



EMPLOYMENT TRIBUNALS

Heard at: Southampton (by video) **On:** 22 to 24 March 2021

Claimant: Ms Mary Mawonera

Respondent: Tregolls School (An Academy)

Before: Employment Judge Fowell (sitting alone)

Representation:

Claimant: In person

Respondent: Ms McGee instructed by DAS Law

JUDGMENT

1. The complaint of direct discrimination on grounds of race is dismissed.
2. The complaint of harassment on grounds of race is dismissed.
3. The complaint of victimisation is dismissed.
4. The complaint of unlawful deduction from wages is dismissed on withdrawal, the parties having agreed terms of settlement.

REASONS

Introduction

1. This appeal concerns allegations of race discrimination. Unusually, I am dealing with it alone, rather than with non-legal members, following the written consent of the parties.
2. The allegations arise from Ms Mawonera's employment at Tregolls School in Truro. She worked there as a Teaching Assistant from November 2017 until July 2019, less than two years, so there is no complaint of unfair dismissal. She was on a fixed term contract for a year, which was then extended to the end of the summer term in 2019. At that point the five Teaching Assistants on a fixed term contract were reduced to three and she was one of those dismissed.
3. During her time there she says that she was subject to harassment and direct discrimination on grounds of her race, and to acts of victimisation when she complained about it. (Ms Manowera describes herself as a black Zimbabwean). None of what happened is alleged to have been expressly racist, but she says that that was the underlying reason, and that was why she lost her job.

4. Most of her complaints stem from the fact that she had already done her teacher training course before she began there, and so had a PGCE. Despite this, she took a job as a Teaching Assistant to gain some experience and to progress her career, but made no progress. Her main complaint is that she was not allowed to lead the class in the teacher's absence. Teachers have a certain amount of time set aside for planning and preparation and assessment, known as PPA time, and in that time their class might be covered by another teacher, or occasionally by the Teaching Assistant, but not, she says, in her case.
5. Further, when a job came up as a Higher Level Teaching Assistant (HLTA) she applied for it. She was the only applicant. But the post was then withdrawn.
6. In the Autumn term of 2018 she became the Teaching Assistant for a Mrs Hatch. She says that Mrs Hatch communicated with her mainly by post-it notes, and that there was a humiliating episode when Mrs Hatch got her to clean out the stationary cupboard, then asked her to redo it and still was not satisfied with it and got some students to do it instead.
7. The school say that Ms Manowera was assessed in the same way as other Teaching Assistants but just did not show the aptitude they expected. It was only later on in her time at the school, they say, that she asked to lead a class, and did not do very well when assessed. They put in place some extra support and training, but she went off sick before this could bear fruit.
8. As to the issues with Mrs Hatch, they do not agree that there were any real communication difficulties. The HLTA post had to be withdrawn, they say, on grounds of cost. And there was an investigation into her concerns by one of the governors, but Ms Manowera said throughout that she did not want it treated as a formal grievance.

Claims and issues

9. The complaints presented are therefore as follows:
 - a. direct discrimination (under section 13 Equality Act 2010) on grounds of race
 - b. harassment (under section 26 Equality Act 2010) on grounds of sex and race
 - c. victimisation (under section 27 Equality Act 2010) on grounds of sex and race
 - d. unlawful deduction from wages under section 13 Employment Rights Act, in relation to a bonus payment which she says she was denied.
10. This last issue was resolved by agreement during the course of the hearing. The issue of the bonus was tied up with a question about deductions from her pay for holiday taken in term time, and has now been resolved. The deduction has some remaining relevance though as it is still relied on as an act of discrimination
11. The issues to be decided under each heading were set out in the Case Management Order on 17 September 2020, so I will not repeat them all at the outset. I will just mention the rules around the burden of proof in discrimination cases. Paragraph 136 of the Equality Act provides:
 - (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

12. In the case of **Ayodele v CityLink Limited** [2017] EWCA Civ 1913 the Court of Appeal explained that this involved a two-stage approach: in the first stage the claimant has to prove facts from which the Tribunal *could* conclude, in the absence of an explanation from the respondent, that discrimination had occurred. That involves looking at all of the evidence, not just the claimant's evidence. Then, if that first stage is satisfied, there is a second stage when the burden shifts back to the employer to show that there was no discrimination.
13. This is in keeping with the guidance in **Madarrassy v Nomura** [2007] ICR 867 which established that it is not enough a claimant to show that she had a protected characteristic, in this case race, and was dismissed - "something more" is required. So, the Tribunal is looking in the first stage to see if there is something unexplained, something out of the ordinary here, which may therefore be down to discrimination. That is the approach to be taken with each of the factual issues to be considered here, to ask, "Is that is how a manager / a school / a colleague would normally react or behave in that situation? How would they behave if Ms Manowera had been a white colleague?" That is never an easy task. I bear in mind Ms Manowera's evidence that she was the only BAME member of staff at the school, with the added risk that she may have been regarded as something of an outsider.
14. If there is anything with might indicate an act of discrimination or harassment or victimization, so that the burden shifts, it is then necessary for the employer to disprove it. That is a difficult test to meet. The Court of Appeal also held in **Igen v Wong**, [2005] ICR 931 that this involves showing, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race.

