EMPLOYMENT TRIBUNALS

Claimant: **Mr Thomas Chew**

Respondents: **The Boleyn Trust**

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

On: **4 to 7 May 2021**

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

Representation
Claimant: **In person**
Respondent: **Mr A Ross (counsel)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. **The claimant was not unfairly dismissed for asserting a statutory right in breach of s104 Employment Rights Act 1996.**

2. **The claimant was wrongfully dismissed (i.e. constructively dismissed in breach of contract)**

3. **The claimant was directly discriminated against on the grounds of his race, in breach of s13 Equality Act 2010, in respect of 1 of his 7 complaints.**

4. **In respect of the claimant's successful complaint of rase discrimination, it is just and equitable under s123(1)(b) Equality Act 2010 that this complaint proceeds to remedy.**

REASONS

The hearing

1. This was a remote hearing which had been consented to by the claimant and the respondent. The form of remote hearing was a video hearing through HM Courts & Tribunal Service Cloud Video Platform, and all participants were remote (i.e., no one was physically at the hearing centre). A face-to-face hearing was not held because it was not practical in the light of the coronavirus pandemic and the governments restrictions. All of the issues noted for determination could be decided upon at a

Background and the claim

2. By a Claim Form presented on 6 February 2018 the claimant claimed: a breach of s104 Employment Right Act 1996 ("ERA"), i.e. an automatic unfair dismissal; discrimination on the grounds of his age, sex, disability and race, in breach of the Equality Act 2010 ("EqA"); and he also claimed wrongful dismissal (i.e. breach of contract for the claimant's notice period). This followed a period of early conciliation between 24 January 2019 and 31 January 2019. The Response was accepted by the Employment Tribunal on 11 April 2019. The respondent denied the claimant's claims.

3. At the preliminary hearing of 3 June 2019, the claimant described his race or ethnicity as being of dual heritage, black Caribbean and Asian and he withdrew his complaints of age discrimination, sex discrimination disability discrimination. The case and history of proceedings are summarised in the records of the Preliminary Hearings of 3 June 2019, 16 September 2019 and 31 March 2020.

<u>The list of issues</u>

4. On 2 December 2020, Employment Judge Crosfill set out the issues to be determined by the Tribunal, which were as follows:

I. <u>(Constructive) unfair dismissal for asserting a statutory right</u>

1. Can the claimant established that by asking to be paid sick pay on 6 November 2018 in good faith the respondent had infringed a relevant statutory right for the purposes of section 104 Employment Rights Act 1996 ("ERA")?

2. Was the claimant dismissed for the purposes of s95(1)(c) ERA? That question being broken down into the following issues:

2.1 Did the following acts and/or omissions occur as alleged by the claimant?

2.1.1 Being forced to attend work whilst absent with a Doctor's note".

2.1.2 Being placed on stage II sickness absence without a meeting.

2.1.3 Being denied leave by Elizabeth Harris.

2.1.4 Being told by Margaret Patient that he would not be paid sick pay.

2.1.5 Being told that he was no longer wanted at school.

2.1.6 A letter being sent to parents disclosing "personal data" (it is not clear whether that event postdated the resignation or if not whether the claimant was aware of it when he resigned).

2.1.7 The matters relied upon by the claimant as being direct discrimination insofar as they are any different (see below).

2.2 Did those matters, individually or cumulatively, amounts to a serious breach of contract? The claimant relies upon the express terms as to sick pay and/or the implied terms of trust and confidence.

2.3 This did the claimant resign in response to any such breach of contract?

2.4 if so did he do sufficiently probably after the last matter which contributed to any breach of contract that he did not lose the right to treat himself as being dismissed.

3. If the claimant was dismissed, can he show that the reason, or if more than one reason, the principal reason for any dismissal was because he had asserted a statutory right? If so, the dismissal will be unfair.

4. What, if any, compensation award would it be just and equitable to make?

II. Wrongful dismissal (i.e. breach of contract for notice pay)

5. What right did the claimant have to notice under his contract of employment?

6. Was the claimant dismissed? – Issue 2 above is repeated

7. What, if I made, loss and damage has the claimant suffered because of any failure to give him contractual notice?

8. What sums, if any paid by the respondent should be offset against any notice pay?

III. Direct discrimination because of race

9. Does the Employment Tribunal have jurisdiction to deal with any allegation that took place prior to 25 October 2018? In particular:

4.1 Is any such act of discrimination part of an act extending over a period which ended on or after 25 October 2018; or

4.2 would it be just and equitable to extend time for presenting the claimant?

