



EMPLOYMENT TRIBUNALS

Claimant: Mr R Yousef

Respondent: Bradfield School (a company limited by guarantee)

HELD AT: Sheffield

ON: 11 to 15 November 2019
and 18 November 2019

BEFORE: Employment Judge Little
Ms S D Sharma
Mr L Priestley

REPRESENTATION:

Claimant: In person (accompanied by a
volunteer from STC – except
on 18 November)

Respondent: Mr R Ryan of Counsel
(instructed by DWF Law LLP)

JUDGMENT having been sent to the parties on 25 November 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

1. These reasons are given at the request of the claimant who wrote to the Tribunal on 3 December 2019 to make that request.

2. The complaints

On presenting the claim Mr Yousef had intimated complaints of direct race discrimination, indirect race discrimination, harassment related to race, victimisation and unfair dismissal. However at a preliminary hearing for case management conducted by Employment Judge Rostant on 7 June 2019 the

claimant withdrew the indirect race discrimination and harassment complaints. At an open preliminary hearing conducted on the same day by the same Judge, the unfair dismissal complaint was struck out on the basis that the Tribunal had no jurisdiction because the claim had been presented late.

It follows that the two complaints which we have been required to adjudicate on are :-

- Direct race discrimination.
- Victimisation.

3. The issues

These had been discussed and clarified with the parties at the hearing in June. However at the beginning of our hearing we reiterated the issues as follows:

Direct race discrimination

- 3.1. Were any aspects of this complaint presented out of time – in particular those occurring prior to 26 October 2016?
- 3.2. Was there conduct extending over a period where the last act was in time so as to afford jurisdiction under the provisions of the Equality Act 2010 section 123(3)?
- 3.3. Alternatively, if any part of the direct discrimination complaint is out of time would it be just and equitable to extend time?
- 3.4. Was the claimant subjected to excessive scrutiny and an informal competence procedure?
- 3.5. Was the claimant “side lined” because he was prevented from going on a course on higher maths teaching and because his head of department allegedly failed to respond to the claimant expressing interest in teaching further maths?
- 3.6. Was the claimant constructively dismissed when, ostensibly, he resigned on 5 July 2018?
- 3.7. If the answers to 3.4, 3.5 and 3.6 above are, in any case, ‘yes’, was that because of the claimant’s race?

The claimant relies upon the comparators Mr Best and Mr Tim Higgins.

Victimisation

- 3.8. Were any aspects of this complaint presented out of time and if so would it be just and equitable to extend time?
- 3.9. It was common ground that the claimant’s grievance dated 16 May 2018 was a protected act. However Employment Judge Rostant had found at the June hearing that an email of 6 December 2017 sent to the head teacher by the claimant was not a protected act.
- 3.10. Was the claimant subjected to detriments because:-
 - His grievances were rejected and/or
 - Because there was excessive delay in investigating the claimant’s 19 July 2018 grievance?

- 3.11. If the claimant was subjected to those detriments, was that because he had done the protected act?

4. The evidence

The claimant has given evidence but called no other witnesses. The respondent's evidence has been given by Mr James Osbourne, at the material time director of mathematics (head of department); Mr Chris Wilson, at the material time deputy head teacher, Dr I Gilbert, at the material time the head teacher and Mrs Mo Laycock, independent external educational professional (part of the grievance panel).

5. Documents

The Tribunal have had before them an agreed bundle comprising two volumes and running to approximately 560 pages. Some additional documents were put in during the course of the hearing.

6. The Tribunal's findings of fact

- 6.1. The claimant describes himself as being of middle eastern origin.
- 6.2. The claimant is a maths teacher and his employment with the respondent school in that capacity began on 1 September 2010. At the material time he was also second in the maths department.
- 6.3. For the purposes of this claim, the employment was uneventful until March 2017. On 13 March 2017 one of the claimant's lessons was formally observed by Dr Gilbert, the head teacher and Mr Osborne, head of the maths department. The record of that observation is at pages 300 to 301 in the bundle. Good points and bad points were observed. The pupils were well behaved and their engagement was good. What was described as an excellent challenging real life problem had been presented as a plenary. However there was concern about the level and nature of the work which the students were expected to complete. Some of the questions posed lacked context and any need for students to think beyond the demonstrated method. The "challenging real life problem" could have made for a much more challenging and interesting lesson if had it been used as the main activity. One of the recommended future strategies for the claimant was that he should aim high and differentiate down so that all students should be routinely operating at the edge of their comfort zone. The overall grade given to the claimant was "Below", which was shorthand for below the Bradfield standard.
- 6.4. In September 2017 the school underwent an Ofsted inspection. An extract from Ofsted's report is at pages 303 to 314. Ofsted found that Bradfield School was a school that required improvement. One of the areas where the school needed to improve was to ensure that the most able pupils were fully challenged. (Page 304). The report noted that a new head teacher (Dr Gilbert) and a new deputy head teacher (Mr Wilson) had been appointed and since that time improvements had begun to emerge. Ofsted noted that the senior team understood the necessity for a complete change of culture and that team, with the full support of governors, had the capacity to make the changes that were needed which included calling members of staff to account. (Page 305). Ofsted also observed concerns about the quality of teaching. They felt that this was inconsistent and that pupils had not made

good progress across a range of subjects particularly in English, mathematics and science. They observed that “some teaching, especially in mixed ability classes, fails to match work to pupils’ differing needs because the planning of lessons does not cater for all abilities. Sometimes work is directed towards the middle and lower ability pupils and does not fully challenge the most able, who find it too easy.” (Page 307).