Procedure and evidence

15. This hearing was entirely remote, and apart from some feedback and technical hitches, no real difficulties were experienced with the technology or participation. Ms Manowera was accompanied by a friend, Mr Burns, who helped her with preparing questions and the process generally. I also asked a good many questions of the school's witnesses.
16. The witnesses were Ms Mawonera herself, and on behalf of the school:
 - a. Mr Andrew Watkins, the Acting Headteacher at the time;
 - b. Ms Amy Gibson, then the Assistant Headteacher, now Deputy Head;
 - c. Mrs Heather Hatch, the teacher whom Ms Manowera was assisting;
 - d. Ms Judith Smitham, the Vice Chair of Governors at the time, now the Chair.
17. There was also a bundle of about 250 pages plus tribunal documentation. Having considered this evidence and the submissions on each side, I make the following findings.

Findings of Fact

Background

18. Ms Manowera was a late entrant into the teaching profession. According to the application form she completed in August 2019, after losing her job with the school, (p.270) she worked in a nursing home as a health care assistant for nine

years, from 2002 to 2009. After that she was a Methodist minister for four years. Then she joined Duchy College in Cornwall for what she described as teaching practice. She had clearly been studying during this period too, obtaining a BA in Applied Theology in 2013, and then a PGCE in 2016/17 on a full-time course. After that she continued what must have been part-time study towards a Master's degree in Education from 2017 to 2019. This was during the period she was working at Tregolls School.

Starting work at the school

19. That employment began on 22 November 2017. It was on a fixed-term contract, as is common in the education sector, and expired at the end of August 2018. The contract said that it was to cover the role of Teaching Assistant (Band 2) "pending a review of future staffing needs."

20. There was little evidence about the recruitment exercise but it was carried out by the previous Head, Mr Middlemore. Ms Manowera must have asked to see him in about April 2018 because there is a curious email from him on 20 April (p.139) to say

"Firstly, I can assure you that we were fully aware on appointment that you did not have the skill set. But, we did recognise that you had the skills to become a TA. In essence, we knew that you would need to learn a lot – hence mentoring and support.

Regarding an incident that you have reported, I am only aware of one incident that has been brought to my attention very, very recently for advice only. I believe that a teacher has spoken to you to advise and support you.

Happy for Jodie to diary you a meeting and we can have a professional discussion surrounding your concerns and further support if required."

21. It seems from this that there was an incident when Ms Manowera was either criticised or left unsupported in some way, and Mr Middlemore was writing to reassure her that they knew from the outset that she did not yet have the skills to be a Teaching Assistant, and that she would "need to learn a lot".

22. This is surprising given that on paper Ms Manowera seems overqualified for the role. But there is no criticism in this email, and nothing to show that Ms Manowera was surprised by it, or offended in any way. And this comes about five months into the role, suggesting that at that stage the school still recognised that she needed more time to develop. As I will go on to relate, that view, that Ms Manowera struggled with aspects of the role, was reflected in the comments of other teachers and senior staff at the school, some of whom were unaware of her teaching qualification.

23. Nor has Ms Manowera suggested that her teacher training gave her all the skills she needed. The PGCE was in fact in secondary education, rather than for primary age children, and although there would have been teaching placements as part of the course, she had not completed her NQT year, which is necessary to qualify as a teacher.

24. The school takes children from aged 3 to 11, so it has a nursery and a primary school. I did not get a great deal of information about the school but it must be quite sizeable as there are 27 Teaching Assistants, or were at the time, most of whom are on permanent contracts. Some of them are assigned to particular

children with Special Educational Needs and Disabilities, who need specially tailored provision, and others are assigned to a particular class, like Ms Manowera. Those classes may have children with Special Educational Needs but they do not need such personal support.

25. Not much was said about Ms Manowera's first academic year at the school. Even in her witness statement the earliest section begins in September 2018. By that time her contract had been extended to 25 July 2019, the start of the next summer holidays. She explained in her oral evidence that in her first year she was supporting a child with diabetes, Child B. The child was in year 6, and this was her main role until the Child left the school. Ms Manowera had to calculate the girl's meals, make sure she had a snack, and give her injections every two hours. At the same time, she said, she was given five other children with behavioural issues to look after from time to time. Mr Watkins praised the work she did that year in his evidence, describing it as brilliant, but added that it was normal practice for the teacher in a class to also ask the Teaching Assistant to deal with others or a group with specific learning needs. I accept that that is the position.

Autumn 2018

26. It was therefore a big change when Child B moved on to secondary school. By then Mr Middlemore had left and Mr Watkins had taken over as Acting Headteacher. Ms Manowera was assigned as Teaching Assistant to Mrs Hatch, and it is important to note that all of the concerns really arose in that term, although they were investigated and explored after Christmas.
27. Mrs Hatch's class had 27 pupils and Ms Manowera's role was mainly to support a child with behavioural needs in class, Child F, plus other support with administration, reading and other tasks. Mrs Hatch naturally had to prepare the lessons and would leave post-it notes for Ms Manowera on jobs that needed doing, such as the number of items to be photocopied. That seems to be the normal way of working and Mr Watkins said that he used to do the same as a teacher.
28. Ms Manowera suggested in her witness statement that this was Mrs Hatch's main method of communication, which if true would indicate a very strained relationship indeed. But there was no complaint about this at the time. It was not mentioned in the meeting she had with Mr Watkins on 18 January 2019, described below (p.157) or in the meeting he held with a Ms Shibon Armstrong (p.182) of the Inspiring Women Network, when Ms Armstrong came to see him about Ms Manowera's concerns. Nor is it mentioned in the claim form.
29. Memory is notoriously fallible, particularly when recalling stressful events. There are some respects in which Ms Manowera's recollection is a little lacking. (To cite one example at this stage, in her account of the selection exercise before her dismissal, the form shows that it was completed by Ms Whitehouse (p.256), but her recollection was that Ms Whitehouse was leaving just as she arrived, and that someone else did it.) In any event, since it was not raised at the time, I do not conclude that the post-it notes, or communication generally with Mrs Hatch, was a real concern at the time. The incident with the cupboard, mentioned above, did not take place until the following March.

