STRIKE OUT JUDGMENT AND RESERVED LIABILITY JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Mrs X
Respondent:	Delta Academies Trust
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mr K Lannaman and Mr R Webb
On:	21 and 22 March 2022 and 23 March 2022 (in private)
Representation	
Claimant:	The claimant was represented during the morning of 21 March 2022 by Mr X (lay representative and the claimant's husband). The claimant and Mr X did not attend for the remainder of the hearing.
Respondent:	Mr N Grundy (Counsel)

STRIKE OUT JUDGMENT

1. The claimant's application of 21 March 2022 to strike out the respondent's response under Rule 37(1)(e) of the Tribunal's Rules of Procedure is refused.

RESERVED LIABILITY JUDGMENT

1. The claimant's claims of:
   1.1 ordinary unfair dismissal under s98 of the Employment Rights Act 1996;
   1.2 wrongful dismissal (notice pay);

1.3 direct race discrimination and direct religion or belief discrimination under s13 of the Equality Act 2010; and

1.4 harassment related to race under s26 of the Equality Act 2010;

fail and are dismissed.

TRIBUNAL PROCEEDINGS

1. This claim was listed for a ten day full hearing (liability issues only), starting on 21 March 2022 (the **"Liability Hearing**"). We have summarised the proceedings leading up to the Liability Hearing in this judgment. However, we note that the claim has been the subject of many case management hearings and lengthy parties' correspondence which has not been referred to in full in this judgment.
2. The claimant presented her claim form on 11 February 2020, following ACAS early claim conciliation from 10 December 2019 to 13 January 2020. She has been represented throughout these proceedings by her husband (Mr X).
3. The Employment Tribunal held seven case management hearings of this claim:
   3.1 6 April 2020 – Employment Judge Shepherd;
   3.2 22 September 2020 – Employment Judge Maidment;
   3.3 11 February 2021 – Employment Judge Parkin;
   3.4 23 March 2021 – Employment Judge Parkin;
   3.5 21 April 2021 – Employment Judge Parkin;
   3.6 8 November 2021 – Employment Judge Davies; and
   3.7 31 January 2022 – Employment Judge Cox.
4. The claimant and her representative did not attend the preliminary hearings on 22 September 2020, 11 February 2021, 8 November 2021 and 31 January 2022 for various reasons (including those referred to in more detail below).
5. The claimant submitted three appeals to the Employment Appeal Tribunal ("**EAT**") during these proceedings relating to the Tribunal's case management orders (appeal references EA-2021-000786-BA, EA – 2021-000959-BA and EA-2022-000039-BA)). The parties informed us that the appeals had been rejected on the paper sift, but had been listed for a Rule 3(10) hearing on 30 March 2022.

Preliminary hearing – 21 April 2021

6. On 21 April 2021, Employment Judge Parkin listed a ten day hearing on liability only to start on 8 November 2021. Judge Parkin issued case management orders for the preparation of this hearing, including orders that:
   6.1 **Disclosure** - the parties should send to each other copies of any remaining documents should take place by 2 June 2021;

6.2 **Hearing file** –

"By 30 June 2021, the claimant and the respondent must agree which documents are going to be used at the liability hearing.

The respondent must prepare a file of those documents with an index and page numbers. They must send a hard copy and an electronic copy to the claimant by 28 July 2021."

6.3 **Witness statements** –

"The claimant and the respondent must send each other copies of all their witness statements by 27 September 2021."

7. The respondent provided the claimant with a copy of the hearing file by 30 June 2021. They later disclosed a set of notes for inclusion in the hearing file on 4 October 2021 which had not previously been disclosed to the claimant.

8. The claimant refused to send her witness statement to the respondent by 27 September 2021. The respondent's solicitor emailed Mr X on the afternoon of 27 September 2021, asking if the claimant was in a position to exchange her witness statements. Mr X responded stating that an appeal had been made to the EAT and that the respondent had not complied with the Tribunal's orders. Mr X did not agree to any other date for exchanging witness statements. The respondent applied to strike out the claimant's claim by email on 8 October 2021. Mr X responded in detail with a witness statement on the same date which he stated was a 'robust rebuttal' of the respondent's application.

Preliminary hearing – 8 November 2021

9. The liability hearing of the claim that was due to start on 8 November 2021 was postponed and the first day of that hearing was converted to a preliminary hearing. The claimant and Mr X did not attend the hearing on 8 November 2021. Mr X stated by email on 4 November 2021 that the claimant wished to apply for postponement of this hearing because the claimant had submitted her third EAT appeal.

10. Regional Employment Judge Robertson refused the claimant's application to postpone the hearing on 8 November 2021, stating that the EAT had not directed the Tribunal to stay the proceedings, pending the claimant's appeal.

11. At the preliminary hearing on 8 November 2021, Employment Judge Davies noted that she had received a GP's letter at 8am that day, which stated that the claimant felt unable to attend the preliminary hearing.

12. Employment Judge Davies declined to consider the respondent's strike out application and provided reasons as follows:

"The final ten-day hearing should have started today, but it was postponed when it became clear that the parties were not ready to proceed with the final hearing. EJ Bright converted the first day to a one-day preliminary hearing to consider the parties' outstanding applications and make case management orders. The

outstanding applications included applications by the Respondent to strike-out the claims for non-compliance with Tribunal orders and other reasons. The Claimant has outstanding appeals to the EAT, but these Tribunal proceedings have not been stayed as a result. The Claimant and her representative have been reminded more than once by Tribunal judges of the need to behave reasonably, co-operate with the Tribunal and engage with the Tribunal process. I have weighed all those matters in the balance.

However, at 9am this morning the Claimant's husband emailed to the Tribunal a letter from her GP stating that she had escalating symptoms of depression and stress-related illness and did not feel able to attend the Tribunal as a result. Although brief, on the face of it that is medical evidence indicating that she is not fit to attend today. In considering the Respondent's application to strike-out the claim I would need to consider whether any of the threshold conditions for striking-out were satisfied and, if they were, whether striking-out would be proportionate. That would involve considering whether there was a lesser step that could be taken instead, such as making an order for costs associated with non-compliance with Tribunal orders and/or the postponement of the ten-day hearing. In the light of the medical evidence, the interests of justice in ensuring that the Claimant has the opportunity to deal with those matters outweigh the prejudice to the Respondent in postponing the hearing today."

13. Employment Judge Davies arranged a further preliminary hearing on 31 January 2022 to consider the respondent's strike out application and make appropriate case management orders. The Judge ordered:

"4. The Claimant will be expected to attend the hearing on 31 January 2022 or to provide written representations dealing with the relevant issues. She has ample time to prepare written representations, which should be sent to the Tribunal and the Respondent by 24 January 2022.

5. If the Claimant were to seek a further postponement on medical grounds, she would need to provide more detailed medical evidence, setting out the nature of her ill-health, how it affected her fitness to participate in a Tribunal hearing and when she would be fit to attend a hearing. Any postponement request on medical grounds, supported by detailed medical evidence, should be sent to the Tribunal and the Respondent by 17 January 2022. A Judge would then decide whether or not to proceed in the Claimant's absence. If the cause of the ill-health is the Tribunal proceedings, it may be necessary for those proceedings to be resolved in order for the Claimant's health to improve. That would be a relevant factor."

14. Employment Judge Davies also:

    14.1 re-listed the liability hearing for 10 days starting on 21 March 2022, to proceed if the claim were not struck out. Employment; and

    14.2 ordered as follows: *"In preparation for that final hearing, the Claimant must exchange her witness statements with the Respondent in accordance with*

this order. She must by 10am on 17 January 2022 confirm to the Respondent that she is ready to exchange her witness statements, and those statements must be exchanged by 4pm on 17 January 2022. Failure to do so may be relevant to the determination of the strike-out application on 31 January 2022 or may lead to the making of an unless order on that date."

Preliminary hearing – 31 January 2022

15. The claimant did not attend the preliminary hearing on 31 January 2022. Mr X emailed the Tribunal to state that the claimant's father had unfortunately passed on 8 January 2022 and that he was in the process of making travel arrangements for the claimant and their son to travel to Pakistan to attend a private family service. The respondent forwarded an email which Mr X had sent to the respondent (who manages the school attended by the claimant and Mr X's son), stating that their son would be absent from around 22-26 January to 24 February 2022.

16. Mr X did not attend the preliminary hearing on 31 January 2022 either. However, he had previously emailed a lengthy document (labelled as a witness statement) which he described as a 'robust rebuttal' of the respondent's application to the Tribunal on 8 October 2021.

17. Employment Judge Cox conducted the preliminary hearing on 31 January 2022. She noted in her reasons for refusing the respondent's strike out application:

3.1 The Tribunal is satisfied from the substantial amount of correspondence it has received from the Claimant that this claim is being actively pursued.

3.2 The claim is about the Respondent's decisions to suspend and dismiss the Claimant. Although the Claimant's suspension and dismissal occurred in May to September 2019 and the listing of the final Hearing has been delayed for a variety of reasons and will not begin until 21 March 2022, the Tribunal is satisfied that a fair trial is still possible at this stage. The basis of the Respondent's decisions, and the procedures the Respondent followed, are documented and those documents can be referred to by witnesses to assist in their recall of events.

3.3 The claim continues to be conducted unreasonably on behalf of the Claimant. (The Tribunal's existing findings of unreasonable conduct are set out in paragraph 10.3 of the Reasons for EJ Parkin's Reserved Judgment of 29 March 2021 refusing the Respondent's earlier application for the claim to be struck out.) Her representative continues to make unfounded allegations of bias or improper conduct by the Tribunal and the Respondent's representative. For example, on 21 December 2021 he wrote to the Tribunal complaining that it was ignoring all the facts and evidence and he was preparing a complaint to the Judicial Conduct Investigations Office and the Parliamentary and Health Service Ombudsman. Most recently, on 28 January 2022, he wrote to the Employment Appeal Tribunal saying that the Tribunal was hindering the case and he intended to raise his concern "with the President of the Tribunal and any other relevant bodies". He

has also made further apparently meritless appeals to the Employment Appeal Tribunal, most recently against Regional Employment Judge Robertson's decision that this Preliminary Hearing should go ahead.

3.4 The Claimant has failed to comply with several of the Tribunal's Orders. She has twice been ordered to exchange witness statements with the Respondent. On 21 April 2021 she was ordered to do so by 27 September 2021. On 8 November 2021 she was ordered to do so by 17 January 2022. She has not complied. Further, she has been twice directed to provide copies of her father's death certificate and travel documents in connection with her objection to today's Preliminary Hearing going ahead. She has not complied.

4. From the above findings, it is apparent that the Tribunal accepts that there are grounds for striking out the claim. It also notes that this is the second application for the claim to be struck out because of the Claimant's representative's unreasonable conduct of the claim. The Tribunal has nevertheless decided not to strike out the claim.

4.1 Whilst the Claimant's representative continues to conduct the claim unreasonably, the Tribunal is not prepared at this stage to assume that he is doing so because the Claimant has asked him to adopt this method or that she knows he is doing so. Whilst it may have power to do so, the Tribunal is reluctant to strike out the claim when it appears to be the Claimant's representative, rather than the Claimant herself, who is acting unreasonably. ***The Tribunal asks the Claimant to note, however, that this is her claim and she bears responsibility for ensuring that her representative has clear instructions on how she wants him to act. She will not necessarily be protected from the consequences of further unreasonable conduct by him.***

4.2 The financial impact on the Respondent of the Claimant's representative's unreasonable conduct has the potential to be mitigated to some degree by a Costs Order against the Claimant, since the unreasonable conduct of the Claimant or her representative can provide grounds for such an Order. The Respondent has indicated today that it may make such an application and the Tribunal has given directions accordingly.