- 6.5. Mr Wilson has given evidence to us and we understand his appointment to have been in effect, in the role of a ‘trouble shooter’. He explained to us that the school was very nearly assessed as one which should go into special measures and it was in part through Mr Wilson’s representations and assurances that he felt that improvements could be achieved that that was avoided. However “requires improvement” was we were told a serious matter.
- 6.6. In or about September 2017 Mr Wilson introduced a departmental work scrutiny protocol (see pages 256 to 257). This set out a process whereby during what was described as phase 1 there would be a two week period during which a one hour learning walk would be carried out by the relevant subject leader and the senior leadership team link. Mr Osborne described learning walks as a quality assurance tool and as a means of quickly identifying strengths and areas for development, either for the school, a department or an individual within the department. Mr Wilson in his witness statement (para 15) described learning walks as a process where those doing the walk would drop into a class for a few minutes to monitor lessons so as to ensure that the teaching of those lessons was being delivered to a high standard.
- 6.7. The work scrutiny protocol goes on to provide that all staff should receive their written feedback and action points within one week of the work scrutiny. If staff had not met expectations at phase 1 the protocol provides that subject leaders should meet individually with any staff member who has been identified for what is described as phase 2. Phase 2 would involve the member of staff not meeting expectations being placed on a subject leader support plan which would be drawn up with the support of the SLT link.
- 6.8. Mr Wilson’s evidence was that initially no formal records were kept as to which teachers had received learning walks. However after consultation with the teachers and their union representative it was agreed that there should be a formal record. From January 2018 onwards the respondent kept a spreadsheet, also known as a tracker, and that appears at page 520 in the bundle. By day four we had been provided with a colour copy which made this document easier to understand.
- 6.9. Mr Wilson’s evidence was that he was absolutely certain that prior to the introduction of the spreadsheet the claimant was not singled out to be visited on these learning walks any more than any other teacher was. Mr Wilson said that on those occasions when he visited a class being taught by the claimant he would also visit other members of the maths department teaching nearby (paragraph 21 of his witness statement).
- 6.10. On Thursday 30 November 2017 Mr Wilson and Mr Osborne observed one of the claimant’s lessons as part of a learning walk. In the event it was a revision lesson. In his evidence, Mr Wilson acknowledged that now, over

two years later, it was difficult for him to recall the details of what was observed on this occasion. He believes that the main issues were about pace and challenge. Mr Osborne's recollection is that the claimant did not appear to be setting work that was challenging for the pupils. There was a discussion after the brief observation between Mr Osborne and Mr Wilson who agreed that the lesson was some way below the required standard they expected. It was felt that feedback needed to be given and we now note that the work scrutiny protocol provides for this to happen.

- 6.11. During the course of giving evidence, Mr Wilson was obliged to accept that paragraph 31 of his witness statement and a couple of paragraphs that followed that gave an inaccurate picture of what happened next. In fact we noted that Mr Ryan, representing the respondent, had received instructions directly from Mr Wilson prior to Mr Wilson giving evidence to this effect. As initially prepared, Mr Wilson's witness statement implies that he and Mr Osborne sought to have a feedback meeting with the claimant on the day of the observation. He now accepts that that was not the case.
- 6.12. In fact on 3 December 2017 Mr Wilson sent an email to the claimant in which he enquired whether he and Mr Osborne could meet with the claimant to discuss feedback from the learning walk that had taken place on the preceding Thursday. The email (which is at page 319) goes on to note that Mr Wilson and Mr Osborne had some questions and feedback that would be best addressed in person. Mr Wilson told us that at this stage he did not want to take any formal steps to address the concerns and instead his initial aim was to try and reach an understanding of whether there was any reason that the lesson did not appear to have gone well.
- 6.13. The feedback meeting took place the next day, Monday 4 December 2017. The claimant was informed that Mr Wilson and Mr Osborne had been concerned about what they perceived to be a lack of challenge and a poor delivery pace. Some students were not being stretched. The claimant's reaction at this feedback meeting was that he did not share the views of Mr Wilson and Mr Osborne about his lesson. He told them that they were mistaken, although eventually towards the end of the conversation he agreed that he would focus on the areas to improve. Both Mr Wilson and Mr Osborne deny that they conducted this meeting in an aggressive or otherwise unprofessional manner. Mr Osborne points out that those who undertook learning walks had been specifically briefed to look out for challenge as an issue – no doubt having regard to the sentiments expressed in the Ofsted report about this. Mr Wilson described the claimant as being quite defensive and generally being unwilling to accept the feedback which he and Mr Osborne were providing.
- 6.14. Because of the claimant's reluctance to accept that feedback, Mr Wilson decided that it would be appropriate to write an email to the claimant and that was done on 5 December 2017. A copy of that is at page 320 in the bundle. The email begins by thanking the claimant for his willingness to reflect, although we find that in the context of the evidence we have received about what had actually happened at that meeting that was a somewhat diplomatic gloss. The email went on to record that both Mr Wilson and Mr Osborne had been concerned about the level of challenge in the lesson and the fact that only one child was engaging in thinking during the questioning

which had been observed. The email went on to say that it was recognised that challenge and high expectations could be a real strength of the claimant's teaching as witnessed in other lessons. They were therefore confident that the claimant was able to meet the teacher standards in regard to that. They recognised that that had been a revision lesson but said that they would still expect a greater degree of challenge. The email concluded by noting that the claimant had agreed to review his planning and resources, especially for the year 7 group in question, so as to ensure a consistent level of challenge was offered to all students and to further develop the number of students thinking during the questioning phase of lessons. The claimant was offered further information or support from either Mr Wilson or Mr Osborne if required.

- 6.15. On 6 December 2017 the claimant wrote an email to Mr Wilson and Dr Gilbert. A copy is on page 321. Referring to Mr Wilson's email the previous day, the claimant wrote that after some reflection:

"It reinforced a feeling that I had since September. Unfortunately and for a number of reasons I feel that I am no longer wanted in this school and for reasons unknown to me I am being undermined and pressured into leaving my post.

