EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
EBD	v	Oxfordshire County Council

Heard at: Reading (by CVP) **On:** 1 and 2 June 2021 and 11 June 2021 (in chambers)

Before: Employment Judge Hawksworth
Mrs C Anderson
Mr G Edwards

Appearances
For the claimant: The claimant's husband
For the respondent: Mr F Azman (counsel)
Urdu interpreter: Mr T Ahmed

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the claimant's complaints of direct discrimination because of race or religion fail and are dismissed.

REASONS

The claim, hearing and evidence

1. The claimant was employed by the respondent as a lunch-time supervisory assistant at a primary school from 19 February 2018 to 3 June 2019.

2. After Acas early conciliation from 8 July 2019 to 16 August 2019, the claimant presented her claim on 16 September 2019. She complains of direct discrimination because of race and religion. The claimant also named the HR Manager of the school as a respondent in her claim, but this complaint was rejected under rule 12 of the Employment Tribunal Rules of Procedure 2013, because there was no Acas early conciliation certificate. A complaint of unfair dismissal was also rejected because the claimant did not have the required two years' employment to bring a claim of unfair dismissal.

3. The response was presented on 6 November 2019. The respondent defends the claim.

4. The full merits hearing took place by video (CVP) on 1 and 2 June 2021. Mr Ahmed, an Urdu interpreter, attended the hearing to interpret for the claimant. The claimant said that she required Mr Ahmed to interpret her evidence, but she did not require interpretation of other parts of the hearing. She said she would raise her hand if she needed Mr Ahmed's assistance at any other time. Mr Ahmed interpreted the claimant's evidence and we are grateful for his assistance.

5. We had the benefit of a carefully prepared hearing bundle (with 314 pages), with hard copy and pdf page numbers aligned, which was helpful. Page numbers in these reasons are references to the page numbers in that bundle.

6. The claimant's representative objected to a document at pages 310 and 311 of the bundle which had been disclosed by the respondent shortly before exchange of witness statement. It was said by the respondent to be an incident report. The claimant's representative said it was undated and incomplete. For reasons explained at the hearing we decided that the document could be included, but we said that given the questions raised on behalf of the claimant it would be helpful if the respondent could provide the metadata for the document. We told the claimant's representative that he could question the respondent's witness about the date and origins of the document. The respondent provided a copy of the metadata during the lunch break on 1 June.

7. After reading, we began hearing the claimant's evidence. We heard from the claimant and her husband on 1 June 2021 and from the respondent's witness, the headteacher of the school, on 2 June 2021. Mr Azman prepared written submissions which were sent to the tribunal and the claimant's representative during the lunch break on 2 June. We heard submissions from the parties' representatives on the afternoon of 2 June.

8. We allowed some late disclosure by the claimant on 2 June 2021. There were four pages of documents relating to a subject access request made to children's services. We considered them but they did not assist us to determine the issues we had to decide.

9. We reserved judgment because there was insufficient time in the time allocated for the hearing for us to deliberate and give judgment. A deliberation day was held in chambers (in private) on 11 June 2021. The employment judge apologises to the parties for the delay in promulgation of the reserved judgment. This reflects the current pressures of work in the employment tribunal.

The Issues

10. The issues for determination by us were clarified at a preliminary hearing on 28 May 2020. The case management summary records that the claimant brings complaints of race and religious discrimination based on her being, as she describes, a practising Muslim woman and belonging to an Asian ethnic group.

11. The allegations of race or religious discrimination to be considered by us are recorded as follows:

    11.1. As direct race and religious discrimination: a failure by the school to provide the reference that was requested by another school (see para 5 of the claim);
    11.2. As direct race and religious discrimination: telling social services that she had been disciplined for grabbing a child's wrist, when in fact she had not been disciplined for this (see para 10 of the claim);
    11.3. As direct race and religious discrimination - but as a claim of associative discrimination based on the race and religion of her husband (which she says are the same as her race and religion) rather than on her race or religion - telling social services that her husband did not care about their child's happiness at school, when in fact he had taken the initiative to contact the school about their child's welfare (see para 12 of the claim);
    11.4. As direct race and religious discrimination: the claimant resigned in response to the matters at 9.1 to 9.3 and that resignation amounts to a discriminatory constructive dismissal (see para 19 of the claim).

Findings of fact

12. We decide what happened by considering the evidence we read and heard, and, where there is a dispute, deciding what we think is most likely to have happened.

13. The claimant was employed by the respondent as a lunch-time supervisory assistant at a primary school from 19 February 2018. This was the same school that was attended by the claimant's children.

