



# EMPLOYMENT TRIBUNALS

**Claimant:** Janice Brown-Simpson

**Respondent:** Arbor Academy Trust

**Heard at:** East London Hearing Centre (by Cloud Video Platform)

**On:** 27 & 28 April 2021

**Before:** Employment Judge S Knight

## Representation

**Claimant:** Susanna Thompson (Regional Officer, NASUWT)

**Respondent:** Sarah Bowen (3PB)

# JUDGMENT

1. The Respondent unfairly dismissed the Claimant.
2. The Respondent is ordered to pay the Claimant £27,032.82.
3. For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:
  - (1) The total monetary award for unfair dismissal is £27,032.82.
  - (2) The prescribed element is £16,075.30.
  - (3) The prescribed element relates to 1 September 2020 to 28 April 2021.
  - (4) The amount by which the total monetary award for unfair dismissal exceeds the prescribed element is £10,957.52.

# REASONS

## Introduction

### *The parties*

1. The Claimant was employed by the Respondent as a teacher at Northwold Primary School (“**the School**”). She was originally employed by another employer, but her employment was transferred to the Respondent. She is treated as having been employed by the Respondent between 1 September 2016 and 31 August 2020. She was employed as an unqualified teacher under the Overseas Teacher Training (“**OTT**”) scheme.

### *The claims*

2. The Claimant claims for unfair dismissal arising out of her dismissal on 31 August 2020. The dismissal was at the conclusion of a 4-year fixed term contract. The Respondent says that the Claimant was dismissed either because of her capability, or because of some other substantial reason. The Respondent says the other substantial reason was either: (1) the expiry of the fixed term contract; or (2) the Claimant failing to reach the necessary standard of teaching and obtain Qualified Teacher Status (“**QTS**”) within the fixed term period.
3. On 10 July 2020 ACAS was notified of the Claimant’s claim under the early conciliation procedure. On 12 August 2020 ACAS issued the early conciliation certificate. On 31 August 2020 the Claimant’s employment ended. On 13 November 2020 the ET1 Claim Form was presented in time. On or around 2 February 2021 the ET3 Response Form was sent to the Tribunal.

### *The issues*

4. At the start of the hearing, the parties agreed to a list of issues. It appears at Annex 1 to these Reasons.

## Procedure, documents, and evidence heard

### *Procedure*

5. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was “**V: video whether partly (someone physically in a hearing centre) or fully (all remote)**”. A face-to-face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same. The documents that I was referred to are in a bundle, the contents of which I have recorded.
6. All participants attended the hearing through Cloud Video Platform.
7. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

**Documents**

8. I was provided with an agreed Hearing Bundle comprising 223 pages. To this were added an additional 6 pages at the Respondent's request. Some of the pages were poorly copied, so they were additionally provided by email.
9. Witness statements from the Claimant, Denmark Brown-Simpson (the Claimant's husband), Maureen Okoye (CEO of the Respondent and dismissing officer), Jason Cook (Executive Principal of the Respondent), Marcia Douet (Chair of Trustees for the Respondent and appeal officer), and Loren Feeley (from the Respondent's HR) were provided separately.

**Evidence**

10. At the hearing I heard evidence under affirmation from all of the witnesses except for Denmark Brown-Smith. Denmark Brown-Smith's evidence was not in dispute. Each of the witnesses who gave oral evidence adopted their witness statements and added to them.
11. The Respondent chose not to adduce any other live witness evidence. In particular, it chose not to adduce evidence from the headteacher or deputy headteacher of the School. At least the headteacher remains employed by the Respondent in the same role.

**Closing submissions**

12. Both parties made helpful oral closing submissions.

**Relevant law**

13. Section 94 of the Employment Rights Act 1996 ("**ERA 1996**") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.
14. Section 98 of the ERA 1996 provides insofar as is relevant:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case. [...]

### ***The reason for dismissal***

15. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748; 23 May 2017 Lord Justice Underhill stated that the “reason” for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what “motivates” them to dismiss.