4.3 Regrettably, it is not uncommon for the Tribunal and legal representatives to be subjected to unfounded allegations by a party or their representative. Whilst it is unpleasant and can be upsetting to be the subject of such allegations, Judges and legal representatives are expected to bear some degree of unreasonable conduct directed at them, if doing so makes it possible for the claim to be heard on its merits.

4.4 Although the Claimant is in breach of various of the Tribunal's Orders, the most significant breach is her failure to provide a witness statement. The Tribunal

considers that a proportionate approach would be to issue an Unless Order for her to provide her statement, rather than strike out her claim.

Unless Order

5. *Although ordered to do so, the Claimant has not agreed the contents of a Hearing file. The Claimant's representative's objections to the file proposed by the Respondent appear to be based on the fact that the Respondent sought to include some documents that were disclosed after the initial deadline for the copying of documents to the other side. This objection may have arisen from the Claimant's representative not understanding that a party is under a continuing obligation to disclose relevant documents that come to their attention at any time up to the date of the Hearing. In any event, not having been able to secure the Claimant's agreement, the Respondent has prepared a Hearing file and sent a copy to the Claimant. No further Order is necessary in respect of preparing documents for the Hearing, other than a direction for the Respondent's representative to upload a copy to the Tribunal's Document Upload Centre.*

6. *The most significant obstacle to the claim being fairly disposed of is now the Claimant's failure to provide the Respondent with her witness statement.*

7. *The Claimant has not explained why she has twice disregarded the Tribunal's Orders for her to exchange witness statements. The Claimant has also twice failed to comply with the Tribunal's directions to provide documentation in support of her assertions that her father has died and she has had to travel to Pakistan for the funeral. Nevertheless, for the purposes of deciding whether to make an Unless Order and the terms on which to make it, the Tribunal is prepared to assume in the Claimant's favour (but without finding as fact) that:*

   7.1 The Claimant's father died on 8 January 2022.
   7.2 The Claimant travelled to Pakistan on a date between 22 and 26 January 2022 to attend his funeral.
   7.3 The Claimant will be flying home on or around 24 February 2022.

8. *The Tribunal considers there to be no good reason why the Claimant cannot finalise her witness statement and send it to the Respondent by 4pm on 4 March 2022. That is over a week after her return home and over a month after the date of this Order. The Claimant's representative has not travelled to Pakistan. He has had every opportunity to help her draft a witness statement at any point in the nine months since an Order was first made for statements to be exchanged and in the month after the Tribunal's most recent Order for exchange (which was itself made over a month before the Claimant says she learnt of her father's sudden death). Even though the Claimant is currently abroad, there is nothing to prevent her representative from*

communicating with her if necessary to finalise her statement. When the Claimant returns from Pakistan, she may have family matters to attend to, but this is her claim and she must give it priority if she wants to pursue it.

If the Claimant does not provide her witness statement by 4 March 2022, the Tribunal can reasonably assume that she has no intention of ever doing so. Setting the date for compliance any closer to the date of the Hearing risks the Respondent being put to the considerable and possibly irrecoverable expense of briefing a barrister to represent it at a Hearing that may not happen.

18. Employment Judge Cox made an unless order regarding witness statements during the preliminary hearing on 31 January 2022:

"Unless the Claimant emails the Respondent a copy of her witness statement by 4pm on Friday 4 March 2022 her claim will be struck out without further Order. She must copy the Tribunal in to her email to the Respondent to confirm compliance."

19. Mr X emailed the claimant's statement and his own statement to the respondent's solicitor at 3.46pm on 4 March 2021, in compliance with Judge Cox's unless order. The respondent's solicitor emailed the respondents' statements to the claimant's representative at around 5.15pm that evening. He stated that he had not read the claimant and Mr X's statements before emailing the respondent's six witness statements to Mr X.

20. We also note that the claimant and the respondent had both previously made other applications to strike out the response and the claim respectively (including the applications considered by Employment Judge Parkin at the preliminary hearing on 23 March 2021 and by Employment Judge Davies who refused a strike out application from the claimant on 16 June 2021), but all such applications were refused. Mr X had also emailed the Tribunal on 7 March 2022 a further application to strike out the respondent's response (which differed slightly from the application sent to the Tribunal on 21 March 2022).

21. Mr X emailed the Tribunal again on 9 March 2022, stating:

"Finally, as I stated on the phone and again herein, please accept the application to strike out the response dated; 07 March 2022 and put the same before an Employment Judge for immediate and urgent consideration, as failing to do so and allowing the Respondent's out of time Witness Statements to be admitted as evidence, yet they are not signed and/or dated, we have no option then to raise this on the first day of the hearing (21 March 20220 and should they still be admitted, we would not be continuing with the hearing as listed, due to the Employment Tribunal's bias and unfair conduct."

CLAIMANT'S STRIKE OUT APPLICATION – 21 MARCH 2022

22. The claimant emailed a further 24 page strike out application and 41 pages of Exhibits to the Tribunal at 9.02am on the morning of the first day of the hearing. The claimant's representative's email stated:

    "In consideration and ahead of the hearing this morning, please find attached an application to strike out the response, as a fair trial is not now possible for the Claimant.

    The Claimant requests you to put this before the Employment Judge sitting in the hearing this morning, for this application to be determined today."

23. Mr X quoted Rule 37 of the Tribunal's Rules of Procedure. He stated that the claimant was making an application under Rule 37(1) which states:

    "At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:

    …

    (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

24. The claimant and Mr X attended the first day of the hearing. We checked at the start of the hearing that both parties had copies of the hearing file, both parties' witness statements and Mr X's strike out application and exhibits.

25. Mr X stated that he had not brought copies of the respondent's witness statements to the hearing, stating that he did not accept them as having been served in accordance with the Tribunal's case management orders and they were not signed. Mr X had brought a copy of the 452 page hearing file prepared by the respondent's solicitor, although he stated that the hearing file was not agreed. The Tribunal provided Mr X with a spare copy of the respondent's witness statements.

26. The key issues that Mr X stated had led to the claimant's view that a fair hearing included:

    26.1 the hearing file did not contain all relevant documentation;

    26.2 the respondent had failed to comply with the Tribunal's orders on disclosure and in relation to witness statements;

    26.3 the respondent had not submitted a witness statement for Laura Cooper and had not called her as a witness at the Liability Hearing.

27. We gave Mr X the opportunity to expand on his written application or to highlight any matters in the application. He initially stated that he had nothing to add. However, he then stated:

    27.1 the hearing file was not provided until 30 September 2021, although it was due by 28 July 2021; and

27.2 the respondent's witness statements were not signed or dated.

28. We discussed with Mr X the list of additional documents that he stated should have been included in the hearing file, as set out at paragraph 3.2 of his strike out application. We noted during the discussion that:

28.1 Mr X contended that images of a school prom party should have been included. He confirmed that he had not in fact sent these to the respondent and we asked him to email a copy of these to the Tribunal and the respondent;

28.2 Mr X stated that there were no documents confirming that the DBS and Teachers Regulation Authority did not take any action against the claimant. We noted (and the respondent confirmed) that there was no dispute that no such action was taken against the claimant. We informed Mr X that he could add documents to the hearing file to confirm this, if he wished to do so, but that they were not necessary because there was no dispute on this matter;

28.3 Mr X stated that there were statements from individuals who were part of the investigation into the claimant's disciplinary allegations relating to the claimant. On examination of the hearing file, it became apparent that there was only one missing statement and that was a statement of Child A dated 5 October 2021 (i.e. around a year after the claimant's dismissal). This statement was attached to Mr X's written representations for the preliminary hearing in November 2021 that he emailed to the Tribunal on 8 November 2021. We asked Mr X to re-send a copy to the Tribunal;

28.4 Mr X stated that two 'character references' provided for the claimant had not been included in the hearing file. However, he confirmed when we checked the hearing file that these were in fact already included in the file; and

28.5 Mr X also stated that the claimant intended to rely on medical evidence from her own and Mr X's medical records, which had not been provided to the respondent.

29. We asked the respondent's representative for their comments on the application. The respondent's representative stated that:

29.1 the respondent did not object to the inclusion of the Academy prom party images, statement from Child A dated 5 October 2021 or any claimant medical records in the hearing file;

29.2 disclosure had taken place in accordance with the Tribunal's orders and the hearing file was provided to the claimant on 30 June 2021. There were some additional notes disclosed by the respondent's solicitors in accordance with the parties' ongoing duty of disclosure, that these were added to the hearing file in 4 October 2021 and an updated copy was provided to the claimant on that date;

29.3 Employment Judge Cox's unless order applied to the claimant because she had refused previously to provide her witness statements and that of Mr X to the respondent until her EAT appeal had been dealt with;

29.4 the respondent's solicitor had emailed the respondent's statements on receipt of the claimant and Mr X's statement on 4 March 2022 and confirmed that he had not read those statements before providing the respondent's statements;

29.5 the respondent's witness statements were not signed and dated but they would be confirmed by the witnesses (subject to any typographical errors) as true and accurate when they were called to give evidence; and

29.6 there were no grounds to strike out the respondent's response because the claimant had had ample time to prepare for the Liability Hearing and a full and fair hearing remained possible.

30. We gave Mr X the opportunity to respond to the points raised by the respondent. He stated that:

30.1 an electronic hearing file was sent to the claimant on 25 June 2021 and then an amended hearing file was sent on 29 June 2021;

30.2 the respondent's solicitor's email of 27 September 2021 referred to orders for simultaneous exchange of witness statements, but they failed to do this.

31. We then adjourned from 11.20am to 11.55am to consider our decision on the strike out application. We informed the parties that the claimant's strike out application had been refused and started to provide them with the key reasons for the refusal.

32. Part way through the Tribunal explaining its reasons, Mr X stated that he and the claimant intended to leave the hearing. Mr X said that:

32.1 the Tribunal had not taken anything that he had said into account and had already made up its mind;

32.2 the claimant's symptoms were worsening and they were going to leave;

32.3 he thought it was all pre-determined and that they would appeal to the EAT.

33. We offered the claimant and Mr X the opportunity to have a 15 minute break to consider their position (or longer if needed) and adjourned the hearing from 12.03pm to 12.15pm.

34. Mr X and the claimant returned to the hearing after the adjournment. The Tribunal proceeded to discuss the practicalities of the additional documents that Mr X wished to include in the hearing file, copies of which Mr X had emailed to the Tribunal in the interim.

35. Mr X then stated that he and the claimant did not intend to remain for the rest of the hearing. Mr X stated that:

35.1 the claimant was not going ahead with the hearing;

35.2 the hearing file was not agreed on time;

35.3 the response should have been struck out;

35.4 further non-compliance by the respondent had not been looked at – he stated that witnessed statements were not exchanged, signed or dated; and

35.5 he did not understand why this case was going to a 10 day hearing.

36. The Tribunal attempted to explain again their reasons for refusing the claimant's strike out application. However, Mr X stated that both he and the claimant were going to leave the hearing. He stated that:

36.1 Employment Judge Cox said that the further directions did not affect the orders that were previously made by the Tribunal and described the situation as 'totally wrong';

36.2 he and the claimant would not be participating any further in the Liability Hearing because the Tribunal had pre-determined the outcome;

36.3 they were not going ahead with the hearing and would just wait for the outcome and appeal it.

37. The Tribunal noted that if the claimant and Mr X left the hearing, then the hearing may continue in their absence and that they may not have another opportunity for a further hearing.

38. The respondent's representative stated before Mr X and the claimant left the hearing that he was going to speak to the respondent and that he may apply for:

38.1 dismissal of the claimant's claim and/or for the Tribunal to proceed in their absence; and/or

38.2 wasted costs in relation to the Liability Hearing.

39. Mr X responded that the respondent had previously stated that they would seek costs against the claimant. Mr X then stated he wanted the strike out application to be dealt with by Employment Judge Parkin because Judge Parkin was familiar with the case and should have dealt with it.

