Case number: 1401039/2020

EMPLOYMENT TRIBUNALS

Claimant: **Miss D Blajan**

Respondent: **Havant and South Downs College**

Heard at: **Southampton (by video)** **On:** **18-21 October 2021**

Before: **Employment Judge C H O'Rourke**
Mr J Evans
Mr M Cronin

Representation
Claimant: Mr P Thorn - friend
Respondent: Mr J Bromige - counsel

JUDGMENT

1. The Respondent constructively unfairly dismissed the Claimant and is ordered to pay the Claimant the sum of £5302.00, as set out in the Reasons below.

2. The Claimant's claims of direct race discrimination and victimisation fail and are dismissed.

REASONS

(Written reasons having been requested at the Hearing, subject to Rule 62(3) of the Tribunal's Rules of Procedure 2013, these are now provided.)

Background and Issues

1. The Claimant was employed a teacher at the Respondent College, in their Foundations for Learning (FFL) department. She commenced employment in 2012, in Alton College, which was subsequently amalgamated with the Respondent. She is a British and Romanian citizen. She resigned, on notice, on 25 November 2019, with her effective date of termination being 25 January 2020 and subsequently brought claims of

constructive unfair dismissal and race/nationality discrimination (direct and victimisation).

2. Following a case management preliminary hearing before Employment Judge Midgley, on 6 October 2020 [56], the issues were agreed, as follows (and using that document's paragraph numbering):

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Constructive unfair dismissal**

2.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were the actions identified as direct race discrimination. (The last of those breaches – Mrs Ryan's alleged conduct at the meeting on 22 November 2019 - was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

2.2 The Tribunal will need to decide:
2.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
2.2.2 Whether it had reasonable and proper cause for doing so.

2.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the

Claimant was entitled to treat the contract as being at an end.

2.4 Did the Claimant delay before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.5 It was not pleaded that if there was a constructive dismissal, it was otherwise fair within the meaning of s. 98 (4) of the Act.

3. **Direct race discrimination (Equality Act 2010 section 13)**

3.1 The Claimant describes herself as white Romanian.

3.2 Did the Respondent do the following things:

3.2.1 In December 2015 overlook the Claimant for the role of Learning Support Practitioner despite her holding as ELKLAN qualification (comparator Gemma Bland)?

3.2.2 In February 2019 overlook the Claimant for the role of Learning Support Practitioner despite her holding as ELKLAN qualification?

3.2.3 Between late 2016 and early November 2019 fail to allocate additional teaching hours to the Claimant (so as to increase her hours to 100% FTE) despite the Claimant's requests, generally and in particular on or about:

3.2.3.1 8 January 2018 when the Claimant made the request to Diana Spoors (comparators Colin Tucker and Tozzy Bridger whose hours were increased without advertisement or interview)

3.2.3.2 31 November 2018 when the Claimant made the request to Nicola Kingsley (comparators Colin Tucker and Tozzy Bridger whose hours were increased without advertisement or interview)

3.2.3.3 September 2019 when the Claimant made the request in a meeting with James Youell and Elizabeth Ryan (comparators Colin Tucker and Tozzy Bridger whose hours were increased without advertisement or interview)

3.2.3.4 9 October 2019 when Mrs Ryan made the decision to allocate two 1-hour L1 Catering classes to other staff without advertising the hours or interviewing for them (comparator Colin Tucker who was allocated the hours without advertisement or interview)

3.2.4 In September 2019 the Respondent accepts that one of the Claimant's classes was allocated to another member of staff without consultation with the Claimant. When the Claimant complained to James Youell, did Mr Youell say that he would need to consult the member of staff whose hours had been allocated before he could alter the allocation (comparator Gemma Bland)?

3.2.5 On 22 November 2019 was Mrs Ryan unsympathetic to and unsupportive of the Claimant when she raised her

concerns about her treatment? The Respondent accepts, as the Claimant alleges, that Mrs Ryan told the Claimant that she was stuck in the past and needed to move on and look to the future.

3.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than the comparators named above.

3.4 If so, was it because of race?

4. **Victimisation (Equality Act 2010 s. 27)**

4.1 Did the Claimant do a protected act as follows:

4.1.1 On 8 January 2018 allege in a meeting with Mrs Spoors that she had been treated unfairly and discriminated against when the Respondent allocated roles or teaching hours to her colleagues and not to her.