<u>The incident on 27 March 2018</u>

14. On 27 March 2018 the claimant had to intervene during an altercation between some children in the playground, and while doing so she held two children by the wrist. The children swore at the claimant. The claimant reported the incident to her supervisor. A teacher witnessed the incident and the deputy headteacher spoke to those involved to find out what had happened. He made a note of the conversations he had and reached conclusions about the most likely course of events. His note was not dated but the metadata says, and we accept, that it was made on 28 March 2018 (page 310-311).

15. Later that day the headteacher had a call from one of the children's parents, complaining that her child had been hurt by the claimant. The headteacher also received an email from the claimant to draw her attention to the use of offensive language by the children (page 142). The headteacher said she agreed that no child should use abusive language. She asked the claimant to meet with her the following day to discuss the incident.

16. At the meeting on 28 March 2018 the headteacher decided that, as the claimant was a new employee and this was the first time that there had been any concerns about the way the claimant had handled difficult situations, the incident should be dealt with informally. She told the claimant that restraint on pupils should only be used if they are at risk of hurting themself or others, but that ideally, she should leave this to a senior leader. She said that if there were any further incidents with the two pupils, that another member of the lunchtime team should deal with it, to keep herself safe from further allegations. She said that some training would be arranged for the claimant. No note was made of the meeting and there was no follow up letter or note on the claimant's file.

17. There was a dispute between the parties about the nature of the meeting. The headteacher said that she saw the discussion as an informal verbal warning which was part of the disciplinary procedure, and that to convey this she would have used the words, 'I'm warning you that this mustn't happen again'. An informal discussion about conduct is part of the school's disciplinary policy. However, the headteacher accepted that she had not fully followed that policy because she had not confirmed the discussion and agreed actions in writing (page 263).

18. The claimant did not see the meeting as a disciplinary meeting. From her point of view, the meeting had been prompted by her complaint about the children's behaviour. In her evidence to us, the headteacher accepted that the claimant's interpretation of the meeting was fair and she could see why the claimant thought that it was not a disciplinary meeting. We find that, although the headteacher's perception was that she had given an informal warning at this meeting, it was not given sufficiently clearly for the claimant to understand that she was being given an informal verbal warning.

<u>The claimant's application for a job at another school</u>

19. In December 2018 the claimant applied for a teaching assistant role at another school. On 6 December she was invited to an interview for the role (page 144). On 10 December the headteacher of the claimant's school was asked by the other school to provide a reference for the claimant (page 147). The email requesting a reference did not include any time limit or date for responding.

20. The claimant attended the interview on 12 December 2018 (page 146). On 13 December the claimant was told that her application for the teaching assistant role had not been successful. However, she was offered an

alternative role working two days per week as a teaching assistant in the reception class (page 148).

21. On the same day, 13 December, the claimant spoke to the headteacher of her school and told her about the job offer she had received. She asked whether she could continue with some of her lunchtime duties as well as working in the new role, and the headteacher agreed. There was a dispute about whether the claimant mentioned the reference request in this conversation. We think it is more likely that she did not, because the focus of this conversation was whether the claimant could continue in both roles, and it is likely that the claimant would have assumed that the question of references was being dealt with between the two schools and would not involve her. The discussion in itself would however have been a reminder to the headteacher about the reference request.

22. On 17 December 2018 the claimant had a call from the new school. They said that the job offer was withdrawn as the role was no longer needed.

23. Over the Christmas period, the claimant's headteacher forgot to complete the reference for the claimant. The other school did not chase it up. In January 2019 when she spoke to the headteacher of the other school about a different matter, he told her that the reference was no longer required. We accept the evidence of the headteacher of the claimant's school that she did not have any other conversation about the claimant with the headteacher of the other school at any time prior to this.

24. In January 2019 the claimant noticed another job advertised at the other school. It was described as 'Teaching Assistant (SEN Support)'. The claimant applied but was told (without an interview) that her application was unsuccessful (page 152).

25. The claimant thought that the role advertised in January 2019 was the same job which had been offered to her and then withdrawn. She suggested that this called into question what the school had said about the job being withdrawn.

26. We find that the role advertised in January 2019 is more likely to have been a different role, because the teaching assistant roles discussed in December were not called 'SEN Support' roles. We have considered what was most likely to have been the explanation for the withdrawal of the role. We find that the reason the job offer made to the claimant was withdrawn was because, as the other school said, the role was no longer needed.

<u>Social care referral</u>

27. On Wednesday 12 December 2018 in a conversation with a member of staff, one of the claimant's children reported treatment by her parents that concerned the staff member.