### ***Capability as a reason for dismissal***

16. Where an employer seeks to rely on incapability or lack of qualifications as the ground for dismissal, the onus is on it to show that this was the actual reason or principal reason for dismissal. But this should not be mistaken as meaning that an employer must objectively establish that a dismissed employee lacked capability. As Lord Denning MR put it in *Alidair Ltd v Taylor* 1978 ICR 445, CA: “*Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.*” Put another way by Lord Justice Geoffrey Lane in the same case, the Court of Appeal’s test of a fair capability dismissal (aside from procedure) has two elements: (1) whether the employer honestly believed the employee is incompetent or unsuitable for the job; and (2) whether there are

reasonable grounds for that belief. Shortly after the judgment in *Alidair*, however, section 6 of the Employment Act 1980 removed the onus on the employer in so far as the requirement to show reasonableness was concerned. As a result, the burden of proof in respect of the reasonableness of the employer's belief, and whether the employer has conducted a reasonable investigation to verify its belief, is neutral.

***Some other substantial reason: failing to achieve qualifications***

17. Failing to achieve qualifications required for a job could amount to some other substantial reason to dismiss. There is a potential overlap between this and a capability dismissal.

***Some other substantial reason: expiry of a fixed term contract***

18. The expiry of a limited-term contract is not itself a potentially fair reason for dismissal. The employer must still establish that the expiry and non-renewal fall within one of the potentially fair reasons for dismissal. In *Tansell v Henley College Coventry* 2013 IRLR 174, EAT an employment tribunal dismissed the claimant's claim for unfair dismissal, holding that the reason for his dismissal was the expiry of a fixed term and that the process by which the contract came to an end was entirely legitimate and fair. Allowing the claimant's appeal, the EAT noted that the non-renewal of a fixed-term contract is a dismissal by virtue of section 95(1)(b) ERA 1996. In other words, the expiry of the Claimant's contract was the dismissal itself, not the reason for it. The tribunal had erred by eliding the mode of dismissal with the reason for dismissal. The reason must be one of those listed in section 98(2) ERA 1996 or some other substantial reason, and the tribunal must decide whether the reason relied on by the employer is among those listed.
19. In *Terry v East Sussex County Council* 1976 ICR 536, EAT the EAT noted that if the expiry of a limited-term contract automatically constituted some other substantial reason for dismissal then employers could hide behind pleas of some other substantial reason simply by calling a contract limited-term when the real reason for termination was something else altogether. There, the claimant was employed under a fixed-term contract which expired and was not renewed. The EAT overturned the tribunal's decision that the expiry of the term itself constituted some other substantial reason. In the EAT's view, the expiry and non-renewal of a limited-term contract might well constitute some other substantial reason, but this is not always so. It held that the tribunal should have considered whether the Claimant knew that he had been employed for a particular job on a temporary basis and whether he might reasonably have expected his employment to be renewed. It would then have to consider whether the dismissal was reasonable in all the circumstances, applying what is now section 98(4) ERA 1996.

***Avoiding a substitution mindset***

20. In considering the case generally, and in the Tribunal's assessment of whether dismissal was a fair sanction in particular, the Tribunal must not simply substitute its judgment for that of the employer in this case. Different reasonable employers acting reasonably may come to different conclusions about whether to dismiss. As Mr Justice Phillips noted when giving the judgment of the EAT in *Trust Houses*

*Forte Leisure Ltd v Aquilar* [1976] IRLR 251; 1 January 1976:

“It has to be recognised that when the management is confronted with a decision whether or not to dismiss an employee in particular circumstances, there may well be cases where more than one view is possible. There may well be cases where reasonable managements might take either of two decisions: to dismiss, or not to dismiss. It does not necessarily mean, if they decide to dismiss, that they have acted ‘unfairly,’ because there are plenty of situations in which more than one view is possible.”

21. It is therefore not for the Tribunal to ask whether a lesser sanction would have been reasonable in this case. The Tribunal asks itself whether dismissal was reasonable.

### **Findings of fact**

#### ***The Claimant’s employment and the Respondent’s policies***

22. The Claimant moved to the United Kingdom and took up employment at the School. The School was a state maintained school. The Claimant’s visa was sponsored by the School. She was employed on a 4-year contract. The intention of the employer and the Claimant was that the Claimant would use the 4 years in which she could teach as an OTT to obtain QTS. The employer decided that this would be done through the Assessment Only (“**AO**”) approach. This involved external assessment of the Claimant’s abilities. If the Claimant achieved the required Teaching Standards in the external assessments then she would obtain QTS.
23. It was not a term of the Claimant’s contract of employment that she obtain QTS within 4 years. Nor was it a term of her contract that she pursue the AO approach to obtain QTS: the use of the AO approach was the Respondent’s preference, but not a term of the contract of employment.
24. In state maintained schools OTTs can only teach for 4 years. After 4 years they must obtain QTS to continue to teach.
25. On 1 January 2020 the Claimant’s employment was transferred to the Respondent. The Respondent is an academy chain. Academies do not have the same restrictions on employing OTTs for a maximum of 4 years. They can employ unqualified teachers as teachers without restriction.
26. At no time did the Claimant’s contract change to mean that she had to obtain QTS within 4 years, or to pursue the AO approach. Indeed, the parties at no stage considered that such a term would form part of her contract.
27. Throughout the course of her employment the Claimant did not receive much Continuing Professional Development (“**CPD**”) training through the School. She arranged this herself in her spare time. She did receive some mentoring.
28. The Claimant’s teaching was regularly observed by the headteacher of the School. The headteacher was in a position to comment on the Claimant’s competencies based on her observations.