4.1.2 On 31 November 2018 allege in an appraisal meeting with Mrs Kingsley that she had been treated unfairly and discriminated against when the Respondent allocated roles or teaching hours to her colleagues and not to her.

4.2 Did the Respondent do the following things:

4.2.1 The actions of Mrs Ryan during the meeting on 22 November 2019.

4.3 By doing so, did the Respondent subject the Claimant to detriment?

4.4 If so, was it because the Claimant had done the protected acts?

5. **Remedy**

<u>Unfair dismissal</u>

5.1 The Claimant does not wish to be reinstated and/or re-engaged

5.2 What basic award is payable to the Claimant, if any?

5.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

5.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

5.4.1 What financial losses has the dismissal caused the Claimant?

5.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.4.3 If not, for what period of loss should the Claimant be compensated?

5.4.4 Does the statutory cap of fifty-two weeks' pay or £86,444 (until April 2020, £88,519 thereafter) apply?

Applicable law

Constructive unfair dismissal

6. The definition of a dismissal includes circumstances where an employee is entitled to terminate their employment contract with or without notice by reason of the employer's conduct (Section 95(1)(c) of the Employment Rights Act 1996). This requires a significant breach going to the root of the contract, or something that shows the employer no longer intends to be bound by one or more essential terms of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221, CA).

7. This fundamental breach can be a breach of the mutual duty of trust and confidence, which is an implied term of all employment contracts. The test is whether the employer acted without reasonable or proper cause in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (***Mahmud and Malik v BCCI*** [1997] ICR 606, HL). This can include a "last straw", which must contribute to the breach in some way but need not necessarily be a fundamental breach in itself.

8. In addition, the employee must resign in response to the breach. The resignation needs to be at least in part due to the breach, but the breach does not need to be the significant or the only reason for resignation. In ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703, the Court of Appeal held that the resignation must be in response to the employer's repudiation, but that the fact that the employee also objected to other actions of the employer will not vitiate the acceptance of the repudiation.

9. An employee cannot delay too long or they may be found to have waived the breach or affirmed the contract. An individual can explain a delay in resigning, but continued performance of the contract would generally indicate an affirmation. This is applied less strictly in employment cases compared to other cases, but the Tribunal should consider the facts very carefully before deciding that the employee has affirmed the contract (***Buckland v Bournemouth University Higher Education Corporation*** [2011] EWCA Civ 131, CA).

10. The burden of proof is on the employer to show a potentially fair reason for dismissal. The test is whether the dismissal was fair or unfair, having regard to the reason shown by the employer, and in particular whether in the circumstances the employer acted reasonably or unreasonably in treating this as a sufficient reason for dismissing the employee (section 98(4)(a)).

Direct discrimination

11. Discrimination in employment is regulated by the Equality Act 2010 ("EqA"). Race (to include nationality) is a protected characteristic under the EqA (s.9). Under s.13 of the EqA, a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

12. A claimant can rely on an actual comparator or a hypothetical comparator. Under s.23 EqA, on a comparison of cases there must be no material difference between the circumstances relating to each case.

13. We have considered the burden of proof provisions at s.136 EqA and reminded ourselves of the relevant case law:

> *136 Burden of proof*
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(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.*

14. The key cases providing guidance on the burden of proof provisions are ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] IRLR 332, (EAT), ***Igen Ltd and others v Wong and other cases*** [2005] IRLR 258 (CA), and ***Hewage v Grampian Health Board*** [2012] IRLR 870 (SC).

15. The key question is whether the facts show a prima facie case of discrimination and, if so, whether the respondent's explanation is sufficient to show there has not been discrimination. We are not to apply this in a mechanistic way, and there is rarely direct evidence of discrimination. The essential issue is finding why the claimant was treated as she was. However, under the burden of proof provision we do require some facts to indicate that there may have been discrimination, before we scrutinise the respondent's explanations. A simple complaint of unfair treatment does not, on its own, provide sufficient facts for the burden to move to the respondent or for the Tribunal to find that this treatment was unlawful discrimination.

Victimisation

16. Victimisation is defined in section 27 EqA:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

17. A protected act includes bringing proceedings under the EA, giving evidence or information in connection with proceedings under the EA, doing any other thing for the purposes of or in connection with the EA, or making an allegation (whether or not express) that A or another person has contravened this Act.

18. A victimisation claim does not require a comparator. The claimant must have been subjected to a detriment "because" of the protected act, rather than for another reason, which involves asking why the respondent acted as it did.