10. Can the claimant establish that as a matter of fact, the respondent carried out the following acts and/or omissions?

10.1 segregating the claimant into a group of non-white staff on his first day at work; and

10.2 sending a letter to parents of children that he taught referring to the treatment he was undergoing; and

10.3 not paying the claimant for his absence

10.4 sending the claimant emails in October 2018 which pressurised him into coming into work while signed off sick; and

10.5 stating that the claimant was not "committed to his work"; and

10.6 telling the claimant that he was on stage 2 of the absence management procedure before they had completed stage 1; and

10.7 Elizabeth Harris sent in text to the claimant about returning to work.

11. Do the acts or omissions set out above amount to a detriment to the purposes of s39 Equality Act 2010?

12. In respect of the allegations at 10.1, 10.2, 10.3, 10.4, 10.7 the claimant compares his treatment to the treatment afforded to Paul Prichard. The Tribunal will have to determine whether for these allegations the claimant and Paul Pritchard were in the same material circumstances. Alternatively, and for the remaining acts, can the claimant show that a hypothetical comparator in the same material circumstances would not have been treated more favourably than he [the claimant] was?

13. Has the claimant demonstrated facts from which, absent any explanation from the respondent, the Tribunal would infer that the reason for any detrimental treatment he has established was because of race? If not, the claimant will fail. If so

14. Has the respondent shown that any treatment was in no sense whatsoever because of race? If not, then the claimant will succeed.

15. What, if any, compensation is the claimant's entitlement to?

The relevant law

5. The relevant applicable law for the claims considered is as follows.

Automatic Unfair Dismissal

6. Section 104 ERA provides:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
>
> (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
>
> (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
>
> …
>
> (4) The following are relevant statutory rights for the purposes of this section—
>
> (a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal…

7. So under s104 ERA it is unfair to dismiss an employee because he has alleged that the employer has infringed a right of his which is a relevant statutory right. "Relevant statutory rights" include, for example, claims under s13 ERA (protection of wages). No qualifying period of continuous employment is necessary unlike (ordinary) unfair dismissal claims under s94 ERA in which a 2-year qualifying period is necessary.

8. Under s13 ERA a worker (which is a wider definition than employee) has the right not to suffer an unauthorised deduction from his pay:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

9. The non-payment of wages, or the non-payment of "properly payable" sick pay (in full or in part), could amount to an unauthorised or unlawful deduction of wages and a deduction is defined in s13(3) ERA as follows:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion… the amount of the deficiency shall be treated… as a deduction…

10. The employee need not be specific about the statutory right which has been infringed provided this has been made reasonably clear to the employer: see *Mannell v Newell & Wright (Transport Contractors) Limited [1997] ICR 1039*. However, a claim under s104 ERA must be based on an assertion that there has already been a breach of a statutory right, not that there may be a breach in the future: see *Spaceman v ISS Mediclean Limited UKEAT/0142/18*.

11. S104 ERA does not cover detriments, nor does it cover breaches of contractual obligations (although a claim for wages might also involve a contractual right as stated above). However, it is accepted that where an employer treats an employee in such a way that it repudiates the contract of employment, or otherwise commits a fundamental breach of contract, then a claim of constructive dismissal would be well founded.

12. Where, as in this instance, an employee the does not have the requisite 2-years continuous employment required for an "ordinary" unfair dismissal claim, burden of proof is on the employee to prove the infringement of the statutory right was the principal reason for the claimant's (constructive) dismissal, see *Kuzel v Roche Products Ltd [2008] EWCA Civ 380.*

Constructive dismissal and breach of contract (wrongful dismissal)

13. Under both s95(1) ERA and at common law, an employee is dismissed by his employer for the purposes of claiming constructive unfair dismissal if:

> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

14. An employee may only terminate his contract of employment without notice if the employee has committed a fundamental breach of contract. According to Lord Denning MR:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.*

15. *Courtaulds Northern Textile Ltd v Andrew [1979] IRLR 84 (EAT)* held that a term is to be implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

16. Brown-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)* described how a breach of this implied term might arise:

> To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

17. *Western Excavating* established that a *serious* breach is required. In *Hilton v Shiner [2001] IRLR 727* the Employment Appeals Tribunal confirmed that the employer's conduct must be without reasonable and proper cause. For instance, instigating disciplinary action against an employee would not per se be a breach of mutual trust and confidence if there appeared good grounds for doing so. According to *Morrow v Safeway Stores [2002] IRLR 9* if a breach of mutual trust has been found, this implied term is so fundamental to the workings of the contract that its breach automatically constitutes a repudiation – a Tribunal cannot conclude that there was such a breach but, on the facts, hold that it was not serious.

18. We have considered whether the claimant has established in the respects alleged by her a breach of the implied term of mutual trust and confidence. We have been careful to analyse not only the individual matters relied on by the claimant but also their cumulative effect.

Protected characteristics

19. Under s4 EqA, a protected characteristic for a claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin.

Direct discrimination

20. S13(1) EqA precludes direct discrimination:

> *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.*

21. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

The burden of proof and the standard of proof

22. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

23. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

24. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

25. So, the burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The Court of Appeal, in *Madarassy v Nomura International plc [2007] EWCA Civ 33* at paragraph 56. The court in *Igen* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent *could have* committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal *could conclude* that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It was confirmed that the claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a Tribunal will be in a position where it *could conclude* that an act of discrimination had been committed.