I believe that I am a competent teacher and always work to the highest possible standards BUT if you feel that you have reasons to question my competency then I am happy to start competency procedures".

We should add that other than the matters we have referred to above, the claimant has not explained to us why, in December 2017, he felt he was no longer wanted.

- 6.16. Dr Gilbert responded to that email by inviting the claimant to "pop down" and see him for a chat when he was free on the following day. In Dr Gilbert's witness statement at paragraph 8 he refers to the claimant coming to see him with the concerns that form the basis of this claim in or around April 2018. However during the course of his evidence Dr Gilbert accepted that this in fact would have been December 2017, in response to the email we have just referred to. During the course of cross-examination Dr Gilbert had difficulty recollecting what precisely was discussed during this meeting. In paragraph 5 of the claimant's witness statement he says that he told Dr Gilbert that Mr Wilson and Mr Osborne had treated him completely differently to the rest of the maths department and that he felt that they were keeping records in order to use that against him in the future and to force him out of his job. The claimant recollects that Dr Gilbert reassured the claimant that he would never allow that to happen. Dr Gilbert said that he could not recall the claimant saying that but he didn't dispute that he did. He also agreed that he may have said that he would never allow that to happen.
- 6.17. In late January or early February 2018 parent's meetings were held and Mr Wilson received some feedback from the parents of three students who the claimant taught and who happened to be in Mr Wilson's year 7 tutor group. The feedback was that the work that was being given to these three students by the claimant was at too low a level. One of the fathers of these students was himself a teacher, in a primary school, and he was concerned that his son appeared to be doing the same type of work as had been done

in year 4 at primary school. During the course of cross-examination Mr Wilson explained that the parents were merely expressing a concern and were not making an official complaint. Mr Osborne, who was notified of this matter by Mr Wilson, told us during the course of his cross-examination that he did not feel that the claimant should be told about these concerns and the parents did not want to be identified. Mr Osborne explained that there were frequently complaints from parents about all the teachers in the department, including the claimant, and teachers were not always informed of that.

- 6.18. On 15 February 2018 one of the claimant's lesson was again visited on a learning walk. Mr Wilson described that as a positive learning walk (see paragraph 43 of his witness statement) and by reference to the tracker spreadsheet at page 520 to 520A, we were told that the absence of any colouring against that date in the appropriate column signified a satisfactory result.
- 6.19. The tracker spreadsheet also shows a learning walk on 7 March 2018 where the colouring is blue which signified 'teaching standards not met'. There was a further learning walk on 16 April 2018, and again that is recorded as 'teaching standards not met'. Mr Wilson explained that although he had significant concerns about the claimant's teaching, no feedback was given in respect of the April 2018 learning walk because Mr Wilson was aware that imminently there would be a formal observation of the claimant as part of the routine interim performance management process.
- 6.20. That observation was on 19 April 2019 and it was again conducted by Mr Wilson and Mr Osborne. The lesson observation pro forma is at pages 327 to 331. It was observed that three students had completed the first task before the late coming students had sat down and there was no further task for those three students to attempt. Referring to one piece of work, the notes acknowledge that there were elements of that task which could be described as challenging, but the activities and examples were not carefully chosen to support challenge and allow students to make progress in their learning or thinking. A lack of pace was also observed. The summary at the end of the notes recorded various strengths which included the fact that students were willing to contribute to class discussions and that the claimant had been circulating the room continually to give support on a one to one or one to two basis. However there was an area for development which was described as "Planning lessons which contain challenge for all students and are supported by specific teacher led intervention/questioning that takes account of likely difficulties/misconceptions and addresses them in a timely and clear manner". (Page 331).
- 6.21. The claimant alleges (paragraph 11 of his witness statement), that during the course of this lesson observation Mr Wilson threw the claimant's lesson plan on to the floor and that this made the claimant feel very intimidated. Mr Wilson's evidence is that he would never dream of behaving in a way that could be described as intimidating. He strongly denied that he had thrown any papers on to the floor, as to do so would have been incredibly unprofessional in front of a class of pupils. He says that he was sitting at the back of the class and had a lot of papers to hold but no desk in front of him. It was for that reason that he placed some of those papers on the floor.

Mr Osborne says that he has no recollection of Mr Wilson throwing the lesson plan on the floor and he goes on to say that his knowledge of Mr Wilson as an individual led him to be very sceptical of that allegation. He could not fathom that Mr Wilson would behave in such an unprofessional way.

- 6.22. On 20 April 2018 there was a feedback meeting with the claimant about the preceding days' lesson observation. The claimant alleges that Mr Wilson's comment was that the first two minutes of the lesson had been okay but the rest was rubbish. It seems however that the claimant interpreted a gesture and sound that Mr Wilson allegedly made as indicating that it was rubbish, rather than him actually using that word. The claimant has on numerous occasions during the hearing demonstrated the gesture which was a stretching out of the arms and making what the claimant describes in his witness statement as a spitting sound, but as demonstrated to us was more of a raspberry sound. Mr Wilson denies that he moved his hands in any sort of unusual way and particularly denies that he made any sort of noise. He denies that he referred to the claimant's lesson as rubbish and points out that whilst there were a number of weaknesses in the lesson which had been observed, those were complemented with a number of strengths and those were communicated to the claimant he said in a fair and even handed manner. No notes were kept in respect of this meeting. In cross-examination Mr Wilson accepted that the claimant did not feel that his concerns were fair or accurate. Mr Wilson believed that that could have been addressed in an informal support plan and acknowledged that if he (Wilson) had been overzealous, the informal support plan would have as he put it "called that out". Mr Osborne was not present for the whole of the feedback meeting and Mr Wilson explained to us that he anticipated that his conversation with the claimant about support would be 'emotive' and he felt that this was best dealt with one to one. In addition, if there was to be a support plan the best person to undertake that would have been Mr Osborne and so it was best that he did not hear all that would be said during the course of the 20 April meeting.
- 6.23. At the end of this meeting Mr Wilson considered that the appropriate course of action would be to start an informal support plan for the claimant. That would be under the respondent's appraisal policy rather than being a capability procedure. One of several documents which were not initially in the bundle was the appraisal policy and this has been inserted in the bundle during the course of the hearing as pages 199a to 199o. The latter page has a flow chart which shows the interrelationship between the appraisal policy and the capability policy. In short if a support plan under the appraisal policy does not result in sufficient improvements and there are serious concerns, the matter would then move over to the capability policy timetable.
- 6.24. On 26 April 2018 the claimant sent an email to Dr Gilbert asking if he could observe one of the claimant's lessons. Dr Gilbert's response was that he needed to talk to Mr Wilson about the conversations which Mr Wilson and Mr Osborne had had with the claimant before he carried out any lesson observations (336). In the event understand that Dr Gilbert did not observe a lesson.

