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# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Phathiswa Nomthetho Queenette Cunningham

**Respondents:** (1) Transitional Care Ltd  
(2) Peppermill London Limited  
(3) Advance 5 Limited

**Heard at:** East London Hearing Centre

**On:** 14, 15, 16 May 2019 and 24 May 2019 (in Chambers)

**Before:** Employment Judge Burgher

**Members:** Ms M Long  
Mr Rowe

## Representation

**Claimant:** In person

**Respondent:** Ms M Peckham (Consultant)

## JUDGMENT

1. The Claimant's claims against the First Respondent fail and are dismissed.
2. By Judgment sent to the parties on 18 December 2018, the Claimant's claims for unlawful victimisation contrary to section 27 Equality Act 2010 succeed against the Second and Third Respondents.
3. A remedy hearing in respect of the Claimant's successful claims will take place on 29 July 2019.

## REASONS

### Issues

1. The Claimant's claims against the Second and Third Respondent were the subject of a default judgment sent to the parties on 18 December 2018. The Claimant makes the following allegations against the First Respondent:

- 1.1 Direct discrimination because of race pursuant to section 13 Equality Act 2010 (EqA);
- 1.2 Harassment related to race pursuant to section 26 EqA; and
- 1.3 Victimisation pursuant to section 27 EqA.

2. The combined list of issues agreed at the case management hearing on 29 May 2018 were identified as the matters that the Tribunal must consider in this matter. The matters, as clarified following evidence, were as follows.

*Direct race discrimination claims*

3. Was the Claimant subjected to acts of direct discrimination by the Respondents' because of her race?

4. The alleged acts of direct discrimination made by the Claimant are as follows:

Issue 1

5. Did Nick Rigby discriminate against the Claimant and Mr Cedric McSheen to help organise Black History Month (BHM) due to their race on 15 September 2017?

Issue 2

6. Was the Claimant treated unfavourably when Nick Rigby emailed the Claimant and the only other black member on 27 September 2017 and not the 16 other Caucasian and of staff mixed race members, in relation to organising BHM?

Issue 3

7. Was the Claimant subjected to discrimination due to her race when she was segregated to create a display and put on activities for the Essex Create Hut in the BHM Room on 2 October 2017?

Issue 4

8. Was the Claimant subjected to discrimination due to her race when she was singled out by other members of staff as the most appropriate person for pupil CR to speak to regarding questions to defend the need for BHM on 4 October 2017?

*Race harassment claims*

9. Whether the First Respondent subjected the Claimant to acts of harassment related to race?

10. The alleged acts of harassment made by the Claimant are as follows:

Issue 5

11. Whether the Claimant suffered harassment when the First Respondent requested her to 'twerk' for all the staff in the staffroom in early September 2017?

Issue 6

12. Whether the Claimant suffered harassment when Matt White mocked her with reference to the Lion King as relevant to Black History on 3 October 2017?

Issue 7

13. Was the Claimant subjected to harassment due to racial abuse from pupil CR on 4 October 2017.

Issue 8

14. Was the Claimant subjected to harassment where pupil CRs tutors Ms Bland and Karen created an intimidating, hostile, degrading, humiliating environment for her in the staff room on 5 October 2017.

Issue 9

15. Was the Claimant subjected to harassment because the Claimant rejected the conduct of CR and his tutors continued to treat her less favourably due to that rejection on 5 October 2017.

Issue 10

16. Did the Claimant suffer harassment by not being offered support from Nick Rigby following racial abuse from pupil CR on 6 October 2017.

Issue 11

17. Was the Claimant subjected to harassment when Teacher Talent implicitly advised the Claimant to omit the issue of discrimination from her original statement on 10 October 2017.

Issue 12

18. Was the Claimant, subjected to harassment when the CEO, Mr Keaney stated the he could see why she was "street", during the pupil CR investigation meeting on 24 October 2017.

Issue 13

19. Was the Claimant for the purposes of s.26 (1) of the Equality Act 2010 subjected to a detriment when Ms Elmes requested the Claimant to resign from her job on 03 November 2017.

*Victimisation claims:*

20. Whether the Respondent(s) subjected the Claimant to unlawful victimisation?

21. The Claimant alleges that she made protected acts on 6, 10, 12, 24, 27 October 2017 and 5 November 2017.

22. The Claimant makes the following allegations of detriment because the Claimant has done a protected act.

Issue 14

23. Was the Claimant victimised by being subjected to a detriment when she was not offered any assistance through the Employment Assistance Program but was instead requested to attend an interview with CEO on 10 October 2017?

Issue 15

24. Was the Claimant victimised by being suspended. During evidence the date of this was clarified as 15 October 2017.

Issue 16

25. Was the Claimant victimised by being subjected to a detriment when she was told that she could not choose a representative to bring to the investigation meeting which resulted in her dismissal on 23 October 2017?

Issue 17

26. Did the email sent to the Claimant by Mr Kearney victimise the Claimant on 5 November 2017. During the Claimant's evidence this was changed from an act of race harassment to one of unlawful victimisation.

Issue 18

27. Did the Respondents victimise the Claimant by not following company policy and not allowing the Claimant to agree minutes from investigation meeting as initially stated verbally by Mr Kearney and Ms Elmes at the onset of the investigation meeting on 8 November 2017.

Issue 19

28. Was the Claimant victimised by being dismissed following investigation with no disciplinary action or option of redress on 9 November 2017.

Issue 20

29. Was the Claimant victimised when the First Respondent subsequently decided that she was no longer suitably qualified for her post on 9 November 2017.