Identity of the comparator

30. What seems to have caused genuine upset was the fact that another Teaching Assistant came in to cover the class while Mrs Hatch was doing her PPA. That left Ms Manowera supporting another Teaching Assistant. These other Teaching Assistants also got an extra four days holiday a year.
31. Her evidence was that Mrs Hatch did her PPA in the morning, while another Teaching Assistant took the class, then when Ms Manowera raised this with her, Mrs Hatch switched her PPA to the afternoon. That meant Ms Manowera would be unable to cover. In the afternoon, there were no formal lessons except PE and sometimes French, which was outside her scope.
32. The reasons for this change were not explored with Mrs Hatch but it seems most likely to reflect wider changes in the school. An important part of the school's budget is provided by the Pupil Premium. This is money to help pupils from disadvantaged backgrounds. In September 2018 the school decided to use this to fund Teaching Assistants in spending extra time with those pupils in the afternoon, working with them individually on areas where they needed help, either in reading, maths or in speech and language. These were known as interventions, and Ms Gibson, the Deputy Head, took the lead in organising it. These interventions all took place in the afternoons. In the meantime, two teachers were used to cover French and PE in the afternoon for the children who did not need the intervention work. This was therefore a school-wide change, and not aimed at removing Ms Manowera's chance to lead.
33. For her part in those interventions Ms Manowera agreed to hear children in Key Stage 2 reading. There were 21 in her group, which was about average, and she had some extra training in how to go about it. Ms Gibson gave detailed evidence about how the work was divided up, according to skills and experience, and that was not challenged. It was a fairly even division, and there was no preparation needed for reading, unlike those doing Maths, or a mix of subjects. Even so, it would not be possible to hear them all read 3 times a week for 20 minutes each (an hour per pupil) but the idea was presumably to give them as much time and support as possible, with some prioritisation.
34. In her oral evidence Ms Manowera said that an extra eight children were passed on to her in this time, but confusingly she said this brought the number to 27, not 29. The school had no record of this, and as her statement only mentioned 23 pupils, this may be an error of memory. In any event, as just mentioned, her workload was not raised a concern at the time, and I cannot see that she was given more than she ought.
35. In the mornings Ms Manowera continued to support Child F. There was also a new initiative whereby the TAs were asked to take children in groups of two during maths and literacy in the morning for phonics sessions. A programme of observations was carried out by Ms Gibson, the deputy head, to monitor this. Her view was that Ms Manowera needed support, i.e. that she wasn't really managing, and so she asked Mrs Fisher, who taught the reception class, to help her. That was the start of a series of phonics sessions taught by Mrs Fisher, not just to Ms Manowera but to other Teaching Assistants with children at the same level.
36. During these sessions, attended by the children too, the sort of observations made of Ms Manowera were that she was too passive, sitting back and listening to the teacher rather than making sure the children were engaged. The same points

were observed when the training was complete, that she needed to be more proactive to ensure that the children were engaged. Mr Watkins has similar thoughts. His evidence was:

“During the autumn term, I observed the claimant during an observation of Mrs Hatch (her class teacher) and saw that she was not assertive enough with the two children she was working with. Furthermore, she was unable to control the children’s behaviour; which was having a wider negative impact on the whole class. I then discreetly asked the claimant to work with me outside with the children. I did this in a supportive and coaching manner. We took the children outside for exercise in order to regulate their behaviours. The claimant took the coaching session very well and thanked me for the support.”

37. This was therefore the position for most of the autumn term. The period when Mrs Hatch was doing her PPA time in the mornings, and another Teaching Assistant came in to lead the class, must therefore have been quite brief, and cannot have carried on after the afternoon interventions started. It is not clear who this other Teaching Assistant was. Ms Manowera’s witness statement says that someone called Gemma joined the school in January 2019 and was “already leading interventions”. But if Gemma joined then, it was after this period which led to her complaint, and leading interventions is not the same as leading a class.
38. A Hannah Perry is also mentioned by Ms Manowera in her witness statement. She came to work in November 18 in the Area Resource Base (ARB). Ms Manowera states that she had wanted this role, but I can find no previous mention of that, and clearly this was a different role. In any event Ms Manowera accepted that unlike her, Ms Perry was a SEND Teaching Assistant
39. Mr Watkins explained in his witness statement that the ARB
“... have 10 children in their centre and the level of skill, training and experience that team members need to work in there is significant – I for example, despite currently being a Headteacher, would not have the relevant training or experience to teach and lead a team of specialised teaching assistants in the ARB – it is a highly skilled job. It is simply not possible to compare the claimant’s job description with Miss Parry’s”
40. I have to accept that professional assessment, which again was not challenged at the hearing. So who was the person who came in to lead Mrs Hatch’s class in September 2018? Remarkably, the only mention of it in any of the statements is in that of Mr Watkins, at paragraph 8, when he stated that when any cover was needed in that class he asked Dawn Wilks, a Higher Level Teaching Assistant (HLTA), to do it. I also heard that such HLTAs are experienced and highly skilled teaching assistants who do take over the class during PPA time. Again, that was not challenged.
41. Ms Manowera also mentioned Jenna Kendall as a comparator in her oral evidence but Mr Watkins said that Dawn Wilks was covering Ms Kendall’s classes when required, so there was no need for her to lead, and she did not want to do so. He insisted “categorically” that Jenna Kendall did not lead any class. Reviewing Ms Manowera’s oral evidence, I note that she said that she saw Ms Kendall leading interventions, but again that is not the same as leading a class of 27.
42. The upshot is that I cannot accept that another Teaching Assistant (as opposed to a HLTA) came into Mrs Hatch’s class and led it while Ms Manowera was there,