29. The Claimant pursued the AO route with the Respondent. The Claimant undertook several external assessments. The final stage of the external assessments (“**Stage 3**”) required the Claimant to be observed teaching a class. The Claimant attempted and failed Stage 3 on 3 occasions, 1 May 2019, 7 June 2019, and 26 February 2020. On the final occasion she was observed by the headteacher.
30. Following the 26 February 2020 assessment, on 2 March 2020 an email was sent to the headteacher by the assessor. It was intended that this would be sent to the Claimant as well, but the Claimant explained in evidence that she had no memory of receiving it, and she believed she did not receive it. There is no evidence that she in fact did receive it, as her email address is not on the version of the email disclosed by the Respondent in the Tribunal proceedings. In the absence of any documentary evidence to disprove the Claimant’s assertion, and having observed the Claimant give a wholly consistent, plausible, and credible account in evidence, I accept the Claimant’s account of not having received the email. The email notes that the Claimant had failed the assessment, and that she would not be recommended for re-assessment in 6-12 weeks. It was recommended that she undertake the School Direct route to qualification instead of continuing on the AO route.
31. The School Direct route to qualification involves an applicant making an application through UCAS. The application has to be linked to a college or university. The application is made to a school, which considers the application. The school then makes a decision on whether to accept the applicant. Successful applicants can be salaried or non-salaried. The Respondent accepts applications through the School Direct route.
32. The Claimant did not make an application through the School Direct route.

***The Claimant’s alternative route to qualification***

33. The Claimant took a more proactive approach to obtaining her QTS. She pursued an alternative legitimate route to qualification. She applied to the General Teaching Council (Scotland) (“**GTC(S)**”) for registration in Scotland. The Respondent has termed this route a “loophole”. However, it was a lawful route to qualification.
34. The Claimant’s application to the GTC(S) was supported by two references. The referees were required to certify whether the Claimant’s “Service” was “Satisfactory” or “Unsatisfactory”. Both referees certified the Claimant’s service as Satisfactory. The references then called for detailed commentary on the Claimant’s “Curriculum Knowledge, Understanding and Development”, “Teaching Methods and Assessment Strategies”, “Classroom Organisation and Behaviour Management”, and “Professional Responsibilities, Values and Personal Commitment to the Teaching Profession”. They also called for “Additional Comments on the Candidate” and information on any disciplinary proceedings faced by the Claimant.
35. One of the referees was the headteacher of the School. She supplied a reference on 1 April 2020. It was clarified at the Claimant’s appeal hearing and in oral

evidence at the Tribunal by representatives of the Respondent that the headteacher is an agent of the Trust. The headteacher was in the most informed position to provide a reference, given her nearly 4 years of knowledge of the Claimant, including her lengthy observation of the Claimant's development over that period. That observation had included the observation of the third Stage 3 assessment.

36. The headteacher's reference was based on her overall knowledge of the Claimant's abilities. It was not restricted to the external assessments. The Respondent's case appeared to be that it should have reflected only the external assessments. There was no basis for this contention. It was a balanced reference that was given in appropriate terms based on the headteacher's considered views, including setting out areas for further development, such as "*She needs to continue improving her knowledge of all curriculum areas in the National Curriculum in order to provide the best possible outcomes for all children in her class.*" It was not dishonest. It was not inappropriate. It was holistic.