26. Even if the Tribunal believes that the respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the claimant's race. In *B and C v A [2010] IRLR 400 EAT* at paragraph 22:

> The crucial question is on what evidence or primary findings the tribunal based its conclusion that C would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based; no such situation had ever occurred, and the tribunal refers to no admission by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular, it is second nature to executives to follow appropriate procedures, and the explanation offered by C for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, all the surrounding circumstances, to give rise to that suspicion.

27. It is not sufficient to shift the burden onto the respondent, that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. In *St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ 921* at paragraph 44:

> The respondent's bad treatment of the claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the respondent's similar

> treatment of the claimant in the other instances in which the claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Hayward, the respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the respondent to prove that he had not committed an act of race discrimination.

28. In the case of *Nagarajan v London Regional Transport [2000] 1 AC 501*, Lord Nicholls stated at 512-513:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phases, as well as subtle distinctions, are better avoided. So far as possible. If racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

29. Employment Tribunal's adopt the civil standard of proof, which is on the balance of probabilities, i.e. more likely than not.

Time limits for discrimination proceedings

30. Claims of discrimination in the Employment Tribunal must be presented within 3 months of the act complained of, pursuant to s123 EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month period if they think it *just and equitable* to do so, under s123(1)(b) EqA.

The evidence

31. After a short case management conference and a review of the list of issues, we (i.e. the Tribunal) retired to read the witness statements and the documents that had been identified for preliminary reading. The Employment Judge advised the parties at the commencement of the hearing that, as a matter of course, Employment Tribunals do not read the entire hearing bundle. If a document is important and relevant then that document needed to be referred to us, either in a witness statement or being specifically referred to the Tribunal at the hearing.

32. The Tribunal was provided with a bundle of documents from the respondent amounting to 473 pages.

33. We heard direct (i.e. oral) evidence from the claimant. The claimant confirmed his statement and answered questions in cross examination from Mr Ross. He was also able to clarify some issues asked by the Tribunal. We assess the claimant as an honest and reliable witness. He did not try to embellish his evidence. A key question was the existence of 2 letter of resignation. The claimant originally provided a 1-sentence letter of resignation, which he said he was compelled to write. He later provided an expansive resignation letter. The claimant complained about his forced resignation in his grievance and thereafter, although he did not complain about being forced to rewrite his resignation letter. Mr Ross contended that the claimant did not make explicit that he was compelled to rewrite his resignation. Having heard all of the claimant's

evidence, we are not so worried about this failure. Mr Ross misses the point; the claimant's complaint was that he was bullied into resigning. Having heard the totality of his evidence, being compelled to rewrite a resignation letter is a small part in his overall complaint of ill-treatment, by his senior colleagues. The claimant was a straightforward historian, although not particularly expensive. He said he was not the most educated or skilled individual, but he was bright enough to give clear answers to questions even if it required some probing or effort to understand how he put his case. He was naïve and trusting, which is why, we believe, he was easily browbeaten by Ms Harris and others at the school. And it required some questioning to understand the dynamics of the school environment. Mr Ross contention that we should infer a lack of credibility in a self-representing party failing to put some points to the respondent witnesses is rejected. This is not a credibility point against the claimant, and it does counsel little credit to assert it as one.

34. We heard directly from 4 witnesses for the respondent: Ms Elizabeth Harris, the Head Teacher of Monega Primary School; Miss Claire James the Deputy Head Teacher; Mrs Margaret Patient, the respondent's Human Resources Manager; Mr Steven Lock, the respondent's Chief Operating Officer; and Mr Clive-Anthony Douglas, the Chair of the respondent's Board of Trustees. The respondent's witnesses had provided witness statement and in a manner similar to that of the claim, these witnesses we asked question by Mr Chew, the Tribunal and Mr Ross.

35. Ms Harris' said that the claimant was off work on 9 October 2018 with his underlying kidney complaint, but this is inconsistent with the respondent's records which state that the reason for his absence was not specified. There are no contemporaneous documents or correspondence that allude to this absence. Ms Harris' account of the claimant needing to fulfil 4 formal observations before the end of December 2018 is not credible. There is no documentary corroboration to confirm this point and we prefer the claimant's evidence that he could complete his formal observations at any stage up until the end of the school year. We accept the claimant's contention that Ms Harris bullied him and demanded that he attend work from 8am when he was not paid. We accept the claimant's assertion that Ms Harris harassed him to return to work when the contemporaneous evidence demonstrated that he was in pain and not fit to return to work. Ms Harris even ignored the claimant's GP's sicknote so as to compel his return for the first day after the new term. She made no notes of her exchanges with the claimant (in circumstances where we expected to see a clear record of events) and the texts and email available gave more credence to the claimant's account rather than Ms Harris' version of events. We find that Ms Harris did not give the Tribunal an honest account of what had transpired.

