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EMPLOYMENT TRIBUNALS

Claimant: **Mr N Levy**

Respondent: **Governing Body of Oaks Park High School**

Heard at: **East London Hearing Centre**

On: **17, 18, 20, 23 and 24 September 2019**
26 September 2019 (in Chambers)

Before: **Employment Judge Russell**
Members: **Ms J Forecast**
Mrs P Alford

Representation
Claimant: **Mr G McKetty (Consultant)**
Respondent: **Ms L Robinson (Counsel)**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that :-

1 The claim of direct discrimination because of race fails.

2 The claim of harassment related to race fails.

3 The claim of victimisation fails.

4 The claim of constructive unfair dismissal fails.

5 The claim for holiday pay is dismissed upon withdrawal.

REASONS

1 By a claim form presented to the Tribunal on 23 July 2018, the Claimant brought claims of constructive unfair dismissal, direct discrimination because of race,

racial harassment, victimisation and for holiday pay. The Respondent resisted all claims. At the outset of the hearing, the Claimant withdrew his claim for holiday pay.

2 At a preliminary hearing before Employment Judge Moor on 18 June 2019, the issues were set out as follows:

Equality Act 2010 ('EQA') section 13: direct discrimination because of race

3 Did the Respondent subject the Claimant to the following treatment:

3.1 In September 2015 the Respondent relocated him to an office at the front of the school. This was detrimental because:

a. it had no ventilation and exceeded legal room temperature limits in the summer.
b. And it was so that the SMT could keep an eye on the Claimant.
c. In September 2016 Mr Manning removed the chairs in the office so that group work was not possible.
d. The Claimant compares himself to a white mentor, Miss Baker, who was provided with an adequately ventilated room, with chairs allowing group work, and who was not so carefully supervised.

3.2 From 2016 the Respondent did not provide the Claimant with an appraisal or development plan. The Claimant compares himself to a white mentor, Miss Baker who received them.

3.3 From 2016 onwards, black children were referred to the Claimant in comparison with Miss Baker to whom white children were referred.

3.4 In or about June 16, Mr Russell Manning of the Respondent made disparaging remarks about black men being less able to maintain stable roles within the home and their lack of parenting skills.

3.5 From September 2016 Mr Manning, Ms Caluda and Ms Richardson of the Respondent discouraged students from coming to see the Claimant in their own time and Ms Caluda and Richardson discouraged 6th form students from coming to see him even though it was part of the Claimant's job to mentor students. Some students told the Claimant that in their view this was because of race.

3.6 In September 2016, on the arrival of the new head teacher Ms Hamill, she did not hold a meeting with the Claimant to discuss his role or requirements.

3.7 In September 2016, on the arrival of the new head teacher Ms Hamill, she did not provide the Claimant with a job description. The Claimant compares himself to Miss Baker who did so.

3.8 In or about March 2017 Mr Manning told children to leave the Claimant's room at break time. He stated, in front of them, that 'it looks like a youth club in

here' and that having children in the front of the school made it look 'untidy'. This was detrimental treatment because it limited the opportunity to carry out his role. The Claimant relies upon Miss Baker as a comparator.

3.9 In or about June 2017 Mr Manning required the Claimant to provide proof of an external appointment in respect of a previously agreed long service day that the Claimant had already taken. He was singled out in this respect.

3.10 In or about July 2017 Mr James Todd, a member of the Senior Leadership Team, joked in the office that the Claimant was like a pimp or drug dealer in his car. He repeated words like this in an email about a football match. This was detrimental and hurtful stereotyping of the Claimant because of his race.

3.11 In or about July 2017 the Claimant's compassionate leave requests that had been previously agreed by Mr Dutch were then denied by Mr Douglas and recorded as unauthorised absence. This was a surprising change and the Claimant contends it would not have happened to a white member of staff.

3.12 From 8 November 2017 the Respondent asked the Claimant to refrain from work and escorted him off the premises. (This had also previously happened to Mr RJ another black member of staff in about June 17; and has since happened to black or minority ethnic members of staff: Ms Hamill and Mr Assegai). The Claimant compares himself to a white member of staff subject to disciplinary actions, Mr GE.

3.13 The Respondent discouraged the Claimant from inviting a work colleague or solicitor to attend an official, recorded meeting to discuss his attendance with Mr Douglas and Mr Manning.

3.14 On 15 November 2017 the Respondent suspended the Claimant.

3.15 The Respondent made disciplinary allegations against the Claimant. One of the allegations was that the Claimant allowed a student to use his bank card. Ms Fraser, a white member of staff, was not subject to disciplinary allegations for giving a student a gift. And other staff members were not subject to such allegations although they gave students money (and food).

3.16 The Respondent chose to make those allegations at the level of gross misconduct.

3.17 The Respondent failed to respond adequately to the Claimant's request to preserve documents for use in the disciplinary investigation.

3.18 Ms Hamill raised the allegations and then investigated them in express breach of the Respondent's procedure and/or fairness.

3.19 The Respondent failed to investigate his grievances dated 17 January 2018 and 29 March 2018, which included allegations of discrimination and harassment.

3.20 The Respondent invited him to a stage 2 absence review meeting by letter of 29 March 2018.

3.21 The Respondent continued to pursue matters with the Claimant while he was signed off from work with stress-related sickness.

3.22 In its letter of 12 April 2018, the Respondent:

a. refused to investigate the grievance and indicated that they would only consider 'whether' to investigate them after the outcome of the disciplinary;
b. threatened the claimant with defamation proceedings if his allegations were found to be in bad faith and/or if he repeated them in public.

4 Was any of that treatment to the Claimant's detriment?

5 Was that treatment *less favourable treatment*, i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the real comparators identified in respect of particular allegations and/or hypothetical comparators.

6 If so, was this because of the Claimant's race and/or because of the protected characteristic of race more generally?

EQA, section 26: harassment related to race

7 Did the Respondent engage in conduct as above at paragraph 3?

8 If so was that conduct unwanted?

9 If so, did it relate to race?

10 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Equality Act, section 27: victimisation

11 It is not in dispute that the Claimants written grievances of 17 January 2018 and 29 March 2018 were protected acts in that they alleged race discrimination.

12 Did the Respondent subject the Claimant to any detriments as follows:

a. Failure to investigate his grievances;
c. Threatening to sue the Claimant if the allegations were in bad faith;
d. Threatening to take action against him if made those allegations in public.

13 If so, was this because the Claimant did the protected act/s?

Time limits / limitation issues

14 Were the Claimant's Equality Act complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Act? Dealing with this issue may involve consideration of subsidiary issues including:

a. whether there was an act and/or conduct extending over a period by way of a practice or a state of affairs; and
b. whether time should be extended on a "*just and equitable*" basis.

Constructive unfair dismissal

15 Did the Respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? The conduct the Claimant relies on as breaching the trust and confidence term is set out above at paragraph 3.

16 If so, did the Claimant affirm the contract of employment before resigning?

17 If not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)?

18 If Claimant was dismissed the Respondent does not argue that it was fair.

Remedy

19 If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues include:

20.1 what, if any, reduction should there be to reflect the possibility that the Claimant would still have been dismissed at some relevant stage even if there had been no discrimination?
20.2 What, if any, adjustment should there be for failure to comply with a relevant ACAS Code of Practice by either the Claimant or the Respondent?

Claimant's applications to strike out the Response

20 On the third day of the hearing, the Claimant applied to strike out the Response on grounds of scandalous, unreasonable or vexatious conduct. Mr McKetty said that Ms Robinson, Counsel for the Respondent, had approached him that morning and alleged that during the evidence of Ms Peters (one of his witnesses), the Claimant had made a gun gesture with his fingers and mouthed the words "you watch, you watch" in the direction of Ms Fraser (a witness for the Respondent who was yet to give evidence). Mr McKetty said that Ms Robinson had told him that the Respondent was

considering making a formal complaint to the police or raising it with the Tribunal's security guard. The Claimant strongly denied doing anything like the conduct alleged. Mr McKetty described the Respondent's allegation as frivolous and designed to cause great distress and offence both to the Claimant and to himself as it involved stereotypical assumptions based upon their shared characteristics as black Afro-Caribbean British males.

21 The Respondent resisted the strike out application. Ms Robinson said that her client had raised its concern at the end of the evidence and they discussed how best to deal with it. Rather than raise it with the Tribunal, the Respondent decided that Ms Robinson should approach Mr McKetty as a fellow legal professional. Ms Robinson relayed the alleged conduct to Mr McKetty and said that it could be perceived as a threat, that the Respondent had considered whether to go to police or security but had decided not to and that the matter would only be raised with the Tribunal were there to be any further conduct of this sort.

22 Having heard the respective submissions, the Tribunal considered that this was a serious allegation of misconduct made to Ms Robinson. Once the matter was raised with her, she acted in good faith and there was nothing unreasonable or scandalous in the decision that it should be dealt with informally between professional representatives in the first instance.

23 The central issue was whether this was a genuine concern about the Claimant's conduct or whether it was a spurious allegation made either to unsettle the Claimant (who had finished giving evidence) or to suggest an inappropriate and racially stereotyped assumption in the eyes of the Tribunal. If so, it could be conduct which meets the threshold for a strike out. The Tribunal did not observe any inappropriate conduct by the Claimant, however, we are aware that we cannot observe everything that happens at the back of the room whilst concentrating on the evidence being given by a witness. Bearing in mind the draconian nature of a strike out order, the fact that the conduct of the Claimant was in dispute and the undesirability of conducting a mini-trial of this issue mid-way through the evidence, we decided that the appropriate course of action was to refuse the application to strike out the Response and allow the claim to proceed. A fair trial of the substantive claim was still possible and, as we made clear in giving our reasons at the time, when Ms Fraser was called to give evidence, she could address what she believed happened and be cross-examined and the Claimant re-called to give evidence and be cross-examined on this issue. The representatives were permitted to make submissions on the dispute and we made clear that the Tribunal would make any findings of fact necessary, including any effect upon the credibility of either Ms Fraser or the Claimant. The Tribunal considered that this permitted both the Claimant and the Respondent to have a fair trial of the substantive case and of this dispute about the Claimant's conduct.

24 Given the distress described by the Claimant and Mr McKettty, after giving our decision with oral reasons for refusing the strike out application, we adjourned for the rest of the morning to give the parties and witnesses time to compose themselves and prepare for the resumption of evidence.

25 On the morning of the fifth day of the hearing, the Respondent asked for two additional documents to be admitted in evidence. First, what were said to be signed

copies of a fact-finding meeting with student A where the bundle contained an unsigned version. Second, what were said to be handwritten notes taken at a refrain from work meeting on 8 November 2017. Mr McKetty objected, challenging the genuineness of the new documents. In doing so he relied upon his recollection that student A had denied during cross-examination ever signing the notes. Moreover, he objected to the late disclosure of the documents, submitting that the Claimant could not have a fair trial were they to be admitted.