19. Mr Bromige also provided a detailed skeleton argument, comprehensively setting out the law in relation to these claims, citing many of the above authorities and others, to which we will refer below, as we consider appropriate.

Facts

20. We heard evidence from the Claimant and her partner, Steven Smith. The Claimant also provided a witness statement from a former colleague, Ms Betty Knight, but as Ms Knight did not attend to give evidence, we gave her statement very little weight. On behalf of the Respondent, we heard evidence from Ms Diana Spoors, a former director of learning, who conducted an appraisal of the Claimant; Ms Nichola Kingsley, an assistant principal, who also conducted an appraisal on the Claimant and had other dealings with her and finally from Ms Jane Golds, the director of marketing and admissions, who dealt with a grievance from the Claimant.

21. The Claimant started her employment with Alton College on 8 November 2012, before being transferred to the Respondent through TUPE from 1 March 2019.

22. The Claimant wanted to increase her hours and there were discussions over several years and with several managers on this point.

23. It is accepted that in July 2019, there was a breakdown in communication between the Claimant and the Claimant's then manager, James Youell, relating to Mr Youell taking a class off her and giving it to a Ms Bland.

24. The Claimant attended a 1-2-1 meeting on 22 November 2019 with Elizabeth Ryan, who had replaced Mr Youell as her manager. The Respondent accepts that Ms Ryan told the Claimant that she '*was stuck in the past and need*(ed) *to move on and look at the future'*.

25. The Claimant resigned on 25 November 2019, providing notice until 25 January 2020.

26. The Claimant was signed off sick from 8 January 2020 until 22 January 2020.

27. An exit interview was arranged for the Claimant on 24 January 2020, which she attended.

28. The Claimant raised a formal grievance on 26 January 2020, which was acknowledged by the Respondent on 24 February 2020. As stated, Ms Golds dealt with this matter.

28. The Respondent provided the Claimant with the written outcome of her grievance on 25 February 2020, not upholding any of the Claimant's concerns.

29. The Claimant did not appeal against the grievance outcome.

30. We turn now to each of the claims, in turn.

Victimisation

31. The Claimant alleged two protected acts, as follows:

    31.1 In January 2018, alleging in an appraisal meeting with Ms Spoors that she had been treated unfairly and discriminated against, in respect of the allocation of teaching hours, in comparison to colleagues. However, the Claimant's own evidence, as contained in her witness statement (WS12) made no such assertion, merely stating that she had '*raised these issues'* in the meeting. When challenged as to what these 'issues' were (in relation to what she had said in the previous eleven paragraphs of her statement), she agreed that the first five paragraphs were merely background as to her teaching career. In the fifth paragraph she simply states that she and a black colleague were the only staff members with 'protected characteristics', but there's not even an implication that she raised that with Ms Spoors. The subsequent six paragraphs are either more background, or relate to her ongoing complaints about not being allocated additional hours (but without reference to any discrimination), or relate to matters postdating the meeting with Ms Spoors, such as her subsequent grievance. The Claimant, therefore, has advanced no evidence as to raising the issue of discrimination with Ms Spoors. Ms Spoors had no recollection of the Claimant having used the word 'discrimination' and was absolutely certain that she didn't allude to her race or nationality (WS5), in the context of her complaints about allocation of hours. Ms Spoors was confident that if such an allegation had been made, she would have definitely have remembered it, stating that '*it would have been a red flag for me'*. On balance, therefore, we prefers Ms Spoors' evidence on this issue and find,

accordingly that no protected act took place.

31.2 The second alleged protected act relates to a further appraisal meeting, in October 2018, with Ms Kingsley. The Claimant asserts that she raised the issue of discrimination, again in relation to allocation of hours, in that meeting. However, again, on even the Claimant's own evidence (WS13), she fails to set out precisely what was said by her to Ms Kingsley as to 'discrimination'. Ms Kingsley recalled that there was discussion as to allocation of hours, but had no recollection of the use of the word 'discrimination'. However, Ms Kingsley accepted in cross-examination that subsequently, when the Claimant wrote her 'comments/feedback' on the appraisal form [144], she wrote '*teaching English is something I have never been considered for in our department and I have never understood why, but definitely felt that I was being treated differently and was being discriminated against …* and *I explained the reasons why I feel I am being treated differently and discriminatory* (sic) *which took back exactly to what has happened in the past.'* Although she did not say so in her statement, Ms Kingsley accepted in cross-examination that she had seen these comments when the Claimant returned the form to her, before sending it to HR, but took no action in respect of the allegation of 'discrimination', while she did nonetheless attempt to address the Claimant's concerns about allocation of hours. Nor did she 'flag up' those allegations to HR, for perhaps their investigation (it being generally agreed that without such flagging up, HR would probably simply file the appraisal, without reading its detail). We therefore need to decide whether this reference to discrimination constituted a protected act. Sub-section 27(d) covers allegations, whether or not express, made by an employee, that the employer has contravened the EqA. It is not necessary that the EqA actually be mentioned in the allegation or even be envisaged as coming into play. However, the asserted facts must, if verified, be *capable* of amounting to a breach of the EqA.