28. The headteacher was told about the conversation on Monday 17 December 2018. She is the school's Designated Safeguarding Lead. She recorded the matter as a cause for concern (page 215). She spoke to the child and then made a referral to the Multi-Agency Safeguarding Hub. The referral was made on the same day, 17 December 2018 (page 217). The action log for the incident wrongly recorded the date of the referral as 12 December 2018 (page 216). When making the referral, the headteacher provided children's social care with all the information she had from the discussions with the children, teachers and members of the senior leadership team. She considered this to be her responsibility as Designated Safeguarding Lead.

29. A social worker attended the school on 17 December and met with the claimant and her child as part of a Child and Family Assessment. The claimant asked the headteacher to sit in on the meeting. Again, the school's action log for the incident wrongly recorded the date of this meeting as 12 December 2018 rather than 17 December 2018.

30. The claimant's family had not had any previous involvement with children's social care. Following the assessment, a statement of expectations was agreed and signed by the claimant on 18 December 2018. No further steps were taken by children's social care, and in March 2019 the matter was closed with no further action required (page 220).

31. After the case was closed by social care, the claimant received a copy of the Child and Family Assessment record form which was completed by the social care team (page 221 to 230). The form had a summary of the information provided by the headteacher when making the referral, which included the comment:

    "Mother is a lunch time supervisor and was previously disciplined for holding a child by the wrist whilst at work."

32. The headteacher thought she did not use these words when making the referral, but could not recall the exact words she used. She thought she would have said the claimant was given a verbal warning rather than that the claimant was disciplined. We find that it is more likely that the headteacher said the claimant was disciplined. We reach this finding because the headteacher told us that she saw the discussion with the claimant as part of the disciplinary procedure, and because it is likely that the social worker completing the form would have recorded the terms of the referral carefully.

33. The claimant said later in her grievance that she was shocked by the inclusion of this comment as she felt it was dishonest (page 166).

34. The form also has a background/history section (page 224). Under 'Education' the form included information provided by the headteacher, part of which said:

> "*It took [the child] a while to settle and make friends and [they were] at times isolated. School felt that father did not see this as a concern and appeared to be more focussed on academic concerns. Parents are keen to ensure that the children have lots of work to complete at home including times tables and books to read.*"

35. The view expressed by the headteacher was not consistent with an email sent to the school by the claimant's husband on 12 December 2016 (page 208). The email said:

> "*I will be grateful if the respected Head Teacher/Class Teacher can look into [the child] as [they are] not enjoying [their] time at school for sure. I am happy for [their] educational achievements at your school but at the same time I like to see [them] happy at your prestigious institution.*"

36. The headteacher based her view on a conversation with a class teacher who felt that the claimant's child was under pressure to do well academically. It was also based on a telephone conversation with the claimant's husband. We accept that there was a telephone conversation between the headteacher and the claimant's husband. The claimant's husband said there could not have been because he was out of the country. However, he was in the UK prior to February 2018 (page 178) and was in contact with the school on a number of occasions in 2017 (page 211 to 214). We find that it is likely that a telephone conversation did take place between the headteacher and the claimant's husband in 2017.

<u>The claimant's grievance and the termination of her employment</u>

37. The claimant went on sick leave on 18 March 2019 and was signed off sick by her doctor with work stress until 31 May 2019 (pages 161 and 162).

38. The claimant sent a letter to the school on 23 April 2019 raising a grievance about her treatment as an employee and also making a complaint about her treatment as a parent of children at the school (page 164). A governor of the school was appointed to consider the complaint. A meeting with the claimant took place on 1 May 2019 to discuss both the grievance and the complaint. The governor wrote to the claimant on 2 May 2019 to confirm that he would carry out investigations and these were not likely to be concluded in less than a month (page 180). He wrote to the claimant again on 24 May 2019 to set out the next steps for dealing with the grievance and the complaint (page 192). A mediation meeting was arranged for 12 June 2019.

39. An occupational health appointment was arranged for the claimant. This was due to take place on 4 June 2019.

40. The claimant resigned on 3 June 2019 (page 194). She said she had lost faith in the school's ability to handle her grievance.

The law

<u>Direct discrimination because of race and/or religion</u>

41. Race and religion/belief are protected characteristics under section 6 of the Equality Act 2010.

42. Section 13(1) of the Equality Act provides:

    "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."

43. The EHRC's Employment Code of Practice explains less favourable treatment at paragraph 3.5:

    > *"The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person."*

44. Discrimination in employment is prohibited by section 39 of the Equality Act 2010. That provides that an employer (A) must not discriminate against a person (B):

    > *"(a) as to B's terms of employment;*
    > *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
    > *(c) by dismissing B;*
    > *(d) by subjecting B to any other detriment."*

<u>Burden of proof</u>

45. Sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

    "(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) This does not apply if A shows that A did not contravene the provision."

46. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.

47. 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 has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (*Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279.)

48. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. The respondent would normally be required to produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

49. The tribunal must adopt a holistic rather than fragmentary approach. This means looking not only at the detail of the various individual acts but also stepping back and looking at matters in the round. In *Fraser v University of Leicester* UKEAT/0155/13, HHJ Eady QC described this as a requirement 'to see both the wood and the trees'.

<u>Time limit in discrimination complaints</u>

50. The time limit for bringing a complaint of discrimination or victimisation is set out in section 123 of the Equality Act. A complaint may not be brought after the end of:

> "(a) the period of three months starting with the date of the act to which the complaint relates,
> (a) such other period as the employment tribunal thinks just and equitable".

51. Conduct extending over a period (also called a 'continuing act') is treated by virtue of sub-section 3 of section 123 as done at the end of the period.

52. When calculating the end date of the period of three months, time spent in a period of early conciliation is not counted (section 140B of the Equality Act 2010).

53. Employment tribunals have a wide discretion to extend time under the 'just and equitable' test in sub-section 1(b), but 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.' (*Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA). The burden is on the claimant to persuade the tribunal that it is just and equitable. This does

not mean that exceptional circumstances are required; the test is whether an extension of time is just and equitable.

Conclusions

54. We have applied these legal principles to our findings of fact as set out above, in order to decide the issues for determination.

Reference

55. The first issue for us is whether the failure by the claimant's school to provide the reference requested by the other school was direct discrimination because of race or religion.

56. We have found that the claimant's headteacher did fail to provide a reference for the claimant to the other school. She was asked to do so on 10 December 2018 and had not done so by January 2019 when she was told by the other headteacher that it was no longer required.

57. However, this was not less favourable treatment and did not represent any detriment to the claimant. She was told on 17 December 2018 that her job offer had been withdrawn. We have found that this was because the other school no longer needed the role. Therefore, the failure to provide a reference in the period between 10 December 2018 when it was requested and 17 December 2018 when it was no longer required was not a detriment to the claimant. The provision of a reference would have made no difference, because the failure to provide the reference was not the reason for the withdrawal of the role. The role would have been withdrawn in any event.

58. After 17 December 2018, once the role had been withdrawn, there was no less favourable treatment or detriment to the claimant from the continuing failure to provide a reference, because the other school no longer needed a reference for the claimant. It is not less favourable treatment or a detriment to fail to provide a reference when one is not needed.

59. If we had found that the claimant had been subjected to less favourable treatment by the failure to provide a reference, we would have gone on to consider whether there was evidence from which we could conclude that this less favourable treatment was because of race or religion. There was no such evidence. A reference request for a hypothetical comparator made at the same time would have been treated in the same way. We would not have found that the burden shifted to the respondent to prove that there was no discrimination.

60. Even if we had concluded that the burden of proof had shifted to the respondent, we would have accepted the headteacher's explanation that her failure to provide a reference was because she forgot to do so over the busy period leading up to the end of term before Christmas, despite the reminder of the discussion with the claimant on 13 December 2018. We

would have concluded that the respondent had satisfied the burden of proving that there was no unlawful discrimination in the failure to provide a reference for the claimant.

61. This complaint of direct discrimination therefore fails.

Comment about claimant in referral to social care

62. The second complaint of discrimination by the claimant relates to the comment in the social services report that the headteacher told social services that the claimant had been disciplined for grabbing a child's wrist.

63. The comment related to the claimant's work at the school as a lunch time supervisor. The inclusion of this comment in the referral to social services when the claimant was not aware that she had been disciplined shocked the claimant and she felt it was dishonest. This could amount to less favourable treatment or a detriment. In the circumstances, it was reasonable for the claimant to regard it as such.

64. We have found that the headteacher's understanding was that she had given the claimant an informal verbal warning at the meeting on 28 March 2018 but she accepted that the claimant's different interpretation of the meeting was fair. She also accepted that she had not followed the school's policy, in that she did not confirm the discussion and agreed actions in writing. A failure to follow a policy is a factor from which we could infer that a hypothetical comparator would have been more favourably treated (because they would have been treated in accordance with the policy). This could amount to evidence from which we could decide that the claimant had been subject to direct discrimination. We have concluded therefore that the burden of proof in relation to this allegation shifts to the respondent.