- 6.25. Mr Wilson did speak to Dr Gilbert about the support plan issue and Dr Gilbert advised Mr Wilson to speak to HR as to the appropriate procedure. That was because Mr Wilson, who had not worked in Sheffield schools previously, would not have been aware of the procedure.
- 6.26. On 26 April 2018 the claimant received an email from the NUT who advised that they had been contacted by Capita HR to arrange a date for an appraisal meeting. The 9 May had been suggested (page 33a).
- 6.27. On or about 27 April 2018 the claimant had a meeting with Dr Gilbert. Dr Gilbert describes the claimant as being in a state of distress during this meeting and the claimant says that he told Dr Gilbert that he was having difficulty breathing and had a severe chest pain. The claimant alleged during the course of this meeting that Mr Osborne and Mr Wilson were trying to drive him out of the school and that was causing him to feel very stressed. It was necessary for the claimant to leave work and go home.
- 6.28. Subsequently the claimant went to see his GP and on 30 April 2018 he was signed off work. In the event the claimant would never return to work.
- 6.29. On 16 May 2018 the claimant invoked the grievance procedure. His complaint was that he had been bullied over the last academic year by Mr Wilson and by Mr Osborne. He said that he had been subjected to an extraordinary level of scrutiny, often followed by unwarranted and unprofessional criticism. He also alleged that he had been blatantly sidelined from development in the maths department of which he was deputy head. He described the appraisal improvement plan as having no basis and he was now absent from work through work related stress. He went on to write:
- “I will contend that this bullying is racist as my treatment and the expectations of me are quite unlike those experienced by any other member of staff. I am currently the only BME member of staff at Bradfield. I will also identify an instance where racist abuse towards me from students have been unsatisfactorily dealt with in the past”. (see page 337).*
- 6.30. By reason of the claimant’s absence from work, the proposed support plan was never formulated or put into practice.
- 6.31. On 6 June 2018 there was an initial verification meeting in respect of the claimant’s grievance. This was conducted by Dr Gilbert. HR were also present and the claimant was accompanied by his union representative, Mr Blackie. Notes of this meeting are at pages 338 to 340. When Dr Gilbert asked the claimant how he was feeling at the moment the recorded reply from the claimant is:
- “I feel shit, you have destroyed me”.*
- During the meeting the various learning walks and observations were discussed. The meeting concluded with Dr Gilbert saying that he would look at everything and write back to the claimant with a proposal. The HR representative expressed the view that it would be best to try to resolve the matter informally.
- 6.32. On or about 15 June 2018 Dr Gilbert became aware that the claimant had applied for a job at a neighbouring school, Fir Vale. By 21 June 2018

Dr Gilbert was aware that the claimant had actually been offered a job at that school. It was in that context that Dr Gilbert wrote, on 22 June, to the claimant's trade union representative Mr Blackie. In that email Dr Gilbert notes that he had, the preceding evening learnt that the claimant had got the job at Fir Vale. Having spoken to HR both Dr Gilbert and HR thought that it would not now be necessary to have the proposed meeting with the claimant on 27 June to continue the discussion of the grievance. Dr Gilbert wrote that it was felt that this would only serve to continue the claimant's anxiety and distress.

- 6.33. The response from Mr Blackie was that both he and the claimant were keen for the meeting to go ahead because the matter was an investigation into alleged racist mistreatment and that needed to be addressed regardless of the claimant's future employment. Mr Blackie expressed the view that he found it most surprising that Dr Gilbert would suggest that the matter was dropped (see page 352). In an email which Mr Blackie had sent to the claimant earlier that day Dr Gilbert's email was described as being profoundly insulting, a sentiment with which the claimant agreed. He felt that it was both insulting and outrageous. He wrote to Mr Blackie that perhaps the school should be informed that *"I will not stop this grievance until both racists are struck off the teacher's register and for me to be compensated for all the stress, anxiety, humiliation, discrimination ... that I suffered this year. The sooner we start the Tribunal the better"*. (Page 394).
- 6.34. The proposed meeting did take place the following week – on 4 July 2018. Apparently no notes of this meeting were kept but subsequently a grievance outcome letter was sent (see below). We understand however that the claimant was told at the 4 July meeting that his grievance had not been upheld.
- 6.35. On 5 July 2018 the claimant wrote his letter of resignation. A copy appears on page 348. Writing to Dr Gilbert, the claimant asks that the letter is accepted as his notice of resignation with the employment to end on 31 August 2018. No reasons are given for the resignation.
- 6.36. On 13 July 2018 Dr Gilbert sent an email to the claimant and Mr Blackie (page 354) which had attached a letter which we understand to be the letter at pages 344 to 347, although in error that is dated 2 July. Dr Gilbert reported that in investigating the grievance he had spoken to both Mr Wilson and Mr Osborne. The letter purports to set out the responses of those two individuals to various allegations in the claimant's grievance. Mr Wilson did not accept the claimant's contention that the claimant had nine learning walks in the period up to Christmas 2017, whereas other staff in the maths department had only had two or three. Mr Wilson had responded to this by saying that all staff were seen on a regular basis. Mr Wilson is recorded as giving the same response to the allegations about his behaviour at the 19 April lesson observation and the feedback meeting on the following day as he has given to us during this hearing. Dr Gilbert concluded the letter by stating that he was satisfied that appropriate management intervention had taken place both with the claimant and across the school when needed. He referred to the terms of the Ofsted rating and what he described as the absolute need across the school to raise teaching and learning standards. He was sorry that through those interventions the claimant had come to feel