26 In addition, Mr McKetty made a further application that the Response be struck out for scandalous, unreasonable or vexatious conduct based upon the late disclosure, the earlier allegations about the Claimant's conduct (see our decision above) and the Respondent's expressed concern that he had been communicating with the Claimant as the latter was giving evidence. Mr McKetty described this as a pattern of harassment, causing himself and the Claimant to feel intimidated and which should lead to the Response being struck out.

27 Ms Robinson opposed the strike out application. The absence of a signed copy of the fact-finding interview had first been raised as Ms Hamill gave evidence. Ms Hamill in evidence had confirmed that there was a signed copy. The Respondent's HR representative located it overnight, all without input from Ms Hamill who was still giving evidence. Ms Robinson accepted that the notes of the refrain form work meeting should have been disclosed sooner. She submitted that both documents were relevant to the issues to be resolved by the Tribunal.

28 In deciding the Respondent's application, the Tribunal considered the relevance of the documents and whether their admission was necessary for a fair trial.

29 There is a dispute about whether in the fact-finding meeting, Ms Hamill suggested to student A that the Claimant was a paedophile or a "nonce" or whether this was in fact raised by student A herself. This is a dispute upon which the Tribunal will need to make a finding of fact. The notes of the refrain from work meeting are also relevant to the detriments alleged by the Claimant.

30 Whilst the documents are relevant, however, the Tribunal does not consider them necessary for a fair trial. To include the new documents at this stage, when the Claimant's evidence has concluded, would cause him significant prejudice. The witnesses of fact have given evidence about whether the student A notes were signed and the conduct of the refrain from work meeting. The Tribunal is able fairly to resolve these disputes based upon the evidence already before it and without the additional documents which should have been disclosed far sooner.

31 The Claimant's strike out application was refused. Mr McKetty made the very serious allegation of fraud in respect of student A's signature based upon a recollection of the evidence which does not accord with the notes of the Tribunal, our note being that student A did not recall signing anything rather than an outright denial. This is a case of late disclosure of documents, a not uncommon feature in Tribunal hearings. It should not happen, particularly when parties are legally represented, but it does. It falls far short of the threshold for conduct warranting a strike out on day five of a six-day hearing.

Evidence

32 We heard evidence from the Claimant and on his behalf from Ms Peters, Mr P Assegai and Mrs G Smith. The Claimant also produced statements from Ms Thamini, Mr S Thompson and Ms D Loftman. Those statements were not signed, the witnesses did not attend to give evidence and no reason was given for their absence. In the circumstances, the Tribunal attached little weight to their evidence. Ms Sion Thompson also provided a written statement and did attend to give evidence but this was not possible for practical reasons. We attached such weight to her statement as was appropriate in the circumstances.

33 For the Respondent, we heard evidence from Mrs Ruth Baker (Student mentor and mental health lead), Mrs Samantha Fraser (Teacher of health and social care), Mr James Todd (PE teacher), Mr Russell Manning (Deputy Head), Mr Colin Douglas (Deputy Head), Ms Joanne Hamill (Head) and Mr Omer (Chair of Governors). We were provided with a witness statement for Mr Steven Wilkes (former Head). Mr Wilkes was prepared to attend Tribunal to give evidence on the Thursday but this was not possible for practical reasons. We attached such weight to his statement as was appropriate in the circumstances.

34 We were provided with an agreed bundle of documents and we read those pages to which we were taken in evidence.

Findings of Fact

35 The Respondent is a community school maintained by the London Borough of Redbridge providing education to approximately 1900 students between the ages of 11 and 18. The student cohort is ethnically diverse. Mr Steven Wilkes was headteacher until 1 September 2016, when Ms Joanne Hamill replaced him.

36 From 1 January 2007, initially under a fixed term contract and permanent from 1 September 2009, the Claimant worked at the Respondent for two days a week. Outside of his school work, the Claimant works with the Home Office, Metropolitan Police and other charitable organisations to deliver workshops in schools around London, specifically in knife and crime prevention programmes. The Claimant is deeply committed to his work with young people and enabling them to realise their best potential.

37 The Respondent also employs Ms Ruth Baker as a full-time mentor. Ms Baker describes herself as mixed ethnicity, with brown skin, an Israeli mother and a father born in Aden. The Claimant and Ms Baker had a good working relationship.

38 The nature of the work undertaken by the Claimant and Ms Baker was different. The Claimant's job involved mentoring vulnerable and low achieving students, specializing in students with challenging behaviour. By contrast, Ms Baker specialises in the social, emotional and mental health needs of students.

39 The Claimant's case is that from 2016 onwards, black children were referred to him whilst white children were referred to Ms Baker. In June 2017, Ms Baker had 34

mentees from 13 different ethnic backgrounds, with the two largest single groups being Indian (23.5%) and white British (14.7%). The ethnicity of six (17.6%) was described in some way as black (white and black Caribbean/black Nigerian/black Somali). The Claimant's mentoring list for 2017/18 comprises 17 students from 9 different ethnic backgrounds, with the two largest single groups being black Caribbean (29%) and white British (17.6%). The ethnicity of nine students (53%) was described as in some way black (white and black Caribbean/black Somali/black Congolese).

40 Although the statistics refer to different academic years (2016/17 for Ms Baker and 2017/18 for the Claimant), the dates of referrals included for Ms Baker's mentor list show a stable mentoring group. The Tribunal finds that the ethnic diversity of the students on both the Claimant and Ms Baker's lists was consistent with the diverse nature of the school as a whole. The number of white British students being mentored by the Claimant and Ms Baker was broadly similar, with white students being referred to each. We accepted as reliable Ms Baker's evidence that students are referred to her according to their mental health needs. We find that students were allocated according to the type of mentoring they required and the respective specialist skills of the two mentors, and not according to their ethnicity.

41 As part of her work, Ms Baker undertook formal group sessions as well as one-to-one sessions with students. The Claimant undertook no formal group work, delivering his mentoring in one-to-one sessions with some "paired" sessions involving two students. Any group work undertaken by the Claimant was informal, where students would come to his room without an appointment, often during break times, and the Claimant would agree to see them.

42 The Claimant and Ms Baker also had different working styles. Both had diarised mentoring sessions with particular students. Ms Baker collected the student from and returned the student to their lesson at the beginning and end of the mentoring session. Ms Baker worked in a structured and methodical way. By contrast, the Claimant's mentees would make their own way to and from the session and the Claimant would sign a card to confirm that the session had taken place. The Claimant would also write on the reverse of the card any additional notes required, for example if the student were to be late to class. The Claimant would often see students who did not have a diarised appointment. Whilst Ms Baker and the Claimant worked in different ways, we find that the school was content with the quality of their work with students. Although on occasion Mr Wilkes expressed the need for a tighter structure to the Claimant's working style, for example by letter dated 14 November 2008, the Respondent largely accepted his more flexible working style.

43 Initially, the Claimant and Ms Baker shared a room. This was clearly undesirable given the confidential nature of their work. As the school expanded it became possible for the Claimant and Ms Baker to have separate rooms and in September 2015, they relocated to offices at the front of the school. The Claimant's office was next door to that of Mr Manning. Ms Baker's office was approximately 40 yards further down the corridor. Ms Baker's office was bigger than that of the Claimant, this was because she required more space to undertake her group work with six to eight students sitting in chairs around a table. Her room had no windows or air conditioning, there were heating pipes and sometimes the room became overly hot. The Claimant's room was smaller but similarly lacked windows, air conditioning and

would become overly hot at times. The decision about relocation of their offices was taken whilst Mr Wilkes was headteacher, the Claimant makes no allegations of discrimination or harassment against Mr Wilkes and did not raise any complaint at the time.

44 Despite the Claimant's very positive working relationship with Mr Wilkes, there were concerns about the Claimant's attendance and working style over several years following his permanent appointment. Contemporaneous correspondence shows Mr Wilkes asking the Claimant to sign in to make sure that it was clear when he was in school, to establish clearer procedures about whether students were attending a mentoring session as opposed to "wandering around" and as to the correct notification of his absences. Minutes of a meeting on 21 May 2014 record the Claimant being told that he should turn away any student turning up "out of the blue" unless they had proof of the reason for their attendance. There is no record of similar concern being discussed with Ms Baker.

45 On more than one occasion after 2015, the Respondent expressed concern that students were using the Claimant as an excuse to get out of lessons and that missing students were found in his office when not diarised for a mentoring session. This included concerns expressed by Ms Caluda and Ms Richardson that specific 6th Form students were in the Claimant's office when they should have been in a lesson. As a result, it was agreed in November 2016 that students would only see the Claimant if they had an appointment or had prior approval to be absent from a lesson. The contemporaneous emails do not support the Claimant's case that 6th Form students were discouraged from seeing the Claimant in their own time. Rather, Mr Douglas, Ms Caluda and Ms Richardson were addressing the specific concern that students were missing lessons without an appointment and to ensure that the Claimant's services were delivered in a structured and formalised manner. The desire to prevent students from gathering in the Claimant's room without an appointment and when not attending a formal session with the Claimant was the reason why Mr Manning removed some of the chairs from the Claimant's room in or around September 2016. This was explained to the Claimant at the time. The Claimant made no contemporaneous objection and the Tribunal has accepted that formal group work was not part of the Claimant's job.

46 The Tribunal accepts on balance that in or around March 2017, Mr Manning did tell students to leave the Claimant's room and did say that the room looked "like a youth club" and made the school look "untidy". This is plausible given Mr Manning's admitted concern about students "congregating" (as he put it in his statement) in the Claimant's room without formal appointments and removal of chairs to prevent such gatherings. In evidence, the Claimant maintained that he would not allow students to "hang out" or "doss" in his room and that he would send students away. We inferred from this that he was aware that such conduct would not be appropriate given his role as a mentor in a school setting.

47 The Tribunal find on balance that the Claimant was so committed to his work that he tended to make his own judgments as to what was required to support a student and paid less regard to the school's procedures and rules. This was consistent with the Claimant's frustration as demonstrated in his evidence about what he perceived as inappropriate restrictions by the school on when he could see students. However, the Tribunal accepts that it was necessary and reasonable for the school to

want to avoid students missing lessons and for there to be a more structured approach to the Claimant's work.

48 In the issues, the Claimant alleges that in or about June 2016, Mr Manning made disparaging remarks about black men being less able to maintain stable roles in the home and their lack of parenting skills. The Claimant's witness statement repeated the wording of the complaint in the issues and provided no further detail. In cross-examination, the Claimant says that he told Mr Assegai about the comments in a telephone conversation. By contrast, Mr Assegai says that the Claimant told him about this in person when he attended his office and saw the Claimant looking speechless, dejected and demoralized. He advised the Claimant to make a complaint. Mr Manning categorically denies making any such comments.

49 There was no contemporaneous complaint by the Claimant. The Claimant gave evidence that he kept a contemporaneous journal which he relied upon when producing his chronology of events attached to his 16 January 2018 grievance. The journal was not disclosed or produced during the hearing. The Claimant's chronology in his first grievance included a complaint about a comment by Mr Manning that the Claimant's room looked like a youth club but did not include the alleged June 2016 comment. This was first expressly raised in the Claimant's subsequent grievance dated 29 March 2018. The Tribunal consider the omission significant. On balance, we find that if such an overtly offensive comment had been made by Mr Manning in 2016, it would have been raised at the time and at the very latest in the January 2018 grievance. Moreover, if the Claimant had made a contemporaneous journal record of the comment, it would have been disclosed and relied upon in these proceedings. In the circumstances, including the conflict of evidence between the Claimant and Mr Assegai, we find on balance that Mr Manning did not make the June 2016 alleged comment.

