Case No: 1303155/2018

EMPLOYMENT TRIBUNALS

Claimant: Jagbir Sidhu

Respondent: Our Place Schools Ltd

Heard at: Birmingham **On: 20 21 22 23 24 27 28 and 29 January 2020**

Before: Employment Judge Woffenden
Members: Mr DR Spencer
Mr PM Davis MBE

Representation
Claimant: In Person
Respondent: Mr I Wheaton of Counsel

RESERVED JUDGMENT

1 The claimant's claims of direct race discrimination (race and/or religion/belief) and harassment related to race and/or religion or belief under section 13 and section 26 Equality Act 2010 fail and are dismissed.

REASONS

Introduction

1The claimant (a Turban wearing Sikh) was employed by the respondent as a support worker from 7 August 2017. On 19 June 2018 he presented a claim complaining of discrimination because of race and/or religion or belief and of unauthorised deduction from wages whilst still employed. His employment has subsequently ended.

2 Following withdrawal by the claimant on 20 January 2020 the complaint of unauthorised deduction from wages was dismissed by judgment sent to the parties that day. His remaining complaints were of direct race discrimination (race and/or religion/belief) and harassment related to race and/or religion or belief under section 13 and section 26 Equality Act 2010 ('EqA').

3 On 20 24 27 and 28 January 2020 the claimant had a McKenzie friend (Mr Rashid) with him during the hearing. The claimant has anxiety and throughout the hearing the tribunal made any reasonable adjustments sought by him.

4 On 21 January 2020 the claimant made an application to amend his claim to add a complaint of victimisation under section 27 EqA. The tribunal refused that application for reasons it gave at the time. In written submissions Mr. Wheaton referred to the defence available to respondents under section109 (4) EqA but conceded during his oral submissions no such defence had been pleaded.

5 Witness statements had not been exchanged until 20 December 2019.On 30 December 2019 the claimant had made application for 11 witness orders including for Mr Coombs (the respondent's former head teacher) and Helen Turner (the claimant's trade union representative) .Those applications were determined by Employment Judge Butler on 7 January 2020 and only 3 were granted (for Georgina Martin Dean Spiers and Linda Evans).There was a preliminary hearing before Employment Judge Findlay on 15 January 2020. Paragraph 20 of the order she sent to the parties made it clear the claimant could renew his applications for witness order applications for Mr Coombs and Ms Turner at the commencement of this hearing. He did not do so, nor did he appeal Employment Judge Butler's decision not to grant any of the witness order applications.

6 We heard evidence from the claimant. Mr Wheaton chose not to cross examine the claimant's brother and Ms Turner (both of whom had prepared very short witness statements). Their witness statements were admitted in evidence. However, we gave them very little weight because their contents were of little relevance to the factual or legal issues we had to resolve.

Evidence

7 On behalf of the respondent we heard evidence from Merlin Beedie (the respondent's training manager) ,Jakob 'Kuba' Poturalski (currently the respondent's Deputy Head of Care) ,Mark Maloney (a teacher at the respondent) ,Holly Green (a teaching assistant at the respondent) ,Georgina Martin (a former teaching assistant at the respondent),Dean Spiers (a former duty manager at the respondent),Lorraine McLeod (one of the respondent's duty managers) ,and Lena Graham (a non-executive director at the respondent and formerly its registered manager).

8 Linda Evans (who was subject to a witness order) did not attend on grounds she was unfit for work but provided no medical evidence that she was not fit to attend the hearing. However, the tribunal decided not to postpone the hearing while further efforts were made to secure her attendance for the reasons it gave at the time.

9 There was a bundle of (agreed and disputed) documents of 389 pages to which was added by agreement the claimant's QTS certificate dated 1 August 2003 and a suspension letter to the claimant from the respondent dated

(wrongly) 5 March 2017 signed by Katie Walker (the respondent's then head of HR).

10 We have considered only those documents which were referred to us in witness statements or in cross-examination.

11 There have been stark conflicts of evidence in this case about events that are alleged to have taken place. Sometimes such a conflict of evidence is due simply to a mistake, or a memory failure, by one or both parties. Sometimes it may be one witness, or another is not telling the truth. It is the parties' responsibility to obtain and put before the tribunal the material which they consider will assist the tribunal and promote their case. The claimant apologised in his written submissions if he had missed out information from his witness statement which would have provided more clarity on his complaints but, as we informed him, generally, we make decisions only on the material put before it by the parties. That way each party can look at, assess and criticise the other's evidence. An assertion that something happened is not evidence .

10 However where a party could give or call relevant evidence on an important point without apparent difficulty, a failure to do so may in some circumstances entitle us to draw an inference adverse to that party, sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing. In this case all we were told was that Mr Coombes and Katie Walker are no longer employed by the respondent.

11 Our decision as to what happened is not necessarily the objective truth of the matter or matters in issue. Instead it is the most likely view of what happened, based on the assessment of the witnesses and the other evidential material that the parties have chosen to put before us, taking into account to some extent also what we consider that they should have been able to put before the court but chose not to.