the way that he did. In his discussions he had not come across any evidence that suggested that the claimant's race was a factor in any of the incidents which the claimant had described.

- 6.37. On 18 July 2018 the claimant again wrote to Dr Gilbert. Describing the earlier process as informal resolution the claimant requested that his complaint should now proceed under the respondent's dignity and respect policy so that there could be a formal resolution. We understand that the 16 May grievance had been raised under the Grievance Policy and Procedure (224). The Dignity and Respect at work Policy and Procedure is at page 120. The claimant explained that the grounds for his making this request was that he had reason to believe that some of the witness testimony could be shown to be untruthful under further investigation and he believed that the dignity and respect policy had not been faithfully followed thus far. We should add that 18 July 2018 was also the last day of the summer term.
- 6.38. The claimant's employment terminated on 31 August 2018 in line with the date which the claimant had offered in his letter of resignation. However the respondent points out that that was shorter notice than would normally have been required, but they were agreeable to accepting the date proposed by the claimant so that he could start work at his new school in September 2018.
- 6.39. The first stage formal meeting for this phase of the grievance process took place on 3 October 2018. The panel comprised Dr Gilbert, Mr Willington a governor and Caroline Jones from Capita HR. The notes of this meeting are at pages 373 to 379. During the course of this meeting the claimant described Mr Wilson as a racist on the ground that the claimant had been sent what he described as a written record of what he also described as a failed learning walk (the 5 December 2018 email at page 320). There is a note indicating that at one point Miss Jones had to stop the meeting "due to Rafiq (the claimant) continuing to swear despite being asked repeatedly to control his language". (Page 378).
- 6.40. The panel, noting that the claimant was now expressing concerns about the way Dr Gilbert had handled the initial grievance process, felt it best if Dr Gilbert left the panel. Mr Willington wrote to the claimant advising him of that on 8 October 2018 (page 382). It was now intended to ask an independent educational professional, possibly a former head teacher, to join the panel.
- 6.41. It took some time for the respondent to be able to locate a suitable person, or at least someone who would not charge a significant fee. It was not until October that the services of Mrs M Laycock were retained, although she could not start immediately as she was about to go on holiday and there was then the half term holiday.
- 6.42. By 31 October 2018 the claimant was writing to Mr Willington stating that he was "very disappointed and outraged" that the grievance investigation had not yet started. On 1 November 2018 Mr Willington replied to the claimant. He was sorry that the claimant felt as he did but he was anxious that the most complete and rigorous investigation that was possible was undertaken.

The allegations which the claimant had raised and the outcomes which he was seeking – disciplinary action against the alleged perpetrators and substantial damages - were extremely serious.

- 6.43. The panels' report was published on 14 December 2018. A copy is at pages 427 to 444. As part of the investigation all the maths teachers had been interviewed and the report stated that they had all accepted that more scrutiny of teaching and learning was very necessary and long overdue at the school. It was accepted by those teachers that learning walks were now a regular feature. The panel's understanding was that the claimant had not been the only teacher to receive feedback in respect of improvements to practice or be offered a support programme to enable that. However the difference in the claimant's case was that, according to Mr Wilson, the claimant had been the only teacher not willing to engage in that process. The claimant had been unwilling to reflect or act on the feedback given.
- 6.44. In their conclusions on the issue of alleged racist bullying, the report noted that there had been increased scrutiny and vigilance since 2017 in respect of teaching and learning across the school and other staff had gone on to a support plan. Those teachers had accepted that support although sometimes reluctantly and with some anxiety. The panel felt that the increased scrutiny strategy was necessary and whilst being common to 'all schools', had not existed at Bradfield previously. Because of that, the change in pace and scrutiny had, the panel believed, caused some difficulties with staff and there had been an amendment of the policy in January 2018 with regard to learning walks (presumably the introduction of the tracker among others). Both Mr Wilson and Mr Osborne had been spoken of highly by those interviewed and the panel found no evidence of racist behaviour or bullying by either of them. There was no evidence that the claimant had been observed more than other staff. In fact some maths teachers had received more learning walk visits than the claimant.
- 6.45. A copy of the report was sent to the claimant on 20 December 2018 and that was accompanied by what appears to be a letter from Mr Willington to the claimant at pages 425 to 426. The version we have is not set out precisely in letter form. This reiterated and set out various recommendations in the report although these were of general application, rather than being specific to the claimant's case.
- 6.46. On 17 January 2019 the claimant lodged an appeal against this stage of the process (see pages 445 to 446). Among other things he was now complaining that the grievance investigation had been conducted in an unfair manner and had taken too long.
- 6.47. On 13 February 2019 the respondent invited the claimant to attend an appeal hearing on 19 March 2019. However on 11 March 2019 the claimant informed Miss Jones of HR that he did not wish to proceed with the appeal (see page 455).
- 6.48. Having gone through the ACAS early conciliation process the claimant presented his claim to the Tribunal on 18 March 2018.