50 Ms Hamill became headteacher from 1 September 2016. New in post, she met with her direct reports to discuss the operational requirements of the school. Ms Hamill did not hold meetings to discuss their role or requirements with members of staff who did not report directly to her, this included both the Claimant and Ms Baker. This is not unreasonable given the size of the school and the number of staff involved. Ms Hamill did however, hold some informal "meet and greet" sessions where people were free to drop by her office for a sandwich or a sausage roll. These were informal and attendance was at the instigation of the employee, not Ms Hamill. Ms Baker chose to attend one of the meet and greet sessions, the Claimant did not. Nor were employees provided with job descriptions upon the arrival of Ms Hamill. Ms Baker was only provided with a job description in July 2018, after the termination of the Claimant's employment.

51 The school did not operate a formal appraisal or development process until a system called Blue Sky was introduced in the academic year 2017/2018. Before this, employees would meet with their line manager to discuss their performance informally. The informal meetings were supposed to happen once every half term. The bundle contained notes for only two such meetings, both in 2014, attended by Mr Manning, the Claimant and Ms Baker. Whilst we accept that there may have been some other meetings for which notes were not available, the Tribunal finds on balance that meetings between the Claimant and Mr Manning did not happen as frequently as half-

termly. The same was true for Ms Baker who also had no formal appraisal or development plan until after the introduction of Blue Sky. The Claimant did not request a formal appraisal or development plan and the Tribunal finds that this was not a matter of great concern to the Claimant until the subsequent events leading to the termination of his employment.

52 In both 2010 and 2011, Mr Wilkes wrote to the Claimant requiring him to comply with the absence policy by completing a yellow form in advance and reminding him that leave applications for absence during term time should be exceptional and should be agreed in advance wherever possible. Discussions about the Claimant's attendance also took place in 2012, 2014 and 2015. On 30 June 2016, Mr Wilkes again wrote to the Claimant to remind him of the need to follow the school's absence procedure and complete the yellow request form at least five days in advance. In the same letter, Mr Wilkes suggested that if the Claimant wished to take a day off in the coming September (for the anniversary of his brother's murder), the Claimant should complete a yellow form before the end of term and reminded the Claimant of the importance of keeping accurate records on all of the students he saw. It is clear from the contents of this letter that there was no pre-existing arrangement during Mr Wilkes' headship whereby the Claimant was permitted to take the anniversary as leave without complying with the need to make a prior request in accordance with the school's policy.

53 In the academic year 2016/2017, with Ms Hamill now head teacher, the school again had cause to write to the Claimant about his attendance. On 3 May 2017, the Claimant attended a meeting with Mr Douglas, deputy head, to discuss the levels of his sickness absence and its impact on the service provided by the Claimant. The Claimant had been absent on 12 days in the last school year (a total of six weeks given that he worked only two days a week). Notes of the meeting record the school's recognition of the Claimant's hard work and discussion of the detrimental effect upon his mentees of absence. During the meeting, the Claimant referred to a prior agreement with Mr Wilkes that he could have the day off on the anniversary of his brother's death. Mr Douglas' letter sent after the meeting confirms that the Claimant reported satisfaction with the support offered by the school and had said that there was nothing more they could offer to improve the situation. In the same letter, it was confirmed that the Claimant would write to the headteacher to try to reach an agreement about leave of absence on the anniversary of his brother's death in the coming September.

54 In his evidence, the Claimant said that in the spring term and before he left in March 2017, Mr Dave Dutch had agreed that he could take 16 September 2017 as special leave. There was no yellow absence request form to support this agreement. There is no reference to the alleged agreement with Mr Dutch in the notes of the meeting on 3 May 2017, where the Claimant is recorded as referring to an earlier agreement with Mr Wilkes. Nor is there any contemporaneous correspondence from the Claimant relying upon an agreement with Mr Dutch. On balance, the Tribunal finds that there was no such prior approval from Mr Dutch and the position was as expressed by Mr Douglas in his letter of 3 May 2017, namely that the Claimant would write to Ms Hamill and they would try to reach an agreement.

55 On 24 May 2017, the Claimant emailed Mr Manning to say that he would be late in as he was required to attend a Magistrates Court to support a young person.

The same day, Mr Manning asked for evidence of the court attendance and how the Claimant would make up the lost time. Mr Manning repeated his request on 5 June 2017. The Claimant repeated his need to attend the court but failed to provide evidence from the court or youth offending time or to address the lost time. Mr Manning repeated the request on 11 June 2017 and 19 June 2017, referring in this last email to a request for leave of absence on 28 June 2017. The Claimant objected to having to prove his external activities for leave which he believed that he was entitled to but nevertheless provided evidence of his external commitment on 21 June 2017. The reasons for the absence on 28 June 2017 was to deliver knife crime and violence initiative roadshows at other schools. Mr Manning approved the absence request and it was counter-signed by Mr Douglas on 29 June 2017.

56 Lists of staff making leave of absence requests in the academic years 2017/2018 and 2018/2019 were included in the bundle. In 2017/18, 58 members of staff were chased to provide evidence of the reason for the absence; in 2018/19 it was 107 members of staff. The ethnicity of each is given; in 2017/18, 39 of the staff chased were white, in 2018/19, the number of white staff chased was 57. Based upon the statistical evidence that in the two subsequent years the majority of staff chased for evidence were white and that the policy was that leave during term time should be exceptional, the Tribunal infers that the Respondent required all members of staff to provide evidence of term-time absence.

57 On 6 July 2017, Mr Douglas invited the Claimant to attend a further meeting on 12 July 2017 with himself and Mr Douglas to discuss the recent absences, including on 24 May 2017 and 28 June 2017, and their impact on service delivery. Mr Douglas was concerned to ensure that students were aware of whether or not the Claimant would be present for appointments and, if not, how they could be rescheduled. The Claimant did not attend the meeting and it was rescheduled for 19 July 2017. In his letter dated 13 July 2017 giving the rescheduled date, Mr Douglas informed the Claimant that he could be accompanied by a union representative, professional body or colleague. On 14 July 2017, the Claimant replied that he would be accompanied by a personal friend and asking which part of the disciplinary process the meeting referred to. In an email sent on 17 July 2017, Mr Douglas clarified to the Claimant that it was not a disciplinary meeting Mr Douglas replied that the meeting was not a disciplinary hearing but to go through recent absences and look at how to make up the time, discuss process and agree a way forward that worked for the school and specifically the students supported. Mr Douglas did not mention the proposed attendance of the Claimant's friend.

58 The meeting took place on 20 July 2017. The Claimant was not accompanied by his friend. The meeting discussed late submission of leave of absence request forms and the need to book absence with sufficient advance notice to enable the school to reschedule student appointments. Mr Douglas agreed that the Claimant should be paid for these absences.

59 The Claimant played football as part of a team organized by Mr James Todd, a PE teacher. Mr Todd was a head of year but was not a member of the senior leadership team. The Claimant and Mr Todd had a good working relationship, engaging in a degree of what they described as joking and banter. They played together in a football match on 22 September 2017 following which Mr Todd sent a lengthy WhatsApp message to the Claimant in the style of a football report,

commenting upon the performance of members of the team in what he believed was a humorous manner. With regard to the Claimant, it included the following:

> **"Nathan two day a week – Took ages putting his socks on. Talked a great game and used to be able to bang in the goals but held the midfield well. Second half got tired and the little guy in orange shorts got the better of him telling Nathan what 'hood' are you from. You don't know who I am. Nathan's mentoring skills went out the window and ripped his shirt showing off all his oversized tattoos. Tail between his legs and got changed in the back of his drug dealing Range Rover and went home !"**

60 The Claimant responded to the WhatsApp message with three "crying with laughter" emojis, the words "**you fool, colourful write up**" and then a "thumbs-up" emoji. This is consistent with the Claimant's evidence that he had not been offended by the content of the personal WhatsApp message. The Claimant's case however is that coming in to school some days later, he became aware that the same message had been emailed to a broader readership. He suggested that there were some 40 recipients, including some of the team who were police officers. He was concerned that the reference to a "drug dealing Range Rover" was offensive and portrayed a stereotypical image of him as a young black male implying criminality. In his March 2018 grievance and in the list of issues, the Claimant incorrectly dated the email to July 2017; the email is not mentioned in the Claimant's January 2018 grievance. The email does not appear in the bundle before the Tribunal and the Respondent's case was that it did not exist.

61 Mr Assegai, in oral evidence, confirmed that he had seen such an email although he said that it had been sent to 14 or 15 recipients and that its content was a "quick quip" at the Claimant referring to how he dressed, his car and referenced drug dealing. In describing his reaction when he read it, Mr Assegai made a sharp intake of breath through his teeth, indicating surprise or shock. In his evidence, Mr Todd accepted that the text of the WhatsApp message had been sent in an email to other players on the team. He denied however, that the recipients included any members of the police force.

62 On balance, we find that there was an email sent by Mr Todd to about 14 or 15 people involved in the school's football team and who would be interested in the match report. This was consistent with Mr Assegai and Mr Todd's evidence. We preferred the evidence of Mr Assegai, who we found to be a truthful and credible witness on this issue, to that of the Claimant whom we considered had exaggerated the number of recipients. The contents of the email included the "drug dealing Range Rover" comment consistent with the extract from the WhatsApp message quoted above. The Tribunal infers that due to the passage of time, the email cannot be located and the recipients ascertained.

63 Student A was one of those mentored by the Claimant. On 3 October 2017, her step mother contacted the school to express concern that student A was potentially becoming overly reliant on her mentor. Whilst she did not want to stop the mentoring sessions nor blame the Claimant, the step-mother sought to prevent student A from using him as a "crutch" where she could only go to school if he was there. Shortly after receipt of the email, Mr Manning spoke to the Claimant and it was agreed that student A could see him once a week, during her independent learning periods on Wednesday

(periods 4 or 6) or Friday, period 1.

64 On Friday 3 November 2017, whilst the Claimant was mentoring another student in a one-to-one session, student A attended the Claimant's room, told him that she was hungry and that her pre-payment card for school lunch was not working. The Claimant provided student A with his own pre-paid card so that she could purchase some food at Sainsbury's. Student A left the school premises, went to Sainsbury's brought back food for herself, the Claimant and the other student, was late returning to her class after lunch and the Claimant signed her mentoring card to say that she had a mentoring session with him in period 6. This much is not in dispute.

65 The Respondent's case is that student A had spent an hour in the Claimant's office from 11.55am to 12.55pm, when she should have been in a lesson (the entirety of period 4), before going to Sainsbury's and returning 20 minutes late for her afternoon lesson (period 6). Further, that the Claimant untruthfully completed the mentoring card to suggest that she had been in the mentoring session during period 6 and that this was the reason why she was late.

