to in any publicly available Reasons produced as part of the Tribunal's Judgment. Among other things, this was because the report was redacted to the extent that it included bare details about the terms of reference regarding the investigation, and no details of the subject matter of complaints made or concerns raised by individual teachers.
5. On the final day of the hearing, Duncan Salter was re-called to give evidence following the disclosure of further documents by the respondent at the beginning of that day (comprising email correspondence between Mr Salter, the claimant's induction tutor and head of faculty, in April and May 2017). Those documents were added to the bundle by consent at pages 400 to 405.
6. The Tribunal read the pleadings, and all of the documents referred to in the witnesses' written statements and during oral evidence. References to page numbers in these Reasons refer to those in the complete bundle of documents before the Tribunal.
7. Generally, we would say that we found the claimant and Chris Dring to be convincing witnesses. Most importantly, their evidence remained consistent and they made appropriate concessions during cross-examination. Mr Dring also offered an honest assessment of how developments during the claimant's NQT year subsequently affected his performance as a teacher.
8. By contrast, where there was a dispute we found the respondent's witness evidence to be less persuasive. In particular, Duncan Salter's version of events was contradictory not only within his written statement, but especially so during his oral evidence. Eilidh Barker was a more straightforward witness, but also proved to be inconsistent in oral evidence, most importantly when explaining the decision to place the claimant on a performance support plan and the basis for that decision. Both witnesses also acknowledged that relevant documents were not in the bundle. When resolving disputes, we

therefore relied on the contemporaneous documents where possible, but also preferred the claimant's and Mr Dring's version of events. We later set out our specific reasons for the way in which we have resolved disputes of fact where necessary.

9. During the hearing, reference was also made to a number of the respondent's former and existing teaching staff. The points that the witnesses made in evidence do not depend on revealing in our Reasons (which will be accessible online) the identities of those concerned. In the circumstances, the members of staff in question will be referred to either by their initials, or by their job title at the relevant time. The Tribunal proceeds on the basis that the parties and witnesses who attended the hearing will recognise who those people are.
10. Finally, submissions finished sufficiently late on the last day of the hearing with the effect that the Tribunal reserved its decision. Unfortunately, the hearing fixed for the Tribunal to reach a decision, due to take place at the end of January 2019, was postponed owing to the ill health of one of the Tribunal's members. The Tribunal was thereafter able to meet in April 2019, on the date previously listed for a provisional remedy hearing. The Tribunal apologises for the inconvenience to the parties, but the delay in respect of reaching our decision was unavoidable.

The issues

11. The issues in respect of the claimant's claim were first identified during a preliminary hearing on 4 September 2018. That list was amended and agreed at the beginning of the hearing in accordance with the allegations contained in the grounds of the claimant's claim (page 13).
12. In particular, in the list of issues identified at the preliminary hearing, one of the allegations contained in paragraphs 4 and 5 of the grounds of claim had been summarised as "*unilateral extension of induction year*". In fact, the claimant alleges that he was unfairly targeted by the respondent's senior leadership team (SLT) by, among other things, its NQT co-ordinator, Duncan Salter, suggesting that the claimant's induction year should be extended. He goes on to acknowledge (and it is not disputed) that his induction year was never extended.
13. In addition, the contention that the claimant's NQT workload, and the level of support and/or guidance he received during his induction year, amounted to direct discrimination was abandoned as a complaint on the final day of the hearing, although those matters continue to be relied upon as relevant evidence in support of the claimant's remaining complaints.
14. The issues to be determined by the Tribunal are therefore:
 - 14.1 Has the respondent subjected the claimant to the following treatment amounting to a "*detriment*" within section 39(2)(d) of the Equality Act 2010 (EqA):
 - 14.1.1 Unilaterally suggesting an extension to the claimant's NQT induction year in around May 2017?
 - 14.1.2 From around May 2017, expecting or requiring the claimant to attain 8 out of 10 for each of the teachers' standards?
 - 14.1.3 Placing the claimant on an informal "*red file support*" plan on around 23 January 2018 without prior consultation?

- 14.2 If so, has the respondent treated the claimant less favourably? The claimant relies on the following comparators:
- 14.2.1 in relation to allegations 14.1.1 and 14.1.2: EC, MD, JT and SA, together with IC (who commenced the NQT induction period during year 2 of the claimant's employment);
- 14.2.2 in relation to 14.1.3, the claimant asks the Tribunal to construct a hypothetical comparator based on the general treatment of his NQT cohort, but also taking into consideration the contemporaneous treatment of a full-time maths teacher of Pakistani origin.
- 14.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of race?
- 14.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?
- 14.5 Early conciliation commenced on 20 April 2018, in which case any complaint about events which occurred before 21 January 2018 are potentially out of time. If allegations 14.1.1 and/or 14.1.2 therefore succeed, were those complaints presented out of time? The claimant contends that the respondent's alleged acts and/or omissions amounted to conduct extending over a period ending with allegation 14.1.3.
- 14.6 In the alternative, if any well-founded complaint of direct discrimination was presented out of time, is it just and equitable to extend time?

Factual background

15. Having considered all of the evidence, the Tribunal makes the following findings of fact, on the balance of probabilities, which are relevant to the issues to be determined. Some of our findings are also contained in our later Conclusion to avoid repetition.
16. The respondent is a secondary school and sixth-form academy co-sponsored by the City of Bradford Metropolitan District Council (the local authority) and the University of Bradford. It provides education for 11- to 16-year-olds. Duncan Salter (assistant principal) explained to the Tribunal that the ethnicity of the respondent's student population is approximately 90% Pakistani/Bangladeshi, 8% white and 2% eastern European. In around 2016 it employed approximately 50 permanent teaching staff. Duncan Salter estimated that approximately 20% of those teachers were BME.
17. By way of background, Duncan Salter also explained to the Tribunal that in 2016, following an Ofsted inspection, the respondent was rated as inadequate. Effective from September 2016, the respondent was therefore taken over by a multi-academy trust, Wakefield City Academy Trust (WCAT). In December 2016, WCAT abruptly terminated its arrangement with the respondent. Thereafter, the respondent joined the Northern Lights Teaching School Alliance, whereby schools (among other things) can share resources and buy in teaching support. From January 2017 the respondent also worked with a national leader of education based at the Rodillion Academy Trust under a service level agreement by which it obtained further management and teaching support.
18. The claimant attained his qualified teacher status at Leeds Trinity University in July 2016. He commenced his NQT induction year with the respondent in

September 2016 along with four others. Information provided to the respondent during the recruitment process shows that the NQTs describe themselves as follows:

- 18.1 the claimant: *“Asian or Asian British, Pakistani”*
 - 18.2 SA: *“white or any other white background”*
 - 18.3 EC: *“white British”*
 - 18.4 MD: *“white British”*
 - 18.5 JT: *“white, any other white background”*
19. An unqualified trainee teacher (IC) also joined the respondent at the same time as part of the Teach First programme. She describes herself as *“mixed white and Asian”*, and started her induction year in September 2017.
20. The Department for Education provides statutory guidance for the induction of NQTs (pages 46 to 83). Among other things, it states that during their induction year NQTs must demonstrate *“that their performance against the relevant standards is satisfactory by the end of [that] period”* (page 51). The term *“satisfactory”* is not defined in the guidance.
21. The guidance also states that the head teacher and appropriate body (in this case, the local authority) must also first identify for each NQT a suitable post for induction. In addition, *“the duties assigned to the NQT and the conditions under which they work should be such as to facilitate a fair and effective assessment of the NQT’s conduct and efficiency as a teacher against the relevant standards. In particular, a suitable post must ... not make unreasonable demands upon the NQT ... [and] not involve additional non-teaching responsibilities without the provision of appropriate preparation and support.”* The head teacher must also ensure that the NQT has a reduced timetable of no more than 90% of that of the school’s existing teachers on the main pay range, in addition to the reduction in respect of planning, preparation and assessment (PPA) time that all teachers receive (pages 56 to 57).
22. A suitable monitoring and support programme must also be put in place for the NQT, including the appointment of an induction tutor to provide day-to-day monitoring and support, and the co-ordination of assessments. That role is described as *“a very important element of the induction process ... They will need to be able to recognise when early action is needed in the case of an NQT who is experiencing difficulties.”* NQTs must be observed at regular intervals and formal assessments undertaken on a termly basis. Formal assessment meetings *“should be informed by evidence gathered during the preceding assessment period and drawn from the NQT’s work as a teacher and from their induction programme ... NQTs should be kept up to date on their progress. **There should be no surprises**”* (original emphasis, pages 61 to 62). The guidance also anticipates that the induction period might be extended by the appropriate body for a variety of reasons (pages 68 to 69). Induction tutors are advised to *“take prompt, appropriate action if an NQT appears to be having difficulties”* (page 76).
23. The Tribunal was also selectively taken to a document described as an overview of the statutory requirements for induction (pages 95 to 103). During his evidence, Duncan Salter initially suggested that this was an internal document produced by the respondent, but subsequently identified it as local authority guidance. That document mirrors much of the statutory

guidance, but also contains details of the “*relevant standards*” by which NQTs are assessed (pages 101 to 102). In summary, there are eight teachers’ standards (often abbreviated to TS, followed by the relevant number, in the correspondence and other documents in this case). In headline terms, teachers must:

- “1 *Set high expectations which inspire, motivate and challenge pupils*
- 2 *Promote good progress and outcomes by pupils*
- 3 *Demonstrate good subject and curriculum knowledge*
- 4 *Plan and teach well-structured lessons*
- 5 *Adapt teaching to respond to the strengths and needs of all pupils*
- 6 *Make accurate and productive use of assessment*
- 7 *Manage behaviour effectively to ensure a good and safe learning environment*
- 8 *Fulfil wider professional responsibilities*”

24. The claimant was recruited as the respondent’s only specialist geography teacher. He was assured by the then head teacher at interview (in reliance on resources anticipated to be provided by WCAT) that all lesson planning would be in place for September 2016. During his induction year, he was also timetabled to teach a BTech course, travel and tourism.
25. The claimant’s line manager (NK) was his head of faculty and a religious studies specialist. Faculty leaders and other senior colleagues are also required to observe lessons and review marking (known as “*learning walks*” and “*book looks*”), and provide feedback as part of what Duncan Salter variously described as the respondent’s general “*quality assurance of teaching and learning*” or “*whole school evaluation*”. Mr Salter explained that members of SLT also conduct “*drop-ins*”, whereby they enter a classroom unannounced and observe a lesson for up to five minutes.
26. During the 2016/2017 academic year, Duncan Salter was the SLT member responsible for co-ordinating NQT support. At the beginning of that year, however, some of his responsibilities were delegated to two “*middle leaders*” to allow him to concentrate on improving the respondent’s performance in teaching maths (page 392). Those responsibilities included “*quality assuring the role of mentors/NQT induction tutors*” and “*ensuring internal paperwork and statutory documentation is completed*”, and in the claimant’s case were delegated to SJ. In May 2017, those responsibilities returned to Mr Salter.
27. The claimant’s appointed induction tutor (MS) is described by the respondent as “*an experienced teacher*” (page 23). She held weekly meetings with the claimant and maintained a written record summarising progress on targets, areas discussed, standards showing improvement, and next steps and agreed actions before the next meeting. The only example of such a record we saw related to the claimant and cross-referenced a “*tracker*” which appeared to contain more detail about his development and progress (page 365). We understand from other documents in the bundle that the tracker was also accessible to (among others) the NQT co-ordinators as a shared document (quoted in emphasis at paragraphs 41 and 49 below).
28. Each NQT was also formally observed once each half term by their induction tutor and a member of SLT. Those observations were written up on a largely standard form and feedback was provided. Completion of the statutory formal

NQT assessments was overseen by the NQT co-ordinators and sent to the local authority towards the end of each term. Each form was digitally signed by the head teacher, the NQT and the induction tutor (for example, page 174).

29. The respondent's main-scale teachers are allocated 22 lessons per week and three hours' PPA time. NQTs are accordingly expected to teach 19 hours per week. The claimant was allocated such a timetable in his first term, which was reduced to 18 hours per week in his second term following the intervention of his induction tutor and faculty leader (pages 188 and 191). He was also given an additional two days to mark coursework (also known as controlled assessments). The claimant says that in any event he spent significant time during the school holidays and at weekends marking those assessments.
30. Mark Turvey (assistant principal, achievement and data) largely gave evidence as to how the respondent's yearly timetable is planned. In any event, during cross-examination the claimant acknowledged that on paper his teaching allocation complied with the statutory guidance, but in practice he maintains that throughout his induction year his workload was excessive for a number of reasons:
- 30.1 He was the sole geography specialist and travel and tourism teacher, and therefore had no day-to-day access to advice and support in this respect. He also had no previous knowledge of the content of the BTEC course.
- 30.2 As the only geography specialist, he was obliged to teach all exam classes. A change of curriculum also meant that year 10 and 11 students were following different GCSE course content.
- 30.3 The resources provided by WCAT were in the event unsuitable and therefore the claimant had to try to devise his own.
- 30.4 Controlled assessments are not part of the PCGE curriculum, therefore he also had to work out for himself, for example, the requirements for geography coursework and a marking scheme. To this effect, he sought advice from his previous GCSE and A-level teacher, as well as the head of geography at another WCAT school. During the spring term in 2017, he also spent "*no more than hour*" with a teacher from a Northern Lights school who moderated his marking.
31. The claimant also shared and created resources for three non-specialist geography teachers who were timetabled to teach non-exam classes, including assessments and marking schemes. In cross-examination, Duncan Salter claimed that he was "*surprised to hear*" that the claimant was providing such support and thought it "*inappropriate*". However, it was noted in the claimant's NQT assessment at the end of his first term that he had "*produced a year 9 assessment with marking criteria which non specialists have been able to utilise*" (page 168). In April 2017, a non-specialist teaching geography also asked the claimant to provide his marking for year 9 assessments "*to show us a top, middle and bottom*" (page 210).
32. Chris Dring (a former colleague and NASUWT representative) says that the claimant was given "*an incredibly challenging situation*", also because the respondent's geography results had been "*inadequate over a long period of time*". In any event, our later findings show and the Tribunal accepts that the respondent (including Duncan Salter) acknowledged that the claimant faced a particularly challenging set of circumstances during his induction year

compared to the other NQTs in his cohort (for example at paragraphs 42, 51, 58 and 62 below).

33. By the claimant's first term, the respondent had also adopted WCAT's system of whole school evaluation which assessed teachers across a range of competencies, including marking and classroom teaching, according to Ofsted-style ratings – namely, "*inadequate*", "*requires improvement*", "*good*" or "*outstanding*" (for example, pages 131 and 137). During his first term, the majority of the claimant's assessments in the bundle ranged from requires improvement to good. Chris Dring explained to the Tribunal that a requires-improvement rating was usual for most NQTs even at the end of their induction year. However, in December 2017, the claimant's faculty leader reviewed the claimant's marking (pages 199 to 200). In summary, she explained that the last two reviews had shown that although his marking was now "*effective*" and "*up to date*", she would need to see a consistent improvement for the claimant to move from "*inadequate to RI and then to good*".
34. Nevertheless, as Duncan Salter noted later in the academic year, the Tribunal accepts that teachers' standards and Ofsted grading criteria have "*no specific equivalence*", meaning that achievement according to the respondent's method of whole school evaluation did not necessarily mean that an NQT's performance was also satisfactory according to the statutory guidance (page 394).
35. The respondent's formal NQT lesson observations involve assessments against the teachers' standards using grading criteria ranging from 0 to 10 (for example, pages 123 to 126). The lowest score means that there is no evidence by which to make an assessment. A score of 1 to 4 indicates that development is needed and the NQT should therefore be subject to an "*action plan*". A score 5 to 8 indicates that development is occurring and various levels of progress are taking place. A score of 8 indicates that "*progress is strong and is almost consistent*". A score of 9 or 10 shows that the NQT is well developed, consistent and the teacher standard is "*demonstrated fully at all times*". It was put to Duncan Salter in cross-examination (and the Tribunal accepts) that a score of 5 or more therefore suggests that an NQT's performance is satisfactory (notwithstanding the fact that development may be inconsistent) whereas a lower score does not (on the basis that action must be taken).
36. The NQT lesson observation form also contains a section for "*observations/comments*" in respect of each teachers' standard. On the forms seen by the Tribunal, all contain feedback in that section and most contained a score. The final part of the form requires the observer(s) to summarise the NQT's strengths and areas for improvement. It finally asks whether, on the evidence of the lesson, the NQT is likely to satisfactorily meet the teachers' standards. On all of the forms before the Tribunal (relating to the claimant and his cohort), the answer was "*yes*".
37. Duncan Salter explained that the numerical scoring system was devised by the local authority as a progress-monitoring tool, and the respondent adopted it for this purpose. It is not disputed that the statutory guidance and the formal NQT assessment forms do not require particular scores to be achieved.
38. During the autumn term, the available NQT lesson observation forms show that in October 2016 the claimant scored between 4 and 5 (pages 123 to 126) and in November 2016 between 5 and 7 (pages 141 to 143). EC's form in

October 2016 contained no scores, only comments (pages 127 to 129). In December 2016, MT scored between 7 and 8.