36. Miss James did not play a direct role in most of the matters upon which she gave evidence in her statement. At the outset, her statement needed corrections prior to her confirmation, which did not assist her credibility. Her evidence was contradictory and diminished by her accounts of her school walks, in which she said she was able to get a negatively impression of the claimant. She was new to the school yet she was highly critical of the claimant as a newly qualified teacher ("NQT"), particularly over matter in which she was completely wrong, for example, her contention (shared with others) that the claimant was regularly late. This undermined the veracity of her account. The claimant was not late. Miss James evidence was further significantly undermined by her obvious animosity to the claimant. Ms James alleged that the claimant had 25 days absence by the first half-term. This did not stack up even with the respondent's

unreliable figures. Miss James made no record of the key meetings of 6 and 7 November 2018 where we expected there to be at least an email confirmation of the meeting outcome or meeting notes shared with the claimant. She chose to absent herself from the claimant's appeal hearing, without explanation, when the claimant sough to clarify matters through this internal process. We make the unusual finding that Miss James was not a truthful witness, and we could not believe what she said because of her various contradictory and unconvincing accounts and her efforts to cast the claimant in a bad light.

37. Mrs Patient was also an unsatisfactory witness. Her witness statement also needed to be corrected at the outset because she could not get the claimant's sick pay entitlement correct. She was responsible for log of the claimant's absences, yet this was not accurate because it recorded 1 date of absence incorrectly (9 October 2018), it did not categorise the illnesses correctly and the claimant's final absent end date had been altered. We were very dissatisfied with this alteration and regarded this a an attempt to mislead the Tribunal. Notwithstanding the respondent purported to be concerned about the claimant's punctuality, Mrs Patient did not write to him about this matter nor did she document any formal concerns about the claimant's absence until the end of this sorry saga. However, we are particularly concerned that Mrs Patient did not keep records of meetings or make contemporaneous or near contemporaneous file notes of any significant dealings with the claimant, which is surprising and difficult for us to accept coming from a relatively senior HR official.

38. Mr Lock and Mr Douglas were peripheral witnesses who investigated and determined the claimant's grievance and grievance appeal respectively. The Tribunal makes findings of facts in these types of cases so as there was no complaints about the grievance process, we were not sure why these witnesses were called to give evidence other than, we determine in hindsight, to shore up some bad behaviour and poor decision-making of the school's senior officers. So far as the respondent's investigations, these were perfunctory and neither Mr Lock or Mr Douglas dealt with the issues of this case in sufficient detail to be helpful to the Tribunal.

Our findings of fact

39. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

40. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis (and drew appropriate inferences) on the absence of obviously relevant documents that we expected to see as a contemporaneous record of events, particularly where no satisfactory explanation was given for the non-production thereof. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard the witnesses' statements with a little circumspection as both memories fade and the accounts may reflect a degree of misremembering or re-interpretation.

41. The claimant commenced employment with the respondent on 1 September 2018 [Hearing Bundle page 1, 125, 137] as a Classroom Teacher at the Monega Primary School.

42. The claimant was told by Ms Harris, Miss James and Mr Partient (a Deputy Head Teacher) that he would be inserted into a class year group where the year group of employees was mainly Asian heritage. The claimant questioned this and he was told he would be the best fit for this year group because of the majority of the students' parents been Asian.

43. The claimant said, and we accept, that he was always present in the morning for the "soft start" in which teachers would greet parents and students in the playground at 8:45am and that he would get to work at 8:30am and leave after 5:30pm. Even if he had 1-hour lunch break away from work this meant that he worked 40 hours per week. We are satisfied that the claimant's contract provided for a working week of 32½ hours. Nevertheless, on 19 September 2018 Miss Harris emailed the claimant complaining that he had been late on a few mornings and that she expected him to be in the school by 8am each morning [see HB140a]. In fact, the claimant had not been late, and Miss Harris insisted that he work unpaid addition non-contractual hours.

44. The respondent produced a record of the claimant's absence which was not accurate or reliable, so we have gone to the source documents to produce the following:

Dates of absence	**No. of working days absent**	**Reason**	**Certified, self-certified or uncertified**
24 & 25 September 2018	2	Day 1: in A&E all night for accident; and, day 2: kidney complaint[1][HB142e]	Self-certified
11 & 12 October 2018	2	Kidney complaint [143]	Self-certified
15 October 2018 – 25 October 2018	9 although the claimant was signed off for 3 weeks from 16 October 2018	Under investigation/personal [HB144]	certified

45. The respondent claims that the claimant was absent from school on 9 October 2018; however, we reject that contention. The respondent's record of the claimant's sickness absence is not reliable [HB243]. The schedule was compiled by Mrs Patient, and we do not regard her evidence as reliable. There is no corroborative correspondence or documents that identify the claimant as being absent from work on 9 October 2021; this particularly in circumstances where Ms Harris would have pounced on the claimant's absence [see email 24 September 2018, HB141, which followed the claimant's unheard answering-machine message].

