



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms Y Gonzalez**

**v**

**Michaela Community School**

**Heard at:** Watford

**On:** 7, 9 and 10 May 2019

**Before:** Employment Judge Manley  
Ms S Goldthorpe  
Mr R Clifton

**Appearances:**

**For the Claimant:** In person  
**For the Respondent:** Mr P Edwards, Counsel

**JUDGMENT** having been sent to the parties on 21 May 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction and issues

1. The factual and legal issues were agreed at an earlier case management hearing in March 2018. The case management summary recorded this:-
  1. *By a claim form presented to the tribunal on 10 March 2017, the claimant made claims of direct race discrimination; harassment related to race; victimisation; and breach of contract.*
  2. *To these claims the respondent denies liability and asserts that there were concerns about the claimant's performance and following termination of her employment, it genuinely believed that she had engaged in an act of gross misconduct, in that, it discovered that £470 of uniform money which she had access to, was missing. It then changed the reason for her dismissal to gross misconduct.*

### The issues

3. *I now record that the issues between the parties which fall to be determined by the tribunal are set out below. The claimant brings the following claims:*

- a. *Direct discrimination on grounds of nationality, pursuant to s.13 of the Equality Act ('EqA') 2010;*
- b. *Harassment on grounds of nationality, pursuant to s.26 EqA 2010;*
- c. *Victimisation, pursuant to s.27 EqA 2010;*
- d. *Breach of contract.*

Direct discrimination on grounds of nationality

4. *Has the claimant established that the following acts occurred?*
  - a. *On 14 March 2016, Ms Katherine Birbalsingh, Headteacher, told the claimant that her English was not improving sufficiently to carry out her tasks and she should not talk "like the wife of a gangster".*
  - b. *The Headteacher and Mr Barry Smith, Deputy Headteacher, told the claimant on a weekly basis that her English was not good and needed to improve.*
  - c. *From May to October 2016, the Deputy Headteacher told the claimant that he did not like her speaking to parents and preferred to have a trainee teacher speak to them instead.*
  - d. *The claimant will rely on a meeting held on 11 January 2016 with Deputy Headteacher to discuss the school's software programme when he said, "I don't know how you could do this job because English is your second language."*
  - e. *In October 2016, the Headteacher told the claimant that the respondent needed to hire an English person to undertake the role of Office Manager.*
  - f. *On 19 October 2016, the Deputy Headteacher told the claimant that an English person could do a better job than her.*
  - g. *On 21 October 2016, the claimant was dismissed by the respondent.*
5. *In each case:*
  - a. *Did the respondent treat the claimant less favourably than it treated or would have treated an Office Manager not of the claimant's nationality in materially similar circumstances? The claimant relies upon a hypothetical comparator. The respondent will say that an appropriate hypothetical comparator is a non-Colombian national who does not speak English as a first language, employed as an Office Manager.*
  - b. *If so, was any less favourable treatment because of the claimant's nationality?*

Harassment on grounds of nationality

6. *Has the claimant established the acts set out at paragraph 5 above?*
7. *In each case:*
  - a. *Was the conduct unwanted?*
  - b. *Did the conduct relate to the claimant's nationality?*
  - c. *Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? In considering the effect of the conduct, the tribunal should consider the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect*

Victimisation

8. *Has the claimant carried out any protected acts? The claimant will assert that the Headteacher repeatedly said she spoke like a drug dealer's wife and that she dressed in a revealing manner like a Colombian woman, to which the claimant objected. On the following dates the comments were made which were followed up by the claimant complaining which constituted further protected acts:*
  - a. *On 6 February 2015, the Headteacher said to the claimant that she spoke like a drug dealer's wife. The claimant objected by saying that she was not the wife of drug dealer and that there was nothing wrong with her Hispanic accent.*
  - b. *On 14 March 2016 at 5.30pm, the claimant raised with Ms Katie Ashford the Headteacher's comments about her accent and about giving her more work to do.*
  - c. *On 15 September 2016, at a meeting with Ms Ashford, Mr Birbalsingh and the claimant, the claimant objected to Ms Ashford's statement that she was incompetent because of her accent, her Colombian nationality and her appearance.*
9. *The claimant relies upon the following alleged detrimental treatments:*
  - a. *Dismissal;*
  - b. *Respondent's failure to deal with her appeal;*
  - c. *Respondent's failure to provide her with a reference.*