40. The Tribunal offered the claimant a further adjournment of an hour to break for lunch if she wished to consider her position. The Tribunal also offered to provide written reasons for the refusal of the strike out application that morning for the claimant to consider before deciding whether she wished to attend the hearing in the afternoon. However, Mr X repeated that he and the claimant were leaving the hearing.

41. The Tribunal clarified that they would note that the claimant and Mr X had left the hearing and did not intend to return. Mr X then spoke for some time and his comments included that:

41.1 the Tribunal fell far short of what he and the claimant expected and was not impartial;

41.2 they were leaving and the claimant needed to take her medication;

41.3 he would be asking for a transcript of the hearing (to which the Tribunal informed him that the hearing was not recorded);

41.4 he has already informed or intended to inform the President of the Employment Tribunals, the Judicial Ombudsman and his MP regarding the conduct of the Tribunal proceedings to date and would be writing to inform them of the conduct of this hearing as well.

42. The claimant and Mr X left the hearing room at around 12.30pm. The Tribunal's clerk confirmed that the claimant and Mr X had left the Tribunal's office. The Tribunal adjourned the hearing shortly afterwards until 1.30pm. The Tribunal then waited to re-start the hearing for a further 15 minutes. However, the claimant and Mr X did not return to the Tribunal's offices. They did not contact the Tribunal at all that day or at any time during the remainder of the Liability Hearing

Reasons for refusal of claimant's strike out application

43. We attempted to provide the parties with a summary of the reasons for refusing the claimant's strike out application, but were interrupted as described earlier in this judgment. We stated that we appreciated the frustration that the claimant and Mr X felt about process. We also noted that:

43.1 Mr X is representing the claimant in his capacity as a lay representative, although he has informed the Tribunal that he has a law degree and that the claimant has previously sought legal advice in relation to her claim; and

43.2 both the claimant and Mr X are intelligent and articulate individuals, as demonstrated by Mr X's ability to refer to ET Rules and caselaw in his strike out application.

44. We read the strike out application in detail and considered the submissions put forwards by both representatives. We concluded that a fair hearing of this claim was still possible and that it would not be appropriate to strike out the respondent's response. The key reasons for this conclusion were:

44.1 the claimant was provided with a copy of the vast majority of the documents in the hearing file by 29 June 2021, with limited additional notes being provided by 4 October 2021. The claimant did not 'agree' the contents of the hearing file but that did not prevent her or her representative from preparing the claim on the basis of the file provided to the parties. Judge Cox decided at the preliminary hearing on 31 January 2022 that no further orders regarding the hearing file were needed, other than to make provision for the file to be uploaded to the Tribunal's Document Upload Centre for the Tribunal's use at the Liability Hearing;

44.2 the hearing file consisted of 462 pages. The first 215 pages of that file consisted of the parties' pleadings, together with parties' correspondence and Tribunal and EAT correspondence and documents. The vast majority of the

remaining 246 pages of the hearing file consisted of documents that had already been provided to the claimant during the investigation, disciplinary and appeal process that formed the central subject matter of this claim;

44.3 we had established that there were limited extra documents that the claimant wished to add to the hearing file and that were in her possession. The respondent did not object to the insertion of those documents into the file and there was ample time within the 10 day hearing for the parties to undertake any additional preparation as a result of those additional documents;

44.4 Employment Judge Cox's unless order of 31 January 2022 regarding witness statements applied to the claimant and not to the respondent, for the reasons set out in her order and quoted earlier in this judgment. The respondent had not breached any witness statement order;

44.5 in any event, the claimant received the respondent's six witness statements on 4 March 2022. The claimant and Mr X had had ample time to read these and prepare for the Liability Hearing;

44.6 the respondent's solicitor stated that he had not read the claimant and Mr X's statements before emailing the respondent's statements to Mr X around 1.5 hours later. Mr X did not provide any evidence to suggest that the respondent's solicitor had read the claimant's witness statements and altered an of the respondent's six witness statements as a result;

44.7 the respondent was not required to call Laura Cooper as a witness to the hearing. We also noted that the claimant could have requested a witness order for Laura Cooper if she had wished to do so.

45. We took into account the cases cited by Mr X in reaching our decision on the strike out application. We concluded that the following cases that he cited did not assist us in reaching our decision because:

45.1 *Emuemukuro v Croma Vigilant (Scotland) Ltd* [2022] ICR 237 – this case involved a situation where the respondent had failed to comply with Tribunal orders regarding preparation of a hearing file and exchange of witness statements. The EAT held in *Emuemukuro* that a fair hearing was not possible within the trial window. By way of contrast, we concluded that the respondent to this claim had complied with the Tribunal's orders and that, in any event, a fair hearing was possible within the 10 day listing because the claimant had received the complete hearing file by 4 October 2021 and the respondent's witness statements on 4 March 2022.

45.2 *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 – this case concerned strike out applications on the basis of no reasonable prospects of success. It did not relate to a strike out application where one party contended that a fair hearing was no longer possible.

Respondent's application to dismiss the claim under Rule 47

46. The respondent applied to strike out the claim under Rule 47 at around 1.45pm on the afternoon of 21 March 2022. They stated that the Tribunal was entitled to take into account the whole history of the case to date, in accordance with the overriding objective.

47. The respondent's key submissions included that:

    47.1 the claimant and Mr X had not attended the hearing to deal with the case on its own merits, but had already decided to leave the hearing if the claimant's strike out application was dismissed because:

        47.1.1 they had not brought a copy of the respondent's witness statements with them; and

        47.1.2 they did not appear to have read the hearing file – for example Mr X stated that some documents were missing from the hearing file, when they were in fact included in the hearing file;

    47.2 the claimant and Mr X did not put forwards any good reason as to why they would not participate in the hearing:

        47.2.1 the claimant was fit and able to attend the hearing in order to deal with her strike out application;

        47.2.2 the letter of 16 March 2022 from the claimant's GP (which was attached as an exhibit to the claimant's strike out application) did not indicate that the claimant was unfit to attend and participate in the hearing;

        47.2.3 the claimant could have applied for an adjournment or postponement of the hearing, but did not do so;

    47.3 the claimant has had ample time to prepare for the hearing; and

    47.4 the claimant and Mr X were aware from previous case management orders that the fact that they wished to appeal various case management orders and/or the Tribunal's judgment on the claimant's strike out application did not mean that the Tribunal would not proceed with the hearing; and

    47.5 a fair hearing of the claim was possible if the claimant had chosen to remain in the hearing.

48. We considered the respondent's application. However, we concluded on balance to refuse the respondent's application to dismiss the claim under Rule 47. We decided that the hearing would continue in the claimant's absence, if she chose not to attend. The key reasons for our decision included:

    48.1 Mr X stated in his email of 9 March 2022 that if the respondent's witness statements were 'admitted as evidence', then: *"we would not be continuing with the hearing as listed…"*;

48.2 on 21 March 2022, the claimant did not request an adjournment or postponement of the Liability Hearing and had indicated that they would instead await the outcome of this hearing before submitting an appeal;

48.3 the claimant was aware that the hearing may proceed in her absence and that the respondent intended to make the applications referred to above. The claimant and Mr X chose to leave the hearing on 21 March 2022, despite being offered the opportunity to consider her position during a second break of an hour. They did not return to the hearing and did not make contact with the Tribunal during the remainder of the Liability Hearing;

48.4 this claim had been the subject of extensive case management during the previous two years:

48.4.1 the claim was submitted on 11 February 2020 and had been the subject of multiple case management hearings;

48.4.2 the Liability Hearing of this claim was originally due to start on 8 November 2021, but was postponed at short notice;

48.5 we had copies of the documents relevant to the claim in the hearing file and by email from Mr X, as noted during our discussions regarding Mr X's strike out application;

48.6 the claimant and Mr X had submitted detailed witness statements, running to around 20 pages in total; and

48.7 the respondent's six witnesses had provided detailed witness statements and were in attendance at the hearing to provide evidence.

ANONYMITY ORDERS – RULE 50

49. We discussed during the hearing whether it would be appropriate to make an anonymity order under Rule 50 of the Employment Tribunal Rules in relation to the identities of the children involved in the background to this claim. The Tribunal decided of its own motion to make an anonymity order in relation to the names of the children their parents (including the claimant and Mr X) and the name of the respondent's Academy should be anonymised. The claimant and Mr X had left the hearing before this discussion took place (as set out earlier in this judgment). However, the respondent agreed with the Tribunal's proposed order.

50. In reaching our decision we took into account the principle of open justice and gave that principle due weight. However, we concluded that it would be appropriate to make this order due to the sensitive nature of the information referred to in this Reserved Judgment in relation to the children involved (all of whom were under the age of 16 at the time of the events referred to in this judgment). The reason why we decided not to identify the name of the Academy was because this could in turn lead to the identification of the children, given the factual background to this claim and the fact that the children involved live in close proximity to the Academy.

EVIDENCE CONSIDERED DURING THE LIABILITY HEARING

51. We considered the following evidence during the hearing:

    51.1 a joint file of documents and an additional statement from Child A dated 5 October 2021 provided by the claimant at the start of this hearing;

    51.2 witness statements from the claimant and from Mr X (neither of whom provided oral evidence because they chose not to attend the hearing, after the claimant's strike out application was refused);

    51.3 witness statements and oral evidence from the respondents' witnesses:

Name	Role at the relevant time
1) Mrs Anna Young	Principal
2) Mr Joe Cohen	Learning Manager for Y11
3) Mrs Karen Slawek	HRBP
4) Mrs Rebecca Ewing	Vice Principal
5) Mr C McCall	Associate Executive Principal
6) Ms Z Bidmead	Associate Executive Principal

52. We also considered the respondent's representative's oral submissions.

CLAIMS AND ISSUES

53. Employment Judge Parkin set out the claims and list of issues in his case management summary of 21 April 2021, which we have reproduced in the Annex to this document.

FINDINGS OF FACT

54. The Tribunal has made the findings of fact set out below, based on the evidence provided to us during the Liability Hearing, including both parties' witness statements. We have read the documents in the hearing file that were referred to in the witness statements and in the witnesses' oral evidence. When making our findings of fact, we preferred the respondent's witnesses' evidence to that of the claimant and Mr X. This is because the respondents' witnesses gave evidence the Liability Hearing and we were able to test their evidence by asking appropriate questions of the witnesses. The claimant and Mr X did not give evidence at the Liability Hearing because they left the hearing after the claimant's strike out application was refused, as set out above.

Background

55. The respondent is an Academy Trust, responsible for around 18 secondary schools and 27 primary schools in the local area. The respondent's senior staff at the relevant time included:

55.1 a Chief Executive and Director of Education;

55.2 Associate Executive Principals, responsible for overseeing several schools (including Mr McCall and Ms Bidmead);

55.3 Principals and other senior staff based at each school; and

55.4 a central HR team, headed by a HR Director (Miss H Ruddle).

56. The claimant and Mr X's two eldest children (Child C and Child D) attended the Academy where the claimant worked (the "**Academy**") at the time of the events relevant to this claim.

57. The claimant was employed by the respondent at the Academy from 3 September 2016 until she was dismissed without notice by letter dated 16 September 2019. The letter purported to terminate the claimant's employment with effect from 10 September 2019 (the date of the disciplinary hearing). However, the claimant did not attend the disciplinary hearing and was not notified of the termination of her employment on that date.

58. Mr McCall stated in his oral evidence to the Tribunal that he believed that the letter was posted on 16 September 2019 by the respondent's HR, after he had completed the body of the letter. The claimant's witness statement said that the letter of 16 September 2019 was posted to her, but she did not state when it was received. However, we concluded that the letter was received by the claimant in mid-September 2019 because she apologised in her appeal letter for the delay in submitting her written appeal by letter dated 14 November 2019.