7. The parties' submissions

7.1. The claimant's submissions

Mr Yousef had prepared a written closing submission. He also made oral submissions. In his written submission the claimant points out how hard he worked for the respondent. He said that he always listened to advice and accepted constructive criticism. The respondent's position that he had not accepted advice and had resisted change was a total fabrication based on false accusations, manipulating data and being untruthful. He suggested that the respondent had purposely delayed the grievance process so that the application to the Tribunal would be out of time. The claimant referred to his 2018 results. At the conclusion of his written submission the claimant pointed out that whilst he considered himself to be fluent in English it was his second language and that might mean that he had used words in court that could be interpreted as inaccurate. We should add that we had not perceived the claimant as having any difficulty in communicating in English and there had never been any question of him needing an interpreter.

In his oral submissions the claimant contended that the 20 April 2018 feedback meeting had not contained anything constructive. Ofsted had not just criticised the maths department but rather all the departments. That meant that everyone needed to do something to raise their game but it seemed that only the claimant had done that. With regard to time issues the claimant said that he had relied upon his union representative. Whilst he knew of the existence of Employment Tribunals, he did not know about time limits.

7.2. Respondent's submissions

Mr Ryan had prepared written submissions and also addressed us orally. In his written submission the legal framework relevant to this claim is set out. Mr Ryan goes on to point out that the claimant had accepted that as a result of the Ofsted report the need to monitor and challenge staff was a plausible and understandable aim. However the claimant's case appeared to be on the basis that such concerns were effectively a smokescreen to cover up the discriminatory behaviour of Mr Wilson and Mr Osborne.

Mr Ryan contended that the claimant had completely misinterpreted Mr Wilson's 5 December 2017 email. That was because the claimant regarded it as being a record for the future. Mr Ryan went on to address the apparent dichotomy between the claimant's progress 8 data being good (grades achieved by students) but nevertheless a proposal that the claimant be put on an informal support plan. Was that enough to infer discrimination? In Mr Ryan's submission, 'no'. Mr Osborne and Mr Wilson had addressed that in their evidence. Lesson observations did not refer to grades and the progress 8 data only helped to a certain extent because it reflected the results of the top set. There was also the issue of the claimant's reaction to the feedback which Mr Wilson and Mr Osborne gave. The respondent accepted that the claimant felt genuinely aggrieved and was himself convinced that he had been discriminated against. However many of the allegations which the claimant made appeared to be based upon misunderstanding. This was a sad case which had had a broad impact.

The claimant's case was based on nothing more than an assertion of a difference of treatment and a difference in race. However in **Madarassy v Nomura**, Mummery LJ had explained that that would only indicate a possibility of discrimination and was not, without more, sufficient material

from which the Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

In his oral submissions Mr Ryan acknowledged that it had been unfortunate that some of the respondent's witness statements as presented to the Tribunal had not initially been accurate. Mr Ryan said that the respondent's witnesses had not given evidence in a Tribunal before and some witnesses feel that they are not able to change or amend statements which lawyers have drafted.

8. The Tribunal's conclusions

We remind ourselves that in a case where discrimination is alleged, the initial burden of proof is on the claimant. The Equality Act 2010, section 136 provides:

"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 ... but (that) does not apply if A shows that A did not contravene the provision".

This is often described as a shifting burden. The initial burden is on the claimant but, in the circumstances described in the section, the burden can pass to the respondent, who will then be required to explain their apparently discriminatory behaviour.

In the case of **Madarassy v Nomura International Plc** [2007] IRLR 246, a case to which we have been referred by Mr Ryan, Mummery LJ stated:

"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".

With this in mind, our conclusions in respect of the various issues before us are set out below:

8.1. The time issue

In circumstances where, for the reasons set out below, we have found that the claim fails on its merits, it is now academic to determine this jurisdictional question. On the basis that we have heard this claim over six days, we have taken the view that this approach, avoiding the need to exclude any of the material and evidence which has been put before us, is the preferable course. We should add that it appeared to us that there was at least an arguable case for contending that there had been conduct extending over a period or that failing that it could have been just and equitable to extend time.

8.2. Direct race discrimination

By way of introduction, we accept that the claimant genuinely believed that he was being discriminated against because of his race. He has explained to us that that belief arose because he was the only teacher from an ethnic minority employed by the respondent.

Direct race discrimination will occur where there is less favourable treatment of the employee because of, in this case, his race. Accordingly first we need to determine whether the various matters which the claimant says were less

favourable treatment occurred and if so whether they were actually less favourable.

8.2.1 Was the claimant subjected to more learning walks than other teachers in the Autumn term (September 2017 to December 2017)?

The claimant contends that he was visited nine times whereas some colleagues in the maths department were only visited three times. Unfortunately the respondent kept no documentary record of learning walks for this period. We have been told that Dr Gilbert may have kept a record for his own purposes, but that is not in the trial bundle. The respondent has explained that as Dr Gilbert is no longer at the school, documents such as these are likely no longer to be in existence. We have not heard evidence from any other teachers within the maths department other than Mr Osborne. As we have observed above, Mr Wilson's evidence is that he is absolutely certain that the claimant was not singled out. If he dropped in on a lesson of the claimant's he would also do the same for other members of the maths department teaching in nearby classrooms.

On the balance of probabilities we find that the claimant was not visited more frequently than other teachers. However even if he was, none of those learning walks, with the exception of that on 30 November 2017, resulted in any concerns being expressed about the claimant's teaching. We find the respondent's explanation for there being a need for greater scrutiny of teachers throughout the school because of the Ofsted rating to be a plausible explanation for the scrutiny of the claimant.