31.3 We consider that the examples in the two following cases are instructive. In ***Durrani v London Borough of Ealing*** EAT 0454/12: D claimed that he had been subjected to a detriment for having complained to his employer of 'being discriminated against'. An employment tribunal dismissed his claim, finding that D used the term 'discriminated against' to refer to what he perceived as general unfairness, rather than to detrimental action based on his race. The EAT upheld the tribunal's decision, as it was clear that D had not raised any complaint which could be understood as alleging treatment contrary to the EqA. The Appeal Tribunal did, however, stress that the instant case should not be taken as 'any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of S.27 EqA'. All will depend on the circumstances of the particular case.

In ***Fullah v Medical Research Council and anor*** EAT 0586/1**2**: F was the only black person working in a scientific research unit. He brought an internal complaint of harassment against M, his manager. In support of this he stated that he had been 'physically, verbally and psychologically bullied and harassed, discriminated and victimised both directly and indirectly; and I was at a loss to understand why'. This was rejected and he appealed, stating that he believed that M had subjected him to bullying, harassment, discrimination and victimisation over the course of four years. However, he did not mention race. An internal communication within the HR department referring to his allegations noted that it involved 'white male on black male although race has not yet been raised as an issue'. A tribunal concluded that there was no protected act and the EAT agreed. While the documents indicated the possibility of a tribunal claim based on race, the tribunal rightly considered the context, including the fact that a year later F had made explicit claims of race discrimination. He was articulate and well educated and clearly knew the appropriate language to use for such a claim. However, in the documents he relied upon to found his victimisation claim, there was no basis for a complaint of race discrimination. The EAT accepted that the word 'race' does not have to appear but the context has to indicate a relevant complaint, and here that context was lacking.

31.4 We consider that in this case before us, similar factors apply. It appears likely that at least at the time, the Claimant was using the term 'discrimination' in its plain English sense, of being treated less fairly than others, in relation to the allocation of hours, but that she was not necessarily expanding that allegation to meet the legal definition, by asserting that it was because of her nationality. Indeed, on her own evidence, over ten months later, when she had her discussions with Mr Youell about the allocation of the class to Ms Bland, she asserts that she had not been given more hours '*because I am not married, have no children and am foreign'* (WS15), indicating to us that even at that point, she was unable to put a label on the alleged discrimination. She subsequently did, but only on 2 February 2020, a year and a half later, in an email response to Ms Golds, who had raised questions in relation to her grievance, despite having had the opportunity to do so in an exit interview and her written grievance. Accordingly, therefore, as with the case of ***Fullah***, the Claimant is '*articulate and well educated and clearly knew the appropriate language to use for such a claim*' but did not use the language necessary to constitute a protected act.

32. However, even if we are wrong in relation to that alleged protected act, there is simply no evidence that Ms Ryan was motivated in any way by such act, in her meeting with the Claimant of 22 November 2019. We will deal later with the detail of that meeting, but regardless of what is alleged about Ms Ryan's behaviour during it, there is simply no evidential link between the use of the word 'discrimination' in an October 2018 appraisal document, involving Ms Kingsley and Ms Ryan's

behaviour towards the Claimant in a meeting, over a year later. There is no evidence that Ms Ryan was even aware of the appraisal document (and we note from what the Claimant said that there were no subsequent appraisals, at which Ms Ryan might have read the October 2018 appraisal, by way of preparation) and the Claimant herself said that she did not raise either appraisal with Ms Ryan. Clearly, therefore, any alleged detrimental behaviour by Ms Ryan towards the Claimant cannot have been because of any alleged protected act of hers.