59. We found that the claimant received the letter of 16 September 2019 on 18 September 2019 (having applied the legal principles of the "postal rule" – please see the section on Relevant Law for more details).

Respondent's policies and training

60. The respondent required all staff to abide by a Code of Conduct. The provisions of the Code included (with our emphasis in bold):

6. Principles

This Academy is part of Delta Academies Trust ("Delta") and will work within all guidelines produced by the Trust and with all Delta academies to ensure pupils' health, safety, welfare and well-being are fully safeguarded. This academy is committed to Keeping Children Safe in Education. Each pupil's welfare is of paramount importance to the academy and the academy will welcome, value and support every child to the best of our abilities and resources. This guidance document describes the standards of conduct and practice that Delta employees and volunteers should follow when working with children.

The following principles apply to all aspects of this policy:

- *If no specific advice, policies or guidelines for a specific situation exist or if you are unsure, consult a senior manager (e.g. member of the Academy Senior Leadership Team) to discuss the issue.*

- *If you need to take a particular course of action in an unplanned circumstance, which may vary from policies or does not allow time for advice to be sought, record these actions with a senior manager.*

- ***If at any time you are concerned that an action or comment by yourself may be misinterpreted or that a child behaves or makes a comment in a way that causes you concern in this respect, log your concerns immediately with the appropriate senior member of staff.***

…

7. Reporting incidents

Employees and volunteers must:

- *Be familiar with the academy's system for recording Child Protection and other concerns about children and young people*

- *Take responsibility for recording any incident, and passing on information where you have concerns, or concerns are disclosed to you by, or about a child/student. Do this speedily and accurately without unnecessary delay.*

…

- ***Contact the Academy Designated Safeguarding Representative, the Deputy Safeguarding Representative or a member of the Senior Leadership Team immediately (the same day without fail)***

61. Mr McCall gave evidence on the manner in which safeguarding concerns could be reported. These included:

    61.1 a phone call or email to the Academy's designated safeguarding lead;

    61.2 an entry on the respondent's online system known as "CPOMS" (Child Protection Operating Management System).

62. The respondent's Code of Conduct also stated (again with our emphasis in bold):

8. Propriety and Behaviour

Employees and volunteers must:

• Be aware that behaviour in your personal life may impact upon your work with children and young people

• Follow professional codes of conduct at all times

• Refrain from behaving in a manner which would lead any reasonable person to question your suitability to work with children or act as a role model.

…

10. Making a professional judgement

Employees and volunteers must:

• Make judgements about their behaviour in order to secure the best interests and welfare of the child;

• Record judgements taken and share them with a senior manager;

• Ensure actions taken are warranted, proportionate, safe and applied equitably;

• Discuss any misunderstandings, accidents or threats with a senior manager;

• Be aware of their position of trust and ensure an unequal balance of power is not used for their own or others personal advantage or gratification;

• Not use their position to intimidate, bully, humiliate, threaten, coerce or undermine children;

*• **Maintain appropriate professional boundaries and avoid behaviour which might be misinterpreted by others;***

• Not promote relationships which create a personal friendship or are of a sexual nature, or which may become so.

…

11. Personal/living space

Employees and volunteers must:

***• Not invite a child/student into their home or any home or domestic setting frequented by them, unless the reason for this has been firmly established and agreed with parents and senior managers** or the home has been designated as a work place e.g. childminders, foster carers;*

• Be vigilant in maintaining their own privacy and mindful of the need to avoid placing themselves in vulnerable situations;

• Not ask children to undertake personal jobs or errands;

• Maintain professional boundaries."

63. The claimant had attended training on these issues (the most recent of which took place on 6 February 2019), including Safeguarding Young People Secondary training. She also signed the respondent's register to state that she had read the 2018 version of Keeping Children Safe in Education ("**KCSIE**").

64. The respondent's disciplinary policy stated:

6.2 Gross Misconduct

This is a grave breach of discipline which may be serious enough to end the employment contract between the Trust and the employee making any further working relationship and trust impossible.

Gross Misconduct could lead to dismissal or a final written warning, even in cases of first incidents of Gross Misconduct.

Examples of Gross Misconduct are outlined below. The list is not intended to be exhaustive or exclusive and there may be other incidents of Gross Misconduct of a similar gravity which could result in dismissal.

…

• Serious breaches of relevant professional Codes of Conduct

…

• Failure in Duty of Care to protect pupils or young adults by placing them at significant risk

…

• Wilful refusal to follow reasonable instructions in line with their role and responsibilities

…

• Bringing the Trust into serious disrepute

…

7. SUSPENSION

Careful consideration will be made as to whether the circumstances of each specific case warrant the employee being suspended from their duties whilst the case is being investigated and/or before a disciplinary hearing is held.

Examples in which suspension may be considered include, but are not limited to:

• Potential Gross Misconduct cases;

…

• Where the allegations are so serious that dismissal for Gross Misconduct is possible.

In accordance with the statutory guidance 'Keeping Children Safe in Education', there will be careful consideration of whether the circumstances of the case warrant the employee being suspended from contact with children or whether suitable arrangements can be put in place as an alternative to suspension whilst the investigation is taking place and/or prior to a disciplinary hearing being held.

Suspension is not an assumption of guilt and is not considered a disciplinary sanction.

Where suspension is being considered, an interview with the employee should take place as soon as possible.

In child protection cases, the LADO must be contacted in accordance with local child protection procedures.

Where suspension is subsequently deemed appropriate, the employee will be informed in person of the decision and has the right to be accompanied by a work colleague or a Trade Union representative. Following the employee being informed of the decision, they will be escorted offsite immediately. Where the Trade Union representative is not able to attend the suspension meeting, the employee will be advised to contact their Trade Union representative as soon as possible for support and assistance.

Depending on the reason for suspension, it may be appropriate for the Trust to temporarily revoke access to information and/or confiscate items belonging to the Trust in order to assist in completing the investigation in a timely and thorough manner. In all cases where this is necessary, the employee will be asked, when suspended, to hand over any equipment the Trust feels appropriate and/or return items not currently in their possession at the earliest opportunity.

The employee will receive written confirmation of the suspension. This confirmation will include the reasons for the suspension and why alternatives are not considered appropriate at this stage, the effective date of the suspension and details of any restrictions relating to their suspension, including restricted access to site and/or equipment/services. The employee will be provided with an information contact during the period of their suspension. The role of the contact is to provide information regarding the progress of the investigation and to ensure the employee has appropriate support in place during their period of suspension.

Where the employee requires access to their emails and/or computer network in order to obtain appropriate information in order.to assist the investigation process, supervised access will be arranged by the Trust.

During any period of suspension, the employee remains in employment and will be on full pay, including associated contractual benefits, without prejudice to the outcome of the investigation.

Parents evening – early 2019

65. The claimant and Mr X stated in their witness statements that Mr X raised an issue regarding announcement of a new Head of Year with Mr Julian Yuall at Child D's parents evening at the Academy in early 2019. The claimant told Mr X that the respondent had not advertised the vacant post. The claimant also said that the appointed member of staff did not have the formal qualifications required for the post.

66. The claimant said that Mrs Ewing and Mrs Young wanted to get rid of her because she had raised a concern with Mr Yuall. Mrs Ewing and Mrs Young confirmed in their oral evidence that they were not aware of Mr X raising any such concerns with Mr

Yuall. In addition, Mr McCall said that he was not aware of any such concerns having been raised by the claimant. We have concluded that there is no evidence that the claimant's concerns were reported to anyone, other than Mr Yuall.

67. The claimant also referred to other appointments that she believed were made outside the correct process in her witness statement. However, she did not state in her witness statement that she raised concerns with the respondent regarding these matters.

Monday 29 April 2019

68. Mr X was arrested on the morning of 29 April 2019. Mr X states that he was released without charge and the police dropped him off at home at around 6.45-7pm that evening.

69. Child A and Child B (who were both aged around 15 years old at the time) saw Mr X being dropped off. The claimant and Mr X knew Child B, because he lived in the neighbourhood. Mr X did not know Child A. Child A was a student at the Academy and in the same year group as the claimant and Mr X's eldest child (Child D). Child B did not attend the Academy.

70. Mr X was speaking with Child A and Child B and invited them to into his and the claimant's home for some food. The claimant and her children (including Child C and Child D) were in their home at the time. The claimant said *"Hi"* to Child A and Child B as they entered her home.

71. The claimant stated during the second meeting on the morning of 1 May 2019 with Mrs Young and Laura Cooper that she:

"saw [Child A] *and thought "oh god oh no he is a student and shouldn't be in my house"*

72. After Child A and Child B were inside the house, the claimant told her husband that Child A was a student at the Academy. Mr X said the food was on the table, that they should let them eat and that he would then ask Child A and Child B to leave.

73. The claimant also confirmed at the second meeting on the morning of 1 May 2019 that her children knew of Child A but that they were not friends with him.

74. The claimant took some food into the lounge for Mr X, Child A and Child B before returning to the kitchen to feed her own children. She stated that Child A and Child B left shortly after they had finished eating at around 7.45pm.

75. There was a dispute between the parties as to:

    75.1 whether Child A was smoking cannabis;

    75.2 if so, was he smoking a spliff inside the claimant's and Mr X's home or within the vicinity of their home.

76. Mr Cohen (Year 11 Learning Manager) asked Child A to provide a statement about the events on 29 April 2019 during school hours on 1 May 2019. Child A stated that

he thought that the claimant and her children saw him and Child B smoking a spliff inside the house. This was also confirmed during Mr Cohen and Mrs Ewing's meeting with Child A on 7 May 2019. Mrs Ewing later included an extract from the notes of the meeting on 7 May 2019 in her investigation report which stated:

"[Child A] *confirmed that* [Mr X] *and* [Child B] *and himself all shared and smoked a spliff and passed it round between them.* [Child A] *is not sure whether* [the claimant] *saw him smoking the spliff, but that all three of* [the claimant and Mr X's] *children would have seen him do this.*

The spliff was only smoked in the living room."

77. Mrs Young interviewed the claimant and Mr X's eldest child (Child D) also on 1 May 2019. Child D wrote a statement in which she stated that:

"[Child A] *and* [Child B] *came to my dad to ask if everything was okay.* [Child A] *was smoking a spliff outside and so my dad told him to finish it and then he came inside.* [Child A] *and* [Child B] *came in for some food and left a little while after my dad explaining everything.*

He said this as it would affect my mum's reputation if she would find out. On Tuesday, I explained everything to my Mum, some boys in my maths class were questioning if [Child A] *was smoking in the house, which I completely denied as I didn't want everyone to know anything that was happening. I told my mum that whatever my dad said to* [Child A] *was true and he came into the house with nothing in his hands.*

My mum said she was going to have a word with [Child A]*, but it left her mind, in which case* [Child A]*, has spread it around."*

78. We note that the claimant disclosed the following statements after her dismissal and appeal as part of the Tribunal proceedings:

78.1 three other statements which she stated were written by Child A on 31 January 2020, 8 February 2021 and 5 October 2021 which included the following statements:

78.1.1 **31 January 2020**: *"…rumours was going around about me smoking cannabis in* [the claimant's] *house. This is not true and I don't know who spread the rumours.*

The statement I gave under pressure to Mr Cohen and Mrs Ewing was written by hand by me, [Child A], *but the statement I see in* [the claimant's] *evidence against her the statement I gave is typed…"*;

78.1.2 **8 February 2021**: *"I…can confirm the witness statement used by* [the Academy] *singed* [sic] *by me is not actually me…*;

78.1.3 **5 October 2021**: (referring to the meeting on 7 May 2019) *"I…can confirm that the minutes that have been sent to* [Mr X]*…are not true coppy* [sic] *of the meeting…*

…School was pressurising me into writing a statement against [the claimant]*…Mr Cohen said to me on first 1 May 2019 during the breaf* [sic] *meeting that the school is doing everything to take* [the claimant] *out and my statement would help…*

…I did not say [Mr X] *is a drug user…I did not say that it was a natural thing to use drugs in* [Mr X's] *house. He has a law degree,* [the claimant] *has a degree the children are doing well and it is a good family…*

…the teachers threw [the claimant] *out, as* [Mrs] *Ewing said to me they want to get rid of her."*;

78.2 a statement which she stated was written by Child A's mother on 1 February 2020, which stated *"When I spoke to* [Child A] *he said he did not smoke cannabis…I have no reason not to believe what* [Child A] *told me"*;

78.3 two statements which she stated were written by Child B, one undated statement and the other dated 13 May 2019 signed in the presence of his mother, stating that *"me or [Child A] didn't smoke anything in [Mr X's] house, legal or illegal"*;

78.4 the claimant also disclosed one other statement from Child D dated 9 February 2021, around a year after these proceedings started. In her statement of 9 February 2021, Child D stated that her statement of 1 May 2019 *"is fabricated, made up and written by a person of Garforth Academy"*.