Issue 21

30. Was the Claimant victimised not being offered any other avenues of work by Teacher Talent despite numerous attempts to request work (31 October 2017 and 16 November 2017).

**Evidence**

31. The Claimant gave evidence on her own behalf.

32. The Respondent called the following witnesses:

32.1 Mr Thomas Keaney, owner and proprietor.

32.2 Ms Claire Elmes, Senior HR Advisor.

32.3 Ms Sadie Bland, High Level Teaching Assistant.

32.4 Ms Rachel Morgan, Assertive Outreach Tutor.

33. All witnesses had prepared written witness statements and they were subject to cross-examination and questions from the Tribunal.

34. The Tribunal was also referred to relevant pages of a bundle and supplementary bundle consisting of over 500 pages.

**Facts**

35. The Tribunal has found the following facts from the evidence.

36. The First Respondent, Transitional Care Ltd is also known as TCES Group. The First Respondent is a private sector education provider rather than government funded. All of its referrals are from local authorities.

37. The Company operates a number of Schools in the London and Essex area which provides specialist education services to young people aged between 7 to 19 years of age who have social, emotional and mental health needs (SEMH). This encompasses children and young people who are on the autism spectrum and other children who have been 'statemented' meaning those who have been formally assessed as having social, emotional, mental health needs often including behavioural needs. The children are often excluded from mainstream education because of their behavioural needs.

38. The First Respondent has three independent schools including Essex Fresh Start Independent School, and the Essex Create Service (Create Service) is part of that school where the Claimant was subsequently assigned.

39. The Create Service is a transition service, to assist the pupils. It is not a school. The pupils are often on one to one tuition to improve their skills in order to address a

child's care and educational needs so that they can improve and eventually return to a mainstream school.

40. The Create Service takes pupils that have a higher level of need and would be classed as mental health needs tiers 3 and 4. Tier 1 and 2 are pupils that can be in schools. Tier 1, need some support and tier 2 can be in school but may need clinical interventions while tier 3 are mental health category requiring clinical support. Particular pupils presented with Social Emotional Mental Health Needs (SEMH), Autistic Spectrum Condition (ASC) or a mixture of both. All of the children who are placed within the Respondent's Create Service are vulnerable and a significant number have multiple inter-relating conditions that mean that they can be volatile in their behaviour and usually have interventions with Child and Adolescent Mental Health Service.

41. Approximately 33% of the First Respondent's teaching and support staff are agency workers. This is necessary as there is no certainty that any particular child will remain in the Create Service, as the children frequently move to different parts of the country. There was also no guarantee that a particular child would bond with a teaching staff.

42. The First Respondent also has another department known as Teaching Talent which is a separate division of the TCES Group but not a separate limited company. Teaching Talent are a recruitment agency and they work as an agency to provide staff to both TCES Group and other Local Authorities and schools who have no relationship with TCES Group. They refer agency workers to other schools and carry out pre employment and vetting checks.

43. The Claimant is of black African origin. The Claimant did not have any experience of working with SEMH pupils. On 26 April 2017, the Claimant was approached by a recruiter from Teacher Talent Agency after she had submitted her CV. It was thought that the Claimant would be a good candidate to work at the Respondent's Fresh start school in Clacton on a permanent basis.

44. On 22 May 2017 the Claimant declined a job offer with the Respondent as her current employer offered her more hours and a higher salary to continue working with them.

45. The Claimant subsequently resigned from her then employer and entered into a contract of employment with the Second Respondent, Peppermill – London Ltd on 5 September 2017. Peppermill - London Ltd agreed to provide assignments for the Claimant to work with other organisations and, under clause 4.1 of the contract of employment, it guaranteed that the Claimant would be offered at least 336 hours of pay over the course of a 12 month period. The contract included provisions for termination (clause 9) and grievance and disciplinary matters (clause 18).

46. The Third Respondent, Advance 5 Ltd is a payroll company that processed the Claimant's salary.

47. The Claimant worked on assignment, provided by the Second Respondent, Peppermill - London Ltd, to the First Respondent on 28 August 2017 as an Assertive Outreach Tutor (AOT). She was based at the Create Service.

48. On commencement of the assignment the Claimant undertook intensive training with the First Respondent. There were 5 training days including a 2 days certified Management of Actual or Potential Aggression (MAPA) training inducting her in de-escalation techniques in respect of pupils behaviour and the actions to take if a pupil becomes a danger to themselves or others. De-escalation was the objective and the training addressed that third party intervention may be required as well as self reflection to ensure that professional boundaries are maintained to manage emotions in the event that a pupil is triggering a negative response.

49. During her induction there was a group training for all the First Respondent's staff where Mr Keaney made a speech noting that he wanted all schools to celebrate BHM on a large scale in 2017.

50. The Claimant worked with a number of teachers and other AOTs. The work was stressful and at the end of each day it was not unusual for staff to unwind in the staff room. Music was played on occasion. On one occasion Sister Act music was playing including the gospel song 'Oh Happy Day' and a number of staff including Francisco, a black science teacher, started singing and dancing to it. Ms Bland recorded Francisco doing this and played it from time to time. In her ET1 the Claimant asserts that she found this degrading and offensive. However, it did not form any part of her internal grievance and no reference was made to this matter in her witness statement.