39. In December 2016 the respondent sent the first NQT assessment forms to the local authority (pages 149 to 182). Each form summarises the NQT's strengths and areas for improvement in respect of the teachers' standards, and personal and professional conduct. The NQT thereafter provides their own comments having discussed the form with their induction tutor. Each NQT was judged by the respondent to be "*making satisfactory progress against the Teachers' Standards within the induction period*".
40. During the spring term in 2017, the available lesson observation forms show EC achieving marks between 5 and 8, JT 4 and 6, MD 6 and 8, and the claimant 5 and 7 (pages 113 to 115, 192 to 195, and 201 to 209). Most importantly, in April 2017 the claimant scored 5 in respect of teachers' standards 2, 5 and 6. In March 2017, JT scored 4 for two of the standards and 5 in respect of four others.
41. At the beginning of April 2017, Duncan Salter reviewed the NQTs' second term assessments. By email on 6 April 2017, he wrote to the claimant's induction tutor (MS), copied into his faculty leader (NK). This was one of the documents disclosed by the respondent following the conclusion of Mr Salter's evidence (page 400):

"Apologies for not being able to speak to you about this in person. I have QAed the NQT assessment forms and also looked at evidence from dropins and the tracking against the Teachers' Standards.

Please read the following email carefully! It is a small cause for concern – not that [the claimant] won't meet the TS but there are a couple of vulnerabilities.

I have amended the assessment form slightly to reflect this. Hoping you are able to sign off tomorrow please!

Please feel free to give me a call on Friday to discuss any of this (or email and I will call you back). The SLT dropins had a slightly different picture to what was being seen from the Induction Tutor angle. This isn't surprising really as everyone performs slightly differently on unannounced visits! (emphasis added)"

No documentary evidence from SLT drop-ins was placed before the Tribunal.

42. Before contacting MS, Duncan Salter had already emailed the claimant to inform him that the judgement on his NQT assessment form was "*satisfactory progress during the induction period*" (pages 390 to 391). However, Mr Salter went on to state:

"The tracking against the Teachers' Standards (1-10 scale) suggests that progress has been less rapid in TS5 and TS6 and if progress continues at the same rate in the summer term then there is a vulnerability that you may just meet these standards and not securely meet them so I am suggesting that we put in some additional support [from a tutor at Leeds Trinity University] ...

This is not a cause for concern, we want to make sure that you are securely meeting the Teachers' Standards and I am confident that with some additional help in the summer term – especially once the pressure of exam classes has gone – you will be able to make rapid progress ...

Thanks again for your hard work – we appreciate the particular challenges that you have had as the only geography specialist in the school and the resilience you have shown throughout the year.”

43. By assessment forms signed by the respondent on 7 April 2017, the local authority was duly advised that all of its NQTs were making satisfactory progress (pages 214 to 255).
44. Put very simply, TS5 and TS6 relate to what is known as “*differentiation*” (that is to say, addressing the needs of all levels of ability during classroom teaching), and marking and feedback respectively. In the event, the claimant did not take up the offer of support from the tutor at Leeds Trinity. He explained to the Tribunal that at the time his priorities were access to a geography specialist and reducing his workload. In response to the Tribunal’s questions, Duncan Salter confirmed that this was the case and it was subsequently agreed that the claimant would obtain the appropriate support from his induction tutor. Mr Salter agreed that the claimant should not therefore be criticised for not taking up the offer.
45. On 18 May 2017, Duncan Salter attended the claimant’s weekly meeting with his induction tutor. As we have explained, the only example of a written record of the claimant’s weekly meetings with MS within the bundle related to this meeting (page 395). MS records that Mr Salter “*attended meeting and spoke to [the claimant] about the possibility of extending [his] NQT year. This discussion is to be continued at a further meeting, as yet to be arranged.*” The claimant recalls that MS was as surprised as he was at this intervention.
46. Duncan Salter stated in his evidence that the claimant was made aware of the possibility of an extension to his induction year by his faculty leader on 11 May 2018. The Tribunal is not persuaded by that evidence because in June 2017 Mr Salter recorded that the claimant had been “*unaware of any concerns*” (page 393). The Tribunal therefore accepts that the claimant was not warned about the possibility of an extension beforehand and, at that point, he understood that he was on track to pass his induction year.
47. In his written evidence, Duncan Salter further states that he intervened because concerns had been raised with him about the claimant by NK during a faculty leaders’ meeting on 10 May 2017 and another discussion the following day. He relies on the note he had made on around 5 June 2017 in respect of this matter (pages 393 to 394). In his statement, he says that in May 2017 MS “*had a different opinion as to the claimant’s progress. NQTs who are not securely meeting the Teachers’ Standards can have their induction extended to give them time to meet them. In the claimant’s case an extension was suggested due to a difference between the assessment of the claimant’s performance made by myself and the claimant’s faculty leader against Teacher Standards ... The claimant had been made aware of concerns ... by email on 6 April 2017 (emphasis added).*”
48. The Tribunal has already noted above that in June 2017 Mr Salter in fact recorded that the claimant had been unaware of any concerns. In any event, we find that Mr Salter’s email to the claimant in April 2017 indicates that he might “*just meet*” rather than “*securely meet*” two of the teachers’ standards, which was stated to be not a cause for concern. It did not say that the claimant was going to fail to meet the required standard and thereby face the possibility of an extension to his induction year.

49. In response to the Tribunal's questions, Chris Dring told the Tribunal that MS and NK were in fact "quite angry and upset" about Duncan Salter's intervention. By email on 19 May 2017, MS wrote to SJ (copied to NK and the claimant) to set out her position (page 259). Most importantly, she wrote:

"Duncan stated the possibility that [the claimant] would need to extend his NQT period in order to 'secure the meeting of the standards'. I asked Duncan what evidence there was that [the claimant] was not meeting or would not be able to meet the standards. He indicated that it was from SLT drop ins. When I asked him which ones he was only able to recall one from [a member of SLT, SC] who dropped in on a year 12 lesson, when they were completing coursework and a vague recollection of one that he claimed to have done with [the claimant] last week. ([The claimant] could not recall one last week but then remembered it was three weeks ago). I asked what it was that Duncan saw during this learning walk that indicated that [the claimant] was not meeting the standards. He said that he spoke to a couple of students who weren't clear about what they should be doing. [The claimant] was very clear that he identified this and that he clarified his instructions to these students. When this was pointed out to Duncan he said that he couldn't get a full picture as he was only in for 5 minutes. As it was TS5 and 6 that the claimant did not make progress on in the last review, I asked him what evidence he observed in the lesson that the claimant wasn't meeting these; again, he couldn't comment. He then said that these concerns came from [NK] ([NK] has sent you an email regarding this).

I asked him if he was disregarding other evidence that [the claimant] is progressing such as book looks and mentor learning walks. He asked where the evidence is for this so I referred him to the evidence I have recorded in the tracker and mentor meetings. He asked if this was being shared and I pointed out that it is available to all relevant parties to see since it is in a shared file. He then asked if it had been quality assured by [NK] or yourself but he was unable to explain what he meant by this when I asked him.

He said that this wasn't a good time to talk about this and suggested a further discussion at [the claimant's] review meeting. He suggested putting this and [the claimant's] observation off until next half term. [The claimant] indicated that he was not happy about this. Duncan suggested two weeks into the next half term but I said that this was too late and should be done as soon as possible. Duncan said to leave it with him and he would speak to yourself and [NK] (emphasis added)".

50. When Duncan Salter first gave evidence, it was explained to the Tribunal by the claimant's representative during cross-examination that a copy of the email from NK to SJ mentioned in the above correspondence had been requested, but the respondent had said that it could not be found. Nevertheless, during the Tribunal's questioning of Mr Salter he suggested that he had in his possession emails from NK which in his view were "garbled" and "contradictory", and therefore unhelpful. In the event, Mr Salter finished his evidence at the end of the third day of the hearing, but we asked the parties to establish overnight whether any further documents should have been disclosed and, if so, whether any witness needed to be re-called on that basis.
51. On the final day of the hearing, it was agreed that Duncan Salter should be re-called to give evidence on the basis of a number of further documents disclosed by the respondent. Those documents included NK's email to SJ,

copied to MS, dated 19 May 2017 (page 403). Most importantly, NK states (quoted as written):

“Just to clarify my thoughts on [the claimant] at the moment.

I agree that there are concerns with some areas of [the claimant’s] teaching at the moment, these are mainly ... surrounding differentiation and marking. However, as I have said all along [the claimant] has had an incredibly difficult timetable and despite probably having [the] most challenging of teaching loads he has done OK to get where he has, as mainly a sole Geographer with minimal support from WCAT [and teachers at Northern Lights Alliance schools] (though this came into effect relatively recently).