We note that all of these statements were dated after these proceedings had started, save for the statement of Child B. Child B's statement was not disclosed to the respondent until after these proceedings had started.

79. We have concluded on the balance of probabilities that the statements from Child A and Child D of 1 May 2019 were written by those children at school, as stated by Mr Cohen and Mrs Young in their witness evidence. We have reached this conclusion because:

79.1 the claimant had the opportunity to discuss the key contents of the statements with Mrs Young and later with Mrs Ewing. The claimant stated in her letter to Mrs Ewing of 3 June 2019 (just over a month after her suspension):

"Furthermore, [Child D] *is mentioned in the notes/minutes of the meetings to have seen my husband smoke with* [Child A]*, but the fact of the matters is that* [Child D] *actually saw* [Child A] *smoking and heard my husband ask him to drop it.."*

The claimant did not state that Child D's statement was fabricated during her meetings with Mrs Young and Mrs Ewing or in her letter of 3 June 2019. We note that during her meeting with Mrs Young on 2 May 2019, the claimant stated:

"no I have said everything and so has [Child D] *with her statement to* [Mrs Young]. *There is nothing which is being hidden or lied about…"*;

79.2 the only part of Child A's statement that the respondent relied on as part of the disciplinary and appeal process was an extract from the notes of a meeting with Mr Cohen and Mrs Ewing on 7 May 2019 set out in an appendix to the investigation report which we have quoted above. The respondent did not rely on Child A's handwritten statement;

79.3 Child A's statement of 5 October 2021 states that the minutes of 7 May 2019 'are not a true copy'. However, this statement was made nearly two and a half years after the incident on 29 April 2019;

79.4 Mr Cohen and Mrs Ewing denied the allegations made by [Child A] in his statement of 5 October 2021 during their oral evidence. They confirmed that the minutes of their meeting with [Child A] on 7 May 2019 were accurate. The claimant did not call Child A to provide evidence during the Liability Hearing. The Tribunal prefers the evidence of Mr Cohen and Mrs Ewing because they were able to test that evidence by asking questions of those witnesses during the Liability Hearing.

Tuesday 30 and Wednesday 1 May 2019

80. Child D (the claimant's eldest child) told the claimant on 1 May 2019 that another school student had mentioned that Child A said that they had smoked a spliff their house on the evening of 29 April 2019. In addition, Child D told the claimant that another Year 11 student had asked Child D about the incident.

81. The claimant did not work on Tuesdays. Her next working day was Wednesday 1 May 2019. The claimant stated in her witness statement that she intended to speak to Mrs Young about Child A's visit to her house on 1 May 2019, but that Ms Laura Cooper (Admin Officer) approached her before she had spoken with any member of staff.

82. The claimant and Ms Cooper had an informal meeting to discuss matters. The claimant told Ms Cooper that Child A had been spreading a rumour that he had gone to her home on the night of Monday 29 April 2019 and smoked a spliff.

83. There was a second meeting on the morning of 1 May 2019 between the claimant, Ms Cooper and Mrs Anna Young (the Academy's Principal) later that day. In that second meeting, the claimant gave an account of what had happened on 29 April 2019. Mrs Young asked the claimant why she did not report the incident immediately. The notes of the meeting record that:

"[The claimant] stated she did not think to email yesterday (Monday evening/Tuesday) as she doesn't work Tuesdays and at the time did not think it was relevant. So she thought it would be best to come into work today (1st May 2019) to inform somebody".

84. The second meeting ended at around 11.10am and Mrs Young asked Mr Cohen (Learning Manager) to speak with Child A. Child A wrote a handwritten statement regarding the evening of 29 April 2019. He added further details to the statement to clarify the names of the people to whom he was referring, at Mr Cohen's request.

85. The respondent arranged a third meeting at 2.05pm on 1st May 2019. The claimant, Mrs Young, Mrs Karen Slawek (respondent's HR Business Partner) and Ms Cooper attended this meeting. They had further discussions regarding the incident on 29 April 2019. Mrs Young asked the claimant if Child A's presence in the house made her feel 'uncomfortable'. The claimant's response was noted as follows:

    "yes very uncomfortable, but [the claimant] *did not tell her husband that* [Child A] *was a student as his anxiety was very bad from being in Elland Road police station all day.* [The claimant] *had no opportunity to speak to her husband about it as he was busy so* [the claimant] *just said "Hi" to* [Child A] *as he came into her house*".

86. Mrs Young raised the issue that [Child A] said that a spliff was smoked in the claimant's house that evening. They discussed this issue in detail. The claimant said that Mrs Young could question her children on the events. Mrs Young adjourned the meeting and said that she would arrange to speak to the claimant's two children (Child C and Child D) who attended the Academy.

87. Mrs Young stated in her oral evidence that Child C told Mrs Young what had happened and that she made notes. She stated that this was because Child C has additional learning needs. Mrs Young said that Child D wrote a statement in Mrs Young's presence.

88. Mrs Young then continued the third meeting with the claimant and told the claimant that she had spoken with her children as agreed. She noted that Child D said she had seen Child A smoking a spliff outside with Mr X's husband. The claimant said that Child D had not told her about this. Mrs Young told the claimant that she should go home and reflect on matters. She stated that they would have another meeting in the morning to discuss the incident.

Thursday 2 May 2019

89. Mrs Young, Mrs Slawek and Ms Cooper met with the claimant again on the morning of 2 May 2019. The claimant said that she was 'very stressed' at the start of the meeting. The claimant provided Mrs Young with some images of the layout of her house and they discussed where the claimant and her children were in the house in relation to Mr X, Child A and Child B on the evening of 29 April 2019. Mrs Young also discussed the claimant's child protection training. The claimant said: *"If I was the culprit - why would I come forward?*".

90. Mrs Young adjourned the meeting and they had a further meeting with the same attendees at 11.38am. Mrs Young had prepared a letter suspending the claimant with immediate effect, which she read to the claimant. The letter stated that the allegation against the claimant was:

"On Monday 29 April 2019, a Year 11 student from the Academy was at your property smoking an illegal substance while you were present".

91. The letter also set out the reasons why the claimant had been suspended, pending the investigation. The letter states that the respondent was unable to provide the claimant with alternative duties, rather than suspend her, due to "*the nature of the allegations and the severity of these allegations".* The claimant has not suggested that it would have been possible or appropriate to place her on alternative duties, rather than suspend her. In any event, we find that it would not have been practical for the claimant to have been provided with non-teaching duties, given her role as a teaching assistant in the Academy.

92. The letter stated that she must not enter the Academy during her suspension. Mrs Young stated that she would be able to collect her children from the Academy, but could not enter the Academy grounds without permission. Mrs Young clarified in her oral evidence that parents (who are not staff members) are not permitted to enter the Academy without permission or without first speaking to reception (e.g. to attend a pre-arranged meeting with staff or collect an ill child).

93. Mrs Young asked the claimant to hand back her staff badge (which was attached to a lanyard) and to return her keys and laptop. The claimant said that her laptop was at home and that her children would bring it to the Academy. The claimant said that she had some personal possessions in her locker upstairs in the staff room. The claimant retained her lanyard (to which her locker keys were attached) and she and Mrs Young went upstairs to the staff room. The claimant and Mrs Young then went downstairs. Mrs Young's oral evidence was that the claimant willingly handed over her lanyard to Mrs Young before she left the Academy.

94. The claimant has raised a complaint regarding the manner of her suspension. The claimant states in her witness statement that her staff badge was pulled from her neck before she left the building. However, we note that:

    94.1 Mr X's letter of 9 May 2019 (which he sent on the claimant's behalf) complained that the claimant's suspension was a *"knee jerk reaction"* and had taken place *"before carrying out preliminary investigations to ascertain if there was a case to answer"*. Mr X did not allege that Mrs Young pulled her staff badge from her neck and also did not allege that the suspension and/or the manner of the suspension was due to the claimant's race; and

    94.2 the claimant stated in the investigation meeting on 20 May 2019 with Mrs Ewing that Mrs Young 'could have been much more polite' when removing her staff badge. However, she did not say that the badge was pulled from her neck or that the suspension and/or manner of the suspension was due to her race.

95. Mrs Young responded to Mr X's letter of 9 May 2019 regarding the suspension, together with another three letters that the claimant and Mr X sent on 9 May 2019. In relation to the claimant's suspension, Mrs Young stated:

95.1 the decision to suspend was not a 'knee jerk' reaction – she stated that preliminary investigations were carried out, including meetings with the claimant and potential witnesses;

95.2 *"Due to the nature of the allegation involving alleged drug use by an Academy student at your home…I concluded that it was not appropriate for you to remain in your role whilst this was investigated. Consideration was given as to whether there was any practicable alternatives to suspension such as an alternative role or amended duties…"*.

96. We find that:

96.1 it was appropriate for the respondent to suspend the claimant, given the nature of the allegations and her duties as a Teaching Assistant in the Academy and the KCSIE statutory guidance; and

96.2 the manner of the claimant's suspension was consistent with the respondent's policies, which provide that it may be appropriate to ask suspended staff to return the respondent's equipment during any period of suspension; and

96.3 Mrs Young did not pull the claimant's staff badge or lanyard from her neck. We concluded that if she had done so, either Mr X or the claimant would have raised this during the investigation process.

Investigation process

97. Mrs Young appointed Mrs Ewing to investigate the allegations against the claimant. Mrs Young wrote to the claimant 2019, arranging an investigation meeting with Mrs Ewing on 10 May 2019. The claimant was told that she was entitled to be accompanied by a work colleague or trade union representative to that meeting. The letter repeated the allegation made against the claimant in the suspension letter and stated:

"The above allegation is believed to be considered within the Trust's disciplinary policy under the following category of misconduct:

• Failure in Duty of Care towards pupils and employees;

• Failure in protecting the Health, Safety and Wellbeing of pupils and employees;

The above allegation could also be considered within the Trust's disciplinary policy under the following categories of gross misconduct:

• Failure in Duty of Care to protect pupils or young adults by placing them at significant risk;

• Wilful refusal to follow reasonable instructions in line with their roles and responsibilities;

• Bringing the Trust into serious disrepute;"

98. Mrs Ewing and Mr Cohen spoke with Child A on 7 May 2019 and took notes of their meeting with him, which were then typed into a note of that meeting.

99. The claimant submitted a fit note stating that she was not fit to work due to a 'stress related problem' from 3 May for two weeks. The original investigation meeting with the claimant was arranged for 10 May 2019. Mr X's letter of 9 May 2019 stated that the claimant would not attend that meeting. The claimant was absent on sick leave at that time but did not state she was unfit to attend an investigation meeting. Mrs Young rescheduled the investigation meeting for 20 May 2019.

