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EMPLOYMENT TRIBUNALS

Claimants:	**Ms A. Balogun**
Respondents:	**Cubitt Town Infants School**
Heard at:	**East London Hearing Centre (by Cloud Video Platform)**
On:	**7 and 8 April and (in chambers) 4 May 2022**
Before:	**Employment Judge Hallen,**
Members:	**Ms. J. Forecast** **Ms. T. Alford**
Representation	
Claimant:	In person
Respondent:	Ms. S. Chan- Counsel

RESERVED JUDGMENT

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

The unanimous judgment of the Employment Tribunal is that: -

1. **The Claimant's claim for direct race discrimination contrary to section 13 Equality Act 2010 ('EqA') is made out and succeeds.**

2. **The Claimant's claim for victimisation contrary to section 27 of the EqA is made out and succeeds.**

3. **The Claimant's claim for unfair dismissal against the Respondent is dismissed on the basis that she was not an employee of the Respondent.**

4. **The case will be set down for a remedy hearing and separate directions will be made in that respect including listing the case for hearing on this issue.**

REASONS

Background and Issues

1. The Claimant worked as a Teaching Assistant for the Respondent from 6 January 2020 to 28 January 2021 when her services were terminated by the Respondent. She was an agency worker and was employed by Teaching Personnel Limited ('the agency') which company supplied her services to the Respondent via a contract for services for an agency worker.

2. Prior to this case commencing, the issues had not been defined by the Tribunal at a preliminary hearing and as a consequence the issues were defined at the beginning of this hearing and agreed between the parties. The Respondent accepted that as an agency worker the Claimant could pursue a claim under the EqA pursuant to section 41. The Claimant identified herself as a black British woman. She is a single mother taking care of two children (a boy and a girl) of school age. She said that she was subject to direct race discrimination contrary to section 13 of the Equality Act 2010 in that she was not offered the opportunity to work from home in January 2021 when a female white Teaching Assistant was permitted to do so at the beginning of the third national lockdown due to the covid pandemic. She also stated that she was treated less favourably due to her race when her agency assignment was terminated on 28 January 2021 on the basis that she wished to work from home. In addition, she asserted that she was subject to victimisation contrary to section 27 of the Equality Act when she raised a protected act by complaining of discrimination contrary to the Equality Act by way of a text sent to the Respondent on 28 January 2021 at 10 pm. She asserted that she was subject to a detriment namely the termination of her assignment as a consequence of the protected act. The Claimant relied upon an actual comparator LC who was a white Caucasian British Teaching Assistant who undertook the same role as she did at the school. This Teaching Assistant was permitted to work from home from January 2021 as her mother was a vulnerable person and was shielding. The Claimant asserted that she was the mother of a vulnerable school age boy who was suffering from cancer, and she should also have been permitted to work from home as the circumstances were broadly comparable with LC. The Respondent asserted that it could not permit the Claimant to work from home because she could not conduct one to one teaching assistance remotely, that the parent of the disabled child that she was supporting wanted the child to be involved in classroom activity remotely and that it did not need the Claimant to provide emotional assistance to the child remotely. Further, it asserted that there was no other work that the Claimant could do remotely working from home.

3. With regard to the claim for direct discrimination, the Tribunal had to ascertain whether the Claimant was subjected to less favourable treatment that she asserted and whether this was done due a difference in her race. With regard to the claim for victimisation, the Tribunal had to ascertain whether the Claimant raised a protected act, whether she was subject to a detriment and whether this detriment was due to her raising the protected act. The Respondent asserted that the Claimant did not raise a protected act in the first instance and that the termination of the Claimants agency assignment was due to a breakdown in the relationship between the school and the Claimant due to her refusal to attend to work on 28 January 2021. The Respondent also asserted that the comparator was not an actual comparator as there were significant differences between the Claimant

and the comparator. The comparator was a full-time employee of the Respondent whereas the Claimant was not, and the Claimant was responsible for one-to-one teaching support whereas the comparator undertook teaching support for an entire classroom. It was also argued that the qualifications of the comparator were greater.

4. The Tribunal had an agreed bundle of documents in front of it made up of 189 pages. During the course of the hearing the Respondent produced the CV of the comparator (LC) and the Tribunal permitted this late disclosure in the interests of justice. The Claimant produced a short witness statement made up of two pages (3 paragraphs) which was supplemented by the grounds of support attached to her Claim Form. The Respondent called the school's Headteacher, Ms Robyn Bruce. However, it chose not to call the main contact with the Claimant, the acting deputy Headteacher, Ms E. Alcock. This was because she had a new job and could not attend to give evidence. The Respondent chose not to ask for a witness order to compel her attendance. It also chose not to produce any Equality Procedures in the agreed bundle of documents although the Tribunal was assured that they existed. The Claimant and Ms Bruce gave evidence. They prepared written witness statements and were subject to cross examination and questions from the Tribunal.