and there were good reasons for that arrangement. The two comparators identified at the preliminary hearing, and therefore the ones I have to focus on, are Gemma (who arrived later and only led interventions) and Hannah Parry (in the ARB). They do not appear to be in a comparable situation. Ms Manowera may have felt that others were progressing and she was not, but it is necessary to compare like with like to see if there was any unfairness.

HLTA Position

43. On 1 November 2018 a job was advertised as a HLTA, and as already noted, Ms Manowera applied, only to find that it was then withdrawn. This was explored at the hearing, and Ms Smitham explained that the reasons were purely financial. At the direction of the governing body a working party had been formed to look at pay. That working party compared financial benchmarking data for similar academies in Cornwall from 2016/17, the latest period available. The amount spent on staffing at Tregolls had risen from 70% to 81%, against an average of 75%. That left very little room for any unallocated or discretionary spending, so they concluded that staffing costs were too high. Having more staff also meant it was more difficult to increase pay.
44. So, on 14 December 2018, Mr Watkins had to tell Ms Manowera that the job was not available. Her main complaint at this hearing was that he did not give her the reason, he just told her it was not going ahead. He denies that, and said he took her into his office to explain things. It seems unlikely that he would be blunt about it. He had every reason to be apologetic, and his later approach was concerned and supportive. I conclude that Ms Manowera must have been disappointed and did not take it in. It is just very unlikely that anyone delivering bad news in this way would not seek to reassure the person concerned that this was no fault of theirs and that it was in truth down to budgets, as was the case here.
45. The decision did save money. The French and PE teachers took on the job of supervising the PPA sessions, in addition to their other tasks.
46. I should note that there was still no certainty of her being appointed. The process would have involved an interview, and other evidence from around that time suggests that Ms Manowera had not developed the skills needed for this role.
47. The first communication from Ms Manowera in this term which appears in the bundle is an email dated 22 November (p.161).

“Dear Sir, ...teaching and leading opportunities... I do hold a PGCE and currently Masters in education.”
48. This was in the period before the HLTA job was withdrawn. It is understandable that she wanted to progress. She probably felt overlooked and that her qualifications were not counting for anything. She even felt she had to mention them. But it was sent to “Head@ “ rather than to his personal account. All his replies came from “AWatkins@...” He says that he did not receive it, and that he never used this account. That seems the most likely explanation. When other things were raised with him he responded very promptly, and it would in any event be very rude to simply ignore a request from a member of staff for a meeting. She would not of course have been aware of that, so may well have felt slighted. It is difficult to judge. They clearly met on 14 December to discuss the withdrawal of the HLTA role, and his evidence was that they had many chats, on most days.

If so, it is surprising that there was no mention of this request for a meeting. All that can be drawn from this is that she was interested in progressing at the school, wanted to discuss this with the Head and, I infer, was feeling overlooked.

49. At the same time Mrs Hatch was having concerns about Ms Manowera's existing performance. This was set out in her email to Mr Watkins on 19 December 2018. (p.142). Mrs Hatch said she was:

“.. often late....extremely slow with tasks... does not take the initiative... needs to be constantly asked to do things...even when a child is hitting another...constant support and reminders... having to undo tasks she has done

50. Some of these do appear rather fussy – “she sticks things in books incorrectly” – and shows that Mrs Hatch was checking up on her and finding it a little exasperating. From Ms Manowera's point of view, Mrs Hatch was being unduly critical and even following her around. However, the concerns about not taking the initiative or being proactive echo the earlier observations by Mr Watkins and Ms Gibson and Mrs Fisher.

51. This did result in a conversation between Ms Manowera and Mr Watkins, and Mrs Hatch thought that things improved for a while. Again it is surprising, since Ms Manowera was asking for a meeting with Mr Watkins at that time, that the email was not mentioned. Perhaps it was not a good time to be talking about progression when he was having to speak to her about her performance.

52. It is difficult to ignore that weight of evidence from different observers, and so I conclude that Ms Manowera's performance at that time was rather lacklustre. There may be various reasons for that. She may have felt underappreciated. Her payslip for November was also short of what she expected. It did contain a small “non-consolidated payment” which is the description given to the staff bonus, but it had a deduction for four days' holiday she took in term time. This related to a trip to Zimbabwe which Ms Manowera had booked before she joined and subsequently the school accepted that the normal pay deduction should not have been made. However, at the time it was a further source of friction.