51. On one occasion in early September 2017, there was music in the background and a number of staff were present. Ms Morgan asked her if she could twerk. The Claimant said that she could twerk and Ms Morgan asked the Claimant if she could demonstrate twerking. The Claimant started twerking and another member of staff Sara joined in. We do not accept that the Claimant was uncomfortable and embarrassed as she asserts. In particular, we find that the demonstration of twerking by the Claimant was voluntary and not pressured. We find that the Claimant is an assertive individual who would have been able to express her discontent had she felt uncomfortable. We also have reservations in respect of the Claimant's credibility in respect of this allegation. The way in which the Claimant put her case in her evidence in this regard was less emphatic from the contents of her more detailed expression in her ET1 which was submitted on 14 January 2018. Further, there was no mention of this incident forming the basis of upset at any time prior to the ET1 being submitted or her making a number of other detailed allegations of unlawful discrimination. On the contrary, in the investigation meeting held on 24 October 2017 the Claimant stated that she loved her job and loved the Create Service.

52. On 15 September 2017, Mr Nick Rigby, the then Manager of the Create Service enquired briefly of the Claimant and Mr Cedric McSheen, another black member of staff, whether they would like to be involved in the planning of events for BHM. The Claimant stated that Mr Rigby informed them that he was not singling them out because they were black and added that he expected everyone to be involved. The Claimant did not have any reason to disagree with this statement made to her and no evidence was presented to us to the contrary.

53. We find that there was an element of embellishment in the Claimant's statement where she alleges that Mr Rigby stated that both she and Mr McSheen were to 'spearhead' planning for BHM. This was not how she expressed the incident in her ET1 or at any time previous to that.

54. Both the Claimant and Mr McSheen were happy to be involved in BHM and readily agreed to do so. BHM was raised in staff meetings and all staff were asked to be involved. During one of the meetings the Claimant volunteered to be involved and we find that she was excited and eager to be involved in implementing her ideas. It was accepted that the Claimant had many good ideas and it transpired that, in respect of the non teaching cultural aspects and events, the Claimant led the process. The Claimant worked exceptionally hard on this and worked additional hours and weekends to produce materials to make the programme a success.

55. We find that teachers were involved in the planning and timetabling of teaching and educative aspects of BHM and that the responsibilities were not directed only towards black members of staff. Specifically, we do not find that Mr Rigby asked only the Claimant and Mr McSheen to undertake BHM responsibilities. In coming to this finding we balanced the fact that Mr Rigby was not called to give evidence before us against the Claimant's evidence given under oath which was able to be challenged. Mr Rigby was not called because he no longer works for the Respondent having been made redundant in July 2018. The Claimant stated that Mr Rigby told her that he was not singling her out because she was black and there was discussion in the staff meetings for the planning of BHM. The email from Ms Bland dated 16 October 2017 is evidence of other (non black) AOT's being involved in BHM activities. Further, there was an internal investigation regarding the concerns the Claimant raised at the time. The Claimant stated in her investigation meeting held on 24 October 2017 that Mr Rigby stated to her that he said he wanted everyone to work together for the programme. On 7 November 2017 investigation meeting with Mr Rigby, he is noted as stating that the Claimant volunteered to be involved, that she could look at her outside contacts as she knew a lot of people linked to Black History in the local area. In the internal investigation meeting with Mr McSheen on 9 November 2017 he was asked whether he had been pushed into being involved in BHM. Mr McSheen stated that BHM was initially explained as being important at a company wide meeting run by Mr Kearney and then mentioned again at a meeting in Create Services where he volunteered. Ms McSheen said he was glad to be involved and wished he could have done more.

56. On 27 September 2017 Ms Cheryl Rutter, Head Teacher, sent an email to all teaching and support staff asking for plans and details of any trips arranged for BHM to be submitted to her by the next day. Mr Rigby forwarded this onto the Claimant, Mr McSheen, Ms Sandra Burch and Ms Caroline White a few hours later asking for details of events and curriculum activities. Ms Burch and Ms White are white members of staff. When questioned on the distribution list for this email the Claimant complained that it went to only 2 of the 18 AOT's both of whom were black. She stated in evidence that

Ms Burch and Ms White were not AOT's, they were teachers. However, we find that Mr Rigby forwarded this email to the four individuals as they had volunteered to provide ideas and plans during staff meetings that had taken place earlier in the month. In addition to these four, other staff were also involved in overseeing BHM curriculum and activities.

57. The Claimant's ET1 stated that she requested a separate space which she called the Afro Chill Lounge as part of BHM celebrations. This was not part of her witness statement but following questioning the Claimant stated that this occurred on 2 October 2017 and she was actually granted the space she requested.



58. By 3 October 2017 a room in the Create Service had been decorated by the Claimant with African art and references including pictures of animals that can be seen in Africa. Mr Matt White, and AOT, made a suggestion that the Lion King should be watched as part of BHM celebrations. The Claimant stated that the Lion King was a cartoon about animals and had no relevance to black history. The Claimant stated that this comment continued to be made to others as a joke when they entered the BHM room but did not specify who these comments were made to. The Respondent did not call Mr Matt White as he no longer works for them and they had concern for his personal circumstances involving serious health issues. The Claimant did not mention the Lion King comment as a particular concern during her internal grievance and it was raised for the first time in her ET1. On balance, we therefore conclude that Mr White, mentioned the Lion King once and when the Claimant responded the matter was closed. If the matter was continually raised by Mr White after the Claimant's objection we find that she would have been more likely to have complained about it at the time in her lengthy grievance.

59. Staff members would ordinarily be responsible for a key student, each staff member would have a key student that they were expected to work with. Ms Bland worked with pupil CR a 15 year old male who was subject to an Education and Health Care Plan. CR had SEMH needs and presented with traits of autism and Post Traumatic Stress Disorder. CR is academically able and tended to fixate on issues with an analytical thought process making it longer to process what has been said.