### ***The Claimant's dismissal***

37. On 14 April 2020 Maureen Okoye, the CEO of the Respondent, wrote to the Claimant to tell the Claimant that she was being dismissed. The letter began "*I am writing to you regarding your most recent teacher trainee review that was undertaken by our DFE accredited body and your employment status as an overseas trained teacher at Northwold Primary School.*" The letter said that it was unlawful for the Claimant to teach in a school for more than 4 years without being awarded QTS. The letter listed the Teaching Standards which the Claimant failed to meet in her third Stage 3 assessment. The letter was then clear that as a result of not attaining QTS the Claimant would be dismissed on 31 August 2020, at the conclusion of her 4-year period of employment. The letter also said that the Claimant's sponsorship to remain in the United Kingdom would end, so she should leave the United Kingdom.
38. Sometimes employers mislabel reasons for dismissal, and I must consider what the principal reason for dismissal in fact was. I have found that a mislabelling of reasons for dismissal did not occur here.
39. The sole reason for the dismissal of the Claimant was that Ms Okoye thought that the Claimant would not achieve QTS using the AO route within 4 years, and therefore that the Respondent would no longer be able to employ the Claimant as a class teacher. There was no other reason within the mind of Ms Okoye. Any other reasons the Respondent later advanced were justifications made up after the event to cover up the mistake they made in dismissing the Claimant.
40. Ms Okoye's belief that the Claimant could not be employed for more than 4 years without achieving QTS was wrong, unreasonably held, and reached without regard to the law or any appropriate guidance. Ms Okoye had also failed to consider that even if she was right, when she made the decision to dismiss there were other legitimate routes available to the Claimant to gain QTS, or to remain employed with the Respondent, for example on the School Direct scheme to which she could be encouraged to apply.



41. After the failure of the Stage 3 assessment on 26 February 2020 the Respondent did not invite the Claimant to apply for School Direct; the Respondent did not invite the Claimant to continue (lawfully) to teach as an unqualified teacher; the Respondent did not suggest to the Claimant that she take on a non-teaching role in the school; it did not suggest any other route to help the Claimant to qualify, or to retain her employment. It tried nothing and it was all out of ideas.

***The Respondent's deliberate sabotage of the Claimant's QTS status***

42. Following the Claimant's application and the provision of references, the GTC(S) registered the Claimant. As a result, on 30 April 2020 the Teacher Registration Agency in England issued the Claimant with QTS.
43. The Claimant in the meantime on 4 May 2020 pursued an appeal against her dismissal. On 12 May 2020 she informed the Respondent that she had obtained QTS.
44. On 13 May 2020 the Respondent's HR staff wrote to the GTC(S) in order to tell them that the headteacher of the School did not have authority to provide a reference, and that the reference did not truly reflect the Claimant's teaching abilities. Only the headteacher would in fact have been able to comment on the Claimant's teaching abilities in detail. However, the Respondent had taken the view that the reference did not truly reflect the Claimant's teaching abilities because it was not based exclusively on the third Stage 3 assessment arising from a single lesson observation. Instead, the reference had been based on the headteacher's view of the Claimant's teaching formed over the course of almost 4 years of employment and numerous observation sessions, including observation of the third Stage 3 assessment. The Respondent then engaged in swift correspondence with the GTC(S) and the Department for Education with a view to have the Claimant's QTS revoked.
45. In the course of these Tribunal proceedings Ms Okoye made a claim that the Claimant was related my marriage to the headteacher who supplied the reference. This claim was false. The Claimant and the headteacher are not related, and there is no evidence to support the contention that they are. At the hearing the Respondent did not seek to pursue this false allegation.
46. At the hearing Ms Okoye gave evasive answers to every question she was asked about this issue. She was unable to give any coherent explanation for why the claim that the Claimant and the headteacher were related appeared in the ET3. She denied that it was included in order to form a basis for an allegation that there was collusion or dishonesty in the provision of the reference, despite this allegation appearing in the ET3. However, she was incapable of providing another reason for its conclusion. Eventually, something resembling the truth slipped out: it was included because she "*wondered if there was influence from the relationship issue*". What Ms Okoye was referring to was her intention to advance the baseless case that the Claimant and the headteacher had dishonestly colluded in the provision of the reference.
47. Ms Okoye also came unstuck when she attempted to explain how and when a claimed relationship between the Claimant and the headteacher came to her