53. She also concerns about her son, M, who was at the school, and these were perhaps her main concerns at the time. She noted in her diary (p.310) that on 17 December M refused to go to school, and that the next day she spoke to the school's social worker about it. Shortly after this she had a word with the Head, which she attributed to the intervention of the social worker, and afterwards followed up her concerns in an email on 20 December, mentioning several incidents (p.144). One of these was a comment by Mrs Hatch to M in which she said:

“You have to follow the rules and you are not different to anyone else.”

54. Mr Watkins replied the next day, (also p.144). It was clearly close to Christmas but he said that he would speak to the adults involved, would reassure M and would feed back more in the New Year. It seems to be a speedy and concerned response. This was followed up after Christmas by a further email, (p.146). It is a detailed response. The comment by Mrs Hatch was, he concluded, about M's mother working at the school, and having to wait with the others in the hall, and that was not disputed.

55. Mr Watkins finished by noting that M seemed happy in school, and said he would

personally check in on him from time to time. He obviously spent some time and care in trying to resolve this, as one would expect for a colleague concerned about their son being mistreated at school.

This also supports my view that Mr Watkins never saw the first email. It would be odd to take such a close personal interest in this issue and to ignore her previous email altogether.

Allegations of discrimination

56. The first mention of discrimination arose in the next email from Ms Manowera, on 16 January 2019 (p.152). It starts on a relatively upbeat and positive note, about a planned diversity event but then says:

“Yes we are hoping to bring an African choir to Truro in June. I was hoping they will be able to come and sing in our school. It happened in Richard Lander school and it was a great event. Us, as BAME community, this will also be an opportunity to put the message across against hate and racial related incidents. Its happening in our school, direct or indirect.

The question is, what can we do as a community to change attitudes. I see myself as a role model for the BAME children in our school, although in some ways I feel discriminated against.”

57. It was signed by the “Rev Mary Manowera, President and founder of Cornwall Diversity Food Festival”, which may also have been intended to make Mr Watkins aware of her status and connections. He was quick to spot the mention of discrimination and wrote back the next day quoting the relevant passages and stating that all such concerns were taken seriously and asking her to come and see him immediately the next day.
58. On paper this rapid response may seem a little threatening, but that has not been suggested, and this was clearly a serious concern for a headteacher, or any manager. He would want to know all the details, just as he might for an allegation of sexual harassment at the school. He took advice from HR and had a notetaker at the meeting next day. It is therefore all minuted, and he clearly pressed Ms Manowera for details. She was a little vague in response, and most of her replies were in the context of treatment of BAME children at the school, saying for example that they had been called ‘baboons’ or ‘fluffy’. The main point mentioned on her own account was about the opportunity to lead classes, and seeing other Teaching Assistants do so. She also then raised the extra four days holiday they get, the bonus issue and the withdrawal of the HLTA role.
59. This cannot have been a total surprise for Mr Watkins. He knew that she wanted to be a HLTA. He would also have been aware from his own observations, and the points raised by Mrs Hatch, that this would need work. He explained at this hearing that leading a class is not the norm, and most Teaching Assistants did not have the desire or skills to do so. He may also have been relieved that this was the extent of the alleged discrimination, and as far as I can see he set about rectifying things. Ms Manowera made clear that she did not want this to be regarded as a formal complaint, she just wanted to be able to use her abilities to the full. It ends with the words:

“AW said that he will meet again with MM and look at what can be offered to help her improve. Also asked that MM resends the email he didn’t receive.”

60. After that meeting Mr Watkins felt it was important that Ms Manowera speak to one of the governors, and contacted Ms Smitham, then Vice-chair about it. He arranged a time on 28 January when they could meet. Ms Smitham was briefed on the situation by their HR advisors and they had a pleasant meeting. Once again, Ms Manowera said that she did not want to make any sort of formal complaint. She was happy that the issues with her son had been resolved, said she was pleased to have been appointed to Mrs Hatch's class, but she felt strongly that she should have had the chance to lead, and wanted to make a wider contribution to the school, such as with the cultural event about food, which Ms Smitham felt was a low priority at that time. Ms Manowera had recently done her citizenship exam and felt that more could be done to explain and promote British values in the school.
61. After the meeting she emailed the school's Business Manager to look into the pay issue, and was assured that it had been paid. The issue with the holiday pay was not then apparent. Mr Watkins also took the more practical step of asking Ms Rhiannon Whitehouse (a Senior Leader) to provide Ms Manowera with some coaching. He also told me that they had daily conversations from then on about how to help her. She had recently been on a trip to Jerusalem and was keen to give the children a talk about it, which she did.
62. All this seems positive, but a few days later, on 1 February, Ms Manowera and her son were not at school, and on 5 February, Ms Manowera went off sick with stress. In hindsight it is a great shame that this happened when it did, because it cut across the positive efforts which were then being made to help her. Quite why things became too much for her at that point is not clear to me, and may involve factors outside work, but there does not seem to have been any particular incident at work which prompted it. She did not shed any light on it in her witness statement.
63. While she was off her son M had some further problems. On 14 Feb 19 he was shouted at by one of the cleaning staff, and the next day he was not allowed to take part in the school disco and was made to stand in the corner. I heard nothing more about why that was.
64. Then on 19 Feb 19 Ms Manowera applied for a job as a teacher at Key Stage 1 at the school. This is a puzzling episode as she had not completed her NQT year, and so it is not clear to me how she could have been appointed to such a role. She may simply have been making a point. However, there were 11 applicants, and her application scored only 6 out of 31 points. The scoring matrix is at page 203 and shows that she was given one of these points for being a qualified teacher, like the others. The reason for the poor score seems to have been that her written application lacked concrete examples of her experience and skills, which of course she was lacking, given her role as a Teaching Assistant.
65. She returned to work on 27 February, and this meant that she could start her coaching with Ms Whitehouse. The first session was arranged for 6 March and she was observed by Ms Whitehouse teaching a whole class mental maths starter session. The feedback (at p.183) was that her behaviour management skills needed to improve. She needed "to pick up on children who are continuously not following the rules (by shouting out, distracting others and chatting throughout the warm up) and follow the schools behaviour policy."