60. On 4 October 2017, the Claimant gave a lesson relating to BHM and the reasons for having it. All the staff and pupils were invited to this lesson and it was very well received. However, Ms Bland and pupil CR did not go into this session because he was in the middle of completing some work relating to Martin Luther King's speech. Once CR had finished this work he raised a number of questions about BHM. One question concerned why BHM was being celebrated. CR could not understand this as he felt that there should be an event where white history month is celebrated. CR was told by a number of staff members that white history is celebrated every day but CR, with his cognitive skills, could not understand this. CR directed this question to every member of staff he met that day. Ms Bland spoke to another teacher, Gavin Williams, about this and he suggested that she speak to the Claimant about this as she had given a good talk on it.

61. Ms Bland spoke to the Claimant to ask if she was prepared to speak to CR about the talk she had done as they had missed it. The Claimant was more than happy to speak to CR. We accept Ms Bland's evidence that she briefly informed the Claimant to be mindful that CR has no social filter and says things how he processes and understands them and to be aware of his processing difficulty when giving explanations. However, we do not accept that Ms Bland went into further detail or that she informed the Claimant that CR could come across as rude and ignorant because he may not understand and process what is said.

62. The Claimant spoke to CR and Ms Bland disengaged from the discussion. CR was frustrated at the start of the discussion because he could not understand why there was BHM. The discussion between CR and the Claimant became heated and the Claimant stated that what CR was saying could be perceived as racist. CR took this to mean that the Claimant was calling him racist and he became agitated. Ms Bland then

interjected to stop the conversation as CR was becoming agitated, he informed her that he could not get his point across to the Claimant. CR then went out for a walk with Ms Bland who remained very agitated about the discussion. Ms Bland subsequently explained to CR that in order to avoid any negative behaviour it was best that he did not interact further with the Claimant about BHM.

63. When CR returned he had a class with Mr McSheen. The Claimant then sought to approach CR to apologise for upsetting him. In doing so she sought to challenge CR's views and gave a personal account of a difficulty that had arisen in her life due to racism. CR then stated that he was not sorry that the Claimant was a cotton picking descendant and that he was from a better, cleverer people who were at the top of the food chain. This interaction made CR more upset and Mr McSheen asked the Claimant to leave and give CR some space. The Claimant eventually left and went to the staff room. CR then followed the Claimant to the staff room and was in an agitated state and tipped over a table.

64. The Claimant maintained her position in staff room and did not de-escalate the situation by removing herself. CR made further racially abusive comments. The Claimant stood her ground. She stated that it was important for her to also comply with her duty, under the First Respondent's policies, to contribute to (amongst others) an 'anti bullying and anti racist' ethos and to engage in practice that encourages staff and pupils to challenge attitudes about bullying and discriminatory behaviour and to address them as they arise.

65. Ms Bland had to stand in between CR and the Claimant. The Claimant and CR effectively squared up to one another and the Claimant maintained her ground and said to CR, let's take this outside. The Claimant had by this time lost control. CR had triggered an unprofessional response from her.

66. Andreia Santo, Clinical Psychologist and Clinical Lead, witnessed part of the incident informed the Claimant to be quiet during an interaction and noted that the Claimant was unable to stop herself when requested by the student's tutor as she was very immersed in the discussion and seemed to be taking it very personally. Ms Santo noted that the Claimant had spoken to her and recognised her mistake and clarified that she did not have enough information about CR's particular needs which would have been useful before the interaction.

67. A debrief commenced after CR had left that day and the Claimant stated that Ms Bland's actions were racist. Ms Bland became upset and left the staff room before the debrief was complete and did not feel able to discuss the matter.

68. On the morning of 5 October 2017, the Claimant attended for work and early in the morning attempted to speak to Ms Bland and CR's other tutor 'Karen' were busy and could not speak to the Claimant when she requested.

69. On 5 October 2017 CR submitted a complaint against the Claimant. CR had alleged that the Claimant had called him racist and then following him around further triggering him. The complaint was referred to the Local Authority Designated Officer (LADO) from Essex County Council to seek advice. LADO required that Mr Keaney undertake an internal investigation and report back to them.

70. The Create Service has rules that they are required to comply with imposed by its landlord regarding the storage of food. The general policy is that food is put on a trolley and is wheeled out into the communal area and at the end of the day is tidied and not left out overnight.

71. On 5 October 2017, Stacey, from the Create Service Administration, notified the Claimant to remove African/Caribbean sealed food and drink items from the BHM room and lock them away in the cupboard in the staff room. This upset the Claimant as she believed that staff and pupils should have been able to help themselves to sample the food and drink that the Claimant had purchased as part of the BHM celebrations. We find that Stacey simply informed the Claimant of the existing policy.

72. On 6 October 2017 Mr Rigby asked the Claimant if she was ok and informed her of the complaint made against her by CR and informed her to work at the Witham School to give CR some space. The First Respondent had resolved that the Claimant would not return to work at the Create Service from that date.

73. The Claimant was not provided with support in respect of her being racially abused by CR and her removal from duty at the Create Service. There was confusion within First Respondent as to whether the Claimant, as an agency worker, could benefit from their Employee Assistant Program and it was not offered to her.

74. On 6 October 2017, the Claimant sent a poem competition entry which was being run for BHM to the Marketing department of the First Respondent making reference to a black person organising black history month. It was sent from the Claimant's email address but was signed ANON. We find that no relevant members of the First Respondent were aware of this email at the relevant time.

75. The Claimant took a week off from work between 9 and 13 October 2017 as she was not in the right frame of mind to work at the Witham School.