10. *In each case:*

- a. *Did the alleged detrimental treatment occur?*

- b. *If so, did the respondent carry out any of the detrimental treatment because the claimant has done a protected act/s?*

Jurisdiction

11. *Did any of the act(s) of discrimination or harassment relied upon the claimant occur more than three months before the date on which she submitted her claim form to an Employment Tribunal (subject to early reconciliation)?*
12. *If so, do any such acts form part of “conduct extending over a period” for the purposes of s.123(3) EqA 2010, and was the claim brought within three months of the end of that period?*
13. *If not, would it be just and equitable to extend time?*

Breach of contract

14. *Was the claimant entitled to one months’ pay in lieu of notice under the terms of her contract of employment?*
15. *Was the respondent entitled to withhold any pay in lieu of notice on grounds the claimant had committed a repudiatory breach of contract?*
2. In summary, the claimant brings claims for direct discrimination, harassment and victimisation, all related to her Columbian nationality. She also brings a breach of contract claim related to failure to pay notice pay.

**The hearing**

3. At the hearing we heard from the claimant and from three witnesses for the respondent - Mr Smith, a former Deputy Head; Ms Ashford, a Deputy Head and Ms Birbalsingh, the Head Teacher. There was a further witness statement from a witness who did not attend as the claimant had no questions for her, although she did not necessarily accept the evidence in her statement.
4. We also had a bundle of documents of about 200 pages, and we considered a limited number of those documents.

**The relevant facts**

5. The claimant, who is Columbian, started working as an administrator for the respondent on 22 January 2015. Her daughter attended the school and when Ms Birbalsingh and other senior leadership team members heard the family might have to move out of London, they decided to offer the claimant work so that the family could stay in the area and her daughter at the school. The school at the time was a relatively new free school and there had been some controversy because of political or other objections to free schools. The school started with around 150 pupils and has been academically very successful. We heard considerable detail about the ethos and values of the schools. In short, the school aspires to provide high quality education in an inner-city area where there is gang activity and

problems with children carrying knives. It is a relatively poor area of London with families from around the world, many of the parents having English as their second language. The school places strong emphasis on behaviour and discipline with strict rules about appearance, timekeeping, attitudes to learning and so on. Not unusually for inner-city London, the students and staff are international. For example, there is another Columbian member of staff, as well as staff from Zimbabwe, Algeria, Romania, Poland, Jamaica, Nigeria, Albania, Spain, Portugal etc.

6. Ms Birbalsingh's evidence was that problems with the claimant arose from the outset, particularly with her dress. Her evidence was that she had to speak to the claimant on several occasions emphasising the need to dress in a professional way, advising the claimant that staff needed to set an example to students and not dress as they would out of school. In particular, she referred to avoiding mimicking the streetwear related to gang culture.
7. At one point, probably in 2015, Ms Birbalsingh said that she was discussing the claimant's dress and she said that the staff should be role models and the problems there would be "*if we look like the wives of gangsters*". The respondent accepted that on the response but suggested that it was said in a jokey manner. This conversation appears to form the basis of one of the claimant's complaints. It was said to be in March 2016 in the claim form and list of issues and the comment is recorded as - "*you should not talk like the wife of a gangster*". In the claimant's witness statement, she sets out two occasions when Ms Birbalsingh allegedly made similar comments, one in February 2015 when she said that Ms Birbalsingh said she, "*spoke like the wife of a drug dealer*" and on 14 March 2016 when she alleged Ms Birbalsingh said "*stop talking like the wife of a Columbian gangster*". When giving evidence at the tribunal, the claimant rather altered the words allegedly used by Ms Birbalsingh into that she "*spoke and looked like a drug dealer's wife*". She suggested that Ms Birbalsingh made direct reference to her being Columbian but, under cross-examination, she accepted that there was no mention of her Columbian nationality. The tribunal accepts Ms Birbalsingh's version of the comment that she made. Her evidence has been consistent and is credible bearing in mind what she says about professional dress at the school.
8. Ms Birbalsingh also told us that there were problems with how the claimant carried out her administrative tasks. Mr Smith gave us examples of problems there were with the claimant's competence in this area. He said her communication skills in English were a barrier for her, that she was confused and confusing, particularly when speaking to parents on the phone. The claimant complains that criticism was made of her weekly which would appear to be exaggeration, but it is true that there were many discussions with her about various problems about how she was carrying out her work. It is alleged by the claimant that Ms Birbalsingh and Mr Smith said your "*English is not good and needs to be improved*". It is true that words to that effect were probably used. This was not a criticism of her accent but of her difficulties of speaking clearly in language which was suitable for the listener in the circumstances. Mr Smith decided there were too many problems with the claimant talking to parents on the phone and he decided that he would ask a trainee teacher to carry out that work. This