66. This echoes the earlier concerns. Ms Manowera did not say that this was feedback was wrong. In fact, in her oral evidence that she focussed on the positives, noting that this was her first observation and there were recommendations to follow up on. She seems to have got on well with Ms Whitehouse, and another session was booked for the following week.
67. The next day came the incident with clearing out the cupboard. So, it came at a time when Ms Manowera was very sensitive about her status and the perception of her, and followed a period of stress-related absence. On her account, both in her claim form and witness statement, at about 9.00 am she was asked by Mrs Hatch to clean and tidy the cupboards in the classroom. She did this, and even washed down dirty bowls. When she came back to class after the break, Mrs Hatch had taken everything out of the cupboards and told her to do it again. There were no further instructions. So, she did it again, and after lunch she found a group of College students there doing it all over again.
68. Mrs Hatch agreed that she asked Ms Manowera to tidy the cupboards but the purpose of the task, clearly explained, was to organise equipment so that people could quickly get things. Painting equipment was to be put in one area, cooking equipment in another, science equipment in a third place, all labelled clearly and boxed up. But when she looked in, it was a little tidier but still disorganised. She explained it again, taking a few things out to demonstrate, then asked her to do it again, with the same result. She then asked two student volunteers to finish it off.
69. It is unfortunate to have a disagreement about such facts, but it seems to me that Mrs Hatch's version of events is the more likely. It would be an extraordinary thing to ask Ms Manowera to tidy cupboards without explanation and then get her to repeat it, again without any further explanation, let alone dragging out the contents to make a point. There may have been some strain their relations but nothing to suggest disrespect of that extreme sort.
70. The next day there was a further significant event. Ms Manowera had a meeting with Mr Watkins, and this time was accompanied by the representative from the Inspiring Women Network, Shibon Armstrong. It was not minuted this time but Ms Armstrong documented her concerns in an email on 10 March (p.185). That email summarised her concerns very clearly. It again stressed the barriers to progress, mentioned the cupboard issue, and also the bonus and the HLTA application. More significantly, as the school accepts, it contained allegations of discrimination which amount to a protected act, for the point of view of her complaint of victimisation.
71. This had become a very awkward situation for Mr Watkins to manage. He had a member of staff who he believed still needed supporting in her role as Teaching Assistant, but who saw herself as seriously undervalued and deserving of speedy promotion. Coupled with that was an allegation that the failure to do so was discriminatory. Finally, there was no clarity about how Ms Manowera wanted things to be handled, either as a formal grievance, to look into the reasons for this state of affairs, or to be dealt with informally, which appears to mean giving her some advancement without any further discriminatory barriers being applied.
72. Naturally he took HR advice, and passed it on to the governors. They felt that she should be sent the grievance procedure. He asked Ms Manowera what she would like done and Ms Armstrong responded (p.192) to say that the issues needed

addressing but that there was no need to progress to the complaint stage. She suggested further diversity training to learn lessons from the experience. This does little to recognise the fact that these concerns were only raised with Mr Watkins on 16 January, that he acted promptly to deal with them, and that he had put in place steps to help her. There is also the fact the employers cannot always sit on complaints because the person raising them does not want to make them formal. There may be wider implications. So, on 21 March, Mr Watkins replied to Ms Manowera and said that he had passed this on to the governors and asked if she would meet Jackie Parker to discuss things.

73. Ms Parker was also in communication with Ms Smitham, who emailed on 17 March to brief her on the situation (p.190). It is quite candid, and states:
- “I found her to be pleasant and Andy [Mr Watkins] assures me that she is not and definitely has an agenda. He does not trust her and feels she is trying to form a case for racism. About ten days ago she brought a lady into the school with her (with permission) from the Inspiring Women’s Network and this lady spoke on her behalf to Andy. They directed the member of staff to the school’s grievance policy, which is where we are now.”
74. This is not direct from Mr Watkins of course, but must broadly reflect his view by that stage, that Ms Manowera was a source of trouble. He may well have resented the intervention by Ms Armstrong, and being lectured about the same points again, all in the context that he and the school were failing in diversity and respect. That does not necessarily affect my view that his initial approach was genuine and concerned, if conflicted, given his views about her performance. But this was clearly now a sensitive issue, and he no longer accepted that these points were being raised in good faith. On the other hand, the governors involved do not seem to have bought into this view, and the rest of the correspondence shows an active involvement and a determination to deal with things properly.
75. I will attempt to take the subsequent events more briefly, because they largely played out while Ms Manowera was off sick. This happened on 25 March, the day she was told that her application for the Key Stage 1 Teacher role had been unsuccessful. Mr Watkins then wrote to her on 1 April in sympathetic terms, rescheduling her meeting with Jackie Parker. She was also referred to Occupational Health, who recommended that she return to her GP to discuss medication and recommended some counselling.
76. Signs of strain are apparent from an email sent by Ms Manowera to all staff on 22 March, a few days earlier. In it she exhorted everyone not to make false accusations about children, and that going to the headmaster without having the facts straight was unprofessional. This followed Mr Watkins receiving a report that she had treated F wrongly.
77. And then, with surprising rapidity, came a letter advising Ms Manowera that her job was at risk. This letter dated 15 April 2019 (p.208) was sent to all five Teaching Assistants on a fixed term contract, contracts that expired that summer. It explained that there would only be three such roles next year, a specialist SEND role, and two other Teaching Assistants, one at Key Stage 1 and one at Key Stage 2. The timing does appear suspicious, and I remind myself that at this stage I am looking for something out of the ordinary, something that could amount to an act of discrimination. Against that there is the fact that the school did go through this exercise, and so Ms Manowera was not the only one to lose her job as a result of