76. On 9 October 2017 the Claimant set out her version of events and the concerns she had and sent them to Teacher Talent to consider. She stated that she had been racially abused by CR and that she felt that black staff were left to champion and represent BHM. She stated that racial abuse is a serious matter and that she hoped that policies are implemented to protect both staff and students. Ms Ivona Ash, recruitment consultant of Teacher Talent discussed the statement with the Claimant and the Claimant decided to edit the statement to focus on self reflection and positive steps going forward following Ms Ash's suggestions. Ms Ash did not coerce the Claimant to change her statement or tell her to remove any elements of discrimination complaints. However, the Claimant diluted the emphasis of her concerns, but not the concerns themselves, and added further paragraphs about working in the future in the edited document that she sent to the Create Service on 12 October 2017.

77. On 12 October 2017, the Claimant submitted a further poem competition entry for BHM to the Marketing department of the First Respondent entitled nobody cares about BHM. The Claimant put her name to this poem. We find that no relevant members of the First Respondent were aware of this email at the relevant time.

78. On 15 October 2017, Ms Ash informed the Claimant not to return to work until the CR investigation was completed.

79. The Claimant sought to make use of the First Respondent's grievance procedure which did not strictly apply to her as she was not an employee.

80. A meeting to discuss the CR's complaint was arranged and took place on 24 October 2017. On 23 October 2017 the Claimant was informed by Debra Doughty of Teacher Talent that the meeting was not a disciplinary meeting and normally staff do not bring other staff into investigation meetings and friends were not allowed to attend. However, Ms Doughty stated that she would be prepared to attend the meeting with her if necessary.

81. The Claimant attended the meeting and gave her version of events and made several allegations of race discrimination regarding her treatment. The Claimant alleged that during the meeting Mr Kearney said that he could see that she was 'street' when she stated that she 'still manages to be street'. The notes of the meeting, which are not verbatim, do not record this. Mr Kearney denies saying this, he stated that 'being street' would have been irrelevant to what was being discussed and he would have ignored this. Ms Elmes was at the meeting and during her evidence to the Tribunal she recalls that Claimant did mention being 'street' but that Mr Kearney did not say 'I can see that'. On balance, we do not find that Mr Kearney confirmed that the Claimant was street. The meeting was long, the response ascribed to Mr Kearney does not seem to be compatible with the tone of the meeting and it does not form any part of the complaint that the Claimant submitted on 27 October 2017. We find that the Claimant is more likely to be unreliable in her recollection of this event than Mr Kearney and Ms Elmes.

82. At the end of the meeting the Claimant stated that she loved her job and working for Create Services but was worried how it could work. She stated that she did not think she could or would wish to go back. She stated that she would be out of the country for 6 weeks from 27 November 2017 going to Cape Town. The Claimant queried whether she could work for her own event company, Majestic and work with the First Respondent through this. The Claimant stated that she would send some details when she returned of what her company could provide.

83. Ms Elmes stated that she would write up the notes of the meeting and send them to the Claimant to check, agree and sign off. However, this was not in fact the Respondent's policy given that it could unduly delay complaint resolutions whilst seeking to agree minutes.

84. On 27 October 2017, the Claimant submitted a complaint making numerous allegations of discrimination regarding her treatment in respect of planning BHM celebrations, the CR incident and how it was handled, the lack of support she had and the Stacey incident regarding the removal of food. The Claimant's racial harassment allegations did not feature in this complaint.

85. On 29 October 2017, the Claimant contacted Ms Debra Doughty of Teacher Talent to enquire whether there was any agency work she could do.

86. The Claimant wrote an apology letter to CR on 27 October 2017 that implied that she was going to return to the Create Service around him. Ms Elmes therefore

wrote to the Claimant on 3 November 2017 highlighting that they would like to inform CR of her intention not to return to the Create Service and for her apology to be amended to reflect this. Ms Elmes had this understanding because it was mentioned by the Claimant at the meeting on 24 October 2017.

87. The Claimant responded to Ms Elmes on 5 November 2017 at 18.44 with a 6 page email reiterating her discrimination complaints, her disappointment that they had not been dealt with, she had seemingly decided that she could now return to the Create Service and was questioning what the First Respondent had done to facilitate this. This email was copied to Mr Kearney and relevant contacts at Teaching Talent.

88. Mr Kearney then emailed the Claimant on 5 November 2017 at 20.14 seeking confirmation that she would amend the apology letter to CR to confirm that she would not return to the Create Service. Mr Kearney further emphasised that the CR complaint regarding the Claimant's conduct and behaviour and responding to LADO would be the priority. Mr Kearney made reference to the Claimant's behaviour and conduct four times in this email and the Claimant was upset by this. The Claimant also felt that her complaints about race discrimination were not seen as important.

89. Mr Kearney then took steps to investigate the Claimant's complaint.

90. Mr Kearney notified the Claimant of the outcome of the CR complaint by letter dated 9 November 2017. This was sent to the Claimant by email and post on 10 November 2017. Mr Kearney concluded that the Claimant did not heed instruction from two members of staff to stop speaking with CR during BHM incident. In his professional opinion he concluded that the Claimant did not have the requisite experience to work with pupils that have the high complexity as at the Create Service and he recommended her back to the agency to be placed at locations with pupils without such complexities. As the Claimant was an agency worker she had no right of appeal within the First Respondent's processes.