12 We found each of the respondent's witnesses gave clear and credible evidence. We found the claimant was from time to time reluctant to answer questions inconsistent vague and inclined to make assertions of fabrication and wide-ranging conspiratorial conduct which require but were completely unsupported by any cogent evidence. He was not a credible witness.

13 Finally, although we must take into consideration all the evidence presented and weigh all the arguments made, we are not obliged to deal in our reasons with every single point that is argued, or every piece of evidence put in front of us. The specific findings of fact made are inherently an incomplete statement of the impression which was made us by the primary evidence. Our conclusions must be seen in that light.

Issues

14 The agreed issues to be determined by the tribunal were as follows:

EQA, section 13: direct discrimination because of race and/or religious belief

14.1 did the respondent subject the claimant to the treatment complained of as set out in the further information document lodged with the tribunal on 7 September 2018?

14.2 was the 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 hypothetical comparators and in relation to allegation 2 on Michael Maloney.

14.3 if so, was this because of the claimant's race and/or religious belief and all because of the protected characteristic of race and/or religious belief?

EQA, section 26: harassment related to race and/or religious belief

14.4 did the respondent engage in the conduct complained of as set out in the further information document lodged with the tribunal on 7 September 2018?

14.5 If so was that conduct unwanted?

14.6 if so, did it relate to the protected characteristic of race and/or religious belief?

14.7 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 have that effect, the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

14.8 The diffuse and narrative nature of the individual allegations made by the claimant in the further information document lodged with the tribunal on 7 September 2018 (Allegation 7 having been clarified by the claimant at the request of the tribunal during the hearing on 21 January 2020) prohibit their being set out in full but they have been summarised in bold within the fact finding section below.

Fact Finding

15 The respondent is a charity and private limited company operating a residential and day school for children and young persons (YP) up to the age of 19 who have complex special educational needs, including those with autism. It has 107 employees and is regulated by OFSTED. The school is in Worcestershire.

15.1 The claimant has had a QTS certificate since 1 August 2003. This means he has Qualified Teacher Status. He lives in West Bromwich. At the time of the events in question he worked during the week as a supply teacher teaching science in the West Midlands conurbation. He was

employed by the respondent as a weekend support worker from 7 August 2017 but was suspended on 5 October 2017.He did not work for the respondent after that date.

15.2 The respondent has not disputed that the claimant has the relevant protected characteristics. The claimant is the only Sikh employed by the respondent since 2012. The respondent has also employed some Nigerians and white non-British. It has received no previous complaints of race/religion discrimination from employees.

15.3 The respondent has an Employee Handbook (prepared by its HR advisers (RBS Mentor) which provides that it can suspend an employee pending further investigation or disciplinary action and that during a period of suspension an employee may not contact anyone connected with the respondent .If the employee needs to contact such a person during suspension they are told to contact their manager and any reasonable request will not be refused. The respondent ran a duty manager system so staff reported to the manager for the shift they were working on at any particular time. There was no named manager in the claimant's terms and conditions of employment. Sarah Davies (the head of care) was also the registered manager for the school at the time the claimant was suspended.

15.4 Employees are entitled to be accompanied to disciplinary hearings by a fellow worker or trade union official, but it is expressly stated there is no right for employees over the age of 18 to be accompanied to investigation meetings.

15.5 The Employee Handbook contains a grievance procedure that provides grievance appeals are dealt with by a different manager to the person who dealt with the grievance and the reasons for the appeal must be submitted in writing. It used to provide that grievance appeals would be dealt with by a body independent of the respondent (which would have been someone from RBS Mentor) but this was changed prior to the claimant's grievance appeal hearing on advice by RBS Mentor. The claimant was aware of the existence of the grievance procedure.

15.6 The respondent provides training on Equality and Diversity (which includes an element relating to unconscious bias) in its induction for staff. It places particular emphasis in all its training on the need to treat everyone equally.

15.7 At the time of the events in question Chris Coombs (the headteacher and Head of Education) and Sarah Davies (the head of care) were the designated safeguarding officers ('DSOs') responsible for reporting safeguarding concerns to the local authority via the Local Authority Designated Officer ('LADO').

Allegation 1 (a complaint about hand gestures allegedly made by Merlin Beedie on 9 August 2017)

15.8 The claimant (with 8 other new employees) underwent a three-day induction process on 7 8 and 9 August 2017 led by the respondent's training manager Merlin Beedie who (as well as devising delivering and resourcing training for the respondent)has about 10-years' experience in inducting and training staff. The induction was followed by 2 days training on MAPA (Managing Actual or Potential Aggression) on 11 and 12 September 2017. That training was designed to help the respondent's staff develop an understanding of violent and aggressive behaviour and what the response should be when faced with those behaviours including as a last resort physical interventions and restraint.

15.9 One of the final sessions of the induction on 9 August 2017 dealt in depth with safeguarding children and a discussion took place about grooming and child sexual exploitation and how the media narrative that the gangs in question comprised Muslim men was not really the case. The claimant said he had received training about fundamentalism as part of his work in schools with a large percentage of BAME pupils. He also mentioned a group of Sikh men of which he had knowledge who sought to prevent the grooming of girls by Muslim men. Mr Beedie drew the conversation to a close and said he would catch up with the claimant after the session. He had a degree of unease about what the claimant had said but the claimant approached him immediately afterwards and they had a discussion in the doorway, initially about the claimant's knowledge of grooming gangs and then Sikh and Muslim cultures.