The bulk of this support will come into effect as the claimant gets some gained time and will have the opportunity to work with other Geographers in other schools and do some joint planning.

I have been informed by [MS] (as his mentor) and had other staff that overall [the] standards have significantly improved over the last few weeks. the key here in my opinion was him sending off his [controlled assessments] which has allowed him to have more time to focus on other areas. My own recent [book look] shows that marking for Year 10 has significantly improved and a plan is in place to allow for this to be maintained. I’ll QA this over next week.

In light of this I am of the opinion that [the claimant] should be given the opportunity to show he is meeting the standards for the rest of the year, as I believe he will be able to demonstrate that he can. He already has shown that he has improved. This is what I said to Duncan on Monday of this week.

I have raised any issues with [the head teacher] as the SLT for social sciences, as they have arisen, who is of the same opinion as me (emphasis added).”

52. Following the meeting on 18 May 2017, the claimant went to see Duncan Salter in his classroom. Mr Salter told him that the extension of his induction year had been suggested because he “*had not received enough 8s*”.
53. The claimant thereafter sought advice from Chris Dring. Mr Dring first says that MS and NK categorically denied to him that they had raised any concerns with Duncan Salter. Secondly, Mr Dring had been alarmed by the suggestion that the claimant’s scores during his lesson observation forms were inadequate. Most importantly, Mr Dring looked at MD’s scores. He says that although MD had most recently scored a 5, he had been told that he was comfortably passing his induction year. Mr Dring says that he therefore approached SJ who was equally concerned and suggested that the claimant should report the matter to the local authority. In cross-examination Mr Dring also said that he contacted the local authority and was told that “*there is no score that you have to get*”.
54. The Tribunal notes at this stage that between 23 and 26 May 2017, the available NQT assessment forms show that MD scored between 5 and 9, JT 5 and 8, SA 8 and 9, EC 8 and 9, and the claimant 6 and 7 (pages 260 to 275). Most importantly, MD scored 6 in respect of two standards and one 5, and JT 6 for three standards and one 5. In terms of the standards identified by Duncan Salter as of concern, the claimant scored “*6/7*” for each.
55. The claimant also later attended a meeting with Duncan Salter and another member of SLT (SC). They both stated that they wanted the claimant to be “*really good ... to pass [his] NQT year*”. The claimant pointed out that this

requirement did not reflect the statutory guidance. Mr Salter also told the claimant that the suggestion to extend his induction year had come from NK. NK later told the claimant that this was not true.

56. In his written evidence Duncan Salter maintained that the respondent's NQTs are "*expected to consistently achieve a score of 8*" for each of the teachers' standards by the end of their induction year according to the criteria set by the local authority, and the claimant's cohort was told as such in September 2016. The claimant says that up until this point he was never told that he had to achieve a certain grade. During his evidence, Mr Salter further suggested that each induction tutor was also briefed on this basis.

57. The Tribunal was not persuaded by Duncan Salter's evidence for the following reasons:

57.1 During cross-examination Mr Salter acknowledged that the statutory assessment process was evidence-based or "*qualitative*", rather than "*quantitative*". Indeed, this is clearly set out in the statutory guidance and NQT assessment forms. Among other things, he stated that "*the only thing that matters is evidence of meeting the teachers' standards*" and it is "*not about numbers*".

57.2 On only four of the lesson observation forms before the Tribunal and relating to only two of the NQTs (including the claimant), after the explanation for the score of 8 appears the words: "[NQT is currently meeting this Teacher Standard]". That comment does not appear on the remaining forms in the bundle. If these words show (as Mr Salter suggested) that a score of 8 was an eventual expectation or requirement, we would have expected to see them on at least all of the forms generated in the summer term.

57.3 We have explained that, objectively assessed, the scoring matrix suggests that a score of between 1 and 4 indicates that the NQT is falling below the required standard.

57.4 When the dispute arises, Mr Salter and SC suggested to the claimant in explanation that they want him to do "*really well*", rather than simply pass his induction year.

57.5 In the correspondence that follows, no one (including the claimant's induction tutor, and Mr Salter in his later summary report) refers to such an expectation or requirement, or specifies that the claimant is "*failing*" on that basis.

57.6 The evidence before the Tribunal indicates that none of the other NQTs who were not getting 8s for any of the standards were at any time identified by the respondent for remedial action.

57.7 In the circumstances, although we accept that the local authority directs that the respondent should use its scoring system when NQTs are formally observed in the classroom in order to readily identify progression (or lack of it), we are not persuaded that NQTs are expected or required to obtain 8s in order to pass their induction year, or that NQTs and/or induction tutors are briefed at the beginning of the academic year or at all on this basis.

58. Further documents added to the bundle following conclusion of the respondent's evidence (at pages 401 and 402) comprised email exchanges between Duncan Salter and NK between 22 and 24 May 2017 (that is to say,

after Mr Salter's meeting with the claimant and MS). In the first of those emails, on 22 May 2017, Mr Salter provides a draft of what will appear in amended form in his later report on this matter dated 5 June 2017. Most importantly Mr Salter asks NK to approve a summary of the "context" to the issue, to be emailed to the local authority later that day, namely:

"- Faculty Leaders 10th May – [the claimant] working routinely below Teachers standards requiring continued support with all aspects of teaching and learning. [Duncan Salter/NK] spoke on 11th May and [NK] said [the claimant] was clear about this.

- School firmly of the view that the circumstances around [the claimant's] induction are extenuating (many exam classes, sole geographer in school, support from [WCAT] weak even before they pulled out in December)

- There have been significant improvements but still some concerns."

59. NK replied by two emails in succession. Most importantly she commented:

"yes, that is all accurate, other than in our brief meeting I said that [the claimant] since having sent off his Geography [controlled assessments] has shown significant signs of improvement."

"Also, I think it is important to be clear that he may be significant below, in comparison to a fully-fledged teacher perhaps in comparison to [other] strong teachers within the faculty but probably about where he is expected for an NQT under the circumstances that he has had to deal with."

60. Duncan Salter thereafter replied to NK on the basis that the claimant would need to be meeting the teachers' standards at the end of the induction period:

"If we think that he is not then I'll be arguing that he should be entitled to an extension of that period due to extenuating circumstances. [The local authority] has to agree to this but it has been flagged to [them] and [they have] agreed our approach (quoted in emphasis)".

61. In the circumstances, the Tribunal is not persuaded that concerns about the claimant's performance as an NQT, or any suggestion as to extending his induction year, originally emanated from NK. We conclude this because:

61.1 In cross-examination, Mr Salter's evidence was contradictory in this respect. Among other things, when he was re-called to give evidence about NK's emails he said that he could not in fact remember whether concerns about the claimant originated from NK or the head teacher.

61.2 In April 2017, the first indication that there might be any difference of opinion in terms of the claimant's progress was specifically stated to be as result of SLT drop-ins and not NK's opinion.

61.3 Mr Salter did not address MS's email to SJ in his written evidence. This was surprising as, in the Tribunal's view, it presents a version of events which undermines his. He claimed not to have seen it before the hearing. We therefore gave him time during his evidence to read it and gather his thoughts. Most importantly, MS recalls that Mr Salter first cites SLT drop-ins as the basis for his intervention. When he was asked to be more specific about the evidence, he then suggested that concerns had in fact come from NK. Mr Salter told the Tribunal that he could not remember the course of his conversation with MS and the claimant.

61.4 The documents show no more than NK agreeing that there were concerns around differentiation and marking, but also that the claimant

was improving and performing satisfactorily despite challenging circumstances. Mr Salter does not say in his emails to NK or eventual report on the matter that concerns about the claimant were raised by her rather than simply discussed. Further, in her email to SJ, NK does not support the suggestion that the claimant's induction year should be extended. Mr Salter considered that this discrepancy was because NK was "*giving a different impression to different people*", but the Tribunal concludes that in this context it was unlikely to have been the case. NK had clearly been asked for her opinion and was duly providing it.