66 The Claimant's evidence, by contrast, is that student A had come to his office at 12.45pm and he had asked her to leave, it was when she returned during the lunch break that she said that she had not eaten and could not buy lunch. The Claimant's evidence was that he sent student A to the office but she returned saying that they had been unable to help her, only then did he give her his own pre-paid card to go to Sainsbury's. He simply asked her to buy him some fruit to avoid student A feeling embarrassed. The Claimant's evidence is that he did not see student A again until she returned to his office at 2.16pm and he told her to go straight to her lesson. The Claimant's case is that he acted entirely appropriately with a student coming to him hungry and in distress. The Claimant denies untruthfully signing the mentoring card as student A had gone to Sainsbury's during lunchtime and had returned only 10 minutes after the start of period 6.

67 Ms Fraser, who describes herself as black Afro-Caribbean, is the designated person for looked-after children (LAC). Due to her work with the most vulnerable students and difficulties with food poverty, Ms Fraser had a drawer at work containing cereal bars, juice boxes and other snacks for students who were hungry. This was agreed by her line manager and she was the person designated by the school to provide food in such circumstances. In this role, however, Ms Fraser was not authorized to give students money or her own bank cards; nor was there any suggestion that she ever did so. It is also part of Ms Fraser's job to provide each LAC student with a small gift upon leaving school. The precise gifts are agreed in advance with the student's social workers, carers and her line managers.

68 On 7 November 2017, Ms Caluda (the assistant headteacher responsible for Sixth Form), emailed Ms Hamill to report the concern that student A had told the teacher that she was late because she had been buying lunch at Sainsbury's, the Claimant had signed her mentoring card to say that she had a session with him in period 6 and was late as a result of their discussion. Ms Caluda said that the CCTV footage showed student A returning at approximately 2:20pm with two big Sainsbury's carrier bags and going straight to the Claimant's office, therefore she was not in the school building at the time that the Claimant had said she was in a mentoring session

with him. Ms Caluda said the episode caused her a number of concerns:

- the Claimant should not be giving his credit card to students;
- students should not be doing shopping for members of staff;
- the Claimant had not told the truth to cover up why the student was late to lesson; and
- a student was off site during lesson time when they should be in lessons and the Claimant had not told the truth about that either as he said that she was in school discussing an incident with him.

Ms Hamill decided that further investigation was required.

69 On 8 November 2017, the Claimant was asked to attend Ms Hamill's office. As set out at the beginning of these Reasons, late disclosed handwritten notes of the discussion were not admitted in evidence. A letter dated 8 November 2017, sent after the meeting, confirms that the conversation took place and what was discussed. The Claimant was instructed to refrain from work with immediate effect due to an allegation that had been made, pending a preliminary investigation. The Claimant was not told the detail of the allegation, despite several requests during the meeting, as Ms Hamill said that she was unable to share them at this stage. Ms Hamill told the Claimant to collect his personal belongings and that Mr Douglas would walk him offsite. In fact, as the Claimant admitted, Mr Douglas only escorted the Claimant part of the way and allowed him to walk alone as he left the site. There was no evidence that students or other teachers saw Mr Douglas as he escorted the Claimant part of the way, as it occurred during lesson times and the Claimant had no mentoring sessions booked. On balance, the Tribunal finds that this was an approach by Mr Douglas which was mindful of the Claimant's dignity in a difficult but necessary situation.

70 The Claimant was invited to attend a preliminary investigation with Mr Wyre, Deputy Headteacher, on 10 November 2017 and advised of his right to be accompanied. The Claimant was concerned that he did not know the allegations made against him. Following permission from the London Borough of Redbridge, by letter dated 8 November 2017, the Respondent informed the Claimant that the allegations were as follows:

(i) Giving his bank/credit card to student A to enable her to visit Sainsbury's and purchase items at a time when she should have been in a lesson.

(ii) Concerns regarding the information handwritten on student A's mentoring form relating to the times mentioned above.

(iii) Following expressed parental concern, failing to adhere to arrangements that were communicated to him by his line manager regarding student A.

71 The Claimant's case is that the request to refrain from work was an act of race discrimination. He asserts that a disproportionate number of black male teaching staff were required to refrain from work and suspended, relying on the case of Mr RJ and subsequent refrain from work of Mr Assegai. The Respondent denies that there was any such practice and has adduced documents to show that six members of staff were suspended from work during the period September 2016 to July 2019. Based upon

those documents, which we consider reliable, the Respondent sent six refrain from work/suspension letters as follows: (a) GE, a white British male and named comparator; (b) Mr Assegai, a black British male; (c) KT, a white British male; (d) RJ, a mixed white and black Caribbean male; (e) IP, an Asian/Indian male, and (f) FI, an Asian/Pakistani male. Mr KT was asked to refrain from work as part of a sickness absence process and the Tribunal did not consider that his case was comparable to the others due to this material difference. The last three (IP/RJ/FI) appear to be subject to the same disciplinary process. The Tribunal did not hear evidence about the total number of staff at the Respondent nor their ethnicity.

72 The Claimant attended the preliminary investigation meeting on 10 November 2017 with a pre-prepared statement. Notes of the meeting were included in the bundle. The Claimant was advised that the meeting was intended to gather facts regarding the allegations. The Claimant accepted the non-disputed facts, said that he had only asked her to buy him fruit to save her embarrassment, he believed that student A was in independent study that afternoon and that he had not altered the mentoring card. As he has in this Tribunal hearing, the Claimant queried why this was treated as a disciplinary matter and maintained that there should have been informal discussion about best practice for supporting a hungry child and not a formal investigation into his conduct. The Claimant asked whether the allegations were regarded as gross misconduct. The Claimant agreed to email a copy of his pre-prepared statements later that day. Despite being subsequently reminded by Ms Hamill's personal assistant, the Claimant did not do so.

73 The Claimant was invited to a meeting on 15 November 2017 at which he would be formally suspended on full pay pending an investigation. The Claimant replied that he was not able to attend and said that his legal representative would be in touch. As the Claimant had given no acceptable reason for not attending, Ms Hamill wrote to inform him that the meeting would proceed in his absence.

74 On 14 November 2017, at 11am, student A was interviewed by Ms Hamill with her Head of Year present. Typed notes of the interview are included in the bundle but are unsigned. As set out at the beginning of these Reasons, a purportedly signed copy was not admitted in evidence.

75 The unsigned typed notes record that student A agreed that she had been in the Claimant's office for the entirety of period 4 with another student present the whole time and that she had incorrectly told the Claimant that she had permission to be there. Student A had gone to Sainsbury's after form time (12.55-1.20pm) and bought each of them a full lunch, showing the order she had noted on her phone where the Claimant had chosen a "meal deal" of sandwich, drink, crisps and fruit. She was late back because she had needed to telephone the Claimant to get the PIN number for the card. Student A said that she gave the Claimant his food and card and he completed her mentoring card to give to her teacher, confirming that it was the Claimant who had written that she was 20 minutes late as they had been discussing an incident. Student A confirmed that this was not the truth but she thought that the Claimant did it to stop her from getting into trouble.

76 The unsigned typed notes record that student A said that there was nothing to be concerned about with the Claimant, "**he was just being kind and was not a pervert**". Ms

Hamill is recorded as saying that she was not investigating what student A had suggested and, later, that it was only student A who was alluding to other things. A lot of time was spent in evidence dealing with the Claimant's case that Ms Hamill had accused him of being a paedophile. This was not identified in the list of issues which the Tribunal is required to determine. This was not the Respondent's case and there was no evidence before us that the Claimant's conduct on 3 November 2017 was borne of any such impropriety. Student A gave evidence at this Tribunal hearing about the interview. The Tribunal considered her evidence to be unreliable both due to the passage of time as she frequently accepted that she could not recollect matters clearly and her apparent desire to ensure that her evidence supported the Claimant's even where it contradicted the contemporaneous record of what she had said in the interview. The Tribunal finds that Ms Hamill did not make any suggestion or insinuation that the Claimant was a paedophile or tell student A that he was a "nonce" (as Mr McKetty later suggested in submissions). It is inherently more probable that "nonce" was a word used by student A, a teenaged student, than Ms Hamill, a headteacher; moreover, that student A said it as part of her eagerness to make clear that there was no such impropriety by the Claimant. The Tribunal accepts as truthful the content of the typed note, confirmed by Ms Hamill in evidence, that she made clear that the investigation did not involve any suggestion that the Claimant had behaved inappropriately for any sexually related reason.

77 Student A attended a second investigation meeting at 3.30pm the same day, again typed notes are in the bundle. The typed notes record that she signed the minutes of the earlier meeting as correct. She confirmed that the lunch order was placed with her during period 4 and that she had made five calls to the Claimant's mobile phone to confirm the PIN but denied saying that she had not eaten for days. At the end of the typed notes, in bold, it is stated that a signed copy is available but redacted from the version attached to the disciplinary report for data protection. Student A stated in her evidence to us that she could not recall signing the notes, she did not deny that she had done so. On balance we find that the notes are accurate, that student A did sign them as accurate on the day and that they are a reliable source of evidence.

78 Mr Manning was interviewed as he is the designated safeguarding officer. He confirmed the concern raised by student A's step-mother, the instruction to the Claimant to mentor her only when she was not in lessons and of the times that he had had to remind the Claimant of procedures he must follow when mentoring students. Mr Manning said that he expected accurate attendance records from both the Claimant and Ms Baker, whom he also managed. Mr Manning said that the disclosure by student A showed that it remained a concern that the Claimant was not logging mentoring sessions correctly. Mr Manning also confirmed that at the meeting on 8 November 2017, Ms Hamill had become aware that the Claimant had organized a trip involving some of the school's students, using the school minibus, but without the school's knowledge.

79 The student being mentored in period 4 on 3 November 2017 was also interviewed by Ms Hamill. He confirmed that student A had been present throughout that session and had said that she had not eaten in two days, that the Claimant had given her a pre-paid card, told her to go to form time and then to Sainsbury's during lunchtime. The student said that he had lied to get out of lesson 6 early, saying that he

had an appointment with the Claimant, to collect his food.

80 A description of the CCTV footage between 12pm and 3.20pm was produced by Ms Caluda and included as an appendix to the disciplinary pack. The actual CCTV footage was not available to the Tribunal and had not been viewed by the Claimant. Ms Caluda's description said that CCTV showed student A entering the Claimant's room at 12.01pm, leaving at 12.57pm, returning to his room at 2.22pm with two very large/full Sainsbury's bags and leaving again at 2.25pm. This is consistent with the account given by student A in her interview and not consistent with the Claimant's account. It is also consistent with student A's attendance card which records her as absent from period 4 and late for period 6 that day.

81 The Claimant did not attend the suspension meeting on 15 November 2017 but was formally suspended in his absence. A letter sent to him on the same day stated that he was suspended because of the need to investigate two allegations, one was neglect of duty regarding safeguarding procedures in relation to student A on 3 November 2017 and the other allegation was failure to follow school trip procedures. Further particulars of each allegation were provided and the Claimant was told that if proven, they would constitute gross misconduct and could result in dismissal. The same statistics as referred to above in relation to the refrain from work are relied upon for suspension.