15.9 Mr Beedie had gained some knowledge of the practice and history of the Sikh faith through working with a YP, a Sikh whose family had wanted to ensure his faith was maintained while the YP was in school. Mr Beedie referred in his conversation with the claimant to his awareness of the past history of Sikhs being persecuted by Muslims and said that some were executed including by being sawn in half. Mr Beedie tends to illustrate his speech with gestures for emphasis because of his extensive experience of working with children with language difficulties. He also frequently saws wood at home for a woodburning stove. The activity of sawing is therefore one which is familiar to him. The conversation ended without the claimant giving any indication to Mr Beedie that he was upset or discomfited or offended by what had been said.

15.10 The claimant included in the bundle some extracts from a Sikh encyclopaedia referring to the execution of a Sikh martyr (Bhai Mati Dhas) in 1675 by two men using a double handed saw, including a small and indistinct picture showing this , each of the men holding their end of the saw in their two hands.

15.11 The claimant became visibly distressed when viewing the above picture and a short adjournment was needed. There was no evidence before us (other than his assertion that this was the case) that Sikhs find sawing gestures generally or a specific sawing gesture (whether or not accompanied by discussion about the past

history of execution of Sikhs by Muslims using saws) offensive or highly offensive.

15.12 The claimant accepts he raised no complaint about Mr Beedie until 18 December 2017 when he presented a grievance in which he complained of race and religious discrimination between 9 August 2017 and 5 October 2017. He complained among other things that Mr Beedie had made reference to Sikhs and used hand gestures to depict the sawing of Sikhs which he found '*highly offensive derogatory and humiliating'*, though he did not explain why.

15.13 At the grievance hearing before Michelle Kiesslinger (the respondent's former Head of Business) on 5 January 2018 the claimant referred to Mr Beedie's knowledge about Sikhs in general and explained that some of the 10 gurus had been martyred, likening the effect of the hand gesture made by Mr Beedie to '*bashing nails'* through his hands' *so its offensive'*.

15.14 At his investigation meeting on 11 January 2018, Mr Beedie said he thought the gesture he was accused of making was the Makaton language sign for bread which is a slicing gesture across the hand. The claimant explained in his evidence to us that was not the gesture of which he accused Mr Beedie. He demonstrated a sawing action using the side of one hand across the opposite forearm. In the investigation meeting Mr Beedie could not recall having consciously used the Makaton sign while talking about Sikhism with the claimant which conversation he volunteered had included the sort of things Muslims used to do to Sikhs including sawing them in half. He asked what the claimant thought it meant and was told he thought it was offensive. He said he did not remember doing it and if he did and caused offence, he apologised. He said the claimant should have said then and let him know why it was offensive perhaps. He said he did not understand how the claimant could have found it offensive in any way.

15.15 When on 19 January 2018 Michelle Kiesslinger wrote to the claimant to inform him that his grievance was not upheld as far as the allegation against Mr Beedie was concerned she found '*Merlin Beedie does use hand gestures whilst talking but the investigation does not lead us to believe the gestures he used during your specific discussion were intended as offensive ,derogatory and humiliating. Merlin was genuinely confused by how his gestures could've been interpreted this way*.'

15.16 We find that Mr Beedie made either a chopping or sawing gesture with his hand during the post training discussion with the claimant on 9 August 2017. However, the claimant has failed to prove on the balance of probabilities that the gesture Mr Beedie made was the very specific gesture which he alleges is offensive to Sikhs.

Allegation 2 (a complaint that Katie Walker allegedly told the claimant he had to speak to the headmaster Mr Coombs before applying for a teaching post at the respondent; Mr Coombes allegedly told the claimant he was busy and did not have time to talk when approached and Linda Evans deputy head teacher allegedly undermined the claimant by telling him he had to have QTS for the position)

15.17 The claimant has alleged that Mr Maloney (who is white) told him that when he started working as a teacher at the school he did not have the QTS qualification .Mr Coombs had told staff (including Mr Maloney who did not have any teaching qualification at the time) about an earlier vacancy for a teaching assistant and when the advert went up he went to see Mr Coombs to ask for more information about it before putting in his application. He had applied was interviewed by Mr Coombs and was successful. He gained his teaching qualification after appointment.

15.18 On 5 September 2017 the claimant saw an internal advert for the job of teaching assistant at the respondent which required QTS or QTSL. The former was a qualification which the claimant already had but he had not provided a copy of his certificate to the respondent before it was included in the bundle during the course of the hearing. The advert had opened on 22 August 2017.He was interested in applying for the post. He asked Katie Walker for a job description (which she provided) and she told him he had to speak to Mr Coombs (who was then the respondent's head teacher) before applying.