33. This claim is therefore dismissed.

Direct Discrimination

34. We reminded ourselves as to the law on the burden of proof in such claims and in particular the need for the Claimant to show a prima facie case of discrimination, before the burden of proof would shift to the Respondent. As stated in **Nagarajan**, '*After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.*' We note also the guidance in **Law Society v Bahl [2003] IRLR** that a finding that the Respondent's conduct towards the Claimant was unreasonable does not of itself give rise to inferences that the motive or reason must have been because of the protected characteristic and that as stated in a later case, **Base Childrenswear Ltd** '*there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group.'*

35. It is at this practical first hurdle that the Claimant's allegations fall. Following '*careful and thorough investigation'*, we find no evidence, beyond a much-belated supposition by the Claimant that her nationality must the reason for any less favourable treatment that she suffered. This entire aspect of her claim seems entirely to be based on her subjective 'feelings' in this respect and she has advanced no worthwhile evidence to support this assertion. We agree with Mr Bromige's submission on this point that her case is undermined by the already-mentioned challenge to Mr Youell (that his alleged mistreatment was potentially because of being unmarried, not having children, or her nationality) indicating, we agree, the '*shifting sands'* of her case, particularly when we consider the absolute last-minute mention by her of her nationality as a factor, a couple of weeks before the termination of her employment. This indicates to us that she did not really believe this to be the case and even if she did, had no evidence to support such a belief. She still does not. She has sought to rely on a tribunal claim brought by a former colleague, heard in November 2018, which on the limited details we were provided with [28a&b] indicated at most the possibility of one successful discrimination allegation against the Respondent, had that claim been brought in time, but it was well out of time. The Judgment recorded that this was the only allegation, out of

126, which stood any chance of success, the rest being '*unfounded*'. We were to hear evidence from Ms Knight in respect of a race discrimination claim she is pursuing against the Respondent, but she chose not to give evidence and we therefore consider that neither of these matters permit us to draw any inferences about the Respondent's attitude towards equal opportunities. The Claimant, therefore, has simply not made out her prima facie case that any less favourable treatment was because of her nationality and accordingly has failed to shift the burden of proof to the Respondent.

36. We nonetheless deal with the Claimant's allegations of unfavourable treatment, as these are mirrored in her constructive unfair dismissal claim.

37. She states that in December 2015 she was overlooked for the role of Learning Support Practitioner (LSP), despite her holding an ELKLAN qualification, in relation to the comparator of Ms Bland. As with many of these allegations, there was very little evidence for us to consider. No corroborative or documentary evidence was provided to show how the comparators were valid comparators for the Claimant, in relation, say to their level of experience, or qualifications, when assessing whether she had been less favourably treated than them. Simply put, we had no evidence before us, beyond mere assertion by the Claimant that the comparators were either similarly, or even less qualified or experienced than her and that therefore if they had been offered opportunities or hours that she had not that that was less favourable treatment of her. The Respondent's witness evidence was that an ELKLAN qualification was not the 'be all and end all' of what was needed to fill the LSP role, with experience in other areas and a range of skills being necessary and that in fact the ELKLAN qualification was more suited to the role the Claimant was already in. The Claimant failed completely to rebut this evidence.

38. She makes a similar allegation that in February 2019 she was again overlooked for the LSP role. However, when it was pointed out to her that the role had been advertised to all staff, but that, as stated in Ms Ryan's email to her of 13 March 2019 [149], she had not applied for it, she accepted that it was possible she may have missed the advertisement, stating in an earlier email [150] that it '*didn't cross my mind at all that I had to apply for a job I was already doing*' (she had been covering it part-time). She did not dispute that an advertisement had been sent to all staff and it appears from her evidence that she either missed it, or if she saw it, didn't consider she needed to apply, which in the context of the Respondent going to the trouble to advertise a role, cannot be logical. She names no comparator in this respect, but it must be assumed that it would be the person who was offered the role, but of whom there is no evidence. In any event, it cannot be less favourable treatment to appoint a person to a role, who has, as instructed, applied for it, as opposed to a person who hasn't.