8.2.2 Was the 30 November 2017 learning walk less favourable treatment of the claimant?

As we have noted, the evidence of Mr Wilson and Mr Osborne was that there were some concerns about what they saw during a relatively brief drop in to a lesson being conducted by the claimant on this date. The claimant has questioned the credibility of Mr Wilson's evidence because in the version of the witness statement which Mr Wilson had signed on 4 November 2019 he had stated that the claimant had resisted verbal feedback on 30 November, hence the need for an invitation to the meeting on 4 December 2017. However, as we have noted above, during this hearing Mr Wilson realised, (before he actually gave evidence) that that was wrong. There had been no attempt to give feedback on 30 November. Instead the reason for the invitation to the meeting was the level of concern about the lack of challenge in that revision lesson. Mr Wilson had explained to us that by the time he was being asked to consider the witness statement which the respondent's solicitors had drafted, that is in November 2019, almost two years had elapsed since that particular learning walk. He has also explained that he subsequently left Bradfield School to become head of a school in Liverpool that had gone into special measures. That, he told us, had been a particularly difficult period of his career. In his new school he had been required to deal with such issues as gang violence. In these circumstances we are prepared to accept that the initial failure to recollect the precise chronology or the failure to notice that perhaps the solicitors had

got the chronology slightly wrong, is perfectly understandable and does not diminish the credibility of Mr Wilson's evidence overall.

The respondent accepts that no other teacher was invited to attend a feedback meeting after a learning walk visit, but again we are asked to take into account the context namely the Ofsted rating. The Ofsted report had specifically identified the need for teaching to challenge the most able pupils as being an area where this school needed to improve. The claimant has not put before us any evidence to suggest that a teacher of a race other than his would have been treated differently than the claimant.

8.2.3 Mr Wilson's email to the claimant of 5 December 2017

The claimant labels this as the record of a failed learning walk. He also contends that it represents Mr Wilson and Mr Osborne going through what the claimant has described as one of the 'hoops' that would be necessary before the claimant could be subjected to a capability procedure and then dismissed. On the contrary, we find that Mr Wilson's email was a diplomatic and balanced communication which, we have to say glosses over the claimant's actual hostile reaction to the feedback given at the meeting on the preceding day. The email contains a recognition of the claimant's strengths together with what we find to be constructive criticism on the issue of a consistent level of challenge being required, but being absent in this brief observation. The email says in effect "we know you can do it, but that was not what we saw last week".

We find that the claimant's reaction to the meeting and the follow up email – by his own email of 6 December 2017 (page 321) was a significant overreaction. The claimant at this stage could only attribute his perceived treatment to reasons unknown. There was no allegation of race discrimination at this stage.

The claimant's case is not supported by the reaction of Mr Wilson and Mr Osborne to the informal complaints raised by the parents of three students at the parents' meeting early in 2018. If, as the claimant alleges, Messrs Wilson and Osborne were seeking to build a case against the claimant in terms of his capability with a view to him being dismissed then the Tribunal would have expected these complaints, which after all chimed with Mr Wilson and Mr Osborne's own concerns about the claimant's teaching, to have been formalised to increase pressure on the claimant. However that was not done. The same observation applies to the fact that a learning walk conducted on 7 March 2018, categorised as teaching standards not met, did not result in any action being taken against the claimant. On the claimant's case, the respondent therefore would have missed two opportunities to proceed through another "hoop".

8.2.4 The lesson observation on 19 April 2018

As we have noted, this was also conducted by Mr Wilson and Mr Osborne. Whilst there were some concerns we note that the summary on the lesson observation pro forma includes both strengths and areas for development. As we have also noted the claimant contends that during this observation Mr Wilson threw the claimant's lesson plan to the floor, which the claimant suggests was done in a contemptuous way. We have taken into account Mr Wilson's strenuous denial that this was what happened and he has given

us his explanation for placing, rather than throwing some papers on the floor. Having heard from Mr Wilson and assessed, we hope accurately, his demeanour and professionalism we accept that he would not behave in such a way. We doubt that any experienced teacher, let alone a deputy head with, as we understand it, a reputation for dealing with difficult schools, would have indulged in such theatre in plain sight of the pupils. We find this to be an example of the claimant grossly, but possibly innocently, misinterpreting events.

8.2.5 The 20 April feedback meeting

There are then the claimant's allegations about Mr Wilson's alleged comments and behaviour during the course of the 20 April feedback meeting – the waving of arms, sound effects and referring to the lesson as rubbish. As we have noted, it is unclear whether the claimant is alleging that Mr Wilson actually said 'rubbish' or just allegedly implied that by making the gesture and the alleged spitting or raspberry sound. Mr Wilson's evidence to us was that it would be unhelpful to say that a lesson had been rubbish. He would never say that as it would provide no development and it would be too emotive as he put it. Having regard to Mr Wilson's experience role and again taking into account the frank and open way in which he has given his evidence (on more than one occasion he explained he realised he was not perfect but nor was he racist) we find that the "rubbish" comment was neither made nor implied by gesture. Mr Wilson accepts that by this stage he felt that it would be appropriate to start an informal support plan and we accept that this can properly be regarded as being less favourable treatment – although of course in the event the claimant was never actually required to undergo such a support plan. However, we are satisfied that this plan was being considered under the appraisal policy rather than under the capability policy. We do not regard the contact Mr Wilson had with HR after reaching the decision that a support plan was appropriate to be sinister. As we have noted, Dr Gilbert advised on this course and now that we have had the opportunity to see the appraisal policy itself we note that it actually requires a manager to check their position with HR when a support plan is being proposed and that the employee is to be offered the support of their union.