15.19 Although the claimant only worked weekends and Mr Coombs worked during the week the claimant worked overtime during the summer holidays and approached Mr Coombs twice. On each occasion Mr Coombs said he was busy and did not have time to talk. The claimant's evidence was that he was thereby denied the opportunity to discuss the prospects of the post with Mr Coombs and this was done for no reason and that Linda Evans told him that a teacher needed to be fully qualified after he told her he was a teacher and said he had to have QTS for the position and he told her again that he did have that qualification.

15.20 The respondent's HR team wrote to the claimant on 3 October 2017 to thank him for expressing an interest in the internal vacancy and asking him to complete an application form and up to date CV in accordance with OFSTED requirements. He was aware that he could apply for the post and, at that stage, produce his teaching qualification. It is common ground he did not apply for the post. His evidence was that he did not do so because he was told it had removed and was no longer available. The letter of 3 October 2017 was evidently an error because the post had been withdrawn by 26 September 2017 and the 4 external applicants were notified of this. There was no evidence before us to support the claimant's assertion that there was a deliberate conspiracy to stop him applying for the

job. The claimant's evidence was that his teaching credentials had been undermined in that he was reminded of the need for the qualification ,he was denied the opportunity to apply for the position and the respondent had 'one criteria (sic) 'for him and another for others. In the absence of Ms Walker Ms Evans and Mr Coombs we accept that the events as described by the claimant took place.

Allegation 3 (**a complaint that in early September 2017 when the claimant told him he lived in West Bromwich Dean Spiers allegedly told the claimant 'What did you do in your previous life to be born in such a shithole?')**

Allegation 4 (a complaint that on 3 October 2017 during a training class Lorraine McLeod allegedly said "Jag works as a male escort when he is not here."

15.21 Mr Spiers and Ms McCleod gave clear unequivocal evidence that they did not make the remarks attributed to them by the claimant. These remarks were not raised by the claimant until he referred to them in his grievance of 18 December 2017. They were investigated during the grievance procedure and, in the case of the remark attributed to Ms McCleod, witnesses did not recall it being made (a remark which they considered would have been memorable because of its inappropriateness). The claimant has alleged that he was offended felt humiliated and 'indirectly discriminated against' because West Bromwich Smethwick and Handsworth were home to a high concentration of 'BMES' in particular turban wearing Sikhs such as the claimant though there was no evidence to corroborate or quantify this. His pleaded case (though not referred to his witness evidence in which he said he was offended and humiliated) was that he had replied to Mr Spiers that it was not that bad. Mr Spiers' perception of West Bromwich was that it was run down with areas of poverty but not that it was ethnically diverse. As far as the 'male escort' remark was concerned his evidence was that he associated the words used with being accused of being a paedophile. The claimant has failed to prove on the balance of probabilities that such remarks were made. He delayed raising the remarks for some months without any satisfactory explanation for the delay and we have preferred the evidence of Mr Spiers and Ms Mcleod. Further we did not find his evidence under cross examination that he associated the male escort remark with being accused of being a paedophile at all credible. He gave no evidence about this in his witness statement and we reject it.

Allegation 5 and 6 (a complaint that on 5 October 2017 Holly Green made allegedly racist remarks towards the claimant regarding the lack of coloured people in Herefordshire. That afternoon Georgina Martin made an allegation against him and he was suspended pending a police investigation- no further action was the outcome of the investigation and the LADO stated it was an unfounded case)

15.22 It is accepted that Holly Green (who comes from Herefordshire) used the term '*coloured people* 'in a discussion with the claimant on 5 October 2017 about the numbers of people of colour in Herefordshire. The claimant alleged she would not have done so had he been white. We accept her evidence that she had been wholly unaware at the time she did so that the phrase had any derogatory connotations. We find she would have used that term in such a conversation with any person. The claimant raised no complaint with her about this remark at the time and evinced no sign of discomfort annoyance or distress. He provided no evidence about any effect of this remark on him in his witness statement other than to record that the remark had been made. He did not raise it until he mentioned in his grievance on 18 December 2017.The claimant under cross examination frankly stated that he admired Holly Green for her honesty about having made the remark and also accepted that this was the only occasion he had worked with her.

15.23 The reporting of safeguarding allegations is not an unusual occurrence at the respondent school. In 2018 there were 5 safeguarding allegations made at the respondent which met the threshold for the respondent's DSO to make a report to the LADO, 2 of which were also reported to the police. We accept the evidence of Mr Beedie that there are robust recording and reporting structures in place and the service is one in which people can raise complaints with the respondent. Indeed it was the claimant's evidence that on 3 October 2017 he himself had raised what he has described as a safeguarding concern with Lorraine McLeod saying that a chart for the previous week for an autistic YP (who according to the claimant was 'BME') ('the YP') had not been completed as it should have been .The YP was also the subject of Georgina Martin's safeguarding allegation against the claimant (see paragraph 15.24 below).

15.24 On 5 October 2017 Georgina Martin made a handwritten statement at the request of Sarah Davies setting out her account of what had occurred that day when she and the claimant were working with the YP raising a safeguarding issue about the way the claimant had treated the YP ('the safeguarding allegation').On that day Katie Walker suspended the claimant with pay pending investigation into the safeguarding allegation and a letter confirming the suspension was sent to the claimant reminding him he should not contact anyone connected with the allegation unless authorised by Mr Poturalski. The claimant has alleged the safeguarding allegation was raised maliciously and fabricated by Ms Martin in conjunction with Mr Poturalski but there was no evidence whatsoever to support this.