- 61.5 As the more credible witnesses, we accept the claimant's and Chris Dring's evidence that NK not only denied this was the case, but was also angry and upset that Mr Salter had suggested otherwise.
62. In his review report dated 5 June 2017 (pages 394 to 395), Duncan Salter noted a number of extenuating circumstances in respect of the claimant's induction year, including that there was no other geography specialist based at the respondent, schemes of work needed attention, weekly visits from WCAT abruptly stopped during the autumn term, and the claimant was teaching "*10 hours of exam classes*" each week and also had the "*pressures of final assessments*". Mr Salter also stated that NK and MS were "*now in agreement that there has been rapid progress since coursework/controlled assessment*" and the observation evidence generally was "*much more positive*". The Tribunal notes, however, that NK and MS were in fact in agreement at the time of Mr Salter's intervention in May 2017 (quoted in emphasis at paragraph 51 above).
63. Duncan Salter further stated that the respondent would be "*looking to support a faculty leader who is a geography specialist but if not possible a second geographer would be needed who would be an experienced teacher*". Mr Salter noted that it would not be an ideal start to the claimant's second year if he was "*only just meeting some of the Teachers' Standards ... but both [MS and NK] were very confident that he will progress quickly now and 'will fly'*". Mr Salter also recorded some "*lessons to be learnt*", including that NQTs should not be given "*mixed messages*".
64. On 22 June 2017, one of the claimant's lessons was rated as "*good*" by Duncan Salter and NK (pages 284 to 285). Chris Dring told the Tribunal that in respect of that observation NK was again quite upset by Duncan Salter's negativity. She nevertheless stood her ground and successfully argued for the claimant's grading. Mr Salter stated to the Tribunal that he "*relented and went with [NK's] evidence*" because he did not want to appear to be difficult. We found that explanation to be unconvincing. We consider it highly unlikely that Mr Salter would effectively cave in on that issue when he had readily intervened in respect of the claimant's NQT assessments.
65. Unfortunately it appears that the claimant was not told when the decision was made that his induction year would not in fact be extended. Chris Dring explained that the fear of not passing his induction year caused the claimant "*serious stress and he looked unwell until he knew he had passed it*". With only a short time to go until the end of the academic year, on 3 July 2017 the claimant had to email Duncan Salter to ask whether he would be "*completing his NQT year*". Mr Salter replied: "*You are currently meeting the Teacher Standards. Questions were raised earlier this term but both [MS] and [NK] agree that these have been resolved so there are no concerns on my part.*"

There is no reason for an extension – apologies if this has not been communicated clearly to you” (page 396).

66. On 20 July 2017, the claimant and Duncan Salter signed the claimant’s final NQT assessment form on the basis that he had *“performed satisfactorily against the Teachers’ Standards for the completion of induction”* (pages 309 to 332).
67. At the beginning of the academic year 2017/2018, Eilidh Barker became the claimant’s head of faculty and line manager. She is a specialist geography teacher who was seconded to the respondent by the Rodillian Trust. In cross-examination she confirmed that she was aware of the challenging circumstances surrounding the claimant’s induction year.
68. Mrs Barker proceeded to observe the claimant and provide feedback according to the respondent’s formal evaluation procedures, but also provided informal support by way of reviewing lesson plans, schemes of work and resources used by the teachers in her department. The claimant confirmed that he and Mrs Barker met every two weeks to discuss his progress. As far as the claimant was concerned, although aspects of his teaching practice were discussed, and he proactively asked for advice and feedback, during the autumn term he was not made aware that his performance was causing any particular concern.
69. Eilidh Barker explained that she adopted a positive and informal approach to line managing the claimant. During cross-examination, she said that the teaching resources being used by the claimant and others within her faculty were not *“fit for purpose”*, and she therefore shared hers. Mrs Barker was also generous with her time. She arranged for the claimant to be timetabled to observe her GCSE lessons and vice versa (in total, six lessons each week). They also undertook joint lesson planning together, and she arranged for the claimant to observe geography teaching at another school in Leeds.
70. Mrs Barker maintained that these *“supportive interventions are not usually put in place unless there are concerns about a teacher’s performance”*. In cross-examination she accepted that she *“probably wasn’t transparent enough”* in this respect, but the claimant would have known that it was not common practice. Nevertheless, based on our findings thus far, the Tribunal accepts that in terms of specialist subject support, the claimant was at a disadvantage following a challenging induction year. Most importantly, our findings above show that the claimant received minimal such support before his final term as an NQT. Chris Dring also told the Tribunal that at this point the claimant appeared depressed and diminished by what had happened in the final stages of his induction year, to the extent that he has lost faith in SLT, and this necessarily affected his confidence as a classroom teacher. In Mr Dring’s view, the claimant was therefore *“not teaching to his full potential”*.
71. In cross-examination, when asked whether she had told the claimant that he was receiving such support because he was *“not doing well”*, Mrs Barker replied that she *“always framed [her conversations with the claimant] in a positive manner”*. She recognised that the claimant lacked confidence and therefore *“tried to move forward by being collaborative”*.
72. The respondent has in place a professional development and performance management process known as red file support. This process lies outside the respondent’s formal capability procedures (pages 84 to 94), but is referred to in the respondent’s appraisal policy (not included in the bundle). We

conclude this from an explanatory note at the beginning of the respondent's red file support form (page 104). We quote that guidance in full because it informs our later reasoning in terms of the claimant's treatment by the respondent:

"This form is designed to be used by a line manager and teacher to address an area or areas of concern and to identify appropriate support.

The use of this support process is in line with [the respondent's] Appraisal Policy (Section 4) and is used when a line manager has concerns that a teacher is not meeting any of the required teacher standards ... (this may be more than 1 standard).

The form is intended to be used to support the process of professional development and manage performance and is recommended to be used for a period of 6 weeks.

During this period a minimum of 3 formal lesson observations will take place and work scrutiny will be carried out as required to assess the impact of the support.

The process is not, in itself, a part of the school's formal procedures for dealing either with competency or with discipline, however, if a concern persists the line manager is required to refer the matter, along with the relevant action forms, to the link member of the Leadership Team. This may then lead to informal competency or formal competency proceedings in line with [the respondent's] Appraisal Policy.

At the end of the process the link member of the SLT will be responsible for deciding what further support should be made available and whether or not the matter should be taken into an informal or formal competency procedure. (emphasis added)."

73. The respondent's capability procedure provides for a transition meeting "where the formal appraisal process has been complied with and the member of staff has been unable to address concerns regarding their performance" (page 87).
74. In her written evidence, Eilidh Barker stated that between September 2017 to January 2018 she received verbal feedback from various members of SLT regarding their drop-ins to the claimant's lessons. Their feedback suggested that "some Teachers' Standards were not being met satisfactorily" by the claimant. In cross-examination she confirmed that SLT drop-ins ordinarily lasted for between two and five minutes, but she could not remember the identity of any of the various members of SLT who observed the claimant. She confirmed that she did not tell the claimant that any members of SLT were concerned about his performance.
75. Eilidh Barker also stated in her written evidence that she did not specifically tell the claimant at any time between September 2017 and January 2018 that red file support was a possibility because she wanted to avoid having a "confrontational conversation with him regarding areas of his performance". The Tribunal was surprised by that reasoning, on the basis of not only the way in which the claimant came across during his evidence, but also the resilience he had shown during his induction year. In cross-examination and in response to the Tribunal's questions, however, Mrs Barker accordingly accepted that her choice of words was probably inappropriate, but maintained that she nevertheless chose to be positive and collaborative in her approach as the claimant's line manager.

76. During the autumn term in 2017, NASUWT members voted to take industrial action (comprising non-cooperation with the appraisal process beyond three pieces of written feedback). A collective grievance was also raised on the basis that certain teachers appeared to have been targeted by SLT and, in particular, the way in which it used drop-ins. Chris Dring described the issue at the heart of the dispute as “*a culture of bullying and discrimination*”.
77. In her written evidence, Eilidh Barker says that the following specific matters informed the eventual decision in January 2018 to place the claimant on red file support.
78. First, on 10 October 2017 at a departmental meeting the claimant and his colleagues undertook a group work scrutiny evaluation exercise. As part of that exercise, the claimant’s colleagues reviewed his year 11 class work against an evaluation template comprising various standards (page 337). The claimant’s form shows an absence of evidence of “*progress over time*” or “*actions/reflection/response to peer or self-reflection*”. During his evidence, the claimant explained that none of his colleagues were able to demonstrate such evidence because they were only at the beginning of the academic year. In cross-examination, Eilidh Barker accepted that this was the case and she recommended to everyone at the meeting that they would need to demonstrate such evidence as the year progressed.
79. Secondly, on 11 October 2017, Eilidh Barker also completed a ten-minute learning walk evaluation in respect of one of the claimant’s year 11 lessons (page 338). Among other things, Mrs Barker determined that the claimant’s “*questioning needed more pace to keep the lesson flowing, there was not much peer assessment or evidence of self-assessment ... [and] the more able students needed to be stretched and challenged.*” She also noted that students did not appear to be retaining information and suggested to the claimant “*to use strategies to check the students’ understanding*”. She says that these suggestions were fed back to the claimant the following day. The claimant does not remember that feedback specifically, but recalls that his meetings with Mrs Barker were “*friendly*” and gave him no cause for particular concern. Indeed in cross-examination, Mrs Barker described her feedback sessions as “*usually short, quite informal, a general discussion*”. Mrs Barker says that she was thereafter unable to formally observe the claimant until January 2018 owing to the ongoing industrial action.
80. Finally, on 23 January 2018 Mrs Barker made a record of a learning walk in respect of the claimant’s year 11 class (page 365). This was a revision lesson which, the claimant says, was therefore untypical. The claimant remembers Mrs Barker entering his classroom empty handed. However, she left soon after the beginning of the lesson and returned with a form. Mrs Barker told the Tribunal that she went to get a new form because the lesson had started badly and she wanted to give the claimant the benefit of the doubt. Mrs Barker outlined a number of concerns, including a lack of marking, students’ inability to answer basic questions, and the absence of active revision strategies.
81. Notwithstanding that dispute, Eilidh Barker initially stated that, in respect of her records of the three matters summarised above, she shared them with her line manager (CM, who was also her relevant link member of SLT according to the red file support process). Thereafter they jointly made the decision to place the claimant on red file support at a meeting on 15 January 2018, and she finalised the contents of the form with CM on 22 January. In cross-