Facts

5. At the outset of this section of the judgment, it should be said that the principal point of contact between the Claimant and the Respondent was the acting deputy Headteacher Ms Alcock. The Respondent chose not to call Ms Alcock to give evidence relating to relevant events pertaining to her dealings with the Claimant. It was said to the Tribunal that Ms Alcock had obtained another job and was not able to attend to give evidence to assist the Respondent in defending the serious allegations of race discrimination. The Tribunal was greatly hampered by the Respondents failure to call Ms Alcock to give evidence as explained later in the course of this judgement. It was clear to the Tribunal that the Respondent had the option of obtaining a witness order to compel Ms Alcock to attend but choose voluntarily not to do so. Instead, it produced a timeline of events prepared by Ms Alcock which was at pages 51 two 53 of the bundle of documents. It should be noted that this was not a signed witness statement. Nevertheless, Ms Bruce who was not involved in the day-to-day interactions with the Claimant adopted the majority of Ms Alcock's timeline of events in her witness statement. We considered the timeline prepared by Ms Alcock as part of the case even though she did not attend the hearing. Through most of her evidence, Ms Bruce sought to give the Tribunal the impression that Ms Alcock was the sole decision maker in decisions that were relevant to the Claimant, then only in re-examination changed her position to suggest that she was involved herself in making a decision jointly to terminate the Claimant's agency assignment. The Tribunal chose not to accept this evidence. Rather, the Tribunal accepted the statements made by Ms Alcock in her timeline of events that she was the main point of contact with the Claimant and took all the relevant decisions including terminating the Claimant's agency contract. Indeed, Ms Bruce in her statement confirmed the same. The Tribunal did not accept the evidence of Ms Bruce that she was involved in the termination of the Claimants agency contract and the Tribunal found that this was entirely due to the actions of Ms Alcock. Indeed, on two occasions, Ms Bruce confirmed in direct questions asked by the judge that Ms Alcock was the sole decision maker when it came to the termination of the Claimant's assignment.

6. The Claimant started working for the Respondent as a Special Educational Needs and Disabilities (SEND) 1:1 Teaching Assistant for a child with an Education and Health Care Plan (EHCP) from 6 January 2020 until 28 January 2021. The Claimant was booked through an agency, Teaching Personnel Limited by Ms Alcock (Head of Inclusion at the time but deputy Headteacher since). Ms Alcock was the only point of contact between the Respondent, the Claimant and the agency though the entirety of the Claimant's placement.

7. In March 2020, when schools closed due to Covid-19 and entered the first national lockdown, all of the agency staff employed at the school were paid for 5 days' work but were part of a rota with reduced days in school. The Claimant was part of this rota and was attending school for two days per week albeit like other agency Teaching Assistants she was paid for 5 days per week. She did not attend school during the summer holiday from July 2020 to September 2020 and like all agency staff she was not paid during the school holidays.

8. In June 2020, when the government asked some year groups to return to school, the Claimant shared a shielding letter for her son with the agency and requested to stay at home. This had not been shared previously. At the time there was limited guidance around pay for agency staff and Ms Alcock and the headteacher prior to Ms Bruce at the time (who left in August 2020) agreed to continue to pay the Claimant whilst the shielding advice for her son was in place.

9. The Claimant returned to work as normal in September 2020. The school was closed to most children from 4 January 2021 following government guidance. The Respondent held 3 Zoom meetings during the inset day on 4 January 2021, where it was explained how the school would be operating. The Respondent went through the school risk assessment and requested that staff with any concerns could request a meeting with the Ms Bruce or Ms Alcock to complete an individual risk assessment. The link to this meeting was shared in a WhatsApp group and by email and with the agency so all staff could attend. Following this meeting, the Claimant did not request to speak with Ms Alcock about an individual risk assessment for her.