82 The Claimant commenced a period of sickness absence on 16 November 2017. His fitness to work certificate covered the period 10 November 2017 to 31 December 2017 and gave anxiety and depression related to stress at work as the reason.

83 On 20 November 2017, Ms Hamill informed the Claimant that she would make a referral to Occupational Health. The Claimant did not attend the Occupational Health assessment scheduled for 12 December 2017, stating that he had been given insufficient notice. He also declined to attend a disciplinary investigation meeting on 24 November 2017 as he was medically unable to attend and could not find representation. He said that he had taken legal advice and would submit a written response to the gross misconduct allegations and a witnessed statement. This statement was provided on 20 December 2017.

84 Mr Douglas was responsible for managing the Claimant's sickness absence. The Claimant declined to attend a sickness absence meeting with Mr Douglas scheduled for 13 December 2017 on grounds that meeting with managers or employees involved in the suspension and disciplinary process would not help his stress or anxiety. The meeting proceeded in his absence and as there was no evidence about prognosis and possible adjustments to support a return to work, Mr Douglas decided to schedule a new Occupational Health appointment. Several attempts were made to arrange an Occupational Health appointment in January 2018 but on each occasion the Claimant either declined or failed to attend.

85 From the date of his suspension on 15 November 2017, the Claimant did not attend any further disciplinary or sickness absence meetings arranged by the Respondent.

86 On 16 January 2018, the Claimant submitted a 16-page grievance with a covering letter stating that he understood it to have the effect of postponing the disciplinary procedure. The grievance alleges that the Claimant has been treated in an unfair, prejudicial and discriminatory manner and specifically with regard to the allegations in the disciplinary process. The grievance is divided into two parts: events up to and including the 8 November 2017 disciplinary allegation and the handling of the disciplinary and sickness absence procedures thereafter. The Claimant expressly complained about a negative environment and actions taken to his detriment in the preceding 18 months which he regarded as harassment, bullying and discrimination and which he expressly linked to race. The grievance makes specific complaints about the conduct of Mr Manning, Mr Douglas and about the school's management generally.

87 The grievance includes complaints about the handling of the disciplinary process. Attached was a witness statement dated 20 December 2017 setting out his denial of the disciplinary allegations. On the final page, the Claimant detailed his "personal issues" with the disciplinary process, in summary that he had not been supported, given the opportunity to respond informally, given appropriate support and guidance, had simply given a hungry young person money for food and that the investigation had been led from the beginning with bias, unfairness and a lack of appreciation for his years of service. Whilst it is clear that the Claimant did not believe that he should be subject to formal disciplinary action for his conduct, the Tribunal finds that he did not make any express complaint about Ms Hamill personally or set out any reason which would render it inappropriate for her to continue to investigate.

88 Paragraph 7.1 of the Respondent's Disciplinary Procedure provides that employees cannot raise a grievance to complain about or object to the fact that the school may take disciplinary action, including the fact that the school is commencing or contemplating commencing the investigation stage of the procedure. Paragraph 7.2 goes on to state that the only exception is where the grievance is that the disciplinary action amounts to discrimination, bullying or harassment when consideration should be given to a short suspension to permit investigation. The decision about whether or not to suspend disciplinary action and, if so, for how long is at the sole discretion of the headteacher after taking HR advice.

89 Paragraph 2.2 of the Respondent's Grievance Procedure provides that generally a grievance related to an ongoing disciplinary matter will not be investigated until the disciplinary case is completed. In very exceptional circumstances, there may be a short suspension if there is a serious complaint about the behaviour of the headteacher involved in the disciplinary process *and* where there is evidence of concerns about that behavior *and* where the complaint is raised formally. Such a suspension of process is to allow a preliminary consideration of the complaint by the Chair of Governors to consider all inter-related issues before deciding whether the disciplinary process or a full investigation of the complaint should take precedence.

90 On 23 January 2018, the Chair of Governors wrote to the Claimant confirming receipt of the grievance, he referred to paragraph 2.2 of the Grievance Procedure and advised that the Claimant fully participate in the disciplinary process to its conclusion after which the grievance investigation could be initiated. Ms Hamill wrote to the Claimant on 24 January 2018, referring to the Chair of Governors decision, and said that the disciplinary investigation meeting would go ahead on 2 February 2018.

91 The Claimant replied stating that he was becoming more stressed by the repeated contact to request his attendance at meetings and that he would "**not be attending any occupational health meetings or assessments and certainly would not engage or attend any disciplinary meeting**". By letter dated 9 February 2018, Ms Hamill explained to the Claimant that the efforts to obtain an Occupational Health assessment and/or hold a sickness absence meeting with him was to establish how he was, what progress he was making towards recover and to determine what could be done to facilitate his return to work as part of the school's normal sickness absence procedure. Ms Hamill thanked the Claimant for his written response to the disciplinary allegations, confirmed that the investigation meeting had proceeded in his absence and that he would be advised of the outcome as soon as possible.

92 Ms Hamill produced an investigation report dated 2 March 2018. Originally, Mr Wyre was going to conduct the formal investigation but he left the school at Christmas, and so Ms Hamill became responsible for it instead. The report is detailed, running to some 12 pages with a further 150 or so pages of appendices including the notes of the investigation meetings and the mentoring card for 3 November 2017. The Claimant's case was that the report was unfair and biased. The report set out the evidence obtained in the investigation which was said to show a prima facie case of misconduct against the Claimant and also included the Claimant's response as set out in his initial 10 November 2017 meeting and subsequent statement.

93 Throughout the process, the Respondent continued to arrange sickness absence review meetings and occupational health attendance. Again, the Claimant did not attend as he had said he would not. The Claimant continued to be signed off as unfit for work. His medical certificate had expired on 11 February 2017 but he subsequently provided a certificate dated 14 March 2018 for the period 11 February 2018 to 16 April 2018.

94 A disciplinary hearing was scheduled for 16 March 2018 but did not proceed that day.

95 At about this time, the Claimant instructed solicitors to act on his behalf. On 21 March 2018, the required the Respondent's assurance that it would preserve any disclosable documents, including electronic documents, as litigation was anticipated. Ms Hamill responded denying that there was any unfairness in the ongoing disciplinary action and confirming that the school would comply with any legal obligation that arose from litigation which may be pursued by the Claimant.

96 A stage 2 absence review meeting was scheduled to take place on 28 March 2018, again the Claimant did not attend. Mr Douglas reviewed the Claimant's continuous absence since 10 November 2017, noted the unsuccessful efforts to arrange Occupational Health appointments and that in the circumstances it was not possible to obtain an update on the Claimant's current state of health or medical prognosis. The outcome of the meeting was to arrange a further review for 23 May 2018 and the Claimant was informed accordingly.

97 On 29 March 2018, the Claimant's solicitors submitted a further formal grievance on his behalf. The grievance alleged entrenched institutional racism within

the school and, for the first time, made specific allegations of discrimination against Ms Hamill, including that she had allowed a discriminatory culture to flourish. The Claimant's solicitor stated that this was a separate grievance to that filed in January 2018 as it did not directly relate to the disciplinary proceedings (albeit that it alleged the commencement of disciplinary proceedings was part of a hostile, degrading and discriminatory environment) and so asked for confirmation that a grievance hearing would be scheduled and that the disciplinary proceedings be suspended. The grievance attached a three-page document to which we have referred in making our earlier findings of fact. Having regard to the chronology and all of the circumstances, the Tribunal finds that this second grievance and the way in which it was expressed was made with the purpose of stopping the disciplinary proceedings.

98 The Claimant's solicitors continued to correspondence with Ms Hamill about the preservation of documents dissatisfied with her initial assurance and reserving the right to make an application to the court for preservation of documents and for costs involved. Ms Hamill replied on 9 April 2018 as follows:

> **"It is the school's clear intention to comply with its legal obligations to Mr Levy in the ongoing disciplinary procedure. The School has taken legal advice and is well aware of its responsibility to preserve documents where litigation is contemplated.**
>
> **I am concerned by the impropriety that is imputed in your correspondence and threats of legal action is unwarranted. Should this continue, I will refer future letters to the Authority's Legal Department to correspond with you on a Solicitor to Solicitor basis."**

99 Solicitors acting for the Respondent replied on 12 April 2018, acknowledging receipt of the grievance and the allegations set out. The Respondent denied that the grievances were completely separate, concluding that the subject matter overlapped. The letter expressed concern about the limited detail provided in support of the grievance and its extremely emotive language. Before stating:

> **"Your client is cautioned as to potential consequences of making serious allegations which are found to be in bad faith. Additionally, he is cautioned as to the external mechanisms that the school and Ms Hamill will avail themselves of should he repeat or make further defamatory statements about either in a public domain including the costs implications thereof". We decline again to suspend the disciplinary process.**
>
> **…**
>
> **Given the severity of the contents of your letter and grievance dated 29 March 2018, the Chair of Governors will consider whether and, if so how to investigate the allegations made once the disciplinary process has concluded".**

100 The disciplinary hearing was scheduled for the 25 April 2018 in advance of which the Claimant lodged written submissions again refuting any allegations of misconduct against him. At 6.18pm on 24 April 2018, the Claimant emailed to inform the Respondent that he resigned with immediate effect. By letter dated 4 May 2018, Mr Omer confirmed that it had been accepted, that the disciplinary had not proceeded but the Chair of Governors would consider appointing somebody to investigate his grievances. Mr Omer did not write again to the Claimant until 11 September 2018, apologizing for the delay which was in part due to the summer holidays, and asking

that the Claimant contact him in seven days. The Claimant did not respond and the grievance was not heard.

Law

101 Section 13 of the Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

102 Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **"(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.**
>
> **…**
>
> **(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."**

103 In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to a protected characteristic. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

104 Considering specifically the requirements of s.26, Underhill LJ held that in considering whether any conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for conduct to be regarded as having that effect, **Pemberton v Inwood** [2018] EWCA Civ 564. Further, as Ms Robinson submitted, conduct creating the proscribed effect does not always give rise to a prima facie case that such conduct was related to a protected characteristic, **Raj v Capita Business Services Limited** UKEAT/0074/19/LA.

105 Section 27 of the Equality Act 2010 prohibits victimisation. The Claimant does not need to show a comparator but he must prove that he did a protected act and that he was subjected to a detriment because he had done that protected act. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome.

106 Section 27(3) provides that 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 made, in bad faith.

107 There is a distinction to be made between detrimental treatment because of a protected act and detrimental treatment because of the way in which the protected act was made, see for example **Martin v Devonshires Solicitors** [2011] ICR 352. In **Woodhouse v North West Homes Leeds Limited** [2013] IRLR 773 it was made clear that care must be taken in drawing the distinction but that there is no victimisation where the reason for unfavourable treatment is the disruptive way in which a complaint is made rather than the complaint as such.