39. There are then four allegations that between late 2016 and November 2019 the Respondent failed to allocate additional teaching hours to the

Claimant, so as to increase her hours to 100% FTE (she was on 83%). She names two comparators, Mr Tucker and Ms Bridger and asserts that on the four dates in question, the comparators had had their hours increased, without the need for advertisement or interview. Crucially, in respect of this allegation, beyond merely asserting so, she provided no corroborative evidence whatsoever that these persons' hours were increased in the way she described. Indeed, even her own statement makes only passing reference to the issue and there was no valid documentary evidence in the bundle. Mr Thorn, on her behalf, belatedly, in closing submissions, attempted to rely on work rotas for these comparators [example for Ms Bridger 264], to evidence this point, but these documents do not, without explanation, or comparison with earlier rotas, or questioning of witnesses, support this point. We note also that the Claimant accepted that she had, on occasion, been offered and accepted additional hours, '*without the need for advertisement or interview'* and therefore clearly this was not an unusual or abnormal practice of the Respondent. She also failed to challenge the Respondent's witnesses' evidence that over this period student rolls had been falling, staff had been threatened with redundancy, or made redundant and that the Respondent was finding it difficult to maintain staff hours, to the dissatisfaction of many staff, but that despite this, her 83% FTE was maintained throughout. In some aspects, the evidence indicated that on at least some occasions, she may even have been more favourably treated, as some staff fell below their percentage, but she never did. She had no contractual entitlement to demand or expect to have her hours increased to 100% and in that respect, she did not dispute the Respondent's evidence that she was unwilling to work Fridays, when they would have seen it as an absolute requirement that a full-time employee work Monday to Friday. These allegations therefore are not well-founded and are dismissed.

40. The next allegation relates to the allocation, with effect September 2019, by Mr Youell of one of the Claimant's classes to Ms Bland. It is agreed evidence that this was done without consultation with the Claimant and that when she confronted Mr Youell about it, he said that he would need to consult with Ms Bland, before any re-allocation might take place. He essentially confirmed this in a subsequent email to Ms Golds during the grievance investigation [207]. On the face of it, this is less favourable treatment of the Claimant, in that while Ms Bland would need to be consulted about any change, the Claimant did not. However, as identified above in our consideration at the outset of the evidential burden on the Claimant, she has completely failed to link this treatment, or any other alleged less favourable treatment, to her nationality and therefore to establish a prima facie case of discrimination and accordingly, therefore, failing to shift the burden to the Respondent, to provide a non-discriminatory reason.

41. Finally, there is the allegation that Ms Ryan, in the meeting of 22 November 2019 was '*unsympathetic to and unsupportive'* of her, '*when she raised concerns about her treatment'*. As to what happened in this meeting, we had no particular reason to doubt the Claimant's account, as set out in her witness statement and of course we heard no direct

evidence from Ms Ryan. It is clear from Ms Ryan's account subsequently in the grievance process [201] that it was a difficult and confrontational meeting. She accused the Claimant of being aggressive and rude. She said that she had referred to her own personal circumstances, as to being at risk of redundancy and having to apply for other roles and agreed, when asked that she had told the Claimant that she '*was stuck in the past'*. She denied that she had repeatedly said that, in relation to a role left vacant by a retired colleague, for which the Claimant was not considered that she '*created a post that was attractive for a person who is more positive and with a different attitude as that is what I felt the department needed'*, but did accept that she said she '*was looking for someone positive to apply'.* When asked whether the Claimant had told her that she (the Claimant) '*would like to work in a place where she is treated fairly and equally to her colleagues and where she didn't feel discriminated against',* Ms Ryan did not answer directly, simply stating that '*it was a very difficult meeting and in the end, I said DB was being unfair and cut the meeting off'*. We find, on balance that it is likely that the Claimant's account of this meeting is a generally accurate one and that she was, as a consequence, very upset, feeling that Ms Ryan '*did not have any respect towards and treated me, behind my back, with no dignity'* (WS 190) and that she felt '*like I'm being pushed'* and that she was being portrayed as a negative person. We note also that the Claimant discussed the meeting at some later point with Ms Kingsley, who stated that '*it was clear that the meeting had upset her'.*

42. Having made those findings of fact, however, is there any evidence that Ms Ryan would have treated any notional comparator any differently and we find that there is not. Ms Ryan was clearly under some pressure as a manager (a recurring reference from the Respondent witnesses is to 'turmoil' in the College) and had herself been under some threat of redundancy. The Claimant had by now a fairly long history of complaints about her hours and it is clear from the Respondent's evidence that she was regarded as somewhat demanding and direct. While of course, an employee is perfectly entitled to stand up for themselves and to put their case directly, some managers will handle that situation better than others. It seems likely that Ms Ryan was not such, perhaps due to her own circumstances at the time. However, there is no evidence that had another teacher, in the same circumstances as the Claimant, with the same demands and direct approach, had a similar meeting with Ms Ryan that that notional person would have been treated any more favourably than the Claimant was. As with all these claims, the link to the Claimant's nationality is simply not there.