10. For the week beginning 4 January 2021, the Claimant was put on the rota for two days a week. Some of the 1:1 staff were asked to work all 4 days of this week. The Claimant was asked to come into school to work in a Year 2 bubble (only eight children out of the ninety on roll were in attendance) for two days which significantly reduced her contact with others but still allowed her to be paid five days a week. This was the same arrangement that applied to all agency staff during the first national lockdown. Once this rota was shared, the Claimant contacted Ms Alcock and said she was concerned about coming into school because she was the single mother of a young boy who was being treated for cancer and was clinically vulnerable. As a consequence, it was agreed by Ms Alcock with the Claimant via the agency that she could work a non-contact role in school for the two days she was on the rota. The Claimant gave evidence which the Tribunal accepted that even though she was promised a non-contact role, she was working in a classroom that was accessible to children and other staff during the school day. Furthermore, she was also exposed to the risk of catching Covid (which also exposed her clinically vulnerable son and her daughter) when she had to travel to and from school.

11. On 7 January 2021, the agency forwarded a section of a letter which the Claimant had asked to be passed on to Ms Alcock with a request to stay at home but with full pay. The Claimant said this was the back of the shielding letter. Ms Alcock explained to the

agency that the government guidance was that it was only the person themselves that was shielding that should stay at home and other household members could attend work. She explained to the agency that the Claimant had been offered a non-contact role of preparing work packs in a classroom for two days a week for five day's pay. The agency confirmed that the Claimant had agreed to this role.

12. Once the school knew that it would be closed until at least 22 February 2021, the Claimant was sent over the next five weeks of rotas which she agreed. She attended work on Thursday and Fridays and arranged with Ms Alcock that she would start at 10am and leave early at 2pm so that she could do the school run as there was no wrap around care available for her. On 22 January 2021, it was agreed that she could leave early at around 12pm as she had completed the work given. The Claimant gave evidence which was accepted that she did four days of her rota in January 2021 as agreed with Ms Alcock.

13. On 28 January 2021, the Claimant was due in school and did not arrive. She did not inform the agency or the school she would not be attending that day. At 10am the Claimant texted Ms Alcock as follows: *"Hi Emmy, I've made a conscious decision to do what's right for my family and stay home during the lockdown. It is impossible to work in isolation in school. Staff are everywhere and have come to speak to me without a face covering. It's not a risk I'm willing to take. Pupils have also approached me to show me their work, and I won' t turn them away. My children were too in school while I was at work which defeats the purpose. I hope I can still be paid provided that I had forwarded a shielding document alternatively I will look in Teaching Personnel's flexible furlough scheme."*

14. Ms Alcock replied at 12pm when she picked up the text: *" Hi Abi, I understand your concerns and why you want to stay at home. As the shielding document is for your son and not yourself, you are still expected to attend work. All staff apart from those that are themselves clinically extremely vulnerable are expected to attend work. This is the guidance from the dfe. The school have made exceptions for you due to your concerns and have offered a reduced timetable and non-contact work. If you don't feel you can come in to work then we won't be able to pay you and you will need to speak to your agency about the furlough scheme."* The Tribunal noted that what is said by Ms Alcock in this text is not entirely true as LC who was a Teaching Assistant employed by the school and who was not clinically extremely vulnerable was not expected to attend work and was given permission by the Respondent to work from home. As Ms Alcock did not attend to give evidence at the hearing, the Tribunal was not able to ask her about this discrepancy.

15. The Claimant replied to this text at 2.30pm: *"You have indicated all staff apart from those that are themselves clinically extremely vulnerable are expected to attend work. To my knowledge, a specific co-worker is not clinically vulnerable however lives with a family member who is and shielding, why are they not expected to attend work, on the other hand, I have to?"* The Claimant gave evidence which was accepted by the Tribunal that she was referring to the comparator LC in this text who was a full-time Teaching Assistant employed by the Respondent and had been given permission by the Respondent to work from home.

16. Ms Alcock then replied to this at 3pm: *"I have done everything I can in the last lockdown and this one to ensure that you are paid for 5 days work even though you are not working for 5 days in school. This is extremely accommodating considering you don't have a permanent contract with the school. Most agency workers have been furloughed if*

they are unable to attend school and I have tried to make sure that doesn't happen to the staff at our school. I can't discuss other member of staffs arrangements with you as this is confidential. lam going to contact your agency to confirm that you have made the decision not to attend school." It was noteworthy to the Tribunal that Ms Alcock chose not to respond to the Claimant's question about the comparator save to say that her arrangements with the Respondent were confidential. When asked by the Tribunal whether Ms Alcock should have responded to answer the question, Ms Bruce said that in hindsight she would have done although she could not explain why Ms Alcock had not done so. Unfortunately, due to Ms Alcock's nonattendance, the Tribunal was not able to ask her why she chose not to respond to the question asked by the Claimant.