108 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

109 In considering whether the burden of proof has shifted, the Tribunal should not adopt an overly mechanistic approach but rather consider whether discrimination can properly and fairly be inferred from the evidence, **Laing v Manchester City Council** [2006] IRLR 748. A Tribunal will be setting an impermissibly high hurdle, however, if it asks if discrimination is the only inference which could be drawn from the facts, **Pnaiser v NHS England and Coventry City Council** [2016] IRLR 170, EAT.

Time limits in discrimination claims

110 Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

111 An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of ‘policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged

continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Comr.** [2003] IRLR 96, CA at paras 51-52. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

112 If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;

- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account.

Constructive Dismissal

113 Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

114 The term of the contract which is breached may be an express term or it may be an implied one. In this case, the Claimant relies upon breach of the implied term of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it

has been breached to the extent identified above.

115 The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp** [2010] IRLR 445, CA. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position.

116 In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough**."

117 A breach of the implied term of trust and confidence is fundamental and repudiatory, **Morrow v Safeway Stores plc** [2002] IRLR 9.

118 The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council –v- Omilaju** [2005] IRLR 35.

119 In **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, at paragraph 55, Underhill LJ suggested that in a constructive dismissal claim it is normally sufficient for a Tribunal to ask itself the following questions:

> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation?
>
> (2) Has she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation).
>
> (5) Did the employee resign in response (or partly in response) to that breach?

120 The employee must prove that the breach of contract was an effective cause of the resignation. The breach need not be the sole or principal reason, but it must at least be a substantial part of those reasons, **United First Partners Research v Carreras** [2018] EWCA Civ 323.

121 In deciding whether an employee has affirmed the contract, passage of time will be a relevant factor but the question is essentially one of conduct, **Chindove v Morrisons Supermarkets Ltd** UKEAT/0201/13.

Conclusions

Harassment and direct discrimination

122 The Claimant alleges harassment related to race and direct discrimination because of race, relying upon the same conduct. The Equality Act 2010 provides that an act cannot be a detriment if it is an act of harassment. For this reason, we have decided first whether the conduct relied upon in fact happened, if so, whether it was harassment related to race and, if not, whether it was nevertheless less favourable treatment because of race.

123 Issue 3.1: office. The Tribunal has found as a fact that in September 2015, the Claimant was relocated to an office at the front of the school and that it had no ventilation, was hot and later Mr Manning did remove some of the chairs. The Tribunal has also found that the reason for the relocation was the need for Ms Baker and the Claimant to have their own offices given the nature of their work and neither was adequately ventilated. The chairs were removed because Mr Manning wanted to prevent students from gathering in the Claimant's room without an appointment and when not attending a formal session. This was the explanation given at the time.

124 The Tribunal has accepted that Ms Baker required a larger room because of her formal group work, whilst the Claimant's work was usually one-to-one and any group work was informal and ad hoc. Her formal group work is also the reason why Ms Baker had more chairs in her room than the Claimant. As for the Claimant's case that he was moved so that senior management could keep an eye on him, Ms Baker was moved to an office similarly close to Mr Manning's office and only 40 yards from the Claimant's office. The Tribunal finds this consistent with the Respondent's case that they required separate rooms and these were the only rooms available at the time. This is plausible and consistent with the fact that the Claimant made no contemporaneous complaint.

125 For these reasons, the matters relied upon paragraph 3.1 (a) to (d) were neither related to race nor because of race in any sense whatsoever.

126 Issues 3.2, 3.6 and 3.7: appraisal, discussion and job description. The Tribunal accepts that the Claimant did not have an appraisal or development plan, a job description or a meeting with Ms Hamill to discuss his role and requirements. As Mr McKetty submits, there is little evidence of informal supervision meetings with Mr Manning.

127 However, there was no formal appraisal or development system for any employee, including Ms Baker, until the introduction of Blue Sky in the academic year 2017/18. There is no evidence to show that Ms Baker received more frequent informal supervision from Mr Manning. Indeed, the supervision meetings in 2014 for which there are notes were held with both the Claimant and Ms Baker together. Moreover, it

is the Claimant's case that he was *more* closely supervised than Ms Baker. Ms Baker chose to attend an informal meet and greet session with Ms Hamill when she became headteacher; this was available to all employees. The Claimant did not attend such an informal meet and greet. Ms Hamill did not hold meetings to discuss the role of requirements of any members of staff who were not her direct reports. Nor, the Tribunal has found, was Ms Baker given a job description until July 2018 after the termination of the Claimant's employment.

128 Based upon these primary findings of fact, there are no grounds to infer that the Claimant was treated in the way described in these issues for any reason related to (or because of) race. The reason for these omissions were entirely operational and related to all members of staff.

129 Issue 3.3: student referrals. As set out in our findings of fact, the proportion of white British students mentored by the Claimant and Ms Baker was broadly similar at 17.6% and 14.7% respectively. The ethnic diversity of the students on both the Claimant and Ms Baker's lists was consistent with the diverse nature of the school as a whole and was broadly similar between the two mentors. Students were allocated according to the type of mentoring they required and the respective specialist skills of the two mentors, and not according to their ethnicity. The factual basis of this issue is not well-founded.

130 Issue 3.4: Mr Manning's disparaging remarks. On balance, the Tribunal found as a fact that the remarks were not made.

131 Issues 3.5 and 3.8: discouraging students from seeing the Claimant and telling students to leave his room. The Claimant and Ms Baker had different working styles. Ms Baker worked in a structured and methodical way, the Claimant worked more flexibly, allowing students to see him when they considered it necessary as well as by formal appointment. From as early as 2014, the school wanted the Claimant to establish and adhere to clearer procedures about the services he provided to students. Whilst the Claimant believed that he was providing a valuable and appropriate service to students in allowing greater access, the school was concerned that this was to the detriment of their attending lessons. This applied to all students, including those in the sixth form. The agreement in November 2016 that the Claimant would only see students if they had an appointment or prior approval to miss a lesson was intended to address this genuine concern.

132 The Tribunal has found that the informal way in which the Claimant provided his mentoring services did lead to groups of students being present in his office on regular occasions. This caused some frustration to the Respondent, in particular Mr Manning, and concern about noise and whether or not it was an appropriate use of the room. In this context, in or around March 2017, Mr Manning did tell students to leave the Claimant's office, saying that it looked like a youth club and made the school look untidy. Such comments by Mr Manning in front of students were unprofessional and, objectively considered, humiliating for the Claimant as they undermined him in front of his mentees. They were not, however, related to or because of the Claimant's race but because of his way of working.

133 Mr McKetty submitted that this negative perception of the Claimant's working

style was due to stereotypical prejudice against black British Afro-Caribbean males. Whilst the Tribunal accepts that the Claimant feels aggrieved that he has been portrayed as somebody who allowed young people to, as he put it, "doss" in his room, we find that the Respondent had genuine grounds for concern and it was entirely appropriate for it to seek to establish clearer procedures for mentoring delivered in a school setting. This was not due to any stereotypical views related to race but solely because there were repeated problems with students missing lessons to see the Claimant without an organized appointment. The requirement that the Claimant adhere to clearer procedures was not detrimental treatment limiting the Claimant's opportunity to carry out his role. The Claimant's role was to provide one-to-one mentoring sessions to referred students with some occasional paired mentoring. It was not part of his role to conduct group work or impromptu drop in sessions of this sort. Similar concerns were not expressed about Ms Baker because her practice was more structured and formal and the problem of students attending her office when they did not have an appointment or did not have permission to miss a lesson did not arise.

134 For the reasons set out above, the Tribunal accept that the treatment identified at paragraphs 3.5 and 3.8 was not in any sense whatsoever related to, or because of, race.

135 Issues 3.9, 3.11 and 3.13: leave and attendance. The Claimant's case is that following the appointment of Ms Hamill from 1 September 2016, there was a significant change in the ethos of the school and in particular in its treatment of him. He says that the supportive and developmental culture encouraged by Mr Wilkes was replaced with an environment of fear, trepidation and intimidation. He gives, by way of example, the change in the handling of his absences.

136 The Tribunal has found that there was concern about the Claimant's failure to adhere to the Respondent's absence policy from as early as 2010. On more than one occasion, Mr Wilkes wrote to the Claimant reminding him of the need to complete a yellow absence request form at least five days advance of any leave. This requirement was repeated on 30 June 2016 and the letter makes clear that there was no pre-existing arrangement during Mr Wilkes' headship permitting the Claimant to take leave on the anniversary of his brother's murder without complying with the absence policy.

137 The Claimant worked only two days a week. By 3 May 2017, he had been absent for 12 working days. The Claimant gave short notice of his late arrival on 24 May 2017 and was absent again on 28 June 2017, 30 June 2017 and 5 July 2017. Mr Manning, as we have found, asked for evidence of the reasons for the absences on more than one occasion as the Claimant initially failed to reply to his requests. The reasons for the absences were to attend a Magistrates Court and to deliver knife crime and violence initiative roadshows at other schools. The evidence was provided on 21 June 2017 and the leave of absence was approved by Mr Manning and Mr Douglas. Even if the Claimant was entitled to a long service day, he was nevertheless required to comply with the absence procedure which applied to all members of staff. As we have found, this included providing evidence of the reason for term-time absence. The Claimant was not singled out in this regard.

138 The Respondent required proof of an external appointment in respect of a long service day due to concern about the Claimant's level of absences and the impact of

unreliability on students whom he mentored. Some of the leave being considered was unauthorised and the Respondent would have been entitled to withhold the Claimant's pay. Mr Douglas did not do so; rather he met the Claimant and reached an agreement which entitled the Claimant to retain his pay. The Tribunal concludes that this was a supportive action by Mr Douglas and not a desire to penalise him, as the Claimant has alleged.

139 As for being accompanied at the absence meeting which took place on 20 July 2017, the Claimant was not discouraged from inviting a work colleague or solicitor to attend. The Claimant was advised that he could be accompanied at the meeting by a union representative, colleague or professional body. He said that he wanted to be accompanied by a personal friend. Mr Douglas did not comment on that proposal in his email reply. The Claimant's evidence was that he was discouraged by Mr Douglas saying that it was not a disciplinary hearing. The Tribunal does not accept that any objective person in his circumstances could reasonably view this as discouragement, far less an act of harassment or discrimination; not least as Mr Douglas comment was made in reply to the Claimant's request that the Respondent identify under which part of the disciplinary process the meeting was being held.

140 The Tribunal has found as a fact that there was no prior approval from Mr Dutch for the Claimant to have compassionate leave on 16 September 2017. This leave was not in fact denied by Mr Douglas or treated by him as unauthorised absence, instead the Claimant was advised to make an application which would then be considered.

141 There was no significant change in the handling of his absences after September 2016, the Claimant was expected to adhere to the absence policy for all leave requests when Ms Hamill was Headteacher just as he was when Mr Wilkes was Headteacher. Both before and after September 2016, there were occasions when he failed to do so and was reminded accordingly.