43. For these reasons, therefore, the claim of direct race discrimination fails and is dismissed.

Constructive Unfair Dismissal

44. The breaches relied upon by the Claimant are those acts of alleged less favourable treatment set out above. As should be clear from our findings of fact in that respect, the only act that was less favourable treatment was Mr Youell's allocation, without consultation, in September 2019, of

the Claimant's lesson to Ms Bland. By way of repetition, it is agreed evidence that this was done without consultation with the Claimant and that when she confronted Mr Youell about it, he said that he would need to consult with Ms Bland, before any re-allocation might take place. He essentially confirmed this in a subsequent email to Ms Golds during the grievance investigation [207].

45. The Claimant also relies on the meeting with Ms Ryan, as the 'last straw'. As set out above and repeated, by way of emphasis, there is the allegation that Ms Ryan, in the meeting of 22 November 2019 was '*unsympathetic to and unsupportive'* of her, '*when she raised concerns about her treatment'*. As to what happened in this meeting, we had no particular reason to doubt the Claimant's account, as set out in her witness statement and of course we heard no direct evidence from Ms Ryan. It is clear from Ms Ryan's account subsequently in the grievance process [201] that it was a difficult and confrontational meeting. She accused the Claimant of being aggressive and rude. She said that she had referred to her own personal circumstances, as to being at risk of redundancy and having to apply for other roles and agreed, when asked that she had told the Claimant that she '*was stuck in the past'*. She denied that she had repeatedly said that, in relation to a role left vacant by a retired colleague, for which the Claimant was not considered that she '*created a post that was attractive for a person who is more positive and with a different attitude as that is what I felt the department needed'*, but did accept that she said she '*was looking for someone positive to apply'.* When asked whether the Claimant had told her that she (the Claimant) '*would like to work in a place where she is treated fairly and equally to her colleagues and where she didn't feel discriminated against',* Ms Ryan did not answer directly, simply stating that '*it was a very difficult meeting and in the end, I said DB was being unfair and cut the meeting off*'. We find, on balance that it is likely that the Claimant's account of this meeting is a generally accurate one and that she was, as a consequence, very upset, feeling that Ms Ryan '*did not have any respect towards and treated me, behind my back, with no dignity'* (WS 190) and that she felt '*like I'm being pushed'* and that she was being portrayed as a negative person. We note also that the Claimant discussed the meeting at some later point with Ms Kingsley, who stated that '*it was clear that the meeting had upset her'.*

46. None of the other acts can constitute, either singly, or cumulatively breach of the implied term of trust and confidence, as there is either insufficient evidence to establish that they occurred in the manner that the Claimant states, or that applying **Malik v BCCI**, they were behaviour that was calculated or likely to destroy or seriously damage trust and confidence and were done without reasonable and proper cause.

47. We do, however, consider that Mr Youell's decision to allocate the Claimant's lesson, without consulting with her, while he did consider it necessary to consult with Ms Bland and which was further exacerbated by his failure to rectify the matter, was a breach of the implied term. The seriousness of the breach is underlined by Ms Kingsley's instruction that it be reversed. While very unlikely to have been behaviour that was

calculated to destroy or seriously damage the Claimant's trust and confidence, it was, in the circumstances of the history of complaints by the Claimant and her previously-stated perception of unfairness, objectively *likely* to do so. An employer's intentions in this respect are irrelevant. As to whether or not Mr Youell had 'reasonable or proper cause' for his actions, we heard no direct evidence in that respect and we are not therefore in a position to find that he did. Regardless of whether his initial decision to re-allocate the lesson, without consultation, was, as Mr Bromige submits, an 'error in people management not amounting to a breach of the implied term', his failure to rectify it, or further engage with the Claimant until her return in the new academic year, without 'reasonable or proper cause' that we have had evidence of, is a breach of the implied term.

48. We are in no doubt that the meeting with Ms Ryan does constitute at very least a 'final straw' in this case. Our view of the evidence in that respect is that effectively Ms Ryan was fed up with the Claimant's complaints and concerns, was dismissive of them and did strongly imply that perhaps the Claimant should be looking for employment elsewhere. This is strengthened by the Respondent's email [173], from Ms Ryan to HR, telling them to promptly seek a replacement for the Claimant. Also at [174], an email apparently from HR to Ms Ryan, which reports the Claimant saying to them that she '*felt that she was being pushed out*'. It also refers to her being upset and to possible safeguarding issues, for both employees and the Respondent. Such behaviour of itself, is, we find, a breach of the implied term and conduct certainly likely and even perhaps calculated to, in the Claimant's perception of what was being said to her, with implied references to a lack of 'positivity' on her part and to her considering other employment, to destroy trust and confidence. The Respondent failed to use this opportunity to properly address the Claimant's concerns and seek a way forward and thereby retain her, indicating that they had no desire to do so.