65. We have gone on to consider the respondent's reasons for including this comment in the referral. The respondent said that it was because the claimant had been given an informal verbal warning. We have accepted that this was the headteacher's understanding of the meeting on 28 March 2018. Further, we have found that an informal discussion about conduct is part of the school's disciplinary process. We accept that 'being disciplined' could include 'being given an informal warning' because both informal and formal discussions are included in the disciplinary policy.

66. The headteacher's role as Designated Safeguarding Lead required her to report the disclosure which had been made by the claimant's child and to share any other relevant information she had with children's social care. It was reasonable to consider an informal discussion with the claimant under the disciplinary policy to be relevant to the referral.

67. We have concluded that the comment made by the headteacher to social services at the time of the referral was made because of the headteacher's safeguarding duty and because of her understanding of the meeting on 28

March 2018. It was not because of or related in any way to the claimant's race or religion.

68. This complaint of discrimination also fails.

Comment about claimant's husband in referral to social care

69. The third complaint of discrimination by the claimant also relates to a comment in the social services report. The claimant said that the report showed that the headteacher had told social services that her husband did not care about their child's happiness at school, when in fact he had taken the initiative to contact the school about their child's welfare. She said this amounted to associative direct discrimination of her, because of her husband's race and religion, that is being a practising Muslim and belonging to an Asian ethnic group.

70. We pause here to note that it is not clear to us that this allegation falls within the scope of section 39 of the Equality Act 2010. It concerns a comment about the claimant's husband made by the headteacher in the context of a referral to social services arising from the position of the claimant and her husband as parents of a child at the school, rather than the claimant's position as an employee of the respondent. We did not hear any argument on this point. We have concluded that this allegation could potentially fall within subsection (d) (subjecting the claimant to any other detriment) and in light of that conclusion we have gone on to consider the other elements which must be met for the complaint to succeed.

71. In our findings of fact, we have not found that the respondent told social services that the claimant's husband did not care about his child's happiness. We have found that the social services report records the headteacher's view in December 2018 that the claimant's husband was not concerned that his child took a while to settle and make friends and was isolated, and that he appeared to be more focussed on academic concerns. This is not consistent with what the claimant's husband said in an email of December 2016, when he said that he was happy with his child's educational achievements but at the same time wanted to see them happy.

72. We have considered whether there is evidence from which we could decide that there has been a contravention of section 13. The inconsistency between the view expressed by the headteacher in the referral and the email from the claimant's husband is a factor from which we could make an inference of discrimination. It could amount to evidence from which we could decide that the claimant had been subject to direct discrimination. We have concluded therefore that the burden of proof in relation to this allegation shifts to the respondent.

73. We have gone on to consider whether the comment complained of was related in any way to the claimant's husband's race or religion. We remind ourselves that discrimination can be subconscious as well as conscious.

We can well understand why the claimant and her husband were upset about the comment and why they felt it to be an inaccurate representation of their parenting approach. However, we are satisfied that the headteacher formed this opinion based on her conversations with the claimant's husband and with a class teacher and at a time when she may not have remembered the email of December 2016 which had been sent two years before the referral. We are satisfied that the comment was not made because of the claimant's husband's race or religion.

74. For these reasons, we have concluded that the inclusion of this comment in the referral to children's social care did not amount to direct discrimination of the claimant by association.

75. Having focused individually on each of the claimant's complaints, we have stepped back and considered the allegations in the round. We have concluded that the treatment the claimant complains of was not less favourable treatment because of race or religion.

Time limit

76. Finally, we have considered the time limit. As the claimant notified Acas for early conciliation on 8 July 2019 and then presented her complaint within a month of the date of the early conciliation certificate, any acts which took place before 9 April 2019 are outside the primary time limit (three months less a day).

77. The acts complained of by the claimant all took place before 9 April 2019:

    77.1. December 2018 to January 2019 (failure to provide reference) and
    77.2. December 2018 (referral to social services)

78. The claimant did not explain why it would be just and equitable to extend time in her case. If we had concluded that the claimant had been subjected to discrimination, we would have also concluded that the claims were presented out of time.

Discriminatory constructive dismissal

79. We have not found that the claimant was subjected to any direct discrimination and therefore we have not found any discriminatory conduct by the respondent which could be said to have amounted to a breach of contract which repudiated the contract and entitled the claimant to resign and claim constructive dismissal.

80. In light of this conclusion, the claimant's complaint of discriminatory constructive dismissal cannot succeed.

Employment Judge Hawksworth

Date: 6 August 2021

Judgment and Reasons

Sent to the parties on: 25/12/2021

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For the Tribunal Office

Public access to employment tribunal decisions:
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