142 Issue 3.10: Mr Todd. The issue as identified before Judge Moor referred to joking in the office, in fact it was clear from the evidence of the Claimant that his complaint is limited to the email sent after the football match and not the initial WhatsApp message sent privately to him. The Tribunal has found that an email was sent by Mr Todd to about 14 or 15 people involved in the school's football team in terms consistent with the content of the WhatsApp message. It contained the reference to a "drug dealing Range Rover". The Respondent's case is that this was just banter between friends and that the Claimant was not offended by it at the time. The Tribunal disagrees. The words used by Mr Todd plainly inferred a link between the Claimant, his choice of car and drug-dealing. The email was sent to a broad number of recipients. In that context, it was humiliating and offensive for the Claimant. Whilst the Claimant did not refer to it in his January 2018 grievance, and indeed mis-dated in his March 2018 grievance, the Tribunal accepts that this was because he accepted that Mr Todd had not intentionally sought to harass or discriminate against him and they had a friendly working relationship which, we infer, he did not wish to jeopardise.

143 Objectively considered we considered that the comment linking the Claimant, his car and drug-dealing had the proscribed effect. The words used by Mr Todd went

beyond banter between friends. It was related to race because if was based upon an offensive racial stereotype that a young black male with an expensive car must be engaged in drug-dealing. This was shared with a significant number of colleagues. Even if intended as humorous, considered both objectively and from the point of view of the Claimant, it is reasonable to regard it as conduct related to race and which had the effect of violating the Claimant's dignity or creating an intimidating, hostile degrading, humiliating or offensive environment and it was unwanted conduct. Subject to the Tribunal's conclusions about whether the complaint was presented in time, it is well founded as a matter of fact.

144 Issues 3.12, 3.15 to 3.18: disciplinary process. It was clear from his evidence and the submissions made on his behalf by Mr McKetty, that the Claimant firmly believes that his conduct on 3 November 2017 could not have given rise to sufficient cause for concern to warrant a formal disciplinary process for potential gross misconduct. Mr McKetty refers to it as a safeguarding issue with very little merit, deliberately exaggerated in order to have a detrimental impact upon the Claimant's reputation. The Tribunal does not agree.

145 There was evidence which suggested that student A had been with the Claimant for the entirety of period 4, contrary to the wishes of her parent and the agreement reached with the Claimant, when she should have been in a lesson. There was evidence that student A had left the premises and purchased food for herself and the Claimant at a time when, according to the record card signed by the Claimant, she was attending a mentoring session with him. There was CCTV evidence and student A's own evidence at interview which was materially inconsistent with the Claimant's account of what had happened. The Claimant was not being disciplined for giving food to a hungry student, as he repeatedly alleged during this case, but for untruthfully signing the mentoring card and enabling the student to purchase food at a time when she should have been in a lesson. The Tribunal agrees that these are serious concerns which required further investigation.

146 The Claimant agreed that investigation was required but that it should have been an informal discussion with Mr Manning. The Tribunal considers that this shows little insight on the part of the Claimant as to the seriousness of the concerns raised, particularly in light of the email from the step-mother only one-month beforehand and his failure to adhere to the agreement reached as a result. It is indicative of his tendency, as we described it in our findings of fact, to make his own judgments as to what was required to support a student and pay less regard to the Respondent's procedures and rules. It was entirely appropriate in the circumstances that this matter be investigated more formally from the outset. A disciplinary investigation would not necessarily lead to disciplinary allegations or any sanction but would enable the Respondent to know the extent to which, if at all, there was cause for concern and enable the Claimant to advance his explanation as to why he believed that his actions were appropriate.

147 Given the serious nature of the concerns, the Tribunal accepts that there was reasonable and proper cause to suspend the Claimant pending this investigation (first as a "refrain from work" and then a formal suspension). The statistical evidence relied upon by the Claimant shows that more black members of staff were asked to refrain from work than were white members of staff. However, the Tribunal considers that the

weight to be attached to the statistics in this case is extremely limited. Firstly, the number of staff suspended was very low (only six in a two-year period). Secondly, the Tribunal did not have the statistics about the diversity of the teaching staff from which to draw any meaningful conclusion as to whether the suspension statistics are consistent or anomalous. Thirdly, the Tribunal was not provided with any evidence of any member of staff of a different race to the Claimant, subject to the same or similar allegations, who was not suspended. Indeed, the comparator relied upon by the Claimant was also asked to refrain from work and suspended (GE).

148 In the circumstances therefore, we accept Ms Robinson's submission on behalf of the Respondent that given the potentially serious nature of the allegations, the Respondent had no choice but to suspend the Claimant pending a full investigation and that they made the same decision that they would have done with any other member of staff. The difficult situation was handled sensitively by Mr Douglas, who only escorted the Claimant part of the way off site, and there is no evidence that this was observed by any other member of staff or student. This not treatment which could reasonably have the proscribed effect (harassment) or was unfavourable (discrimination) and moreover it was not in any way related to, or because of, the Claimant's race.

149 The allegations were not initially made at the level of gross misconduct. In the letter confirming the refrain from work, it is described as simply "an allegation made". The Tribunal understands the additional stress caused to the Claimant by not being told the precise allegations made against him at the refrain from work meeting on 8 November 2017, but also understands that the Respondent could not share that information without the permission of the local authority. It acted reasonably and appropriately in obtaining that permission and providing the particulars of the allegations to the Claimant later that same day.

150 The allegations were first described as potential gross misconduct in the letter dated 10 November 2017 inviting the Claimant to attend a suspension meeting. This was sent after the initial investigation meeting with the Claimant. The initial investigation meeting was part of the Respondent's preliminary enquiry into whether a formal investigation was required. The Tribunal considers this akin to the informal discussion which the Claimant agreed was required. When the concerns were not satisfactorily resolved in that meeting, it was necessary and in accordance with good industrial practice to make clear their severity (if proven). Moreover, this was information that the Claimant wanted as he asked on 10 November 2017 whether the allegations were gross misconduct.

151 Both in his written submissions to the disciplinary investigation and in this hearing, the Claimant maintained that he had done nothing wrong as he was only providing food to a hungry student. His case is that Ms Fraser, a white member of staff, was not subject to disciplinary allegations for giving students a gift. Ms Fraser is not a white member of staff, she describes herself as being as black Afro-Caribbean. Moreover, it was part of Ms Fraser's job to provide a small gift to looked after children leaving school and she followed an established and agreed procedure to do so. Her circumstances are materially different to those of the Claimant. As for the suggestion that other staff gave children food and money, the only evidence relied upon by the Claimant again concerned Ms Fraser. As set out in our findings of fact, Ms Fraser did

provide food to students who had not eaten. She had authority from her line manager to do so and maintained a drawer of snacks for this purpose. There was no evidence that she provided money nor permitted students to leave the school site to attend a shop to purchase their own food during lesson time, far less then signed a record card to say that they had been with her. In the circumstances, the disciplinary process against the Claimant was not an act of harassment as, objectively considered, it was warranted and entirely unrelated to race. Nor has the Claimant proved facts from which the Tribunal could find that this was less favourable treatment because of race.

152 Ms Hamill conducted the formal disciplinary investigation into the Claimant's conduct. She did so because Mr Wyre, who was to have been the investigator, had left the school by the end of December 2017. Ms Hamill did not, however, raise the allegations. The concern was raised by student A's teacher with Ms Caluda who then reported them to Ms Hamill. Ms Hamill conducted the refrain from work meeting and the interviews with students A and B. The Claimant had raised no express concerns about Ms Hamill at the time when she took over the investigation; these were to come only later. There was no breach of the Respondent's disciplinary policy nor was it unfair for her to conduct the investigation. Ms Hamill's investigation report was detailed and fair as it properly set out both the evidence said to give rise to a prima facie case of misconduct and the Claimant's explanations to the contrary. Having regard to all of the circumstances, the Tribunal do not consider that that it is reasonable to believe that Ms Hamill's conduct of the investigation could have the proscribed effect. Nor is there any evidence that an employee in the same or not materially different circumstances would have been treated more favourably. The conduct of the investigation by Ms Hamill was in no sense whatsoever related to race or because of race.

153 Issue 3.17: preservation of documents. The Claimant's first request that the Respondent preserve documents for use in the disciplinary process was made in his solicitor's letter dated 21 March 2018. The Tribunal has found as a fact that Ms Hamill responded in a timely manner and provided the required confirmation. That confirmation was repeated on 9 April 2018. These responses were adequate and the Claimant has not proved that they were breached. The factual basis of the allegation has not been established.

154 Issues 3.19 and 3.22: investigation of the grievance. The Respondent did not investigate the grievances raised by the Claimant in January 2018 or March 2018. The reasons given by the Respondent were that the grievances overlapped with the disciplinary process and that their internal procedures required that the disciplinary process conclude first. Ms Robinson submitted that the Claimant was unable to provide a credible explanation for why he waited until two months after his suspension to raise complaints about alleged harassment and discrimination dating back to September 2015. The Respondent's case is that the Claimant was attempting to prevent the disciplinary process from proceeding by raising his grievances. The Claimant's case was that his grievances raised issues of race discrimination over a period of time which had caused him much concern and which were separate to the disciplinary process. The Claimant specifically alleges that the complaints made in his grievance were evidence of a negative perception of black British Afro-Caribbean males which caused the issues with student A to be blown out of proportion and subject to a biased investigation.

155 As set out in our findings of fact, the grievance submitted in January 2018 did not make a specific complaint of race discrimination against Ms Hamill, but against Mr Douglas, Mr Manning and against the school's management generally. The grievance made specific allegations of discrimination in the disciplinary process and stated that its effect was to postpone the disciplinary procedure. In such circumstances, the Tribunal concludes that it was objectively reasonable for the Chair of Governors to decide that the grievance was about the disciplinary action and refuse to investigate it until that disciplinary process had concluded. This was in accordance with paragraphs 7.1 and 7.2 of the disciplinary procedure and paragraph 2.2 of the grievance procedure.

156 The grievance submitted in March 2018 made further allegations of discrimination and harassment that extended beyond the disciplinary procedure. The Tribunal has found as a fact that this second grievance and the way in which it was expressed was made with the purpose of stopping the disciplinary proceedings. The Claimant was purporting to raise a grievance about matters which were historic and about which no complaint had been made at the time. By their letter dated 12 April 2018, the Respondent expressed concern about the lack of detail provided in support of the grievance and again stated that the grievance would be investigated once the disciplinary process had concluded.

157 Having regard to all of the circumstances, including our finding that the purpose of the grievances was to stop the disciplinary process, the Tribunal concludes that it is not objectively reasonable to regard the refusal to investigate the grievances before the conclusion of the disciplinary process as having the proscribed effect. Nor was there any evidence before the Tribunal from which we could find that an employee in the same or not materially different circumstances would have had their grievances investigated. Quite the contrary, we find that the decision of the Respondent would have been the same whatever the race of the employee involved. The failure to investigate the grievances was neither an act of harassment related to race nor less favourable treatment because of race.

158 Issues 3.20 and 3.21: sickness absence. The Claimant was absent from work due to ill-health from 16 November 2017 until his resignation on 24 April 2018. Throughout that period the Claimant was invited to attend Occupational Health appointments and meetings to discuss his sickness absence. At the same time, the Respondent progressed the disciplinary investigation and invited the Claimant to attend a disciplinary hearing. The Claimant did not want this to happen and refused to attend each of the Occupational Health appointments and internal meetings. The issue is whether this conduct on the part of the Respondent had the proscribed effect and/or was unfavourable treatment and, if so, whether it was related to or because of race.