attention. In her witness statement she said that *"I was led to believe that she was related by marriage to the Head Teacher. I cannot recall who told me this information. I did not raise this with either the Claimant or the Head Teacher as it was not relevant to the Claimant's performance or the decision to dismiss her"* (my emphasis). She adopted her witness statement as her evidence. She did not ask to amend it. She then specifically adopted this part of her witness statement in cross-examination when it was specifically put to her, again without attempting to amend it. She then appropriately conceded that in light of further evidence that had been served it was clear that there was no such relationship. Then in response to questioning Ms Okoye began to give a more detailed account contradicting her statement. She said that she had a meeting in January 2020 with the headteacher and deputy headteacher at which it was agreed that the headteacher could not mentor the Claimant *"because of a possible relationship"*. In response to further questioning she said she came to know of the relationship earlier on the day of the meeting, from a member of teaching staff at the same school. She said that she had remembered this on Friday, then she changed this to saying it was either 6.30 on Monday, or on the morning of the Tuesday on which she gave her evidence that she remembered it. She then said she could not remember if there was formal documentation of the meeting with the headteacher and deputy headteacher, and then that both the headteacher and deputy headteacher would record the meeting, but no evidence of the meeting was produced. She said that in the meeting with the headteacher and deputy headteacher, the relationship was not confirmed, and it was merely said that the headteacher could not mentor the Claimant due to a conflict of interest.

48. I have considered carefully Ms Okoye's evidence. It shifted constantly as Mr Okoye went along. It is a wholly implausible account, involving sensitive information coming to Ms Okoye from a source that she cannot quite remember, and her not thinking it necessary to confirm the information. I can only conclude that Ms Okoye has manufactured her evidence on this issue. I reject the account she gave of how she came to believe there was a relationship between the Claimant and the headteacher. It is simply incredible.
49. The Respondent disciplined the headteacher for providing the reference. The Respondent forced the headteacher to provide a new reference on 20 May 2020. The new reference certified the Claimant's Service as Unsatisfactory. Its narrative section was calculated to ensure that the Claimant's registration with GTC(S) was revoked. It focussed on the third Stage 3 assessment. It did not focus on areas that the Claimant had satisfied in the first or second Stage 3 assessments which she had not satisfied in the third Stage 3 assessment. The Respondent ensured that this second reference was submitted with the intention of having the Claimant's QTS revoked. This could then allow the Respondent to manufacture a pretext to maintain the dismissal of the Claimant.
50. On 22 May 2020 the Claimant's registration was reduced by the GTC(S) from full registration to provisional registration.
51. On or around 4 June 2020 the Claimant's QTS was revoked as a result of the change in her registration by GTC(S). The Respondent was informed of this.

***The Claimant's appeal against dismissal***

52. The Claimant's representative chased the Respondent about arranging an appeal hearing. The Respondent delayed arranging the Claimant's appeal hearing until the day after it was notified that the Claimant's QTS had been revoked. On 5 June 2020 it told the Claimant that her appeal would take place on 11 June 2020.
53. The conclusion that I draw from the timing and content of the Respondent's actions is that it manufactured the withdrawal of the QTS which the Claimant had legitimately achieved in order to provide a pretext on which it could maintain the dismissal of the Claimant.
54. On 11 June 2020 the Claimant's appeal hearing was conducted using the Zoom videoconferencing application. The Claimant's representative put her case, which was summarised in the minutes of the appeal hearing as follows:
- "That it is not fair or reasonable for Arbor to have taken the steps it did to put JBS in a position where, having satisfied the criterion with the support and knowledge of the Head, this was then undermined by Arbor.
- That, contrary to the statement in MO's letter of 14 April that it is 'unlawful for an OTT to continue teaching in a school within the UK beyond four years if they have not been awarded QTS', it is not factually unlawful for an academy to continue to employ an OTT beyond 4 years.
- That the appropriate remedy for Arbor's unreasonable actions in undermining JBS's QTS would be for Arbor to continue to employ JBS until she is in a position to obtain QTS."
55. On 18 June 2020 the Respondent by letter rejected the Claimant's appeal. The appeal panel noted that the Respondent had taken steps to have the Claimant's QTS revoked and that it had been revoked. The appeal panel concluded that the Respondent's approach to this was reasonable. The appeal panel agreed that the 4-year restriction did not in law apply to the Claimant. However, the appeal panel accepted evidence that "*the Trust do not employ unqualified teachers unless they are employed on the Trust's training programme which is for a period of one year only.*" The appeal panel therefore concluded that it was an "*ongoing trust policy and commitment that we will not use unqualified teachers and the leadership decision in your circumstances is reasonable and consistent with Trust policy.*" The appeal panel therefore upheld the decision to dismiss.
56. Ms Douet agreed in evidence that the appeal panel substituted a new reason for dismissal. Their reason for dismissal was that they concluded that the Respondent has a policy not to "*employ unqualified teachers unless they are employed on the Trust's training programme which is for a period of one year only.*"

***The Respondent's policies about teacher qualification***

57. By the time of the appeal hearing the law was agreed by everyone involved: OTT

staff cannot teach in state maintained schools for more than 4 years, but they can teach for an indefinite period in academies. The School used to be a state maintained school but at all times during the dismissal process it was an academy, so was not bound by the restriction on OTT staff teaching.