this exercise.

78. She replied on 23 May to say that she would take any of the roles although she preferred the SEND role as that matched her studies. This perhaps illustrates the central dilemma, that although she had been studying these things she had no qualifications to act as a SEND Teaching Assistant.
79. Her absence went on for several weeks. The interview for these roles was booked for 7 June, but in her case it was put back to 1 July. The others were all interviewed in June and had to await the outcome. There were also some discussions about reasonable adjustments for the selection exercise and it was arranged that Ms Whitehouse would do the assessment part.
80. On 10 June 2019 there was a meeting between Ms Phillips, the Governor responsible, Ms Manowera and her Union Representative Deborah Hopkins. The school's external HR advisor, Nick Carter, was also there. This was not an official grievance meeting, since Ms Manowera did not want this, but was at least a further attempt to explore her concerns, which was sensible given that any allegation of race discrimination is a serious matter that will attract the attention of governors, and may need to involve some discussion of the Head's handling of things. It is therefore revealing that most of the concerns were still about her son M. The summary by Ms Phillips (p.248) also mentions that Ms Manowera felt victimised by staff at the school – an apparent reference back to the cupboard incident – and that she had been denied opportunities for promotion. The governors then interviewed Mr Watkins and Ms Hatch about this.
81. Meanwhile the redundancy selection exercise carried on, and as already mentioned she was observed by Ms Whitehouse as part of this process. This observation recorded very much the same sort of thing previously noted – not warning children who were misbehaving, not spotting when children were not engaging, not going further to explore answers given. There was, this time, no real praise.
82. It was followed by an interview, and the notes of it are at page 257. It had been agreed to adopt a less formal approach with Ms Manowera and to have only two on the panel. She expressed lots of enthusiasm for the role, and for the school. Unfortunately for her it was not enough and she was told the next day that she had been unsuccessful.
83. The rather unofficial grievance investigation did not conclude until the following term, but it was not an exercise that Ms Manowera had been pursuing, and appears to have been continued largely for the school's benefit, either to learn lessons or with a view to this hearing. As already noted, Ms Manowera's employment ended when the summer holidays started, on 25 July.

Conclusions

84. Those findings are clearly largely against Ms Manowera, so I will turn back briefly to the legal issues I have to resolve, as set out at the preliminary hearing.
85. Firstly, I should mention that there is a time limit issue. The normal time limit of three months begins to run from the last act of discrimination, or failure to act, allowing for time spent in early conciliation, and that means that any events prior to 11 June 2019 are out of time, unless it would be just and equitable to extend it, or unless they form part of a continuous act, i.e. a continuous and related series of

events. That date of 11 June means that the decision to end Ms Manowera's contract was definitely in time, but the other allegations of harassment and discrimination are not.