examination she was however obliged to accept that the learning walk on 23 January 2018 could not have informed her or CM's decision as it took place after that decision had been made. She went on to state that the decision was based mostly on "*verbal conversations*" with the claimant because the ongoing industrial action prevented her from "*writing anything down*".

82. Eilidh Barker otherwise says that during her line management meetings with CM she regularly shared her concerns about the claimant's performance. In cross-examination, she could not remember whether CM had personally observed any of the claimant's lessons in his second year. As we have explained, in her written evidence she described the decision to place the claimant on red file support as jointly made with CM. She explained to the Tribunal that there was initially some discussion between them as to whether the respondent would be able to do so owing to the industrial action, but CM told her that it could even though the process involved an intensive period of observation and feedback. She was unsure, but thought that it had been agreed with the NASUWT that red file support "*wouldn't count*".
83. In cross-examination, Mrs Barker was asked about the joint decision-making process. She presumed that her line manager had first suggested that the claimant should be placed on red file support as a "*normal course of action*" because she was more likely to have remembered if the initial idea had been hers. Towards the end of cross-examination, she confirmed that CM "*suggested it and I agreed*". In response to the Tribunal's questions, however, she stated that as an experienced head of department if she had disagreed with SLT's decision she would have "*had a conversation*". Essentially, she says that she agreed with CM that there were weaknesses in the claimant's teaching which needed to be addressed.
84. The support plan itself records the areas of concern as "*TS1, TS2 and TS5*", namely: "*Concerns over the level of engagement with students, Differentiation of resources, questioning (feedback is better differentiated) [and] Adaptation of [schemes of work] for classes taught*" (page 359). The claimant was further given targets for improvement and details of support to be provided. A review was arranged to take place at the beginning of March 2018.
85. On 23 January 2018, the claimant attended a meeting with Eilidh Barker and CM, during which he was placed on the red file support plan. He was told that it was not an appraisal meeting and "*nothing serious*", and he did not therefore need trade union representation. In cross-examination, Mrs Barker was asked whether there was any written record of that meeting. She replied that it was "*not in the bundle*". She said that CM spent approximately 15 minutes explaining to the claimant that the support plan was not part of the respondent's formal procedures. CM also told the claimant that at the end of the review period if "*everything was OK that would be it*". She accepted that red file support was a "*process*", but not a formal one. She described it as "*a supportive measure to prevent informal or formal capability proceedings*".
86. The claimant was sufficiently concerned about developments to seek advice from Chris Dring. Mr Dring was primarily concerned that the claimant had been persuaded to meet a member of SLT "*alone*" (that is to say, without trade union representation) while NASUWT members were taking industrial action. In his experience, many teachers in the school had been "*threatened*" with performance management plans and had left shortly afterwards even though SLT had been unable to evidence their concerns. He explained that

the claimant's red file support plan was never implemented because the NASUWT "*challenged SLT's actions*".

87. Chris Dring also says that Mrs Barker subsequently admitted to him that the way in which the meeting had been carried out was wrong and the respondent's actions "*went against all procedures*". In cross-examination he explained that Mrs Barker should have spoken to the claimant first and outlined her concerns. Nevertheless he thought Mrs Barker had made a genuine mistake because she had been put under pressure by SLT.
88. Eilidh Barker denies that she made any such admissions to Mr Dring. She nevertheless accepted in cross-examination that the meeting might have taken the claimant by surprise if he had not been explicitly told prior to it that he was failing to meet some of the teachers' standards, but was then informed that he effectively had six weeks in which to improve.
89. Chris Dring considers that by this time the claimant was "*at breaking point*". He was eventually signed off by his doctor with "*work-related stress*" from 31 January 2018 and remained largely absent from work until July 2018.
90. During cross-examination, the claimant explained that he was most concerned about the meeting on 23 January 2018 because since 2016 he had witnessed a number of BME teachers being "*forced out*" but "*no white teachers*". He knew of and named six permanent members of teaching staff who had left during his employment (including his previous faculty leader, NK), as well as a maths teacher of Pakistani origin who was placed on red file support at around the same time as him. He says that by the end of the academic year only two BME permanent teaching staff remained: himself and the maths teacher.
91. As we have explained, NASUWT members took the industrial action in the latter part of 2017 and also raised a collective grievance. On his return to work in the autumn term of 2018, the claimant was given a "*brief summary*" of a consequent investigation and told that the respondent was looking to join another academy chain. The claimant was cross-examined on the basis that SLT were "*exonerated as part of the investigation*". The claimant maintained that staff felt that "*SLT were being unfair*" and understood that the investigation concluded that there had been "*a breakdown in trust between SLT and staff*". In response to the Tribunal's questions, he estimated that at that time SLT comprised 11 members of staff, only one of whom was BME and non-teaching.
92. Chris Dring explained to the Tribunal that when he first started to work for the respondent there were a number of BME permanent teaching staff, but over time their numbers "*reduced drastically*". He also noticed SLT becoming "*more white*". In his view, many staff who left were "*treated terribly*" and a high proportion of those were BME. Other teachers who "*were not so great [were] not targeted*". In re-examination, he also said that in terms of opportunities for promotion, a significant number of BME staff "*gave up and moved on*". Mr Dring left the respondent's employment in the summer term of 2018.
93. Duncan Salter did not appear to dispute that the staff in question had left the respondent's employment, but estimated that approximately six BME permanent teachers now worked for the respondent, some of whom joined in 2018/2019. He also explained that the respondent has been constrained in recruiting permanent teachers generally because of the school's "*financial*"

situation". There are now approximately 42 members of permanent teaching staff.

94. As we have explained, before Duncan Salter gave evidence the respondent disclosed a summary investigation report which was obtained in response to the NASUWT's collective grievance (pages 397 to 399). The grievance is expressed to be about "*alleged poor treatment by members of [SLT]*". It contains no details about individual complaints. In total, 31 statements were submitted to the investigator by current and former staff. The report acknowledges that SLT was primarily concerned with improving performance "*from what is currently a low base*". However, it concludes that "*the perceived lack of supportive, constructive or encouraging feedback where it is due has, to some extent, been warranted and has contributed to the poor relations between the staff and SLT*".
95. The report further concluded that the "*approach of SLT members during some drop-ins has been perceived as clinical rather than supportive*". The report does not confirm or uphold any specific allegations of discrimination and/or bullying. However, it concludes that although "*SLT were faced with the difficult task of turning performance around in a very challenging environment [an] important responsibility of a leadership team is a creation of an effective working culture within which staff are supported through transition. Whilst I do not believe that total accountability for this rests entirely with the SLT team, a breakdown has occurred.*"
96. Duncan Salter explained in cross-examination that he had not seen the full investigation report, but thought that it would be illogical to conclude that the subject matter of any complaints was to do with race or ethnicity because "*the people on strike were white*". The Tribunal is unconvinced by that analysis. Mr Salter did, however, confirm that the then head teacher went off sick with "*stress*" from April 2018. Among other things, during the industrial dispute in around February and March 2018, on more than one occasion she was called a "*racist*" by members of staff as she crossed the picket line. She never returned to work and in September 2018 an executive head teacher was appointed.