58. The Respondent claimed to have a policy prohibiting it from employing OTT staff for more than 4 years, so that it followed the same rules as the local authority schools around it. This was sometimes expressed as meaning it did not employ “unqualified teachers”. The Respondent’s pleaded case on this point, confirmed in closing submissions, was that “*The [...] Respondent has committed to parents and staff to follow the local authority policies upon conversion to academy status. [...] It is a requirement of all teaching staff that, unless undertaking training, they hold QTS status.*” But this is plainly incorrect: the Respondent employs and continues to employ unqualified teachers. Those unqualified teachers included 5 OTT staff of whom the Claimant was one, and a music teacher. I accept the Respondent’s evidence that it is standard state maintained school practice to employ unqualified music teachers, as they are of a different nature to class teachers. However, the pleaded case as to the nature of the policy on a blanket basis excluding the employment of unqualified teachers is simply inconsistent with the Respondent’s own evidence.
59. The Respondent’s evidence was that it never reduced to writing whatever policy it had about not employing unqualified teachers, or unqualified teachers save where they could be employed by state maintained schools. Rather, it was a promise orally made to parents and the local authority. It would be strange for such a promise never to have been reduced to writing if it existed. The Respondent’s further evidence, which I accept, is that this policy is not a condition of the funding for the School.
60. The terms in which the policy are said to exist are so vague as to be impossible to pin down, having been expressed inconsistently by the Respondent. It has never been written down. I simply cannot accept that this policy existed in a rigid form as claimed by the Respondent. If it did, someone would have written it down before now and produced it in evidence.

**The Claimant’s personal circumstances and attempts to find work.**

61. The Claimant is a mother of school-age children. She lives in East London.
62. The Claimant has signed up to job agencies, made direct job applications, and placed her CV on online job sites. I accept her evidence about her attempts to find work. Much of her job search is supported by evidence, and the parts that are not are reasonably explained by them taking place by telephone.
63. The Claimant requires leave to remain in order to live in the United Kingdom. She made an in-time application to extend her leave to remain, which is automatically extended by the Immigration Act 1971 section 3C. However, the fact that she has leave to remain is little help to her in finding work, as to obtain new employment her employer may have to offer sponsorship. Few employers want to do this for unqualified teachers, or for teaching assistants.

## Conclusions

### *Liability*

64. The Claimant was dismissed because of a mistake of law made by the Respondent about the lawfulness of continuing to employ the Claimant. She was not dismissed for a potentially fair reason. The appeal hearing relied on a policy which did not exist to try to shore up the dismissal with a concocted new reason. As such, the dismissal was substantively unfair.
65. If I am wrong about this and if the reason for dismissal was capability, then I would conclude that the Respondent's decision-maker, Ms Okoye, did believe that the Claimant was not capable or was unsuitable for the job. However, the grounds for that belief were not reasonable: they were based solely on 3 assessments and ignored the headteacher's professional opinion developed over almost 4 years. Ms Okoye had no reasonable basis to disregard the headteacher's considered professional opinion. Neither Ms Okoye nor anyone else who contributed to the dismissal and appeal process had appropriate experience of the Claimant's teaching which would enable them to form a view of the Claimant's teaching ability, in particular any view which could displace that of the headteacher. In any event, the decision by the Respondent, motivated by Ms Okoye, to cancel the first reference to the GTC(S) and have the headteacher send a second reference with a view to getting the Claimant's QTS revoked, indicates that Ms Okoye and the Respondent in general had a closed mind towards the Claimant's teaching ability. To Ms Okoye, the only thing that mattered was the third failed Stage 3 external assessment. Nothing could displace this monolithic idea in her mind. As a result of her closed mind and in particular her rejection of the headteacher's considered opinion as expressed in the reference, Ms Okoye and by extension the Respondent did not have a reasonable basis to sustain the belief that the Claimant was not capable. The appeal process was incapable of remedying this. Rather, it provided *ex post facto* justification for Ms Okoye's erroneous decision-making.
66. Again, if I am wrong about the reason for dismissal and if the reason for dismissal was some other substantial reason, in particular the expiry of the fixed term contract, or the Claimant not achieving QTS within the fixed term period, then these alone or together do not constitute substantial reasons of a kind as to justify the dismissal of an employee holding the position the Claimant held. Firstly, in respect of the original dismissal, the Claimant could have continued to act as an unqualified teacher as she had done previously. The Respondent had a continued need for teachers. It has not suggested that there was any redundancy situation in respect of teachers generally. There was no redundancy situation in respect of "unqualified teachers" as the Respondent put it in their ET3. The Respondent always employed unqualified teachers. The requirement for teachers, whether qualified or unqualified, to carry out teaching had not diminished, whether permanently or temporarily, to any extent. The Respondent could have assisted the Claimant in obtaining QTS through the GTC(S). It could have assisted her with School Direct training. It could have continued to employ her as an OTT after 4 years had passed. There was no reason for it not to and which was sufficient to justify dismissal. Secondly, in respect of the appeal, it is noteworthy that the fact that the Claimant did not have QTS at the time of the