15.25 The claimant also alleged in relation to these allegations that white staff members had neglected and used the YP to further their agenda of racism towards him as a BME staff member to sabotage and destroy his career and get the YP section rather than

accommodate his needs to effectively ruin two BME lives. He also pointed to alleged lack of MAPA training for an agency worker. He also alleged the YP had been admitted to the school primarily as a source of income and then became a burden and affected profit margins and that he was asked to work with him because he worked better with black people and the staff wanted the YP sectioned when he did not need to be and could be accommodated at the school. As we have already said in paragraph 12 above, we did not find the claimant a credible witness. There was no cogent evidence to support these serious and wide-ranging allegations.

Allegation 7 (2) (a complaint that on 6 October 2017 he was told by Mr Poturalski that he could only speak to him and nobody else and more than once he would be subject to potential police investigation;

15.26 The LADO was informed about the safeguarding allegation on 6 October 2017 and advised the police should be contacted which was done that same day. The claimant telephoned Mr Poturalski on 6 October 2017 for an update and the gist of their conversation was as subsequently set out in a letter from Katie Walker to the claimant dated 17 October 2017.He was advised in particular to let his employer know he was potentially subject to a police investigation to safeguard him from further allegations . During their conversation he also told the claimant not to have too many sleepless nights which the claimant alleged was done 'laughingly'. We find Mr Poturalski as the person at the respondent appointed to be his sole point of contact was genuinely trying to provide reassurance to the claimant .Under the respondent's Employee Handbook the claimant's manager was to be contacted only if the claimant needed to contact someone connected with the respondent. The claimant asked to speak to sarah Davies the school's registered manager in order to deal the situation amicably. This request was refused. The claimant alleged that Mr Poturalski was the person used to harass and intimidate and victimise him throughout the safeguarding allegation and police investigation process. He did attend a POT meeting on 27 November 2017 (see paragraph 15.31 below) but there was no evidence whatsoever that he was deployed in such a way by the respondent nor did the claimant provide any detail about anything he was alleged to have said or done which was alleged to amount to such conduct.

15.27 On 11 October 2017 a police officer (CID) emailed someone referring to the' *new LADO having asked him to review*' a document said to document a '*torture/assault crime perpetrated by a member of staff*' at the respondent school.

15.28 The police attended the school and interviewed staff on 9 October 2017.

15.29 A Position of Trust ('POT') meeting took place on 18 October 2017 attended by Chris Coombes and Lena Graham (who was on maternity leave but was able to attend on a Keeping in Touch day to

assist Mr Coombes who had not attended such a meeting before). It recorded that initially the police had recommended no further action but upon review the LADO had escalated the matter which the police had agreed to revisit and was now the subject of a live investigation. The claimant was to be informed he was suspended until the POT enquiry was completed.

15.30 The police also attended the school and interviewed staff on 19 October 2017. The claimant was interviewed by the police in the presence of his solicitor on 2 November 2017.

15.31 There was another POT meeting on 27 November 2017 attended by Chris Coombes and Mr Poturalski. The outcome was that the allegation was '*unsubstantiated*' because '*Overall, there is insufficient identifiable evidence to prove or disprove the allegation. The term, therefore, does not imply guilt or innocence.*
Where there is insufficient evidence to substantiate an allegation the employer should consider what further action. if any should be taken.'

15.32 We find the LADO did not state it was an unfounded case as alleged by the claimant and contrary to the claimant's assertion the respondent played no part in the reactivation of the police investigation.

Allegation 7 (1) (a complaint that the respondent allegedly refused to allow the claimant to be accompanied by a trade union representative to the respondent's internal investigation and (3) Holly Kent suggested Mr Poturalski accompany him to his internal investigation meeting knowing he had been involved in making the safe guarding allegation with Georgina Martin).

15.33 On 13 December 2017 the claimant expressed his disappointment in an email that he would not be permitted to be accompanied to the investigation meeting by someone outside the respondent. Although under the respondent's policy employees over the age of 18 had no right to be accompanied to investigation meetings he had nonetheless been offered a colleague as a companion and said he chose Mr French (the respondent's Chief Executive Officer).Holly Kent replied the same day to say he was not available but suggested he ask Mr Poturalski (as he had been the claimant's designated contact during suspension) and offered to contact him on his behalf if he would like him to be approached. There is no evidence that Mr French was in fact available.

15.34 The claimant throughout his evidence and cross examination put forward several explanations for his failure to complain before presenting his grievance :his judgment was clouded ,he was already looking for another job and wanted to keep his head down at this early stage of his employment and he had become accustomed to racial slurs since childhood. He denied under cross examination that that he had only raised these matters to deflect attention from his investigation meeting but he had preceded a question to Mr Poturalski with the comment that his case worker (Ms Turner) had advised him he would either have

to attend the investigation meeting on his own or put his grievance in at the informal investigation at which point they would have to decide whether to change the meeting to a grievance meeting at which she was entitled to be present. We find the grievance was raised at this juncture as a tactical device to avoid attending an investigation meeting into the safeguarding allegation without his trade union representative.