[1] It is proportion and within the over-riding objective to identify the claimant's underlying medical condition in very generic terms only. We accept that the claimant was entirely genuine in his ill-health.

46. At 4:08am on 12 October 2018, the claimant wrote to Ms Harris. He apologised for how much time he had off (which was 4 days at this point). He said that he had been panicking that this would look badly for him. He gave an explanation of his medical condition and his previous absences. He explained his medical treatment and investigations. He apologised for any inconvenience and said that he could be contacted anytime; he gave his mobile telephone number.

47. On 17 October 2018 Ms Harris sent a letter to parents of children in claimant's class [HB145]. The letter is extraordinary, and we would normally quote such relevant correspondence in our findings of fact. However, this round robin letter contained private and confidential information about the claimant's medical condition and his recent medical history. As this document will be uploaded into the public domain it does not warrant any further breach of confidential medical information. The letter invited the parents to raise questions with any leadership team at the gate at the end of each day. Ms Harris wrote to the claimant the following day requesting his attendance in school to discuss his absence and, significantly, she did not tell the claimant about her letter to the parents, nor did she reveal the existence of this letter. The claimant was not aware of this breach of his confidential medical information until 9 November 2018.

48. Despite the claimant being on certified sick leave until 5 November 2018, Ms Harris wrote to him on 24 October 2018:

> Unfortunately we had a large number of parents vocalising the disappointment of the first half term. This wasn't about you, more about them having lots of different teachers replacing you. I appreciate you are not feeling well but I do think it would be wise to be in on the first day of term, this may just be to greet your class in the playground and then take them out at the end of the day. This community have had a legacy of uncertainty in relation to Teachers and this is something we are trying to eradicate.

Ms Harris then proceeded to threaten the claimant with formal action:

> I hope you are starting to feel better and I hope you are able to return with new energy and vitality. Obviously you will have reached stage 1 of the absence procedure and potentially be recommended for stage 2 but we want to try and avoid any unnecessary distractions from your probation period.

In fact at this point, according to the procedure presented to the Tribunal at page 262 of the hearing bundle, the claimant had triggered a stage 1 interview. However, as he had not received a stage 1 interview, he had not triggered, and it was inappropriate for Ms Harris to threaten him with stage 2 of the process [see HB263].

49. On 28 October 2018 the claimant sent an update of his medical condition to Ms Harris. He said:

> … I will be back after half term as requested because I appreciate the history of the school and the lack of commitment towards the children by previous teachers. I do have an [medical] appointment on 5 December… I have been ringing every day to try and get a cancellation appointment but have had no luck…

50. Mrs Patient wrote a pre-prepared letter to the claimant, dated 5 November 2018, to the claimant to invite him to a sickness absence stage 1 trigger level meeting for 14 November 2018 [HB149].

51. On 5 November 2018 the claimant sent a text to Ms Harris early that morning saying that he had not been able to meet with his GP to discuss recent test results as his GP had not received them and that he was feeling very unwell and would not be in that day [HB244-245]. The claimant was still on certified sickness absence at that point. The claimant said that he would make an emergency appointment with his GP and indicated that this was to get a further sicknote (as his sicknote expired at the end of that day). The claimant said that he would keep Ms Harris updated by phone that afternoon.

52. Ms Harris responded later by saying that she had only just seen the claimant's text message. At the hearing she said that either her phone was off, or she did not notice this text, we do not find as credible as she noticed all her other texts promptly and that was a main method of communication out of hours. Ms Harris said she didn't realise that the claimant was still feeling unwell (despite him still being on sick leave). Notwithstanding the claimant's clear message Ms Harris instructed the claimant to let her know what was happening ASAP as, she said, she was expecting him in the next 20 minutes. She rebuked the claimant for no communicating with her effectively [HB246], which was not justified. As a matter of fact, we find the claimant's communication with Ms Harris is clear and effective and if there was any ineffective communication or misunderstanding (deliberate or inadvertent) then this was due to Ms Harris. The claimant had kept Ms Harris informed of his ongoing illness and the effect of this on his attendance.

53. The claimant went to the school following his GP appointment. He was called to a meeting with Ms Harris around 2pm. Ms Harris continued pressure on the claimant to return to work. She questioned whether the claimant would pass his crucial NQT year because of his absence and, we accept the claimant's evidence that Ms Harris raised that the claimant either would not or might not be paid for sick leave because of his probation. We prefer the claimant's because his account is more consistent with the contemporaneous corroboration available. In addition, there was no reason for Ms Harris to raise at so early a stage and at that particular time that the claimant might not pass this crucial NQT year other than to create insecurity for him. We prefer the claimant's account of this meeting, and also generally, because we accept his version that Ms Harris was intimidating, which is also consistent with her angry and bullying tone in the text messages.