appeal was because of the Respondent's own actions in obtaining its revocation despite it being legitimately obtained. The Respondent was therefore trying to generate a reason to maintain the dismissal.

67. As I have found that the dismissal of the Claimant was substantively unfair, it is not necessary to consider whether the dismissal of the Claimant was procedurally fair. Indeed, the Claimant has withdrawn that issue, notwithstanding it being contained on the list of issues. If I had been required to consider this question, I may have had concerns regarding several matters. However, in light of the way that the parties approached the case, I have not found it necessary to reach findings on these matters and I do not make such findings.

### **Remedy**

68. The suggestion that the Claimant could have been dismissed fairly for some other substantial reason because of not having a visa only has to be stated to be rejected. The Claimant's visa was lost because she was dismissed and the Respondent, in that process of dismissal, revoked her sponsorship. The consequence of her dismissal cannot be a cause for her dismissal.
69. The suggestion that the Claimant could have been dismissed fairly for reason of redundancy is nonsense. There was no redundancy situation in respect of "unqualified teachers" as the Respondent put it in their ET3. The Respondent always employed unqualified teachers. The requirement for teachers, whether qualified or unqualified, to carry out teaching had not diminished, whether permanently or temporarily, to any extent. Even if the Respondent's case was extended beyond their pleaded case to include there being a redundancy situation in respect of OTTs who had taught for more than 4 years (and the Respondent has not asked to extend their pleaded case beyond this) I have rejected the Respondent's evidence that it had a discernible policy on this point, and so I reject the conclusion that the Claimant could have been made redundant for this reason.
70. The suggestion that the Claimant could have been dismissed fairly for reasons of capability or qualifications is undermined by the conclusions I have already made. It is also undermined by the fact that the headteacher was willing to provide a reference for the Claimant based on her nearly 4 years of observation of the Claimant. It is also undermined by the fact that the Respondent and its predecessor were happy to employ the Claimant for 4 years. I reject the Respondent's case that the Claimant could have been dismissed fairly for reasons of capability or qualifications.
71. There is no basis on which it could be said that the Claimant's conduct was blameworthy or culpable, or that the Claimant could have been fairly dismissed for it. The Claimant pursued a legitimate route to QTS using legitimate means. The fact that the Respondent did not see a lawful route to QTS as being legitimate is a matter for them. The reference that was provided for the Claimant by the headteacher was appropriate, even if the Respondent does not like what it says. It is surprising that despite abandoning the false suggestion that the Claimant is related to the headteacher, the Respondent continued to allege that the Claimant could have been fairly dismissed for reasons of conduct arising out of the

headteacher's provision of the reference to the GTC(S). Notably, the Respondent did not take disciplinary action against the Claimant or make any allegations of misconduct against her during her employment. The fact that the Respondent took disciplinary action against the headteacher for providing a reference is a matter between the Respondent and the headteacher.