15.35 On 19 December 2017 the claimant failed to attend the internal investigation meeting into the safeguarding allegation.

15.36 On 21 December 2018 the claimant was informed the internal investigation into the safeguarding allegation was concluded and it had been decided that no further action be taken against the claimant but that he might benefit from a behaviour support plan and refresher training. He was to return to work on 30 December 2017.

15.37 Thereafter Michelle Kiesslinger investigated the claimant's grievance. She met with 5 employees including Merlin Beedie Katie Walker and Lorraine McLeod. Typed notes were made of the recordings of those meetings.

15.38 The claimant wrote a letter setting out his grounds of appeal on 25 January 2018. Among other matters he said the best way the school could support him was to continue paying his wages until he recovered and to address the toxic hostile discriminatory work environment. He said that he was still willing to work with the score and would like a "win-win situation". He said he would like to remind the school about the "*sensitivity (sic)nature of this case. A turban wearing Sikh (science teacher) discriminated against by fellow White employees then made into a suspect against a BME child, all the people making allegations white, teachers, deputy headteacher, headteacher, all senior managers all white. Then a police investigation for a potential assault case which required no further action which has caused this person high levels of stress and anxiety and potentially ruined his future career and the school is not taking responsibility. In fact after the school have conducted their investigation rather than remain impartial they have acted to protect the interests of the organisation and not uphold the grievance. My earnings as a delivery driver are much less than what I was earning previously as a science teacher and the foreseeable loss of earnings. Prior to getting suspended, I was earning between 35,000 to 45,000 per year as a science teacher. Furthermore, I was amidst applying for the teachers for leadership programme. This programme aims to fast track teachers into senior leadership positions. The salaries for these positions can be found online for teachers pay and conditions. In comparison a delivery driver earns between £15,000-£20,000 per year. I can address this at the appeal meeting*."

15.39 An appeal hearing was held on 15 February 2018 before Lena Graham. The claimant was asked to agree but declined to have the hearing recorded and typed notes were therefore made. As the appeal hearing concluded the claimant said some' *monetary compensation'* would '*naturally*' help him. By this time the claimant had been absent from work for some months and Lena Graham raised the subject of a return to work and in particular sought to clarify what the claimant had meant by the win win situation mentioned in his appeal. The notes state he said,'*Win win situation would be of the school addressed the environment,2)*

informal meeting with staff to talk with them the other one was impact assessment about having BME in exec decision-making roles. And the 9 equalities actually practiced. You're looking to attract people from diverse backgrounds. You've got one right here. I'm a qualified teacher, this is a Toxic hostile working environment. Your (sic) building a new adult centre, you're going to need teachers. Want to give me a job and I recruit people from diverse backgrounds. I would be able to recover, and you would fill your criteria". Lena Graham asked him if he was saying he wanted a job in the adult centre as a teacher, but he said he didn't. She asked him what he wanted, and his trade union representative said, "*can you clarify what you want as this is important*?". The claimant's reply is recorded as "*give me an executive decision-making role in our place that's what I want. That would solve the problem*". When he was asked later what a positive response from the respondent looked like he said he wanted '*help support emotionally psychologically'* and then said '*I want the allowance I get here a month, massive compensation for all the things that happened to me here .I don't know how long this is going to take .Brush everything under carpet'*

15.40 The notes were sent to the claimant after the appeal hearing and on 1 March 2018, he sent his amendments to the respondent by email in which he said that "*I also talked about another option whereby OP could open up another campus with a school -I'm not referring to the adult centre. Another campus whereby I could be recruited and also recruit staff who are from a BME background in executive positions. This would solve the problem of toxic hostile work environment. Also I never said appointing me to an executive role would solve problem-because the toxic hostile work environment would still exist-only by actually changing the current environment on the ground level can the problem be addressed. If you need more clarification on this point let me know*." He was told by email the same day that the respondent would keep both copies on the file for future reference as there were some disparities between his recollection and the notes produced.

15.41 On 5 March 2018 Lena Graham wrote to the claimant setting out the outcome of his grievance appeal. It was unsuccessful. She said "*We then went on to discuss what you felt would be an appropriate outcome to your grievance appeal. You stated that you wanted your ways to be continue to be paid whilst you were off, and executive decision-making role within Our Place and the toxic hostile working environment to be addressed*." She went on to say that refresher training would be held around communication interactions at work and that the respondent would be happy to facilitate him in a return to work should he decide this was what he would like to do.

15.42 We accept Lena Graham's evidence that the typed notes of the appeal hearing were accurate. We find that in asking for an executive role as an outcome for his grievance the claimant was applying leverage (as he saw it) to fast track his career.

16 For the purposes of the Equality Act 2010 ("EqA"), race and religion or belief are protected characteristics (section 4 Eq A).

17 Under section 13 (2) (a) and (4) EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

18 Section 23 (1) EqA states that "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case

19 Under section 26 (1) EqA

‘(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.”

Under section 26 (4) EqA

‘ (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. ‘

The relevant protected characteristics include race and religion/belief. ."