was a decision he took as parents had reported problems understanding the claimant and she had not always seemed to understand them. He did not say, as is alleged in the claimant's witness statement, but not in the claim form or in the list of issues, that these teachers would be English and indeed one was not English. Mr Smith was supportive and tried to understand the claimant's difficulties of communicating in a second language. He likened it to how he would find it hard communicating in French. This is an entirely supportive comment showing understanding of the difficulties the claimant might be facing. We accept both Mr Smith and Ms Birbalsingh were asked for suggestions by the claimant about improving her English and they were responded with helpful suggestions based on their own experience.

9. In the list of issues, there is an allegation that the claimant raised Ms Birbalsingh's comments with Ms Ashford in March 2016. Ms Ashford denied that she had raised the comments with her and we do not accept that she did. The claimant's evidence on this point was inconsistent and she often had considerable difficulty remembering dates with any accuracy.
10. The claimant became part time in February 2016, but there continued to be problems of mistakes and misunderstandings. Perhaps, rather surprisingly, in June 2016, the claimant was promoted full time to Senior Administrator. Ms Birbalsingh said she hoped that this step would encourage the claimant to improve. Almost immediately, a serious issue arose when the claimant sent an email and/or letter to parents should have been a draft and sent first to Mr Smith for approval. This communication contained errors and mentioned a sanction of "*isolation*" for students, something which upset some parents, was picked up by the national press and led to difficulties for the school. It was also sent to the parent of a child who was no longer at the school, although the claimant says that she was not responsible for keeping a list of children still at the school.
11. In any event, the respondent became increasingly concerned by the claimant's actions and Ms Birbalsingh asked Ms Ashford, the Deputy Head, to work in the office alongside the claimant to support her. Ms Ashford did this, teaching the first period only, and supporting the claimant on a daily basis. Ms Ashford was the claimant's informal line manager from 2 September and became her formal line manager on 13 September. She made numerous notes of discussions with the claimant which we have seen. We just give some examples of concerns of performance she raised in those discussions.
12. For example, she noted that the claimant's phone calls were repetitive and unclear; that she didn't make a proper to-do list which had been suggested and when she did, it was confused; that there was a lack of clarity about telephone messages and poor time management, which led to panic towards the end of the day. Ms Ashford met with the claimant once or twice a day to discuss matters and worked close by her.
13. The claimant agrees that matters were raised by Ms Ashford but does not recall all of them as recorded in the notes. Ms Ashford also heard from other members of staff about problems that the poor organisation in the office was causing and other difficulties emerged about parents being

unable to pay online because of delays with log in details etc. The problems continued with Ms Ashford attempting to set targets for the claimant.

14. Ms Ashford also opened a computer file entitled "Yuri" which Ms Ashford said was to keep details of discussions that she had with the claimant. The claimant's evidence is that there was indeed a computer file called Yuri but that was something she used to keep notes of her work in progress. It is even possible there were two such files and we insufficient evidence to make any clear findings on this, the significance of which we will come to.
15. There was a first formal performance meeting with Ms Birbalsingh and Ms Ashford on 26 September and the claimant was given an initial verbal warning about the many mistakes she was making. The problems continued, some of which were relatively serious. For example, providing the wrong date for information about the date for return to school and losing important information on first aid certificates and DBS numbers.
16. There were then more meetings in early October; one on 10 October with Ms Birbalsingh and Ms Ashford but no further warnings were given to the claimant because Ms Birbalsingh wanted to give her the benefit of the doubt.
17. There were further mistakes, and on the last day of that half term, 21 October 2016, the claimant was called to a meeting and told by Ms Birbalsingh, with Ms Ashford present, that her employment was to be terminated.
18. The claimant raises some allegations about events in October. It is unclear whether they are supposed to have happened at that meeting, but we deal with them now. One of them is that Ms Birbalsingh said that she would to give the Office Manager role to an English person. Ms Birbalsingh denies having said that. We find that it was not said. It is highly unlikely that Ms Birbalsingh would have said that given the diverse nationalities working at the school, her own non-English background and the fact that her Office Manager, who is not English, had previously been appointed.
19. Another allegation the claimant makes is that Ms Ashford said an English person could do a better job. Again, we find that this was not said. Reference was made to the claimant's difficulties in communicating in English, but it is highly unlikely, and it is denied, that Ms Ashford would have made such a comment, particularly close to the termination of the claimant's employment. That was not said.
20. As stated, the claimant was told that she was to be dismissed and a letter was either sent or given to her, which I will just read some sections of. This starts:

*"Dear Yuri,*

*You are aware of the concerns that Katie and I have regarding your performance in the office"*

It then goes on setting out various examples and steps that were said to

have been taken. It concludes in this way:

*"I am now in the position where I cannot see a way forward. The combination of your poor communication and lack of attention to detail have created a situation in which you cannot fulfill your duties to an acceptable standard. In spite of the support given to you by Katie and other members of senior teams, standards have not improved.*

*As such, unfortunately I have decided to terminate your contract. This is not a decision that has been taken lightly. We all sincerely wanted you to succeed in your role, but you have shown no signs of improvement for several weeks. As Headmistress I have a duty to the school and the pupils and staff to make sure that all operations run as effectively as possible. It is with regret that I feel that you are not able to support us in this."*

- 20 When the claimant was cross examined about her dismissal she accepted that she was dismissed because Ms Birbalsingh believed her performance was not improving. The claimant left the office and went to tidy her personal things from the office. It is quite likely that she was upset but she left on that day.
- 21 Two things were then discovered by the respondent. The first relates to what is said to be a missing sum of money. Earlier on the same day as the date of dismissal, the claimant had been handed money in an envelope for two uniforms by the receptionist amounting, it is believed, to £470. She put the envelope in her drawer and mentioned to Ms Ashford that she would put it in the safe. After dismissal the claimant cleared her drawer and Ms Ashford checked it later and found it empty. Some weeks later the accountant said there was a discrepancy of £470. Ms Birbalsingh wrote to the claimant accusing her of having taken the money and asking her to come in and discuss it. The claimant was, not surprisingly, upset by the accusation and denied taking the money. She maintains that position. The respondent has assumed that she did take it but has carried out no significant investigation into what could have happened to the money. There is insufficient evidence for the tribunal to find, on a balance of probabilities, that the claimant took the money.
- 22 The respondent also discovered that the claimant had deleted, or moved, the computer file or files named Yuri. Ms Birbalsingh said in her letter to the claimant that she wanted to discuss this too. The claimant replied that she had deleted files on Ms Ashford's instruction. Ms Ashford said that any such instruction which was given to the claimant was about clearing junk or unnecessary emails and not files. Again, the respondent did no further investigation such as checking whether the files could in fact be retrieved. Again, there is insufficient evidence that the claimant committed a serious act of misconduct here. Given the respondent's evidence about the claimant's failings whilst employed by them for many months, we cannot find that this action was particularly serious. It is possible that it might have amounted to misconduct, but it was not serious enough to be gross misconduct or seen as a repudiatory breach.



23 In any event, the respondent decided, through Ms Birbalsingh, to send a letter, this is dated 15 November, approximately three weeks after dismissal. Ms Birbalsingh sets out the respondent's version with respect to the missing money and the files and concludes in this way:

*"It would appear that you are leaving me with no choice but to report this theft to the police. I will also be forced to override the performance related dismissal with a gross misconduct one instead which means that your notice pay will not be paid."*

24 The claimant sent a letter of appeal against that decision. In that letter she mentioned race and linguistic discrimination. The claimant accepts that that was the first time those matters were raised in writing. For reasons which are not clear the appeal was not progressed.

### The law and submissions

25 The relevant law is set out for the discrimination, harassment and victimisation claims in the Equality Act 2010 (EQA). The sections relied upon are at sections 13, 26 and 27 EQA as follows:-

#### 13 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) -

#### 26 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) -

(3) -

(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.

## 27 Victimization

(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.