159 The stated purpose of the Occupational Health assessments and internal sickness absence meetings was to obtain an update on the Claimant's current state of health, prognosis and any steps that could be taken to facilitate his return to work. Occupational Health advice was also necessary to consider whether the Claimant was able to participate in the disciplinary process. In all of the circumstances, and objectively considered, it was not unreasonable for the Respondent to require this information. Indeed, it was necessary to a fair disciplinary process and was reasonable given the impact upon the students mentored by the Claimant and the need to make alternative arrangements. On balance, the Tribunal concluded that the

Claimant was being unnecessarily obstructive because he was seeking to frustrate the disciplinary process. The Respondent's actions were in no way related to or because of race.

160 Issue 3.22: letter of 12 April 2018. The Tribunal considered the letter to be drafted in strong terms and objectively to give the impression that the Respondent did not accept that the grievance was made in good faith and that it may not investigate its contents. In the ordinary course of events, this would be an entirely inappropriate response to a grievance raised by an employee, particularly one raising serious matters such as discrimination. However, based upon our findings of fact, the response could not objectively be considered to give rise to the proscribed effects in circumstances where the March 2018 grievance was submitted for the purpose of stopping the disciplinary process. The complaints made in the grievance were about events which had occurred long before the three-month time period specified in the grievance procedure. There was no good reason for the late presentation of the grievance, not least where the Claimant's case is that he had a journal detailing the conduct about which he complained and where he was sufficiently aware of the grievance procedure to have raised a complaint in January 2018.

161 The threat of defamation proceedings if the complaints were found to be made in bad faith or were repeated in public was made because of the Respondent's genuinely held belief that this was a grievance made in bad faith for the purpose of stopping the disciplinary process. The Claimant has not proved the primary facts from which the Tribunal could conclude that this strongly worded letter was related to or because of race.

162 Whilst we have addressed each of the issues identified by Judge Moor in turn, the Tribunal reminded itself that where a discrimination claim is based upon multiple allegations, it is necessary also to adopt a holistic approach to consider the explanations given by the Respondent. A fragmented approach risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, so it is important to consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

163 It was a feature of the Claimant's evidence, both in his witness statement and orally, to make repeated generalised allegations of a discriminatory or stereotypical culture and environment at the Respondent. He referred repeatedly to, as he put it, a "drip, drip" effect of race discrimination within the school. The Claimant failed to provide much detail of specific incidents of discrimination, despite his assertion that he had maintained a contemporaneous journal. Indeed, in cross-examination when asked for detail, he repeatedly digressed into a general discussion about the feeling of being discriminated against. The Tribunal recognises that people with protected characteristics may appear to tolerate inappropriate conduct for fear of speaking out and that the failure to make a timely grievance does not necessarily mean that the conduct complained about did not occur. However, even taking that into account, it is significant that in June 2016, whilst under the headship of Mr Wilkes whom he held in high regard and against whom he makes no allegation of race discrimination, there were concerns about the Claimant's failure to adhere to school procedures both in relation to students' mentoring sessions and his own attendance.

164 Allegations of discrimination are extremely serious. The Claimant's apparent willingness to make allegations of this sort, without any evidential foundation and even where the evidence directly undermined his case (for example in the handling of his absences in issues 3.9, 3.11 and 3.13) and with the aim of stopping a genuine disciplinary process, undermined the Tribunal's confidence in the veracity of his evidence as to his belief that he had been subjected to unlawful discrimination or harassment. Overall, the Tribunal did not consider the Claimant's case to be credible or coherent.

165 The Respondent's case, by contrast, was clear, plausible and consistent with contemporaneous documents. There were concerns about the Claimant's adherence to proper procedure over a number of years, both under Mr Wilkes and Ms Hamill. There were repeated instructions about the need to see students in a structured setting. The Claimant did not do so on 3 November 2017 and allowed a situation in which student A missed her lesson in period 4 and was late for her lesson in period 6, conduct which was rendered more serious by the inaccurate record card apparently signed by the Claimant. This led to a disciplinary investigation which revealed significant discrepancies in the Claimant's account of events. Once suspended, the Claimant declined to attend any Occupational Health assessment or internal meetings and took steps designed to frustrate the disciplinary process.

166 Having found that the harassment claim was proven only in respect of issue 3.10, an email sent in September 2017, the Tribunal considered time limits. The claim was submitted on 30 July 2018. The ACAS conciliation period was 19 February to 19 March 2018. The claim was presented out of time.

167 In deciding whether it was just and equitable to extend time, we took into account that the complaint was about six months out of time, the Claimant had been able to present a grievance in January 2018 (about the time that the primary time limit would have expired, depending on the length of ACAS conciliation), instructed solicitors from March 2018 and was expressly contemplating litigation. The Tribunal took into account that on the available evidence the claim would have succeeded but also bore in mind that this was in part because the email itself cannot be located due to the passage of time and the absence of a contemporaneous complaint. The conduct was a one-off act by a colleague, not part of the senior management team, arising from the sharing of the content rather than the content of the message itself. It is of an entirely different nature to the other complaints made by the Claimant. In all of the circumstances, we are not satisfied that it is just and equitable to extend time.

168 All complaints of harassment related race and, in the alternative, direct discrimination because of race fail and are dismissed.

Victimisation

169 Both of the Claimant's grievances were made with the express purpose of stopping the disciplinary proceedings. To this extent they were made in bad faith. With the exception of the email sent by Mr Todd in September 2017, the Claimant has found that the complaints made were not well founded in fact. To this extent, they were false.

170 Even if the grievances amounted to protected acts, the Tribunal concludes that there was no detriment to the Claimant in the Respondent's failure to investigate his grievances before the conclusion of the disciplinary process nor in the content of the 12 April 2018 letter. There can be no objectively justified sense of grievance in the Respondent refusing to accept that the grievances could be used a vehicle to stop the disciplinary process as the Claimant intended. We accept Ms Robinson's submission that the Claimant was not "threatened" but merely cautioned through his solicitor as to the potential consequences of a grievance made in bad faith. Moreoever, the reason that the grievances were not investigated was not that the Claimant had made allegations of race discrimination but that he had done so to frustrate the disciplinary process. In other words, the reason for unfavourable treatment was the disruptive intent with which a complaint was made rather than the complaint as such, analogous to the situation in **Woodhouse v North West Homes Leeds Limited** [2013] IRLR 77.

171 The victimisation claim fails and is dismissed.

Constructive Dismissal

172 The conduct relied upon by the Claimant as founding the constructive dismissal claim is the same as that set out above in respect of harassment and direct discrimination. Insofar as the Tribunal found such conduct to have in fact occurred for the reasons set out above, we conclude that it was for reasonable and proper cause and/or was insufficient to amount to a fundamental breach of contract.

173 In essence, whilst the Claimant's office from September 2015 lacked ventilation and at times became too hot, he and Ms Baker required their own offices given the nature of the work and there was no more suitable office available. It would have been better practice to provide the Claimant, and indeed all staff, with an appraisal, development plan and job description. The Tribunal has not heard evidence about why it was not possible to do so but has found that it was not a matter of great concern to the Claimant until the subsequent events leading to the termination of his employment.

174 The comment made by Mr Manning in March 2017 in front of students was unprofessional and inappropriate. It arose from a concern that students were meeting in the Claimant's room in groups and without appointments. Whilst the concern had reasonable and proper cause, the way in which Mr Manning dealt with it on that occasion did not.

175 The Respondent had reasonable and proper cause to require the Claimant to provide evidence of external commitments when absent during term-time on days when he would otherwise have been at work. The impact on students of unreliable attendance was a legitimate reason to address the Claimant's attendance record.

176 There was no reasonable and proper cause for Mr Todd to send the email message with the "drug dealing Range Rover" comment to 14 or 15 other people.

177 For reasons set out more fully above, the Respondent had reasonable and proper cause to investigate the Claimant's conduct on 3 November 2017, to ask him to refrain from work, suspend him, appoint Ms Hamill as investigating officer following the

departure of Mr Wyre and to consider the allegations as possible gross misconduct. There was not, as the Claimant suggested, a pre-determined finding of gross misconduct to support the Respondent's agenda of terminating his employment by any means possible. The allegations raised against him were not wholly unreasonable and designed to unfairly discredit him, as the Claimant submits, but arose from his own lack of judgment and failure to adhere to required procedures on 3 November 2017. This was not, as the has Claimant repeatedly sought to argue, simply a case of him giving money to a hungry child to purchase food. If that had been all there was in this case we would have had some sympathy with him. The Claimant signed a school record card to say that student A had been in a counselling session with him when she had not, he allowed her to miss a lesson despite knowing that it was contrary to the instruction of her family and his manager, he gave an account of events that day which was at odds with the CCTV evidence and the evidence of student A. There was prima facie evidence that the Claimant had failed to adhere to a process which the Tribunal considered was properly required to ensure that children are safe and receive the education to which they are entitled within a school setting. It is of concern that the Claimant even now appears not to realise that his conduct in these two regards was the proper subject of a disciplinary process.

178 There was reasonable and proper cause to require the Claimant to participate in sickness absence meetings and attend Occupational Health and for the Respondent's refusal to investigate the grievances. We refer to our findings of fact and conclusions as set out above.

179 Looked at overall therefore, the conduct capable of amounting to a breach of the implied term of trust and confidence was: (i) the failure to provide an appraisal, development plan and job description; (ii) Mr Manning's comment in March 2017 and (iii) Mr Todd's email in September 2017. The Claimant resigned on 24 April 2018, the eve of a disciplinary hearing that he had made unsuccessful attempts to halt by presenting grievances. The Tribunal find that the conduct of the Respondent, taken cumulatively, was not so serious as to amount to a fundamental breach of contract. Nor was it a material reason for the Claimant's resignation. These were historic matters about which no complaint was made until they formed part of the grievances designed to stop the disciplinary process. They were not a material or effective cause of his resignation, rather we conclude that the Claimant resigned solely because he was not prepared to attend the disciplinary hearing which and which the Respondent clearly intended would take place on 25 April 2018.

180 The constructive dismissal claim fails and is dismissed.

The alleged conduct during the Tribunal hearing

181 The Tribunal decided the case based upon the contemporaneous documents, witness statements, oral evidence and submissions. We did not consider it necessary to draw any inferences from what is said to have happened during the hearing. Nevertheless, given the importance that the dispute assumed to the parties, we have made the following findings of fact.

182 The Tribunal finds that it is more likely than not that as Ms Fraser turned to the back of her room to her colleague and expressed the view that student A should not be

giving evidence given her tender age, the Claimant caught her eye and mouthed words to the effect of "**just watch, just watch**". This was not a threat but reflected the Claimant's belief that student A would be an impressive witness. Whilst the Claimant may have gesticulated in Ms Fraser's direction at the same time, he did not form the shape of a gun with his fingers. It seemed to us that both legal representatives had made rather more of the issue than strictly speaking was necessary.

Employment Judge Russell

5 March 2020