The relevant law

97. Race is a protected characteristic under section 4 of the EqA. Section 9(1) provides that "*race*" includes colour, nationality, and ethnic or national origins. Section 13 of the EqA defines direct discrimination:
- "(1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*
98. Section 39(2) of the EqA states:
- "An employer (A) must not discriminate against an employee of A's (B) – ...
(d) by subjecting B to any other detriment."*
- A "*detriment*" essentially means a disadvantage.
99. To succeed in a claim for direct discrimination, the claimant must therefore prove that he was subjected to certain treatment; he was treated less favourably than a comparator was or would have been treated in the same circumstances or in circumstances that were not materially different; and, in the absence of any explanation by the respondent, that the less favourable

treatment was because of his race, or otherwise such that the Tribunal could draw an inference that the treatment was tainted with discrimination.

100. Less favourable treatment must be established by reference to an actual or hypothetical comparator. According to section 23(1) of the EqA, on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. However, even if such treatment did occur, it does not automatically follow that, on the face of it, discrimination also took place. The claimant must also show that s/he was treated the way in which he was because of the protected characteristic – **Zafar v Glasgow City Council [1988] IRLR 36 HL**.
101. In the alternative, the Tribunal may simply ask why the claimant was treated in the way that he was. If at least part of the reason was the claimant's race, then it is likely that a comparator would have been treated differently and discrimination will be made out – **Shamoon v CC of the Royal Ulster Constabulary [2003] IRLR 285 HL; Aylott v. Stockton on Tees Borough Council [2010] IRLR 994 CA**
102. In determining whether the claimant has discharged the burden of proving his case, the Tribunal is entitled to consider all the evidence put forward by the parties (**Birmingham City Council v Millwood [2012] EqLR 910 EAT**). In this respect, the claimant must prove something more than a difference in status (in this case, race) and a difference in treatment for the burden to shift (**Madarassy v Nomura International plc [2007] IRLR 246 CA**).
103. If the claimant discharges the burden, the Tribunal must hold that discrimination took place unless the respondent can prove that it did not contravene the EqA (section 136).
104. Finally, the general rule is that (subject to section 140B EqA) a complaint of discrimination in employment must be presented to a Tribunal within 3 months of the act complained of (section 123(1)(a)). Section 140B provides that the primary time limit will be extended to facilitate early conciliation before instituting a claim. A Tribunal may otherwise extend the time limit if the complaint was presented within such other period as the Tribunal thinks "*just and equitable*" (section 123(1)(b)).
105. Conduct extending over a period, however, is to be treated as done at the end of the period, and a failure to do something is to be treated as occurring when the person in question decided on it (section 123(3) EqA). Most importantly, a distinction must be drawn between a continuing act and an act that has continuing consequences.
106. In terms of any discretion in extending the time limit, the "*just and equitable*" formula entitles a Tribunal to take into account any matter that is relevant. The Tribunal has a wide discretion and is to do what is fair in the circumstances (**Hutchinson v Westward Television Ltd [1977] IRLR 69 EAT**). Nevertheless, there is no presumption that the discretion will be exercised, and the claimant must convince the Tribunal that it is just and equitable to do so; the exercise of discretion is the exception rather than the rule (**Robertson v Bexley Community Care [2003] IRLR 434 CA**).

Conclusion

107. The parties' representatives made a number of oral submissions on the final day of the hearing, and the respondent also provided written submissions (marked as R1). We have considered their submissions and responses with care, but do not repeat them in full. Accordingly, we summarise their

submissions below where appropriate. We now apply the law to our findings of relevant facts in order to determine the identified issues.

108. In determining the claimant's complaint, we have also taken into account the general principles for Tribunals to consider when deciding what inferences of discrimination may be drawn. These principles were most recently summarised in **Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11 EAT**. Most importantly:

108.1 It is very unusual to find direct evidence of discrimination.

108.2 It is essential that the Tribunal makes findings about any primary facts that are in issue so that it can take them into account as part of the relevant circumstances.

108.3 The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference.

108.4 Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and overall probabilities.

108.5 The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment.

108.6 If it is necessary to resort to the burden of proof in this context, section 136 EqA provides that where it would be proper to draw an inference of discrimination in the absence of any other explanation the burden lies on the alleged discriminator to prove that there was no discrimination.

109. The treatment complained of by the claimant is as summarised at paragraphs 14.1 1 to 14.1.3 above. First, at this point we note that during cross-examination, Duncan Salter claimed that he shared the role of the claimant's induction tutor with MS. He eventually conceded that this was not the case (although we accept that day-to-day co-ordination was effectively delegated by the head teacher to Mr Salter as a member of SLT). One of his stated responsibilities included quality assuring the role of induction tutors. It was therefore a significant intervention for Mr Salter to attend the claimant's weekly meeting with MS and state that it may be necessary to extend his induction year. It is also apparent that Mr Salter did not consult MS before emailing the claimant in April 2017 in respect of matters which (in his words) were at that time no cause for concern.

110. MS's email to SJ following that meeting suggests that SLT drop-ins were the primary source of concern. In the absence of Duncan Salter being able to confirm the course of the conversation, we conclude that this contemporaneous email is likely to show what was said. Mr Salter also maintained that in May 2017 he made an assessment of the claimant's progress which was at odds with his induction tutor's (quoted in emphasis at paragraph 47 above). Nevertheless, Mr Salter does not appear to have reviewed the claimant's tracker or mentor meetings recorded by MS prior to his intervention, and ended the discussion when that was drawn to his attention. By 22 May 2017 he had also already flagged up the issue with the local authority (quoted in emphasis at paragraph 60 above). After the event,

he then proceeded to obtain an agreed context for his intervention from the claimant's faculty leader, NK.

111. We have found that concerns about the claimant were not prompted by NK. In the circumstances we find that certain members of SLT, including Duncan Salter and SC (as identified to the claimant), without any examination of the evidence collated by the claimant's induction tutor, decided that the claimant would be told that his induction year should be extended. Luckily for the claimant MS and NK were prepared to "*fight his corner*" (as the claimant's representative put it to Duncan Salter in cross-examination). There was no proper evidential basis for the intervention in May 2017, that is why Mr Salter presented a changing account not only to MS during their meeting with the claimant, but also thereafter to the claimant by suggesting that his evaluation scores were too low. In this respect, during cross-examination Mr Salter conceded that there were "*problems with the paperwork ... [but] I wanted [the claimant] to be secure in meeting the standards*".
112. We are further satisfied that this treatment was detrimental because we have found that until that point the claimant thought that he was on course to pass his induction year. The claimant was therefore placed at a disadvantage by being informed of the possibility of an extension to his induction period during its final term. That state of affairs also continued for longer than was necessary because the claimant was not told that the possibility had receded until very close to the end of the academic year.
113. Secondly, it is not disputed that Duncan Salter told the claimant in May 2017 that he "*should be getting 8s*" for each teachers' standard in respect of his NQT lesson observations. We have found that this was not a general requirement for the respondent's NQTs and are satisfied that none of the claimant's cohort (or his induction tutor) were told as such at any point. On this basis, we are satisfied that the fact that the claimant was told in the final term of his induction year that he was expected or required to attain a particular score in order to pass amounted to detrimental treatment.
114. Thirdly, we are satisfied that the claimant was placed on red file support in January 2018 without prior consultation. Eilidh Barker explained her reasons for not discussing the matter with the claimant beforehand. Nevertheless, however commendable Mrs Barker's approach was in terms of managing the claimant, there was no transition from "*framing everything in a positive manner*" (as she put it in cross-examination) to calling him into a meeting with a member of SLT.
115. We further find on balance that CM took the decision to place the claimant on red file support, which Mrs Barker decided to support owing to her genuine concerns about the claimant's performance. Mrs Barker explained in cross-examination that she had tried to be positive but had made no progress. She also stated that she did not remind the claimant about meeting the teachers' standards because she was "*trying to establish a collaborative approach [with] an inexperienced member of staff.*" Nevertheless, when she was asked about the process of coming to a "*joint*" decision with CM, her evidence shifted substantially. Most importantly, Mrs Barker's oral evidence about that meeting (summarised at paragraph 85 above) indicates that CM led the meeting. We are satisfied that this decision also amounted to detrimental treatment.
116. We next consider whether the respondent thereby treated the claimant less favourably and, if so, whether the difference in treatment was because of

the claimant's race. The claimant submits that no other NQTs in his cohort were told that they faced a possible extension to their induction year, or that they needed to consistently score 8s in their lesson observations. In terms of the red file support plan, it is appropriate to construct a hypothetical comparator based on the fact that the only other permanent member of teaching staff on such a plan in January 2018 was of Pakistani origin. Furthermore, the claimant was not told prior to implementation of the plan that he was failing to meet one or more of the teachers' standards. Therefore, although Chris Dring confirmed that in his second year the claimant was not performing at his best, the Tribunal should conclude that the claimant was treated less favourably in this respect.