8.2.6 Was the claimant "side-lined"?

We have not heard very much evidence about this aspect of the claimant's case. The claimant contends that he was denied an opportunity to attend a further maths course and that a colleague, Mr Best, was preferred because he was allowed to go on such a course. Mr Osborne's evidence was that the claimant took no steps to enrol on the further maths course, whereas Mr Best, who Mr Osborne describes as being far more proactive, did arrange his own place on such a course. We were told that teachers were expected to use their own initiative in seeking out courses which they considered would be helpful for their career development. It was certainly not, as the claimant may be seeking to suggest, that he had applied for the course and was refused it. Moreover Mr Osborne's unchallenged evidence was that the claimant had shown a distinct disinclination to teach A level maths or further maths. To that end he preferred not to take his year 12

class forward into year 13 (see Mr Osborne's witness statement at paragraph 32).

The respondent's evidence has also been that whilst it is not disputed that the claimant was hardworking and arrived at work early and put in long hours, he did not take the initiative that would normally have been expected of a second in department. Mr Osborne has also spoken of the claimant's habit of spending much of his non-contact time in his car parked off the school site. Mr Osborne also refers to what he describes as unsolicited feedback from other members of the department to the effect that Mr Best was taking on responsibilities which would normally fall to the second in department and in practical terms staff tended to turn to Mr Best for help because the claimant was often unavailable. The respondent never contemplated taking disciplinary or capability proceedings against the claimant despite this perceived lack of effort in his second in department role. Suffice to say that in the context of this claim, if there had been any side-lining of the claimant that is something that he had achieved on his own.

8.2.7 In so far as there was less favourable treatment, was that because of race?

On the basis of the analysis conducted above, the only matters which we regard as being less favourable treatment are the 4 December feedback meeting, the 5 December email recording the result in respect of the November 2017 learning walk and the subsequent proposal to put the claimant on a support plan.

We do not find that the claimant has discharged the initial burden on him. For the reasons expressed in the Madarassy case, simply saying that the claimant was the only ethnic minority teacher and the only teacher to whom these actions were applied is not enough. In any event the claimant was clearly not the only teacher who was recommended to undergo a support plan, particularly in the aftermath of the Ofsted report and what we take to be a change of approach and culture in this once successful but now almost failing school. Even if the claimant had been able to discharge the initial burden on him, we are satisfied that the respondent would have been able to give a non-discriminatory explanation for the actions it took. In short the post-learning walk meeting was necessitated by the level of concern which Mr Wilson and Mr Osborne had. The post-feedback meeting email was because the claimant, unlike all other teachers in the school, failed to heed the feedback and was unreceptive. The proposal to put the claimant on a support plan was clearly explicable having regard to concerns dating from March 2017 as to the amount of challenge in the claimant's teaching.

For all these reasons we have concluded that the complaint of direct disability discrimination fails. Although the respondent and its advisors have taken a generous approach towards the claimant along the lines of acknowledging that he genuinely believed that he had been discriminated against, we must observe that when consideration is given to the communication between the claimant and his union which has been voluntarily disclosed (the desire to have Mr Wilson and Mr Osborne struck off the teachers register), there is a suggestion of vindictiveness.

In circumstances where, if the allegations had been upheld the result could have potentially been career ending for both Mr Osborne and Mr Wilson, we believe it is appropriate to place on record that both of those individuals are exonerated by this Tribunal from those serious, but in our judgment misconceived, allegations.

8.3. The victimisation complaint

The respondent accepts that the claimant's grievance of 16 May 2018 was a protected act. It follows that the essential issue for us to determine is whether the detriments – delay in dealing with the claimant's grievances and those grievances not being upheld, were done on the ground that the claimant had made a protected act.

8.3.1 In terms of the grievance outcome, both Dr Gilbert and then the Willington/Laycock panel took broadly the same approach as we have taken on the allegation that the claimant was subjected to racial bullying.

We find that the grievance both at the "informal" stage and subsequently under the dignity and respect at work procedure were investigated in a reasonable way. That being said, the Willington/Laycock report was more thorough than Dr Gilbert's approach to the first grievance. In any event we find no evidence that these grievances were dealt with in a superficial way because, for instance, the respondent was offended that the claimant had alleged racist behaviour.

We accept that Dr Gilbert's email of 22 June 2018 is, at first blush unfortunate. It could certainly be read as evincing a desire to shut down the grievance process which of course included the allegation of racial bullying. When giving evidence before us Dr Gilbert has expressed his regret at the way he phrased that email. We find that the respondent's subsequent continuation of the investigation and the conclusion of the first grievance process belies any credible view that there was a discriminatory reason for the sentiments expressed in the 22 June email.

We find that the conclusions reached by both grievance panels were supported by the material before those panels and again the claimant has not discharged the initial burden of showing that the rejection of the grievances was because of the protected act.

8.3.2 In terms of delay, the respondent accepts that there was a delay, particularly in dealing with the second stage of the grievance progress. We find that the respondent has offered a plausible explanation for the delay. The second stage of the grievance was commenced by the claimant's letter which coincided with the last day of the Summer term. It was then realised that Dr Gilbert should not be part of the panel and from the correspondence we have seen there was then considerable time expended on securing the services of a new panel member who would be sufficiently independent, capable and as the respondent frankly puts it, affordable. Again the claimant has not put before us evidence from which we could conclude that the reason for the delay was the fact of the claimant raising a grievance containing an allegation of racial bullying. It follows that we find the victimisation complaint also fails.

8.4. Was the claimant constructively dismissed

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Although there is no longer an unfair dismissal complaint before the Tribunal, the claimant contends that he was constructively dismissed and that that was a discriminatory dismissal. Here the claimant needs to establish that there had been a fundamental breach of the contract of employment. If we had found that the claimant had been unlawfully

discriminated against that fairly clearly would have been a breach of the implied term of trust and confidence with the result that if the claimant had resigned in response to that there would have been a constructive dismissal which was discriminatory. However, as we have found no discrimination this part of the claim also falls away.

Employment Judge Little

Date 31st December 2019