54. Later that afternoon Mrs Patient approached the claimant. A short discussion ensued about the claimant's absence. The claimant said that Mrs Patient raised that he may have reached the threshold of his sick pay and said that he either would not or might not receive further pay if he was absent again. The claimant challenged Mrs Patient on this and he said that he would look into this. Mrs Patient then sent the claimant a letter (dated 5 November 2018) informing him that he had triggered stage 1 of the school's absence procedure and invited him to a meeting on 14 November 2018 [HB149].

55. The claimant texted Ms Harris later that day explaining his pain and he said he was going to come in the next day but, if he was not feeling well, whether it would be okay to leave, as a last resort [HB247]. Ms Harris responded telling the claimant that he needed to be at school to greet the children in the morning and the claimant said he would comply for as much of the day as possible [HB248].

56. There was no point that Ms Harris could have been unaware about the claimant's medical condition, the effect that this was having on him and the consequences of this on the claimant's attendance. The fact that Ms Harris exerted considerable pressure upon a sick employee and effectively bullied him into coming into school was obvious to the Tribunal.

57. When the claimant returned to his classroom, he heard that a letter had gone to parents about his absence or sickness, but his colleagues would not tell him about the contents because, the claimant said and we accept, his colleagues did not want to get into trouble with the senior management group. When the claimant took the children to the playground for the end of day, he was approached by some parents and staff who asked about his medical condition. One pupil and her mother and aunt said that they would pray for the claimant and others queried whether he was fit enough to be in school.

58. The claimant reflected upon what had happened that night and the following day (i.e. 6 November 2018) he went to see Miss James as his NQT mentor to raise his concerns. The claimant expressed his concern about how he was treated and said he wanted to escalate matters. We accept the claimant's account that he said that he had had not reached the pay threshold for sickness absence, that he was in lots of plain and felt it unfair to be compelled to return to work so quickly. The claimant also said that he needed to be off due to his ill-health. We accept that the claimant asked about the letter that had been sent to his class's parents. Miss James said that there was nothing to worry about with that letter as it merely stated that the claimant was unwell. In her evidence, Miss James said that she had not seen Ms Harris' letter at that point which is consistent with the claimant's contention that Miss James did not have a copy of the letter, did not know where to find it and could not say who had signed the letter. Nevertheless, Miss James proceeded to threaten the claimant with "putting him on pause until January" which suggests that Ms Harris had discussed her approach to the claimant with her.

59. We reject Miss James account of this meeting. Given her criticism of the claimant, and Ms Harris' ill-disguised vexation with him, it does not make sense that Miss James would attempt to persuade the claimant against resigning as Miss James' version of events was that the claimant was demanding, unreliable and troublesome. Her story is concocted. She did not send the claimant away to think again about resigning.

60. Furthermore, we believe the claimant's account that Ms Harris sent for him and interrupted his teaching about an hour later. He was called to a meeting with Ms Harris, Miss James and Mrs Patient. Ms Harris told the claimant to resign or that she would dismiss him. She threatened that it would look bad that at such an early stage in his career if his employment was terminated. Ms Harris gave him 15 minutes to go away to decide. The claimant reported back and asked if he could take until the next morning (i.e. 7 November 2018) to decide and Ms Harris agreed on the condition that the claimant report back to her face-to-face with his decision the next morning.

61. The claimant attended work next morning and agreed to resign. He was told to provide a resignation letter, which he did at page 150 of the hearing bundle:

> I am writing to notify you of my resignation, effective of Wednesday, 7th November 2018. Regards.

62. This letter gave a resignation with immediate effect. However, the letter was not good enough for Ms Harris who told the claimant that he should provide a letter which, as the claimant put it praised the school, i.e. sounded more like a voluntary resignation. Adopting the same layout or format as his original resignation, the claimant gave Ms Harris his second resignation letter as follows:

> This letter is to notify you of my resignation, effective of Friday 9th November 2018. As discussed, I feel it is imperative to my wellbeing that I withdraw from my employment within Monega Primary School and focus on recovering from my recent ill health.
>
> I want to thank you on the brilliant opportunity to be part of such an amazing dynamic of school environment. The strategies and attitudes I have learned from working within the setting is one that I will always take forward with me in the next steps of my career. The welcome and support I received has been nothing more than a delight and I am saddened to have to leave so abruptly and untimely. I appreciate your understanding with the matter and sympathy I have received from yourself and other senior leadership staff.
>
> I will work to aid in the transition and handover of my class in the best way I can and hope to make this as smooth as a process as possible.
>
> Best wishes with the rest of the school year.

63. The claimant was told to work until the end of the week, i.e. Friday, 9 November 2018, and Ms Harris endorsed the claimant's letter:

> I agree to pay Thomas' salary until 30th November.

64. The claimant left school on 9 November 2018, which was his effective date of termination. He was upset about leaving the children and his first teaching job. However, that day he came across a copy of the letter sent to parents concerning his ill health. The claimant confronted Ms Harris about this breach of confidentiality and told her she had abused her position of authority in the manner that she had treated him. He said that he would escalate the situation and take this matter further.