117. The claimant further submits that Duncan Salter's evidence was entirely inconsistent and unreliable, and shifted significantly when he was taken to the contemporaneous documents. A significant body of documents were also missing from the bundle. Finally, the "*something else*" which should be sufficient for the burden to shift comprises the background to events: namely a significant reduction in the respondent's BME staff over the period in question, the industrial action and consequent investigation, and the fact that the respondent's SLT is "*overwhelmingly white*".
118. The respondent submits that unreasonable behaviour does not mean that there has been discrimination. Moreover, if the evidence indicates that an employer treats all its employees equally badly, it is not appropriate to infer discrimination. However, the respondent acknowledges that it would alter the position if such behaviour occurred alongside other indications that there might be discrimination on racial grounds (**Commissioner of Police of the Metropolis and anor v Osinaike EAT 0373/09**). The more unreasonable the conduct, the more likely a tribunal will be to decide that an employer's explanation is not credible and thus infer discrimination.
119. The Tribunal starts from the premise that it is very unusual to find direct evidence of discrimination. The Tribunal also recognises that discrimination may be unconscious as well as conscious. It is therefore open for us to decide that the proper inference to be drawn from the evidence is that, even though the employer did not realise it at the time, race was an effective reason why it acted as it did.
120. On the face of it, we conclude that the following matters are sufficient for the burden to shift. At this stage, for the avoidance of doubt we have also drawn inferences from our findings as to inconsistencies in (rather than the substance of) the respondent's evidence, although for clarity we refer to the substance of that evidence below.
- 120.1 There is evidence which indicates an under-representation of BME teachers among the respondent's permanent teaching staff (and in particular in its management team), compared to its student population. Although we are aware that statistics in themselves are not conclusive, if they show any racial or ethnic imbalance, that may indicate areas of racial discrimination.
- 120.2 There is also evidence which indicates that the industrial dispute in 2017/2018 included the fact that BME teaching staff had been disproportionately affected by issues surrounding performance management, including clinical and unconstructive interventions by SLT.

- 120.3 In terms of the claimant's treatment during his induction year, the appropriate comparators should be the other NQTs in his cohort. Although the claimant faced specific challenges as the sole subject specialist, in terms of the scoring issue we find that a direct comparison can be made with JT and MD in the spring and summer term of 2017 (summarised at paragraphs 40 and 54 above). Nevertheless, neither were told that they should be scoring 8s across the board or that there was any concern about passing the induction year).
- 120.4 Duncan Salter's evidence about the source of concerns about the claimant in his NQT year did not stand up to scrutiny. His evidence was largely unreliable. Most importantly, we have found that as at May 2017 the claimant's induction tutor and faculty leader were in fact in agreement as to his rapid progress after he had marked his students' controlled assessments.
- 120.5 We therefore accept Chris Dring's evidence that the claimant was held to a higher standard compared to other NQTs and Duncan Salter attempted to mislead him in this respect.
- 120.6 The red file support procedure states that the line manager and teacher should initially agree a plan to be reviewed usually after 6 weeks; if there is no improvement, the link member of SLT becomes involved (quoted in emphasis at paragraph 72 above). We are prepared to draw inferences from the fact that, in the claimant's case, the procedure was initiated by a meeting with CM and with no explicit prior warning from Mrs Barker that the claimant was judged to be failing in any way. We are not persuaded that the claimant should have read between the lines in terms of the level of support he was receiving.
- 120.7 The industrial action did not prevent Mrs Barker from having straightforward conversations with the claimant if she was sufficiently concerned about his progress. As was put to her in cross-examination, any issues she had appeared to be insufficiently serious for her to put to the claimant first as his line manager, but were sufficient for CM to decide that the claimant should be put on red file support.
- 120.8 There is evidence which shows that the only other permanent teacher on red file support as at January 2018 was of Pakistani origin.
- 120.9 More generally, the Tribunal was concerned about the quality of the respondent's disclosure. Documents were referred to by two of its witnesses were not in the bundle. The further documents which were disclosed during the hearing were clearly relevant. They had been initially dismissed by Duncan Salter as "*not good evidence*". The Tribunal was unconvinced by his explanation that he had not been "*instructed to gather everything*". In one of those further documents, Mr Salter also stated that in April 2017 he reviewed evidence from SLT drop-ins (quoted in emphasis at paragraph 41 above). That evidence was not placed before the Tribunal.
121. We therefore conclude on balance that the claimant was treated less favourably because of the protected characteristic of race.
122. We next consider the whether the respondent has proved a non-discriminatory reason for the proven treatment. We must ask ourselves whether the respondent has given an adequate alternative explanation for its conduct. That determination includes looking at who the decision makers

were and whether any involvement infected all or some of the process. Ultimately, the Tribunal must consider whether the respondent has shown a complete explanation for any treatment, which was innocent and untainted by racial considerations.

123. The claimant submits that the respondent's evidence entirely fails to meet that standard. Although the respondent acknowledges that it is open to the Tribunal to decide that the employer's purported explanation for its actions was not in fact the true explanation, it submits that the burden will be discharged if the Tribunal is satisfied that Duncan Salter and Eilidh Barker independently of one another came to the permissible suspicion that the claimant was not performing well. The respondent submits that, most importantly, Mrs Barker showed that she was not a "*puppet of management*" and formed her own view of the claimant. It acknowledges that Mr Salter's evidence "*lacked some coherence*", but hoped that the respondent's late disclosure "*tied things off*" in respect of the claimant's allegations.
124. In the circumstances, we find that the respondent has provided an incomplete and inadequate alternative explanation. Most importantly:
- 124.1 We have found that the decision makers in respect of the matters complained were all contained within SLT. We have explained in some detail the basis for our conclusions and where we have effectively rejected the substance of the respondent's evidence, particularly in relation to the claimant's induction year.
- 124.2 The common theme was that action was taken in effective reliance on relatively short SLT drop-ins. Duncan Salter conceded in April 2017 that (among other things) these can paint a different picture because they are short and every teacher reacts differently to unannounced visits.
- 124.3 Although we have found that Mrs Barker had genuine concerns about the claimant's performance, we have concluded that the respondent did not adequately explain why the claimant was given no prior warning if he was failing to meet certain of the teachers' standards.
- 124.4 We are further satisfied that the respondent departed from the red file support procedure by involving SLT from the outset. On balance, we therefore conclude that Mrs Barker did make such an admission to Chris Dring when she was challenged about the meeting in January 2018. The support plan was also never resurrected.
- 124.5 The substance of the claimant's complaints is that the respondent (albeit unconsciously) held its BME permanent teaching staff to a higher standard in respect of performance issues. This meant that SLT were more likely to formalise (in the widest sense) perceived problems and without warning or cogent evidence, rather than offer or continue with informal guidance and support from mentors or line managers. There was also a common tendency to try to co-opt its faculty leaders into this process. As a consequence, we find that the involvement of various members of SLT in the matters complained of infected the process of managing the claimant's performance.
125. As a result, although the respondent may have had concerns about the claimant's performance, the Tribunal is satisfied on balance that the respondent has not offered a complete non-discriminatory reason for its actions. Its actions were therefore tainted with albeit unconscious discrimination.

126. The claimant's complaint of direct discrimination therefore succeeds.
127. We next consider whether the complaints in respect of allegations 14.1.1 and 14.1.2 were presented out of time. The claimant contends that the respondent's acts and/or omissions amounted to conduct extending over a period ending with allegation 14.1.3 (which was presented in time).
128. We are satisfied that the conduct in question extended over a period ending with the decision to place the claimant on red file support in January 2018. On balance, we conclude from the evidence that SLT were responsible for an ongoing situation or continuing state of affairs in which BME permanent teaching staff were disproportionately treated less favourably (as found at paragraph 124.5 above).
129. Further and separately, if we had not been persuaded that the complaints of direct discrimination in question were presented in time, we would have considered whether it was just and equitable to extend time. We would have concluded that it was for the following reasons.
130. The claimant explained to the Tribunal that as a relatively inexperienced NQT he did not want to raise his head above the parapet and make a formal complaint. He also later hoped that the industrial action and collective grievance would resolve matters to some degree. He further explained that at the time he was unsure of the reason for developments towards the end of his induction year. He realised that his race might have played a part by the way in which he had been treated by the respondent in January 2018, when he discovered that another teacher of Pakistani origin had been placed on red file support. We are also satisfied that the balance of prejudice tilts towards the claimant as he has proved the complaints in question to be well-founded and fair trial has been possible.
131. The Tribunal recognises that the respondent will naturally be disappointed by our decision, but we were bound by the quality of the evidence it presented. We hope that the respondent nevertheless learns valuable lessons from the claimant's case.

Employment Judge Licorish

Date: 17 May 2019