49. We don't accept the Respondent's assertions that the Claimant was meeting with Ms Ryan to engineer a dispute with her, perhaps to bolster a subsequent claim, because she already had a job offer. It is the case that the Claimant did have a job offer and which she had probably already verbally accepted, but we nonetheless find that she was still, at this point, trying to remain in the Respondent's employment, if her concerns could be addressed. We do so, for the following reasons:

    49.1 The job she had accepted was at a lower rate of pay (when all along, her concern had been to get to a full-time role, for reasons of pay) and not in the profession of teaching, which she clearly enjoyed, had worked hard to develop her qualifications in and had a talent for.

    49.2 Mr Smith's uncontested statement supports this account.

    49.3 The acceptance of a job offer can be rescinded.

    49.4 She did not resign immediately. In our experience, employees

who have resolved to resign, come what may, particularly if they have a new job to go to, come to such meetings, with, effectively, their resignation letter already drafted and figuratively 'in their back pocket', or to follow promptly by email. The Claimant, however, did not resign for three days, indicating that it was not a premeditated decision on her part.

49.5 Both hers and the Respondent's evidence indicates that she was hugely upset by the meeting and her subsequent decision to resign was not the behaviour of somebody simply seeking to garner more evidence for a subsequent claim.

49.6 She still sought to discuss the matter some time later with Ms Kingsley.

49.7 We don't consider that the Claimant's initial failure to disclose the correspondence with her new employer infers a wish to cover her tracks in this respect, but rather, as a litigant-in-person, a lack of understanding of the legal tests in such a claim, as evidenced by her provision of her partner's statement, which exposed this issue.

50. We do therefore find that the Claimant resigned in response to the breaches of the implied term, most recently the meeting with Ms Ryan and that therefore, as that was only three days later, there was no affirmation by the Claimant of the contract.

51. The Claimant was therefore constructively unfairly dismissed.

Conclusion

52. For the reasons set out above, therefore, we find that the Claimant was constructively unfairly dismissed, but that her claims of direct race discrimination and victimisation fail and are dismissed.

REMEDY

53. The issue of Remedy proved relatively uncontroversial. The amount of the Basic Award was agreed, as set out in the Parties' respective schedule of loss/counter schedule [274 and 278], at £3675.00 and also that a year's loss of earnings, based on the difference in salaries between the Claimant's previous salary and that with her new employer, Surrey County Council, was £1327.00.

54. The Claimant had gone straight to new employment, as an Exclusions Officer with the Council, earning a reduced salary. She said that she had not made efforts to find a better-paid role, or to return to a teaching role, as she had not, as yet, felt able to, due to the manner in which her previous role had terminated.

55. Following submissions from Mr Bromige, a short adjournment was ordered to permit the Claimant to consider her position, in consultation with Mr Thorn. Mr Bromige had suggested that the appropriate period for loss of earnings was one year from the EDT, rather than to the date of this Hearing, as but for the Pandemic, this case would likely have come to hearing early this year. He didn't consider that any further loss of earnings should be awarded, but if it was, it should be limited to loss to today's date. He also argued that the award for loss of statutory rights should be limited to £300, rather than the £500 sought by the Claimant.

56. On return, Mr Thorn stated that the Claimant would accept one year's loss of earnings (£1327.00) and £300 for loss of statutory rights.

57. Following a further short adjournment for deliberation by the Tribunal, the following sums were awarded:

57.1 Basic Award - £3675.00
57.2 Loss of Earnings for one year - £1327.00
57.3 Loss of Statutory Rights - £300
Total - £5302.00

58. Following delivery of remedy judgment, Mr Thorn raised the issue of an award for injury to feelings. It was pointed out to him that no such award could be made in respect of unfair dismissal (***Dunnachie v Kingston upon Hull City Council*** 2004 ICR 1052 HL).

Employment Judge O'Rourke
Date: 21 October 2021

Judgment & Reasons sent to the Parties: 15 November 2021

FOR THE TRIBUNAL OFFICE