100. Mrs Ewing, Mrs Slawek and Ms Cooper met with the claimant on 20 May 2019 at the Academy. Mrs Ewing opened the meeting by asking the claimant how she had been. The claimant said that she was trying to cope, she was not sleeping and that she had a further 4 week sick note. The notes record the claimant stated:

"Ramadan has started but [the claimant] *is not fasting at the moment as she has had a funny feeling in her stomach at the moment due to stress"*.

101. The claimant alleged that Mrs Ewing said *"It would be easier for you to fast, now that you're at home"*. Mrs Ewing denied making this comment. Mrs Slawek also stated that this comment was not made. We have concluded that no such comment was made. This issue was not raised by the claimant in any contemporaneous correspondence, including her appeal letter.

102. Mrs Ewing and the claimant discussed the incident on 29 April 2019 in detail. Mrs Ewing then asked the claimant if there was any information which had not already been discussed. The notes record that the claimant replied:

"no I have said everything and so has [Child D] *with her statement to* [Mrs Young]. *There is nothing which is being hidden or lied about – I have done safeguarding...I know my responsibilities as a professional person. I am going for PGCE in September…"*

103. The respondent reminded the claimant that she could access the services of Care First, who provide confidential counselling and other services for staff.

104. The claimant's final comment in the meeting was that the respondent should not contact Child D anymore because she needs to concentrate on her exams.

Claimant's letter of 3 June 2019

105. The claimant wrote to Mrs Ewing on 3 June 2019, complaining that she felt *"very let down"* by the Academy and by Mrs Young. The claimant stated that she had read the notes of the informal and formal investigation meetings, that they were not accurate. The claimant stated that many of the points stated to have been made were "fabricated" and that she would not sign the notes. The claimant referred to a specific discrepancy in Child D's statement. However, the claimant did not identify which parts of the notes of her meetings with the respondent were inaccurate or fabricated.

106. The claimant also stated:

"Taking the above Into consideration and many other discrepancies within the paperwork and the ill-mannered approach by the hierarchy of the Academy, I will not sign any paperwork nor attend future meetings as I am to await the final outcome of your decision; disciplinary or to re-instate me Into the Academy.

I hope you take all Into consideration and bring this matter to a swift and amicable conclusion, as I feel I am being made a scapegoat and being left out to dry; not positive for my health."

107. Mrs Ewing responded to the claimant by letter on 24 June 2019. She noted the claimant's points regarding the notes of the meeting, but enclosed two copies of the investigation meeting notes for the claimant's review. She asked the claimant to sign and return the notes or propose any amendments.

108. Mrs Ewing also stated:

"I also note your intention not to attend further meetings until I have advised you of the outcome of my investigation. I can confirm that the investigation remains in process and I will contact you to update you further as soon as I am able to".

109. Mr X called Mrs Ewing and left a voicemail on 25 June 2019, stating that the claimant's legal representatives would 'be int ouch' and that the respondent should not contact the claimant directly.

Local Authority Designated Officer ("LADO") advice

110. Mrs Ewing spoke with the Academy's Designated Safeguarding Lead regarding whether the children's statements should be included as part of the investigation pack of evidence on 9 July 2019. She also contacted the LADO by telephone for advice on this matter. She spoke with the LADO, who was willing for a summary of Child A's evidence to be included in the investigation pack because this was a key part of the investigation. However, the LADO advised that Child C and Child D's statements should not be included in the investigation pack due to the potential risk of harm given the family relationships involved. Mrs Ewing prepared the investigation pack for the disciplinary hearing in accordance with this advice.

Disciplinary process

111. The claimant was invited to attend a disciplinary hearing by letter dated 10 July 2019 from Mr McCall. The letter stated restated the allegation set out in the investigation meeting invitation letter and added:

"That by your actions, you have demonstrated a breach of trust and integrity in your role".

112. The letter stated that:

"As a result of these allegations, it has been concluded that this act and your subsequent actions may constitute gross misconduct within the Trust's Disciplinary Policy under the following categories of gross misconduct:

• Failure in Duty of Care to protect pupils or young adults by placing them at significant risk;

• Wilful refusal to follow reasonable instructions in line with their roles and responsibilities;

• Bringing the Trust into serious disrepute;"

113. Mr McCall invited the claimant to attend a disciplinary hearing on 10 September 2019 and stated that she would continue to be suspended on full pay, pending the outcome of the hearing. The reason for the long delay to the hearing date was due to the respondent's policies which required 10 working days' notice of the disciplinary hearing. Mr McCall offered the claimant the right to waive that notice period and attend a hearing on 16 July 2019 instead, if she wished to do so. The claimant was reminded of the right to be accompanied by a colleague or trade union representative.

114. The letter also enclosed Mrs Ewing's report and the appendices to the report, together with the disciplinary policy and procedure. The letter stated:

"Should you wish to include any documents to be referred to and discussed at the Hearing please ensure that you submit these to [HR]….*If no additional documents are submitted, the evidence which will be referred to during the Hearing will be those outlined above. Please also supply the names and statuses of any witnesses to be called by this date. If no witnesses are called, those present at the Hearing will be only those referred to within this letter….*

… Please would you confirm your attendance at this Hearing and who will accompany you to [HR] *by 3rd September 2019. I am aware that you have submitted fit notes during your suspension and that your current fit note is due to expire on 14th July 2019. If you are unable to attend the hearing on 10th September 2019 for health reasons please advise me as soon as possible. If you fail to attend the hearing on 10th September 2019 without notification we reserve the right to hold the hearing in your absence and a decision will be made on the information available at the hearing."*

115. The claimant did not attend the hearing. Mr McCall, Ms Wilson and Ms Cooper attended the hearing. Mrs Ewing also attended to present her investigation findings. Mr McCall wait for 30 minutes and then asked Ms Wilson to contact the claimant by phone. She did not answer the phone and the hearing proceeded in her absence at 2pm. During the hearing:

115.1 Mrs Ewing presented the investigation report and Mr McCall discussed this with her in detail;

115.2 Mr McCall adjourned the hearing at 2.27pm to consider the information and Mrs Ewing left the hearing at that point;

115.3 Mr McCall then read out his conclusions on the disciplinary allegations. He also prepared a more detailed outcome letter, which was sent to the claimant on 16 September 2019. The letter stated:

"After the hearing and subsequent adjournment, I gave my decision which is as follows:

- *You have admitted that a Student from the Academy who was known to yourself but not friends with any of your children was at your property on Monday 29th April 2019. You did not ask the student to leave your property and you failed to report this to the Academy until Wednesday 1st May 2019.*

- *In a meeting on Wednesday 1st May 2019, you stated that you did not initially report the student being on your property as the following day, Tuesday 30 April 2019 was your non-working day and you didn't think it was relevant at that time.*

- *There are inconsistencies within the statements that you have provided during the investigation process and your accounts of the events have altered a number of times.*

- *I believe as a practitioner, you have a duty to always put the child at the centre of any decision making. Having taken due regard of the full investigation process, it is my belief that on the balance of probability, you were aware that a student was at your property on Monday 29th April 2019, and was smoking an illegal substance, yet you waited until Wednesday 1st May 2019 to report this matter, only doing so following rumours regarding the issue circulating amongst students within the Academy. It is my belief that having not reported this matter immediately, you have not thought about your wider safeguarding responsibilities in school or the best interests of the child in question.*

- *I believe that your actions of failing to report the matter relating to Monday 29th April 2019 immediately and then not being open and transparent during the investigation with many consistencies in your statements are not in line with professional conduct and duty and I believe you have displayed a serious breach of trust and integrity in your role.*

- *The evidence within the hearing pack confirms that you have completed the relevant Safeguarding Educate modules and that you have read the Keeping Children Safe in Education document. I believe that you understand and can articulate your Safeguarding responsibilities. Despite this you have failed to follow the Delta Academies Trust Code of Conduct, for Safer Working with Children - Section 7 which explicitly states that the*

reporting of incidents should be done immediately (the same day without fail) I would have therefore expected that given this incident occurred in the evening that you would have reported this the following day.

- *In mitigation I have taken into account your vulnerable state due to home difficulties at the time and I have considered your length of service and clean disciplinary record.*

Considering all the information provided to me, I believe your actions constitute Gross Misconduct within the Trust's Disciplinary Policy under the following categories:

- *Failure in duty of care to protect pupils or young adults by placing them at significant risk;*
- *Wilful refusal to follow reasonable instructions in line with their roles and responsibilities;*
- *Bringing the Trust into serious disrepute:*

Therefore, having considered all alternatives available I have decided to summarily dismiss you from your role as Teaching Assistant, terminating your employment with immediate effect from Tuesday 10 September 2019.

Your final day of employment is therefore 10 September 2019. You are not entitled to any notice pay. Your P45 will be issued to you in due course.

116. Mr McCall also enclosed a copy of the notes taken during the hearing.

117. We questioned Mr McCall regarding his decision that the claimant's conduct amounted to gross misconduct. We asked him whether the outcome would have been different if he had concluded that Child A and Child B had visited the claimant's home but that a spliff was not smoked either in the home or within the vicinity of the home. We accepted Mr McCall's evidence that he would still have concluded that the claimant's conduct amounted to gross misconduct because:

117.1 his view was that the claimant's conduct still amounted to a serious breach of the Code of Conduct. Mr McCall noted that the Code of Conduct sought to implement the requirements of the KCSIE statutory guidance, particularly around safeguarding matters and that the claimant had been trained recently on these issues. He also noted that she knew that OW should not be in the house because she had stated in the meeting with Mrs Young that she thought when she saw Child A enter her house *"oh god oh no he is a student and shouldn't be in my house"*;

117.2 he noted that members of staff may sometimes inadvertently find themselves in situations that may fall within the Code of Conduct. For example, if a member of staff's children invited friends who were students at the Academy into their house without the staff obtaining prior approval. However, the key point is that staff should take action to rectify any situation

and report immediately to the Academy's Designated Safeguarding Lead; and

117.3 the fact that Child A and Child B were invited into the claimant and Mr X's house raised a red flag from a safeguarding perspective; and

117.4 the Code of Conduct states that any such incidents should be reported the same day without fail. Mr McCall stated that the claimant should have asked Child A to leave the house that evening and should have reported to the Academy the next day that a student was in the house with her husband.

118. We also questioned Mr McCall regarding the alternatives to dismissal that he stated that he considered. We accept Mr McCall's evidence that he considered whether a final written warning would have been appropriate for the claimant. However, he concluded that the deciding factor was the claimant's failure to be honest about the events during the investigation meetings and tell the Academy what had happened.

Appeal process

119. The claimant appealed by letter dated 14 November 2019 and stated that the delay in appealing was due to her ill health since the dismissal. The respondent noted that the appeal had been submitted outside their normal timescales, but stated that they would still consider her appeal.

120. The claimant set out three grounds of appeal:

"Ground. 1 - The allegations are false

I was falsely accused of wrongdoing that is untrue and/or otherwise unsupported by facts. These accusations are baseless as the reliance is placed upon rumours and no factual evidence. This was confirmed by Rebecca Ewing whilst in discussion relative to the allegations. I am in possession of factual evidence falsifying these allegations.

Ground 2 -The company failed to consider all of the evidence

I believe that I am not guilty as accused. The investigatory meeting held was simply an attempt to gain a measure of the facts available. This meeting enabled me to explain my conduct and clarify matters of concern.

The company failed to consider all of the evidence presented in my defence. My 3 children in attendance at Garforth Academy were made to give statements under pressure. The Disciplinary Hearing notes state the fact that the statements could not be used for 'Safeguarding' reasons. If that is so, then Anna Young has breached 'Safeguarding' for pressuring the children (minors) to make statements in the absence of a guardian adult. I have substantial evidence by way of statements from individuals (one of whom was present, with [Child A] *on the evening in question) and verbal discussions with past and present staff demonstrating that I have not*

committed an act of Gross Misconduct. The information which I possess will no doubt reduce the chances of me being found to have committed the act to zero.