65. On 14 November 2018 claimant sent Miss Harris an email under the title in formal grievance procedure:

> Upon reflection of recent events where I was given an ultimatum by yourself of returning to work whilst still suffering ill health or resignation. When threatened with the factors of not receiving sick pay and my illness starting to reflect on performance. I feel I was left with no other option but to resign from employment at Monega Primary School.
>
> Not only do I feel like I was pushed out the door and forced to provide a resignation letter, in order to obtain a good reference for future employment or "start my career black mark". I have also been made aware by other members of staff that you unlawfully breached GDPR under Article 9 of EU GDPR "Processing of special categories of personal data".
>
> You have without my consent, written permission or knowledge, released personal data concern my health to the public and under this act the exact processing of the information you have released is strictly prohibited. This breach in data protection was by no means beneficial to myself and is seen as unlawful in my eyes.
>
> There is by no means any reason in which a parent in the playground should have to approach me and have knowledge of my health issues which I did not tell them myself. The whole ordeal of

> having to worry about my health, as well as, inform you as my employer as to why I am not able to attend work has been stressful enough. I was given a doctors note stating that the reasons for which I would not be fit for work were personal. You informed me that you had seen this and acknowledged this information given to you by a recognised health professional.
>
> Not only did this infringement happen whilst I was unable to work, you did not even think to notify me of the infringement of post instant. When you was communicating with myself I email you had every opportunity to notify me of the infringement and failed to bring this to light factors that may impose upon my social, emotional and mental well-being. You had deliberately signed your name on a document containing my medical information with the intention of it being released without consent from myself. More to this, once I had been made aware of this infringement, the blame was diverted where in Claire James had told me Michael Patient had drafted the letter there was nothing for me to worry about.
>
> There was no attempt after this infringement for action to be taken to mitigate the damage suffered by myself once I had returned to work. There was also no attempt once I have requested to have more time off with the say so of my doctor to provide me with this time. You made this very clear to other members of staff who also reported to myself and informed me of the decision you had made to suggest it a good idea I quietly resign…

66. On 15 November 2018 the claimant filed a formal complaint which the respondent dealt with as a grievance [HB154-157].

Our determination

67. As can be seen from our findings of fact above, we determine that both Ms Harris and Mrs Patient raised issues about the claimant's sick pay. Both admitted in evidence that they had raised this issue of sick pay, which we determine was unsolicited. We have little trouble in determining that this was to unsettle the claimant so as to bring about his early return to work from certified (and genuine) sick leave.

68. In order to succeed in the automatic unfair dismissal claim the claimant must show that his constructive dismissal was based on a statutory right that had already been infringed, see *Spaceman v ICC* above. We spent some time going through the claimant's pay statements for September, October and November 2018 and we could not determine that the claimant suffered any deduction from his sick pay or any relevant non-payment of wages which were due. Whilst in the circumstances it was reasonable for the claimant to suspect that he would suffer such a deduction, and we believe that he acted in good faith by raising such assertion, as a matter of fact, the deduction did not occur. Therefore, the respondent could not have infringed this statutory right. Accordingly, the claim of constructive automatic unfair dismissal must fail on this point.

69. The wrongful dismissal claim is a claim of breach of contract for the claimant's notice period. This is a claim in common law which may be bought by workers or employees in the Employment Tribunal based solely on the fact that the dismissal by the employer was not in accordance with the contract. When considering a breach of contract claim, unlike unfair dismissal, no account is taken of the reasonableness of the termination.

70. The wrongful dismissal claim in this instance is for the outstanding notice pay in relation to the claimant's contractual notice period of 2 months [see HB138]. The claimant was treated badly by Ms Harris, Miss James and Mrs Patient. Without any justification, Ms Harris threatened him with dismissal if he did not resign. That was outrageous behaviour and is a breach of the implied duty of trust and confidence. This

was the type of behaviour that according to *Woods* above the claimant could not be expected to put up with. The claimant resigned as a result of this unwarranted demand and threat of dismissal.

71. For completeness, in respect of the issues identified at issue 2.1, the respondent was also in fundamental breach of contract for Ms Harris is forcing the claimant to attend work whilst absent with a current valid doctor's sicknote (issue 2.1.1), which was also denying him his right to take his full certified sick leave (issue 2.1.3). As early as 24 October 2018, Ms Harris knew the claimant was on certified sick leave and raised no concern that this was not a genuine health-related absence. She was aware that the claimant was in pain, yet she disregarded this by compelling him to return to work early for the first day after the half term break telling him "it would be wise to be in" was a direct threat to this newly qualified teacher, who was in an insecure position.