72. The Respondent says that the steps taken by the Claimant to mitigate her loss are insufficient. Given the Claimant's personal circumstances as a mother of school-age children, and the pandemic, it was always going to be hard for her to find a new job. That was made nearly impossible by the Respondent's actions in causing the revocation of the Claimant's QTS and ending her sponsored employment, such that the Claimant now needs to find a new sponsor. A new sponsor would not be interested in recruiting anyone but a teacher, and would be much less likely to recruit an unqualified teacher than a qualified teacher. Notwithstanding this, the Claimant has signed up to agencies, made direct applications, and placed her CV on online job sites. The problems that she has had with finding employment through these reasonable steps are of the Respondent's making, not the Claimant's.
73. The Claimant would not have been dismissed but for the Respondent's actions. Indeed, the Claimant would have had QTS but for the actions the Respondent took in order to create a pretext to maintain the dismissal of the Claimant. As such, from 1 September 2020 at the latest the Claimant would have been paid on the Qualified Teacher Scale.
74. The Claimant received some money from her trade union's benevolent scheme. The terms on which this was provided were not explored. In the circumstances of this case it would plainly not be just and equitable to deduct money received from a trade union benevolent scheme from the compensatory award.
75. The **Basic Award** is 4 weeks x capped gross weekly wage of £538 = **£2,152.00**.
76. The Compensatory Award is composed of a Prescribed Element and a Non-Prescribed Element.
77. From 1 September 2020 if the Claimant had not been dismissed she would have transferred to a pay scale 3.52% higher, the Qualified Teachers pay scale.
78. It is 34.2857 weeks from dismissal to the hearing. The loss has been £452.92 per week at the old rate, plus an additional £15.94 per week to reach the Qualified Teachers pay scale rate. That is a Prescribed Element of £15,528.69 + £546.91 = **£16,075.30**.
79. It will be 17.7143 weeks from the hearing to the new term, when the Claimant is likely to obtain new employment in some form. The loss will be £452.92 per week at the old rate, plus an additional £15.94 per week to reach the Qualified Teachers pay scale rate. That is £8,023.15 + £282.37 = £8,305.52. The Claimant will also be awarded £500 for loss of statutory rights. That is a Non-Prescribed Element of **£8,805.92**.
80. That gives a total **Compensatory Award** of **£24,880.82**.

81. The total monetary award for unfair dismissal is **£27,032.82**.

***Concluding remarks***

82. I note that during the course of putting its case the Respondent has made serious allegations, which obviously have particularly concerned the Claimant. Those allegations include the following contained within the ET3: (1) that the headteacher is related, by marriage, to the Claimant (and by implication, that this related to why the first reference was given); (2) that the Claimant sought to circumvent the QTS registration process and that she, in collusion with the headteacher, knowingly misled the GTC(S) as to her capability; and (3) that the Claimant knowingly misled the GTC(S) as to her capability and *dishonestly* sought to circumvent the QTS registration process. The Respondent's counsel made clear in closing submissions that the Respondent now did not put the case any higher than "*an attempt to knowingly mislead the assessment board*", and it resiled from any allegation of dishonesty. Given that this judgment is made in public I want to put beyond all doubt that all of those allegations are incorrect.

**Employment Judge Stephen Knight**  
**Date 28 April 2021**



# ANNEX 1: LIST OF ISSUES

## Liability

1. For what reason did R dismiss C?  
R relies on the potentially fair reasons of (i) SOSR and (ii) capability (performance/qualifications).
2. If the reason for C's dismissal was capability:
  - (1) Did R honestly believe C was not capable or unsuitable for the job?
  - (2) Were the grounds for that belief reasonable?
3. If the reason for C's dismissal was SOSR:
  - (1) Was there some other substantial reason that could justify the dismissal of C? In particular (i) the expiry of the fixed term contract; or (ii) the Claimant failing to reach the necessary standard of teaching and obtain QTS within the fixed term period?
  - (2) If these were the reasons for dismissal, did they (or either of them) constitute substantial reasons of a kind as to justify the dismissal of an employee holding the position the Claimant held?
4. Did R follow a fair procedure in the circumstances?
5. Was the decision to dismiss within the band of reasonable responses?

## Remedy

6. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that C would have been fairly dismissed had a reasonable procedure been followed?  
R says up to 100%.  
C says 0%.
7. If the dismissal was substantively or procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that C would

have been fairly dismissed for the following reason? (R says up to 100%; C says 0%.)

- (1) Capability.
  - (2) Conduct – relating to the Scottish application and reference.
  - (3) Redundancy.
  - (4) Visa expiry.
8. Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to s.122(2) ERA; and if so to what extent?
- (1) C says "no".
  - (2) R says "yes", up to 100%.
9. Did C by blameworthy or culpable conduct, cause or contribute to dismissal to any extent; and if so, by what proportion. If at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to s.123(6)?
- (1) C says "no".
  - (2) R says "yes", up to 100%.
10. Did C take reasonable steps to mitigate her loss?