Ground 3 -The company has failed to follow the ACAS code of conduct

The ACAS guidelines state that 'the meeting should be held without unreasonable delay whilst at the same time allowing an employee reasonable time to prepare their case'.

The disciplinary meeting was held in my absence although I had communicated with you by post, explaining my non-attendance due to my ill health.

The Investigating Officer was not independent nor made individual notes, but relied on notes made by Anna Young giving rise to a possible 'Conflict of Interest.

Furthermore, the company did not (to name a few);

(1) Deal with the issue promptly and efficiently

(2) Act consistently

(3) Carry out all necessary investigations to establish facts, thus relying on rumours.

I would ask that you acknowledge safe receipt of these grounds of appeal once received.

Failing this, I will exercise my right to bring a tribunal claim;

The company did not follow a fair and correct process and come to a reasonable decision in the circumstances, deeming the dismissal to be unfair. Tribunal proceedings will be focused on the conduct of the company to determine whether its decision was reasonable and fair based on the findings, (which are false and fabricated) and evidence will be brought before the tribunal."

121. The claimant did not submit any additional documents or other evidence with her appeal letter.

122. The respondent's HR Director, Ms Helen Ruddle, wrote to the claimant on 29 November 2019 and invited her to attend an appeal meeting on 16 December 2019. The letter reminded the claimant of her right to be accompanied by a colleague or trade union representative. The letter also listed the documents and witnesses that would be considered during the appeal meeting. The letter stated:

"At the Appeal Hearing you will be given the opportunity to discuss your reasons for appeal outlining, as per the Trust's policy, your grounds of appeal raised within your letter of appeal.

Should you wish to include any further documents to be referred to and discussed at the Appeal Hearing, for example, the "factual evidence falsifying these allegations" that you mention in the appeal letter, please ensure that you submit these to [HR] *no*

later than 9.30 am on Monday 11 December 2019. If no additional documents are submitted, the evidence which will be referred to during the Appeal Hearing will be only those outlined above. Please also supply the names and statuses of any witnesses you wish to call to the Appeal Hearing by this same date. If no witnesses are called, those present at the Appeal Hearing will be only those referred to within this letter.

…

I would like to remind you that should you or the Appeal Panel not request any additional documents and/or witnesses to be present at the Appeal Hearing, only the documents outlined above will be referred to within the Appeal Hearing and only the people outlined in this letter will be in attendance."

123. The appeal hearing was chaired by Ms Bidmead. The panel also included Anne Elliott (Regional Executive Principal) and Nicola Williams (Associate Executive Principal). Ms Ruddle and Ms Andrews also attended the hearing. Mr McCall and Mrs Ewing were also asked to attend parts of the hearing to provide further information.

124. The claimant did not attend the appeal hearing. After waiting 30 minutes, the respondent telephoned the claimant but she did not pick up the phone and the hearing started at 10am.

125. The appeal panel considered the points raised by the claimant in detail. They adjourned to consider the evidence and Ms Bidmead went through the panel's decision in detail. She also prepared an outcome letter which was sent to the claimant on 18 December 2019. The outcome letter went through each of the claimant's grounds of appeal and concluded that none of the points of appeal should be upheld. The letter also enclosed a copy of the notes of the appeal hearing.

Comparator

126. The claimant describes herself as British Pakistani and a Muslim. She compared her treatment for the purposes of her direct race and/or religious discrimination claim to that of:

126.1 a former colleague who was a cover supervisor at the Academy, known as KB; and/or

126.2 a hypothetical comparator who was in the same material circumstances as the claimant.

127. The claimant's complaints of discrimination relating to her dismissal and the events leading up to her dismissal.

128. The claimant did not provide any information about KB's circumstances. The respondent gave evidence regarding the circumstances of KB. We concluded that KB was not an appropriate comparator for the claimant because:

128.1 the claimant did not explain why KB's circumstances were materially similar to hers. She only stated that KB was a non-Muslim and was not suspended;

128.2 KB was not subject to any disciplinary proceedings during her employment. Mrs Ewing and Mrs Young both gave evidence that there was an occasion where a student swore at KB, which resulted in statements being obtained from KB and the student. The purpose of those statements was so that the Academy could consider whether any action should be taken in relation to the student's behaviour;

128.3 KB was absent on long term sick leave and it came to the Academy's attention that she had been working in an after school child care setting during her sickness absence. However, no action was taken because the respondent understood that such work was regarded as therapeutic and would potentially assist her to return to work.

129. We have concluded that there was no evidence that a hypothetical comparator who was not a British Pakistani and not a Muslim would have been treated differently. The key reasons for our conclusion are:

129.1 the allegations against the claimant could have amounted to gross misconduct under the respondent's policies and Code of Conduct;

129.2 the claimant accepted that Child A had visited her home on Monday 29 April 2019 and that she had not reported his visit until Wednesday 2 May 2019;

129.3 it was appropriate for the respondent to suspend the claimant and investigate this matter on the basis that this was potential gross misconduct;

129.4 the respondent followed its disciplinary process, set out in the policies in doing so;

129.5 there was no evidence to suggest that the reason for the claimant's dismissal was due to her race and/or her religion.

RELEVANT LAW

Notice of termination

130. In general, notice of termination of employment is only effective at the point when an employee becomes aware that they are to be dismissed. For example, the date when they open and read a letter of dismissal.

131. We note that the CPR provisions relating to 'the ordinary course of post' state that a document that is sent by first class post will be deemed to be delivered the second business day after it was posted (CPR 6.2). The Court of Appeal in *Consignia v Sealy* [2005] ICR 1598 held that it is legitimate for the Employment Tribunals to adopt the approach set out in the CPR in relation to first class post.

Unfair dismissal

132. The right not to be unfairly dismissed is set out in the Employment Rights Act 1996:

> **98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2)....
> …
>
> (2) A reason falls within this subsection if it -
>
> …
>
> (b) relates to the conduct of the employee…
> …
>
> (3) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.
> …

133. Where the employer's reason for dismissing the employee relates to the employee's conduct, the tribunal must first consider whether the respondent has established that its reason (or if more than one its principal reason) for dismissing the employee, was for a reason related to his or her conduct. The tribunal then goes on to consider the fairness of the dismissal for that reason, taking into account the guidance in *British Home Stores Limited v Burchell* [1980] ICR 303.

134. In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair the tribunal has to decide whether the employer entertained a reasonable suspension amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must demonstrate three elements:

134.1 the fact of that belief – i.e. that the employer did believe it;

134.2 that the employer had in its mind reasonable grounds upon which to sustain that belief; and

134.3 the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case, at the time at which it formed that belief.

135. The Tribunal is required to apply a band of reasonable responses test as laid down in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17. It is not for the Tribunal to decide whether the Tribunal would have dismissed the employee, as set out in the *Iceland* case at paragraph 24:

"(i) the starting point should always be the words of Section 98 for themselves;

(ii) in applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(iii) in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right cause to adopt, for that of the employer

(iv) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(v) the function of the tribunal as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if a dismissal falls outside the band, it is unfair."

136. The ACAS code of practice on disciplinary and grievance procedures states as follows:

"(9) If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence which may include any witness statements with the notification."

Wrongful dismissal (notice pay)

137. The question that the Tribunal has to consider in a wrongful dismissal is whether or not the claimant did something so serious that the respondent was entitled to dismiss them without notice. This requires the Tribunal to consider, on an objective basis, whether the claimant's conduct amounted to gross misconduct.

Equality Act 2010 ("EQA") claims

138. Direct discrimination and harassment are defined by the EQA as follows:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

…

> **26 Harassment**
> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are – …sex;
> …

139. In addition, s23 of the EQA states in relation to comparators for direct discrimination cases that:

> **23 Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.
>
> …

Direct discrimination

140. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

140.1 was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

140.2 if so, was such less favourable treatment because of the claimant's protected characteristic?

141. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

142. In relation to less favourable treatment, the Tribunal notes that:

142.1 the test for direct discrimination requires a claimant to show more than simply different treatment (*Chief Constable of West Yorkshire Policy v Khan* 2001 ECR 1065 HL);

142.2 a claimant does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that a claimant can reasonably say that they would have preferred not to be treated differently from the way the respondent treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

142.3 unreasonable treatment in itself is not sufficient. For example, in *CC of Kent Constabulary v Bowler* EAT 0214/16, the EAT observed that: *"merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic"*;

142.4 the motive and/or beliefs of the parties are relevant to the following extent:

142.4.1 the fact that a claimant believes that she has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, *Shamoon*);

142.4.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

142.4.3 for direct discrimination to be established, the claimant's protected characteristic must have had a *'significant influence'* on the conduct of which she complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

143. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA). Lord Justice Mummery in *Madarassy* stated that:

"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."

144. Lord Justice Sedley in *Deman v Commission for Equality and Human Rights & ors* 2010 EWCA Civ 1279 CA qualified this by stating that: *"…the "more" which is needed to create a claim requiring an answer need not be a great deal…it may be furnished by the context in which the act has allegedly occurred"*. For example in *Veolia Environmental Services UK v Gumbs* EAT 0487/12, the EAT held that a tribunal was entitled to take into account the fact that the employer had given inconsistent explanations for its conduct (whilst excluding consideration of the

substance and quality of those explanations at the first stage of the test for direct discrimination).

Harassment

145. There are three elements to the definition of harassment:

145.1 unwanted conduct;

145.2 the specified purpose or effect (as set out in s26 EQA); and

145.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.

146. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

147. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

148. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

149. The EAT in *Dhaliwal* also stated that:

"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

150. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding….An

'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

Burden of proof – EQA complaints

151. The burden of proof for discrimination and harassment complaints is dealt with by s 136 Equality Act 2010, as follows:

> **136 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) But subsection (2) does not apply if A shows that A did not contravene the provision.
> …
> (6) A reference to the court includes a reference to -
> (a) an employment tribunal;
> …

152. The Court of Appeal in Igen Ltd v Wong [2005] ICR 931 gave guidance as to the application of the burden of proof provisions. That guidance remains applicable under the EQA (see Ayodele v Citylink Ltd [2017] EWCA Civ 1913). The guidance outlines a two-stage process:

152.1 First, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see Madarassy v Nomura International plc [2007] ICR 867, CA.

152.2 The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act.

153. The Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

APPLICATION OF THE LAW TO THE FACTS

154. We will now apply the law to our findings of fact.

UNFAIR DISMISSAL

Reason for dismissal

155. We concluded that the reason for the claimant's dismissal was her conduct during and following the incident on 29 April 2019. The claimant admitted that a student (who was not friends with her children) visited her home on 29 April 2019 and that she did not report this until 1 May 2019. We accepted Mr McCall's evidence claimant's admitted conduct was potentially an act of gross misconduct under the respondent's Code of Conduct and its disciplinary procedure. In addition, we accept Mr McCall's evidence that he concluded that that cannabis had been smoked either inside or in the vicinity of the claimant's home during Child A and Child B's visit on 29 April 2019, which added to the serious concerns raised by those events.

156. The claimant failed to provide any evidence to suggest that the reason for her dismissal was Mr X's complaint regarding the appointment of a Head of Year in early 2019. We concluded that none of the respondent's senior staff who were involved in the claimant's investigation and disciplinary process were aware of Mr X's complaint.