Under section 39 (2) EqA an employer must not discriminate against an employee by subjecting him/her to any detriment.

We remind ourselves that ‘detriment’ does not include conduct which amounts to harassment (Section 212 (1) EqA.

20 As the claimant reminded us in his oral submissions Lord Nicholls explained in **Nagarajan v London Regional Transport 199I CR 877 ,HL 19** “*All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected applicant had nothing to do with the applicant’s race. After careful and thorough investigation of the claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did*.”

21The courts in approaching discrimination claims have taken account of the fact that it is difficult for a Claimant to establish discrimination. It is accepted that primary evidence that directly indicates discrimination may often not be available and that it is usually necessary for the Tribunal to draw appropriate inferences from the primary findings of fact they make.

22 Section 136 EqA reverses the burden of proof if there is a prima facie case of discrimination. The courts have provided detailed guidance on the circumstances in which the burden reverses but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred. The two-stage test reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

23 The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

24 It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer (“the reason why”) and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.

25 It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

26 It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. However, as the EAT noted (in **Ladele**) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at

all. In some instances comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

27 If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).

28 Tribunals are urged to take an over view of the totality of the evidence before making findings in respect of individual allegations made by a Claimant. The necessity of setting out chronological findings of fact should not lead to the assumption that they have been made piecemeal. In looking at this case we looked at the totality of the evidence before reaching our findings of fact as set out above and before reaching the conclusions which follow.

29 Tribunals must take into account any part of the Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Code") that appears to them relevant to any questions arising in proceedings. As far as harassment is concerned Chapter 7 addresses harassment and says at paragraph 7.7 that "*unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person surroundings or other physical behaviour. The word "unwanted" means essentially the same as "unwelcome" or "uninvited". "Unwanted" does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment* (paragraph 7.8). Paragraph 7.10 says that "*Protection from harassment also applies where person is generally abusive to other workers but, in relation to a particular worker, the form of the unwanted conduct is determined by that workers protected characteristic.* An example is given as follows "*During a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment, even though the remarks were not specifically directed at her*."

30 In **Richmond Pharmacology v Dhaliwal 2009 ICR 724** Mr Justice Underhill said "*not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by the things said or done which are trivial or transitory, particularly if it should have*

been clear that any offence was unintended.' The claimant must have actually felt or perceived his or her dignity to have been violated or an offensive environment to have been created. The fact that the claimant is slightly upset or mildly offended by the conduct in question may not be enough to bring about a violation of dignity or an offensive environment. In the case of **HM Land Registry v Grant** Lord Justice Elias said "*when assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable*."

31 Tribunals were reminded in **Chapman v Simon [1994] IRLR 124 CA** that the jurisdiction of the employment tribunal is limited to the complaints which have been made to it. It is not for us to find other acts of which complaints have not been made if the act of which complaint is made is not proven.

Submissions

32 We heard and considered the oral and written submissions we received from the parties.

Conclusions

Allegation 1

33 This was an allegation of harassment related to race or religion. We have found above that the claimant has not proved that the hand gesture which he alleged was made by Mr Beedie was made by him on 9 August 2017.However, if we are wrong about that ,we conclude that talking about and illustrating by a hand gesture a barbaric historic method of execution perpetrated upon members of a religion or race could provoke strong negative feelings of revulsion or distress in the listener if of that same religion or race as the events in question are thereby brought vividly to mind and are therefore capable of amounting to unwanted conduct. However, in this case we conclude that Mr Beedie's conduct did not have the purpose of either violating the claimant's dignity or of creating an intimidating hostile degrading humiliating or offensive environment for him. Mr Beedie was engaging in a conversation with the claimant in which he shared with the claimant his knowledge that Sikhs had suffered historical atrocities perpetrated by Muslims. He did not know (and we have not found) that a particular sawing gesture is or sawing gestures generally are offensive to Sikhs. This particular topic emerged as part of a conversation initiated by the claimant. There was nothing done or said by Mr Beedie to indicate animus of any sort towards the claimant. We also conclude that the conduct in question did not have that effect. We do not find that the claimant perceived sawing gestures specifically or generally as offensive to Sikhs. In our judgment the distress displayed by the claimant in tribunal was occasioned by the contemplation of the visual image in the bundle of documents. He did not evince any indication of discomfiture or complain about it at the time of the conversation and did not do so until his grievance some four and a half months later. We conclude he was not at the time nor was he subsequently 'highly' offended as he has alleged. Further

having regard to the circumstances of the case (that it was said in the context of an amicable discussion with a colleague not targeted towards the claimant and there was no repetition and such a gesture is not (or ,if it is, it is not known to be) offensive to Sikhs) it was not reasonable for the conduct to have that effect.