72. We are satisfied that Mrs Patient told the claimant he would not be paid sick pay (issue 2.1.4) and that this also amounted to a fundamental breach of trust and confidence in the circumstances of this case. The claimant was not placed on a stage 2 sickness absence without a meeting, but he was threatened with this by Ms Harris (issue 2.1.2). We do not make a finding of fact that the claimant was explicitly told he was no longer wanted at the school (issue 2.1.5), but that was the message implicit from Ms Harris' conduct and it was understandable that the claimant inferred such. The letter from Ms Harris to the parents which breached the claimant's confidential medical data was a clear and obvious fundamental breach of contract but the claimant did not know fully the extent of this breach until after he had resigned. It is difficult to envisage any act of race discrimination is not amounting to a fundamental breach of contract. However, the claimant did not act upon the race discrimination of early September 2018 and by continuing to work at the school for almost 2½ months, without complaining about this conduct, he effectively waived the breach.

73. In respect of the specific allegations of discrimination, for allegation 10.1, the claimant was allocated to teach year 5. For his teaching practice, the claimant worked with year 7 and he had previously expressed a preference to work with an older age group of pupils because he felt working with younger children might be more difficult for his newly qualified teaching year. This had previously been a failing school, so the claimant was understandably concerned about the support he might get. He was also concerned that year 5 had 7 teachers the year before and the parents were vociferous in their complaints. This was recognised by Ms Harris in her evidence and also the ethnic background of most of the pupils, in the correspondence at page 147 of the hearing bundle for example. We accept the claimant's evidence that year 5 had a disproportionate amount of Asian pupils and this was not challenged in the respondent's statistical, documentary, or even oral, evidence. Year 5 was already allocated 2 Asian teachers (DP and MJ) and the claimant was convinced he was allocated to this year group because of his Asian heritage. Ms Harris said that TS and HW were allocated to year 6 and the claimant identified these as teachers of White-British origin. The claimant said that the teaching staff in year 5 was dipropionate Asian in comparison with other years.

74. We accept that the year 5 group was somewhat of a poison chalice, particularly emphasised by Ms Harris' concerns. The explanation of 3 senior colleagues, which we accept the claimant's evidence on, together with the apparent statistical imbalance of both teachers and pupils is sufficient to shift the burden of proof to the respondents to

prove that race discrimination was in no way the reason for allocating the claimant to this difficult year group. As the respondent has not provided any statistical evidence and as the evidence of Ms Harris, Miss James and Mrs Patient is so unreliable, we determine that the respondent has not discharged the burden of proof to establish unlawful discrimination was not committed or was not to be treated as committed. Therefore, the claimant succeeds in his complaint of direct race discrimination on issue 10.1.

75. Notwithstanding the claimant compares himself with Mr Patient for issue 10.2, there is nothing to suggest that the claimant's race played any part in Ms Harris's breach of confidentiality with 17 October 2018 letter. The letter of 17 October 2018 is significantly different from the brief letter written about Mr Patient's absence on 28 September 2018 [HB142]. However, Mr Patient was a long-standing teacher and a Deputy Head. We believe he was also related to a senior member of staff. Therefore, we do not regard his circumstances is similar to the claimant so as to attribute the breach of confidential information is being attributable to his ethnic origin. In this allegation there are not sufficient facts from which, in the absence of an adequate explanation, we could conclude that the respondent has committed unlawful race discrimination.

76. There is no direct comparator who experience the treatment identified by the claimant in respect of allegations 10.3 to 10.7. In such circumstances, we need to rely upon a hypothetical comparator in the same material circumstances as to claimant, who we believe would have been treated more favourably than the claimant was. The ill-treatment by the troika of Ms Harris, Miss James and Mrs Patient is not enough. It is clear from the line of authorities from *Madarassy* as quoted above, that even establishing a difference in treatment and a difference in protected characteristics is insufficient to shift the burden of proof. However, in this case there is no evidential basis to conclude that a hypothetical comparator, who was White-British, young, newly qualified teacher with a similar pattern of illness would not have been treated equally unpleasantly.

77. Allegation 10.1 was not a continuous act under s123(3)(a) EqA, although the effects of the respondent's discrimination continued throughout his employment. Taking into account the extension of time permitted for early conciliation, we calculate that this discrimination complaint is out of time by 1½ months. There was no significant prejudice to the respondent in hearing this complaint. We determine that it would not be just and equitable to determine this allegation but to deny the claimant a remedy for such discrimination. In making such a determination, we note that, as is all too common in such cases, claimants often refrain from pursuing similar complaints of discrimination, at least until they feel they have no option. So, this factor will be reflected in an injury to award compensation, which we consider may be relatively modest (but not so much as to undermine proper regard for the seriousness of a finding of race discrimination).

Summary and finally

78. We reject the claim of unfair dismissal for asserting a statutory right, and most of the race discrimination claims. The claimant has proven his claim of construct dismissal in respect of the unpaid part of his notice period. The claimant was treated badly and bullied and harassed by his senior colleagues. We note that there are deposit orders outstanding and we will consider these carefully both in respect of our findings of fact

and our assessment of the honesty and integrity of the respondent's representatives if the parties are not able to come to an agreement in respect of the deposit orders and remedy. Pursuant to the over-riding objective at rule 2, we hope that this is sufficient preliminary indication to assist the parties in resolving the remaining matters.

Employment Judge Tobin
Date: 31 August 2021