91. Mr Kearney also sent the Claimant her complaint outcome letter, which was dated 9 November 2017. Save for not offering the Claimant EAP support, for which an apology was given, the Claimant's allegations were not upheld. Mr Kearney identified a number of areas for organisational learning including equality and diversity training; guidance about what to do where a member of staff has been verbally or physically abused, he stated that the existing Senior Leadership Team members will be trained on this; and he stated that SLT members will discuss induction to ensure that staff members are aware of the needs of pupils and that no member of staff is in a position where they are not aware of the needs of a particular pupil.

92. On 16 November 2017 the Claimant enquired of Teacher Talent whether there were any other avenues of work. Ms Doughty responded within 20 minutes stating that the Claimant was included in the mailer for next week for North Essex schools. By email of 27 November 2017, the Claimant indicated that she would be away and sought to return the First Respondent's property. On 12 January 2018 the Claimant emailed Teacher Talent seeking advice as to how to get her P45 and return the First Respondent's property. Following contacting ACAS, the Claimant presented her claim to the Tribunal on 14 January 2018.

**Law**

93. The Tribunal applied the following statutory provisions, appellate court authority and guidance when considering the issues of the case.

94. Section 13 EqA defines direct discrimination.

*'(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

*(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

*(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

*(4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*

*(5)If the protected characteristic is race, less favourable treatment includes segregating B from others.*

*(6)If the protected characteristic is sex—*

*(a)less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*

*(b)in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*

*(7)Subsection (6)(a) does not apply for the purposes of Part 5 (work).'*

95. Section 9 EqA defines race as a protected characteristic. The Claimant asserts that she is treated less favourably because she is black African.

96. Section 26 EqA defines harassment.

*'(1)A person (A) harasses another (B) if—*

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

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

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

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

(2) *A also harasses B if—*

(a) *A engages in unwanted conduct of a sexual nature, and*

(b) *the conduct has the purpose or effect referred to in subsection (1)(b).*

(3) *A also harasses B if—*

(a) *A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*

(b) *the conduct has the purpose or effect referred to in subsection (1)(b), and*

(c) *because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

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

(a) *the perception of B;*

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

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

(5) *The relevant protected characteristics are—*

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.'*

97. When considering harassment the Tribunal had regard to the Equality and Human Rights Commission guidance.

*'...harassment of a worker occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:*

- *violating the worker's dignity; or*
- *creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.*

*7.7 Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions,*

*mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.*

*7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.*

*Example: In front of her male colleagues, a female electrician is told by her supervisor that her work is below standard and that, as a woman, she will never be competent to carry it out. The supervisor goes on to suggest that she should instead stay at home to cook and clean for her husband. This could amount to harassment related to sex as such a statement would be self-evidently unwanted and the electrician would not have to object to it before it was deemed to be unlawful harassment.*

*7.9 Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.'*

98. In respect of third party action, such as pupil CR incident in this case, it is necessary for the Tribunal to consider whether the First Respondent 'created' an intimidating, hostile, degrading, humiliating or offensive environment in being responsible for CR to act as he did.

99. Section 27 EqA defines victimisation

*'(1)A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a)B does a protected act, or*

*(b)A believes that B has done, or may do, a protected act.*

*(2)Each of the following is a protected act—*

*(a)bringing proceedings under this Act;*

*(b)giving evidence or information in connection with proceedings under this Act;*

*(c)doing any other thing for the purposes of or in connection with this Act;*

*(d)making an allegation (whether or not express) that A or another person has contravened this Act.*

*(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

*(4)This section applies only where the person subjected to a detriment is an individual.*



*(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.'*

100. When considering vicarious liability the Tribunal considered section 109 EqA.

*'Liability of employers and principals*

*(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

*(2)Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*

*(3)It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*

*(4)In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*

*(a)from doing that thing, or*

*(b)from doing anything of that description.*

*(5)This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).'*

101. Section 136 EqA provides the burden of proof provisions.

(1)This section applies to any proceedings relating to a contravention of this Act.

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

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

(4)The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5)This section does not apply to proceedings for an offence under this Act.

(6)A reference to the court includes a reference to—

(a)an employment tribunal;

102. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, stated at paragraph 56.

*“The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination). It was confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.”*

103. The burden is therefore on the Claimant to prove, on a balance of probabilities, a prima facie case of discrimination.

## **Conclusions**

104. In view of the facts that have been found and the law set out about the Tribunal's conclusions on the issues are as follows.

### *Race discrimination claims*

#### Issue 1

105. Mr Nick Rigby did not single the Claimant and Mr Cedric McSheen (two black members of staff) out to help organize BHM on 15 September 2017. Mr Rigby asked all staff to be involved and provide ideas and specifically told the Claimant he was not singling her out. The Claimant, and Mr McSheen were happy to be involved in BHM. We therefore conclude that the Claimant has failed to establish this allegation.

#### Issue 2

106. Mr Rigby did not email the only other black member of staff on 27 September 2017 in relation to organising BHM. The email was also sent to two white members of staff. The email was sent to two black AOT's and two white teachers because by that stage following staff meetings they had volunteered to be involved and had suggested ideas and activities for BHM. We therefore conclude that the Claimant has failed to establish this allegation.

#### Issue 3

107. The Claimant requested a separate space to work and plan BHM activities on 2 October 2017 and was granted it. The Claimant was not segregated. We therefore conclude that the Claimant has failed to establish this allegation.

#### Issue 4

108. The Claimant was asked to speak to pupil CR to explain why there was BHM on 4 October 2017. The Claimant gave a lesson relating to BHM and the reason for having it earlier in the day which neither Ms Bland or CR attended. We conclude that the reason the Claimant was asked to speak to pupil CR was because she had given a

good talk on the issue and not because of her race. We therefore conclude that the Claimant has failed to establish this allegation.