86. This was not a feature relied on by the school in their oral submissions, although it is covered in Ms McGee's helpful written submissions. Briefly, it does appear to me just and equitable to extend time to cover the other allegations, given that the last of them – the termination of contract – was in time. Ms Manowera also made efforts during her employment to raise these concerns, perfectly appropriately and, significantly, was off sick for much of the period from 5 March onwards, when it might have been much less easy to bring a complaint of discrimination.
87. Turning to the specific allegations of direct discrimination the test under section 13 Equality Act is as follows:
 - (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
88. The term less favourably invites a comparison with other member of staff, and for the main allegation of being denied the opportunity to lead, Gemma and Hanna Parry were named. For the reasons already given, they were not in the same position for comparison purposes, and so Ms Manowera was not treated less favourably than them, let alone on grounds of race.
89. I have also found against Ms Manowera on the questions of the overuse of post-it notes and the cupboard incidents. Similarly, the withdrawal of the HLTA position was on budgetary grounds, the bonus was in fact paid, and the issue over the holiday pay was simply an accounting matter. The last issue was over being given more pupils than other Teaching Assistants, and again I am not satisfied that that was the case, or might have been the case, because it was not raised at the time, and the numbers mentioned are so variable.
90. The same considerations apply to the allegations of harassment. The test under section 26 Equality Act is as follows:
 - (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic [race], 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.
91. The same six allegations are made under this heading too, although only the issues of the cupboard and the post-it notes seem to be the sort of incident which might create such a hostile environment at work, and on those points I have preferred the school's account. The incident with the cupboards is a difficult one and there was clearly some miscommunication on the day, which would have been upsetting, but even so, and if my conclusions that Mrs Hatch did explain things are wrong, that would still be a normal exercise for a Teaching Assistant, and so unrelated to race.
92. The more difficult aspect is the victimisation claim. The test here under section 27 Equality Act is as follows:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, ...
93. A protected act includes making an allegation of discrimination or other breach of the Equality Act, so the question resolves to this – was Ms Manowera dismissed because of the email sent by Ms Armstrong on her behalf on 10 March 2019, shortly after their meeting?
94. Again, I have to ask whether that could be so, having heard the evidence and explanations from both sides. And on this issue, the school's case is tarnished by the email at page 190 relating the views of Mr Watkins, formed shortly after that meeting, and specifically complaining about it. As noted already, his attitude towards Ms Manowera appears to have changed as a result, and this is not so easy to explain away. It raises the possibility that the school either came up with a selection exercise to remove Ms Manowera or, more plausibly, selected her unfairly.
95. On this point therefore, the burden shifts to the school, to show on the balance of probabilities, by cogent evidence, that the decision to end her contract was in no way whatsoever tainted by discrimination. I have therefore considered the papers and evidence surrounding that exercise with particular care.
96. It is worth reverting to the claim form (p.13) where Ms Manowera said this about the process:
- “The decision this year to take staff on fixed term contracts through processes to fill identified posts, was initiated while I was off sick and I feel I was not fairly treated throughout the process despite my efforts.
- The agreed recruitment day was not adhered to and I felt humiliated and poorly treated on the day by the acting headmaster.
- I felt I have been treated differently to the other applicants and were not successful in achieving a post despite a good record with the school, as a consequence I am now unemployed as my fixed term contract came to an end. Communication from the Headteacher refers to the interview process and the manner in which I was assessed. (I have seen no indication of the criteria and standards that I should be expected to meet in the interview, it is difficult there to confirm that the process was fair.)”
97. This is a restrained criticism therefore. She does not say that the process was a sham but that it was not handled fairly on the day and so she is not sure it was fair. Since then of course she has had sight of the documentation. In her witness statement she is more emphatic:
- When it come to the issues of victimisation, the Claimant feels the interview process was just a formal process to get rid of her and cover their backs. As far as the Claimant is concerned, her job was offered to Michelle Chase (Believed to be White British) whilst the Claimant was still working at the school. The Claimant was told that Michelle Chase was there to help with child F, whom she was looking after yet this child did not need two people, this is the job Michelle Chase is doing now despite going through the interview process for the same vacancy. The Claimant then received a text prior to the interview from Michelle Chase saying that the other job the Claimant had opted for was already offered to Amy, so she struggled to understand what vacancy was available. The Claimant has the text message but is

unable to print this.

98. Ms Chase was part of the process, and joined the school shortly before Ms Manowera went off sick. When she was off sick, Ms Chase covered Mrs Hatch's class and supported Child F. That is not in itself suspicious. The school would not have known that Ms Manowera was to go off sick. And having joined the school on a fixed term contract Ms Chase would have to be involved in the selection process.
99. The point about the text message was not pursued at the hearing, and no mention was made at this on the day. One might expect that she would say, "look, I have had this text to say that one of these jobs has already been offered to someone". Or at least some mention of this in the claim form. Nor was there any challenge to the evidence of Mr Watkins that no one was told of the outcomes until after her interview, which therefore kept the others waiting for several weeks.
100. I have scrutinised as well as I can whether this process was slanted against her, and cannot find anything tangible to support that view. It appears to have been a genuine exercise, and the assessment form reflects in detail both her enthusiasm and the current shortcomings in her management of small children. Had she had the benefit of more sessions with Ms Armstrong the position might have been different, but there was nothing to suggest that Ms Armstrong marked her down, and indeed I note that Ms Manowera used her as a reference later.
101. So, on this one aspect where the burden falls on the school, the process is well-documented. A number of adjustments were put in place for Ms Manowera, not just the delay, but the fact that the interview panel was reduced to two, to make it less intimidating, and that Ms Whitehouse did the observation. She was also not required to carry out any teaching sessions. Mr Watkins met with her in his office on the morning of the assessment and went through the process with her. It is not in fact clear to me who carried out the interview, since their names are not recorded on the forms, but Mr Watkins' evidence was that it was two colleagues from the safeguarding team, including the safeguarding lead. The interview answers were then marked by them on standard forms to ensure some consistency
102. None of this was challenged, and in fact no specific criticism was made of the process. For example it was not said that discarding the teaching assessment part disadvantaged her.
103. It is ultimately a question of the scores. The scorers appear to have been independent and conscientious, and steps were taken to help Ms Manowera to manage the process and give of her best. That may not have been easy given her ill health and absence, and that may indeed have affected her performance on the day, but that is not to say that the decision was influenced to any extent by race, or by the fact that she had raised a complaint about discrimination. I note too that Mr Watkins was not directly involved in the process. So, reviewing the evidence, I am confident on the balance of probabilities that the decision was not tainted by discrimination.
104. Once again, it is unfortunate that Ms Manowera's absence from work cut across efforts to coach her and allow her to progress, and also that budget cuts meant that this selection exercise happened when it did, but on a fair assessment of the evidence I cannot find that the complaints are made out.

105. For all of the above reasons the claim is dismissed.

Employment Judge Fowell
Date: 24 March 2021

Judgment and Reasons sent to the Parties: 19 May 2021

FOR THE TRIBUNAL OFFICE