Procedure

157. We concluded that the respondent held a reasonable belief that the claimant had committed gross misconduct, having investigated the matter appropriately for the following key reasons:

157.1 the respondent investigated the matter thoroughly, as set out in our detailed findings of fact;

157.2 the claimant did not provide any additional evidence for the investigation, disciplinary or appeal processes despite referring to such additional evidence in written correspondence with the respondent;

157.3 the claimant has alleged that the respondent obtained witness statements under pressure and/or fabricated statements. She produced several additional statements during these proceedings which were not provided to the respondent during the investigation, disciplinary or appeal process. However, we considered this allegation in detail in our findings of fact and concluded that the witness statements relied on by the respondent as part of the investigation were not obtained under pressure and/or fabricated for the reasons set out in our findings of fact, including:

157.3.1 the claimant had the opportunity to discuss the key contents of the statements with Mrs Young and later with Mrs Ewing. The claimant stated in her letter to Mrs Ewing of 3 June 2019 (just over a month after her suspension):

"Furthermore, [Child D] *is mentioned in the notes/minutes of the meetings to have seen my husband smoke with* [Child A]*, but the fact of the matters is*

that [Child D] *actually saw* [Child A] smoking and heard my husband ask him to drop it.."

The claimant did not state that Child D's statement was fabricated during her meetings with Mrs Young and Mrs Ewing or in her letter of 3 June 2019. We note that during her meeting with Mrs Young on 2 May 2019, the claimant stated:

"no I have said everything and so has [Child D] *with her statement to* [Mrs Young]. *There is nothing which is being hidden or lied about…"*;

157.3.2 the only part of Child A's statement that the respondent relied on as part of the disciplinary and appeal process was an extract from the notes of a meeting with Mr Cohen and Mrs Ewing on 7 May 2019 set out in an appendix to the investigation report which we have quoted above. The respondent did not rely on Child A's handwritten statement;

157.3.3 Child A's statement of 5 October 2021 states that the minutes of 7 May 2019 'are not a true copy'. However, this statement was made nearly two and a half years after the incident on 29 April 2019;

157.3.4 Mr Cohen and Mrs Ewing denied the allegations made by [Child A] in his statement of 5 October 2021 during their oral evidence. They confirmed that the minutes of their meeting with [Child A] on 7 May 2019 were accurate. The claimant did not call Child A to provide evidence during the Liability Hearing. The Tribunal prefers the evidence of Mr Cohen and Mrs Ewing because they were able to test that evidence by asking questions of those witnesses during the Liability Hearing;

157.4 the claimant attended the investigation meetings. However, she chose not to attend the disciplinary and appeal meetings of her own volition; and

157.5 the claimant failed to put forwards any further evidence for consideration at the disciplinary and appeal hearings, despite being reminded that she should do so in the letters inviting her to those hearings.

Decision to dismiss

158. We concluded that dismissal was a sanction open to a reasonable employer, given the circumstances for the following key reasons:

158.1 we note that the Tribunal must not substitute its own view for that of the respondent when considering whether dismissal was a reasonable response;

158.2 we considered the context in which the claimant's dismissal took place:

158.2.1 the respondent is a large organisation with significant administrative resources;

158.2.2 the respondent operates multiple academies which are bound by the general requirements applicable to all educational establishments, particularly in relation to safeguarding responsibilities;

158.2.3 the claimant admitted that she had permitted a student to enter her home in circumstances that she was aware he should not have been. The claimant also admitted that she failed to inform the Academy of this event that evening or the next day;

158.2.4 the respondent was entitled to conclude that cannabis was smoked either in the claimant's home or in the vicinity of her home around the time that the student entered her home on the evidence set out in its investigation;

158.2.5 the respondent considered alternatives to dismissal, including a final written warning, but concluded that dismissal was an appropriate sanction given the serious nature of the allegations that were upheld; and

158.2.6 the claimant failed to attend the disciplinary and appeal hearings and did not submit any further evidence for consideration at those hearings, including the issues that she has raised as part of these proceedings.

159. The claimant's claim for unfair dismissal therefore fails and is dismissed.

WRONGFUL DISMISSAL (NOTICE PAY)

160. We have concluded that the conduct found by the respondent amounted to gross misconduct for the reasons set out above. The claimant's claim for wrongful dismissal therefore fails and is dismissed.

EQUALITY ACT CLAIMS

Manner of suspension – harassment (race and religion or belief) complaint

161. We concluded that the claimant was suspended in accordance with the respondent's disciplinary policy. There was no evidence to support the claimant's assertions regarding the manner of her suspension, as set out in detail in our findings of fact. In particular, we concluded that Mrs Young did not pull the claimant's lanyard from around her neck because if she had done so then the claimant and Mr X would have complained about this in their letters during the investigation process.

162. In any event, we have concluded that the claimant failed to provide any evidence to suggest that the manner in which her suspension took place was related to her race and/or religion. The claimant's claim for harassment therefore fails and is dismissed.

Fact of suspension – direct race discrimination complaint

163. The claimant has also claimed that the fact that she was suspended at all was an act of direct race discrimination. She cited two comparators:

163.1 KB, a former cover supervisor; and

163.2 a hypothetical comparator.

164. There was no evidence to suggest that the claimant's material circumstances relevant to this claim also applied to KB for the reasons set out in our detailed findings of fact. The claimant also failed to provide any evidence to suggest that a hypothetical

white and non-Muslim comparator who it was alleged had permitted a student to enter her house, smoke cannabis and who had failed to report the incident the next day would not have been suspended. The allegations against the claimant potentially amounted to gross misconduct within the meaning of the respondent's policies. The claimant was a Teaching Assistant and she has not suggested that it would have been possible or appropriate to place her on alternative duties, rather than suspend her. The claimant's complaint of direct race discrimination relating to the fact of her suspension therefore fails and is dismissed.

Dismissal and events leading up to dismissal – direct discrimination (race and religion or belief) complaint

165. The claimant has also claimed that the fact that her dismissal and the events leading up to her dismissal were an act of direct race discrimination and/or direct religion or belief discrimination. She cited the same two comparators that she cited in relation to her complaint of direct discrimination relating to her suspension:

    165.1 KB, a former cover supervisor; and

    165.2 a hypothetical comparator.

166. There was no evidence to suggest that the claimant's material circumstances relevant to this claim also applied to KB for the reasons set out in our detailed findings of fact. The claimant also failed to provide any evidence to suggest that a hypothetical white and non-Muslim comparator who it was alleged had permitted a student to enter her house, smoke cannabis and who had failed to report the incident the next day would not have been investigated, subjected to disciplinary proceedings and dismissed.

167. The claimant's complaint of direct discrimination relating to her dismissal and the events leading to her dismissal therefore fails and is dismissed.

Employment Judge Deeley

29 March 2022

ANNEX – LIST OF CLAIMS AND ISSUES

(as recorded by Employment Judge Parkin at the Preliminary Hearing on 21/4/21)

2. **The Claims**

As a result of the hearing on 23 March 2021, the claims going forward are claims of "ordinary" unfair dismissal within part X, section 98 of the Employment Rights Act 1996; wrongful dismissal/breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 having regard to the statutory minimum notice at section 86 ERA; unlawful direct race and religious discrimination contrary to section 13 of the Equality Act 2010 relying upon the protected characteristics at sections 9 and 10 and unlawful harassment related to race and religion contrary to section 26 of the 2010 Act. Following the earlier identification by Employment Judge Maidment, the discrimination and harassment claims are now therefore:

2.1 The claim of harassment relating to race and/or religion arising out of the manner of the claimant's suspension (on 2 May 2019) when she was escorted out of the building and on have been barred from then entering the school grounds;

2.2 The claim of less favourable treatment because of race (direct discrimination) in being suspended; the comparison with the student OW is not a comparison which falls within the "no material difference between the circumstances" provision at section 23 of the 2010 Act but the claimant has confirmed that she relies upon an actual comparison with the position of her ex-colleague KB and also the hypothetical comparison of what would have happened had she not been British Pakistani and a Muslim.

2.3 The claim of less favourable treatment (direct discrimination) because of race and/or religion in her dismissal, including matters leading up to that dismissal. Again the claimant compares herself with the actual comparator KB and also the hypothetical comparator, herself had she not been British Pakistani and a Muslim.

3. It was agreed that the final hearing listed at this stage should be a liability only hearing, to narrow the issues to be determined by the Tribunal initially since there are potentially complex issues relating to remedy including the claimant's pension loss and personal injury claims, remoteness of damages especially relating to the inclusion of the claimant's husband's claims for damages including business loss and loss of earnings in the Schedule of Loss and the claims for reinstatement and recommendations.

4. The Issues at the final liability hearing

A Unfair Dismissal

1. Section 98(1) and (2) ERA 1996, reason for dismissal: whether the respondent has proved a potentially fair reason or principal reason for dismissal namely relating to the claimant's conduct. The respondent relies upon the claimant's misconduct arising out of the allegation about the student at the academy where she was a teaching assistant smoking cannabis in her presence at her home.

2. Section 98(4) ERA: if the respondent has proved a potentially fair reason for the dismissal, the Tribunal will decide the issue as to reasonableness of the decision to dismiss, with no burden of proof either way. It will determine whether the dismissal was fair or unfair having regard to that reason depending on whether in the circumstances (including the size and administrative resources of the respondent) it acted reasonably or unreasonably in treating that as a sufficient reason for dismissing the claimant, in accordance with equity and the substantial merits of the case. In an alleged misconduct case such as this, the Tribunal will consider whether the respondent held a reasonable belief in the claimant's misconduct after a reasonable investigation and having followed a reasonable procedure; applying the "range of reasonable responses" open to a reasonable employer which remains good law in respect of the reasonableness of the decision to dismiss.

   Here, the claimant is highly critical of the respondent's actions, investigation and the procedure adopted including the fact of interviews of her own and other children, the respondent not then using some interviews, undue pressure upon student witnesses, the manner of questioning (interrogation) of the claimant herself, the holding of the disciplinary and appeal hearings in the claimant's absence and the integrity of those hearings. She contends the process was flawed and discriminatory from the outset; whilst not making a separate claim relying upon the protected disclosure ("whistleblowing") provisions she does contend the senior managers particularly AY and RE, "had it in for her" even before her suspension, particularly because she had challenged the fairness, transparency and equality of opportunity in respect of appointments within the academy.

3. If the Tribunal finds the dismissal unfair, it will need to consider whether the claimant herself caused or contributed towards that dismissal and, if so, to what extent.

B Wrongful dismissal/breach of contract

4. The claimant was dismissed without notice, by letter dated 16 September 2019, with the dismissal effective when that letter was received (although it sought to dismiss with effect from 10 September 2019). She relies upon the statutory minimum notice of termination of employment, which is 3 or 4 weeks (depending

on her length of continuous employment). Unlike her unfair dismissal claim where the Tribunal is concerned with the respondent's actions and decision-making, the Tribunal will determine on the balance of probabilities whether the claimant did commit gross misconduct or some other repudiatory breach of contract. Unless it makes such a finding, she was entitled to notice of termination of employment and therefore the Tribunal will award damages for breach of contract representing her lost pay during the notice period.

C Direct race and religious discrimination, section 13 Equality Act 2010 by reference to the protective characteristics at sections 9 and 10, (see Claims 2.2 and 2.3 at paragraph 2 of the Summary above).

5. The claimant identifies as British Pakistani and is a Muslim, therefore did the respondent unlawfully discriminate against the claimant because of her race or religion i.e. treat her less favourably than it have treated her actual comparator or a hypothetical white, non-Muslim comparator, contrary to Section 13 of the 2010 Act?

   If the claimant proves facts from which a Tribunal could conclude that there has been unlawful discrimination, then the burden of proof shifts to the respondent to prove that it did not act unlawfully.

D Harassment section 26, Equality Act related to the protective characteristics at sections 9 and 10, (see Claim 2.1 at paragraph 2 of the Summary above).

6. Did the respondent engage in unwanted conduct related to the claimant's race or religion, which conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant related to her race or religion.

   Thus, if the Tribunal finds facts from which it could conclude that there has been unlawful harassment, the burden of proof shifts to the respondent to prove that it did not act unlawfully. In deciding whether conduct which the Tribunal finds occurred has that effect, it must take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.