*Race harassment claims*

Issue 5

109. In early September 2017, the Claimant was asked if she could twerk and if she could demonstrate twerking. Whilst this arguably could be related to race, as the Claimant alleged it mocked the innate ability that many black people have to dance, the Claimant did twerk with a white colleague. We balanced the Claimant's assertion that she did so to lighten the atmosphere and fit in against our assessment that she is an assertive individual who would have been able to express her discontent if she was uncomfortable. We also considered the fact that there was no mention of this matter in the Claimant's written complaints or meetings and the first mention was in the ET1. We therefore do not conclude that this matter had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We therefore conclude that the Claimant has failed to establish this allegation.

Issue 6

110. On 3 October 2017 Mr Matt White made a misplaced joke in commenting that the Lion King should be watched as part of BHM. There were pictures of animals that can be found in Africa on the wall in the room. We accept that the Claimant was upset by this clumsy and ignorant comment. The Claimant was able to immediately put Mr White straight by stating that a cartoon about animals had no reference to black history. We accept that the Claimant perceived this comment as undermining black history and was therefore related to race. However, we do not find that Mr White continued to make the comment and as such we do not conclude that this one off ignorant statement had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We therefore conclude that the Claimant has not established this allegation.

Issue 7

111. The Claimant was subject to racial abuse from CR on 4 October 2017. This was very upsetting for her. However, CR is a vulnerable pupil of the school with special needs.

112. The First Respondent is not vicariously liable for the actions of CR. However, for the purposes of this harassment complaint we considered whether the school created, facilitated or permitted circumstances where the Claimant could be racially abused. We conclude that this is not the case.

113. The First Respondent has policies to seek to minimise the risk of abuse to pupils and staff including the MAPA guidance and equality and diversity training and

policies. The racial abuse that the Claimant suffered from pupil CR would have been unlikely to occur at all if she had let him be following the first encounter and followed to direction of her colleagues. The Claimant failed to follow MAPA de-escalation processes, she had lost control and adopted a reactive and unprofessional response to CR, he was in an anxious state and it was clearly not the right time to seek to challenge him on his racist ideology.

114. We therefore conclude that the Claimant has failed to establish this allegation.

#### Issue 8

115. The day after the CR incident, the Claimant sought to speak to Ms Bland and Karen, CR's AOT's. The initial approach was in the morning and they were unable to engage as they were heading to classes. We also find that Ms Bland was upset by being called a racist by the Claimant during the debriefing and this affected the subsequent interaction between them.

116. Ms Bland did not initially feel able to speak to the Claimant after being called a racist by her the previous evening. The unwanted conduct the Claimant alleges is their refusal to engage with her. We conclude that the refusal to engage was related to race in the sense that the Claimant had called Ms Bland racist. However, given the tension in the relationship caused by the Claimant's accusation we do not consider it is reasonable in the circumstances of the case for the Claimant to perceive that the failure to engage at that time had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment her.

117. We therefore conclude that the Claimant has failed to establish this allegation.

#### Issue 9

118. On 5 October 2017, Stacey, from the Create Service Administration, notified the Claimant to remove African/Caribbean sealed food and drink items from the BHM room and lock them away in the cupboard in the staff room. This was in accordance with the rules that the Create Service are required to comply with, imposed by its landlord. At the end of the day food is tidied and not left out overnight. Whilst the food may have been African/Caribbean, the policy was not related to race. There was no evidence that the policy was being inconsistently applied to make the Claimant feel like she was being singled out. We therefore conclude that the Claimant has failed to establish this allegation.

#### Issue 10

119. The Claimant was asked if she was ok by Mr Rigby on 6 October 2017 and informed her of the complaint made by CR. However, he did not refer her to the First Respondent's Employee Assistance Program. This could have been a facility that could have been beneficial to the Claimant. However, there was confusion whether, as an agency worker, the Claimant qualified for this. The Claimant had suffered racial abuse by CR and we considered whether the failure to offer this to her was related to race. Whilst the Claimant was concerned that there was a lack of support being offered to her following her racial abuse leaving an impression that it was not being taken seriously, we do not conclude that the failure to offer her Employee Assistance Program was

related to race at all. The Claimant has therefore failed to establish this allegation. Did the Claimant suffer harassment by not being offered support from Nick Rigby following racial abuse from pupil CR on 6 October 2017.

#### Issue 11

120. Ms Ivana Ash, from Teacher Talent did not implicitly advise the Claimant to omit the issue of discrimination from her original statement on 10 October 2017. The concerns raised were not omitted but the emphasis was changed. We therefore conclude that the Claimant has failed to establish this allegation.

#### Issue 12

121. Mr Kearney, did not state the he could see why the Claimant was "street", during the pupil CR investigation meeting on 24 October 2017. We therefore conclude that the Claimant has failed to establish this allegation.

#### Issue 13

122. Ms Elmes email to the Claimant dated the 3 November 2017 asked for confirmation that the Claimant was not intending to return to the Create Service. This was compatible with what the Claimant said at the meeting on 24 October 2017. Whilst the Claimant may have subsequently changed her mind, Ms Elmes cannot be faulted for seeking the clarification. We therefore conclude that the Claimant has failed to establish this allegation.

#### *Victimisation claims:*

123. The Claimant alleges that she made protected acts on 6, 9, 12, 24, 27 October 2017 and 5 November 2017.

124. We conclude that the Claimant's poems sent by email on the 6 and 12 October 2017 to marketing do not amount to protected acts. If they were found to be protected acts we have found that no relevant persons had knowledge of them for the Claimant to be able to use them as a basis to advance an unlawful victimisation complaint.