Allegation 2

34 This was an allegation of direct discrimination against Katie Walker and Mr Coombes and Ms Evans. We remind ourselves that we are to consider the allegation of discrimination pleaded and not the unpleaded allegations made in evidence. The claimant has alleged the actions of Ms Walker Mr Coobes and Ms Evans collectively or individually amounted to the undermining of his teaching qualification. Even if Ms Walker told the claimant he had to speak to Mr Coombes before applying for the post in question and Mr Coombes said he was too busy to talk to him we are unable to discern how their actions could be said to undermine the claimant's teaching qualification .The allegation in relation to Ms Evans is that she repeated that the post required QTS .We do not consider that such conduct on its own is capable of amounting to an undermining of the qualification which the claimant knew he had. It placed no barrier in the claimant's way as far as applying for the job in question was concerned. Further the claimant has not proved any facts from which we could conclude or infer that if by their actions the individuals in question did undermine the claimant's teaching qualification they did so because of the claimant's race or religion.

Allegation 3 and 4

35 These are allegations of harassment related to race or religion in the form of language used. We have not found that any such remarks were made but, even if they were, we do not consider that any connection between the claimant's protected characteristics and the conduct in question has been made out. Further they were one off remarks not repeated and not sufficiently serious in nature to amount to harassment nor are we satisfied that the claimant felt or perceived his dignity to have been violated or an offensive environment to have been created having regard to the delay in making any complaint about them and his inconsistency in explaining why he found the remarks were offensive.

Allegations 5 and 6

36 The allegation against Holly Green is of harassment related to race or religion. We do not consider that any connection between the claimant's religion and the conduct in question has been made out. As far as harassment related to race is concerned we conclude the use of such derogatory phrase in the presence of a person of colour is capable of amounting to unwanted conduct but it did not have the purpose of either violating the claimant's dignity or of creating an intimidating hostile degrading humiliating or offensive environment for him. Holly Green did not know that this was a derogatory remark. She did not direct or target her remark towards the claimant. We also conclude that the conduct in question did not have that effect. He evinced no indication of discomfiture nor did he complain about it at the time of the conversation and did not do so until his grievance some four and a half months later. There is no evidence on which we could conclude that the claimant felt or perceived his or her dignity to have been violated or that an offensive environment had been created, nor having regard to

the circumstances of the case (that this was the first and only time they had worked together ,that it was said in the context of an amicable discussion with a colleague not targeted towards the claimant , there was no repetition) would it have been reasonable for it to have had that effect.

37 The allegation against Georgina Martin is of direct discrimination because of race or religion. We conclude that the claimant raised the matters identified in paragraph 15.25 because he wanted the tribunal to review the safeguarding investigation and in some way clear his hitherto unblemished record while also ventilating concerns he had about the treatment of the YP but our function is confined to determine those factual matters which are relevant to the alleged race /religion discrimination. Even if proven they are not matters from which we could conclude or infer that Ms Martin's treatment of the claimant was because of his race or religion. In this case we conclude Ms Martin would have made a safeguarding allegation against a hypothetical comparator without the claimant's protected characteristics if having worked with them she had safeguarding concerns about that person. Further the matter would have been reported to the police by the respondent if it had been advised by LADO to do so. There was no less favourable treatment of the claimant. It is nothing to the point that in due course the allegation was '*unsubstantiated*' due to lack of enough evidence.

Allegations 7 (1) and 7 (3)

37 These allegations are of direct discrimination and harassment related to race or religion.

38 The reason why the claimant was not permitted to be accompanied by his trade union representative at the investigation meeting was because the respondent was applying its policy. A hypothetical comparator without the claimant's protected characteristics would have been treated in exactly the same way had they made such a request. His trade union representative knew that this was the respondent's policy. The reason the claimant was not permitted to have Mr French the CEO was because he was not available. A hypothetical comparator without the claimant's protected characteristics would have been treated in exactly the same way had they made such a request. We have not found that Mr Poturalski was involved in making the safeguarding allegation with Ms Martin. Mr Poturalski may not been a suitable person to attend the investigation meeting with the claimant as an alternative colleague but that is not evidence of race or religious discrimination such as to call for an explanation from the respondent.

39 Furthermore if the conduct was capable of violating the claimant's dignity or of creating an intimidating hostile degrading humiliating or offensive environment for him the claimant has not proved any facts from which we could conclude or infer that the conduct was in any way related to the claimant's race or religion.

Allegation 7 (2)

40 This allegation is of direct discrimination and harassment related to race or religion.

41 The claimant did not ask Mr Poturalski to speak to Ms Davies in order to ask for permission to speak to someone connected with the respondent during the investigation. He gave Mr Poturalski (who had been appointed his sole point of contact while the investigation was ongoing) no reason to accede to his request. A hypothetical comparator without the claimant's protected characteristics would have been treated in exactly the same way had they made such a request. Even if we had found that Mr Poturalski repeatedly told the claimant that he could only speak to him and no-one else and /or that he would be subject to a potential police investigation that is not evidence of race or religious discrimination such as to call for an explanation from the respondent.

42 Furthermore if the conduct in question was capable of violating the claimant's dignity or of creating an intimidating hostile degrading humiliating or offensive environment for him the claimant has not proved any facts from which we could conclude or infer that the conduct was in any way related to the claimant's race or religion.

43 All of the claimant's complaints therefore fail and are dismissed.

Employment Judge Woffenden

Date: 04/05/2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

04/05/2020

FOR EMPLOYMENT TRIBUNALS