26 For all these Equality Act claims, the tribunal must make findings of fact and then apply the correct tests. For the direct discrimination complaints, namely less favourable treatment contrary to section 13 EQA, the tribunal is mindful that it is unusual for there to be clear, overt evidence of direct discrimination and that it should consider matters in accordance with section 136 EQA. The tribunal has the guidance of the Court of Appeal in Igen V Wong [2005] IRLR 258 which confirms that given by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332, concerning when and how the burden of proof may shift to the respondent, as modified and clarified in other recent cases. When making findings of fact, we may determine whether those show less favourable treatment and a difference in race. The test we should use to establish whether there has been less favourable treatment is not whether there was treatment which was less favourable than that which would have been accorded by a hypothetical reasonable employer in the same circumstances. The test is: are we satisfied, on the balance of probabilities and with the burden of proof resting on the claimant, that this respondent treated this claimant less

favourably than they treated or would have treated a white employee (or an employee from some other nationality). We are guided by the decision of Madarassy v Nomura International plc 2007 IRLR 246 reminding us that unfair treatment and a difference in race does not, on its own, necessarily show discriminatory treatment. If we are satisfied that the primary facts prove a difference in race and less favourable treatment, we proceed to the second stage. If the answer here is that we could so conclude, the burden shifts to the employer. At the next stage, we look to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable treatment occurred on the grounds of the claimant's nationality.

- 27 The claimant also complains of harassment. The tests are as set out in section 26 with the burden of proof resting on the claimant to show unwanted conduct related to race. She also must show that the unwanted conduct had the purpose or effect of violating her dignity or creating an intimidating etc environment and that it was reasonable for the conduct to have that effect.
- 28 There are also allegations of discrimination by way of victimisation, contrary to section 27 EQA. Here the burden rests upon the claimant to prove that she has done one or more of the "protected acts" defined at section 27 (1) b). This is the first stage and requires the appropriate findings of fact and conclusions. Thereafter we move on to the second stage and determine whether there have been any detriments because the employee had committed the protected act(s).
- 29 As far as the breach of contract claim is concerned, we first consider what the contract says on the giving of notice and, secondly, with what happened. We are concerned with whether there was conduct by the claimant which amounted to an act of gross misconduct so that summary dismissal was justified.
- 30 The respondent's representative handed in written submissions which the claimant read and responded to. The respondent particularly pointed to several allegations made in the witness statement which had not been set out in the issues before and under cross examination appeared to include matters which the claimant did not maintain. He says that they were fabrications. He points to ways in which he says we should find the claimant's evidence lacked credibility.
- 31 The claimant responded saying that she believed she had been treated differently because of her Columbian background. She pointed to matters where she said she had suffered unfair treatment. She also included reference to the lack of warnings and to failures in process.

## **Conclusions**

- 32 We expect that many of our conclusions will be obvious from our findings of fact. The claimant has not been able to show any less favourable treatment because of nationality. Either the comments she attributed to people were

not made at all or, if they were, they bore no relation to the claimant's nationality. Any mention of English was with respect to the claimant's language abilities, not a reference to her nationality. The claimant does not shift the burden of proof to the respondent. Even if she had, the respondent's explanation for conversations that they had with the claimant is entirely without discrimination on the grounds of nationality.

- 33 Nor can she show unwanted conduct related to nationality for the harassment claim. Again, she relies on the same alleged comments which she has either not shown were made or they were not related to her nationality. She cannot therefore show the necessary ingredients for harassment to be found as it did not violate her dignity or create an intimidating etc environment for her.
- 34 The victimisation claim has no chance of success as the claimant accepted in the hearing that she did not raise the issue until after her dismissal. She cannot therefore show any protected act before the alleged detriments. That claim must be dismissed.
- 35 Again, for completeness, the claimant has now accepted that the reason for her dismissal was the respondent's belief in poor performance. This appears to suggest she is no longer arguing that the dismissal was for discriminatory motives, but we think it wise to consider that and say that we find there was no discrimination in the dismissal.
- 36 Turning then to the breach of contract claim. We have found as a fact there were no acts of gross misconduct committed by the claimant at the date of dismissal. She was therefore entitled to notice of dismissal. Contractual notice entitlement is 6 weeks and the claimant is therefore entitled to damages in the sum of £2181.

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Employment Judge Manley  
18 June 2019

Date: .....

Judgment sent to the parties on  
18 July 2019

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For the Tribunal office