125. We conclude that the Claimant's letters and emails sent on 9, 12, 27 October and 5 November 2017 amounted to protected acts. Further, we conclude that the Claimant made protected acts in statements made during the CR complaint investigation meeting on 24 October 2017.

#### Issue 14

126. The Claimant was not offered assistance through the Employment Assistance Program because there was confusion about whether, as an agency worker she could qualify. The Claimant was asked to attend an investigation interview on 24 October 2017 because CR had made a complaint and the LADO had requested the First Respondent to investigate.

127. We do not conclude that these matters were because of any protected acts made by the Claimant. We therefore conclude that the Claimant has failed to establish this allegation.

Issue 15

128. It was decided that the Claimant would not be returning to the Create Service on 6 October 2017, before any protected acts relied on by the Claimant. The Claimant had a period of work and on 15 October 2017 Ms Ash informed the Claimant not to return to work until the CR investigation was completed. By this stage the LADO had been contacted and advised that the complaints procedure should be followed.

129. The reason the Claimant was not provided work by Teacher Talent from 15 October was the progression of the CR complaint and not her protected acts, which by that time were drafted in response to the CR complaint. We therefore conclude that the Claimant has failed to establish this allegation.

Issue 16

130. The Claimant was not permitted to bring a representative to the meeting on 24 October 2017 because it was an investigation meeting and it was not a disciplinary meeting. Ms Doughty informed the Claimant of this by email of 23 October 2017 but offered to attend the meeting with her. This explanation was not because of the Claimant's protected acts and we therefore conclude that the Claimant has failed to establish this allegation.

Issue 17

131. Mr Kearney's email on 5 November 2017 was written in response to the Claimant's email of the same date. In her email of 5 November 2017, the Claimant was seeking to advance her complaints about race discrimination and abuse. Mr Kearney's email in response is uncompromising. It mentioned the investigation into the Claimant's behaviour and conduct four times and emphasised that the CR complaint investigation would take precedence over the Claimant's race discrimination complaints. Mr Kearney wrote this email because it seemed that the Claimant had lost sight of her part in the CR incident and that there was an ongoing investigation into this. Mr Kearney was also concerned, that as far as management of CR going forward it was clear that the Claimant confirm that she would not be returning to the Create Service. We conclude that the content of Mr Kearney's email of the 5 November 2017 was because of this and not because of the Claimant's protected acts. We therefore conclude that the Claimant has failed to establish this allegation.

Issue 18

132. At the end of the CR complaint investigation meeting with the Claimant, Ms Elmes stated that she would write up the notes of the meeting and send them to the Claimant. Ms Elmes did not do this. It was not the Respondent's policy to agree the notes in complaints given the delays that could be created. The fact that Ms Elmes made the offer at the meeting indicates that her failure to do so was not due to protected acts, otherwise the offer would not have been made at all. The failure to provide notes for agreement was due to their being no requirement to get the Claimant's agreement to notes during the investigation and not due to any protected acts. We therefore conclude that the Claimant has failed to establish this allegation.

Issues 19 and 20

133. The Claimant was not an employee of the First Respondent. Therefore the Claimant was not dismissed by the First Respondent. Mr Kearney's conclusions in relation to the CR complaint. His conclusions were evidence based on the investigation that he had undertaken. Mr Kearney concluded that the Claimant did not heed instruction from two members of staff to stop speaking with CR during BHM incident. In his professional opinion he concluded that the Claimant did not have the requisite experience to work with pupils that have the high complexity as at the Create Service and he recommended her back to the agency to be placed at locations where there were no such matters. He was entitled to come to these conclusions following his investigation.

134. We do not conclude that Mr Kearney's conclusions regarding the Claimant's conduct and competence were because of the Claimant's protected acts. We therefore conclude that the Claimant has failed to establish these allegations.

Issue 21

135. The Claimant made requests to Teacher Talent to be offered any other avenues of work outside the Create Service on 31 October 2017 and 16 November 2017. At the 31 October 2017, the Claimant had been informed that due to the ongoing CR investigation she would not be placed with them. Following the outcome of the CR investigation on 10 November 2017, the First Respondent recommended that the Claimant be able to undertake work with them relating to less vulnerable pupils.

136. On 16 November 2017 the Claimant enquired of Teacher Talent whether there were any other avenues of work. Ms Doughty immediately responded stating that the Claimant was included in the mailer for next week for North Essex schools. However, by email of 27 November 2017, the Claimant indicated that she would be away and sought to return the First Respondent's property. This was consistent with what the Claimant said in the CR investigation meeting that she was going away for 6 weeks to Cape Town.

137. We conclude that the Claimant was being continually considered for other work by the First Respondent following the 10 November 2017 but the Claimant's availability was limited due to her impending trip to Cape Town. Following this the Claimant withdrew her interest in being considered for further appointments and presented a claim. We therefore conclude that the Claimant has failed to establish the allegation that she was victimised by not being offered any other avenues of work.

138. The Claimant has failed to establish any of her allegations against the First Respondent. Her claims against the First Respondent are therefore dismissed.

**Remedy hearing**

139. The Remedy hearing in respect of the Second and Third Respondent's will take place on 29 July 2019. The Claimant is ordered to provide a witness statement in relation to remedy and attempts to find alternative work and an updated schedule of loss outlining the sums claimed and send to the Respondents by 14 July 2019. The Claimant is ordered to bring 4 copies of these documents to the remedy hearing.

Employment Judge Burgher  
Dated: 24 June 2019