17. Ms Alcock then had a phone call with Nolawi at the agency. He told her that he agreed with the school that they have been very accommodating, and that the Claimant apologised for not attending work on 28 January 2021. He confirmed that she would be in work the following day. An email at page 88 of the bundle from Nolawi also confirmed that the Claimant had not been in to work on 28 January 2021 and that she would be in school the following day. The Claimant gave evidence to the Tribunal which was accepted that she was planning to go to work on 29 January as she valued her job and wished to continue to work for the Respondent either on non-contact duties or by agreement with the Respondent working from home. Ms Alcock did not attend to explain to the Tribunal why such discussion could not take place and a resolution reached with the Claimant. Ms Bruce told the Tribunal that she wished the Claimant had approached her which confirmed to us that some resolution with the Respondent may have been possible.

18. Ms Alcock then received a text from the Claimant at 10pm on the 28 January 2021 as follows: *"Under the Equality Act 2010, you have the right not to be treated less favourably than other workers, by either the agency or hiring company. After 12 weeks in the job, you qualify for the same rights as someone employed directly."* The Claimant was asked why she had not stated in this text that she had been subjected to race discrimination in this text. The Tribunal accepted her reasonable explanation which was that although she believed at the time that she was being treated less favourably by the Respondent due to her race, she did not want to believe that in this day and age anyone could behave in that way. This was the reason that she had not been explicit, but she insisted that the text was self evidently clear that she was complaining of less favourable treatment under the Equality Act, and this was due to her race. The Tribunal noted that this was the second text of the day (the first being at 2.30pm) which raised the issue of less favourable treatment of the Claimant compared to LC and which again was not answered by the Respondent at all with any reasonable explanation for the apparent less favourable treatment.

19. Ms Alcock spoke with Nolawi from the agency on 28 January 2021. This must have been late as it was after the above text and explained she had received this text with an extract from the Equality Act late at night but with no further information. Ms Alcock was confused as to why she had received this text and explained to Nolawi that despite the extreme lengths the school had gone to ensure the Claimant could work safely and still receive full pay there was still clearly a dis-satisfaction with this offer. As Ms Alcock had already internally covered her work in school due to the Claimant's non-attendance on 28 January, she explained to the agency the school would not require her in school on 29 January. As her role could not be performed from home, the booking was being cancelled in line with the agency contract which allowed for immediate termination without

notice. Ms Alcock did not deliver this cancellation news directly to the Claimant as the agency did so on the Respondent's behalf early the next morning directly to the Claimant.

20. The Tribunal noted that the decision taken by Ms Alcock to terminate the Claimant's assignment was notified to the agency at 11.03 pm and was not much over an hour after she received the text from the Claimant complaining of less favourable treatment under the Equality Act. Unfortunately, the Tribunal was not able to ask Ms Alcock why she had acted so quickly after receiving the text to terminate the Claimant's contract especially given the fact that she knew the Claimant was coming in to work the next day with an expectation to undertake the rota that had been agreed with her less than a month before. The Respondent told us that the decision to terminate was taken because the Claimant had not come in to work on 28 January. However, Ms Alcock had arranged cover for the Claimants absence on this date by her own admission and was aware that she was coming to work on 29 January 2021. We were also not able to ask her why she felt that the relationship had broken down irretrievably and why she felt that suitable alternative arrangements could not be made especially given the two texts that she had received on 28 January complaining of less favourable treatment of the Claimant compared to LC a white Caucasian Teaching Assistant employed at the school. We were also not able to ask her why if she was thinking of terminating the agency contract with the Claimant, she was not prepared to give the Claimant a warning that she was thinking of doing so. This was perplexing to us, as Ms Alcock was aware that the Claimant was a single mother looking after two children, one of whom was suffering from cancer and was clinically vulnerable. We were not satisfied on the evidence presented to us that there was any reasonable evidence that the relationship had broken down. Although Ms Bruce sought to give answers to these questions, we did not accept her evidence as it was not direct evidence from the person that had decided to terminate the contract.

21. In relation to LC as a comparator referenced by the Claimant, the Tribunal found that she was not a comparator for the purposes of section 23(1) of the EqA as this required that there be no material difference between the circumstances relating to each case. LC, the comparator had been employed by the school as a Teaching Assistant since September 2015 and in September 2016 this became a permanent position, and she was contracted to the school. The Claimant was an agency worker only commencing service with the school in January 2020. However, broadly speaking the Claimant and LC's role as Teaching Assistants at the school were similar and the Tribunal decided to regard LC as an evidential comparator for the purposes of the Equality Act. Indeed, the Claimant was more highly qualified than LC. She was a level 3 Teaching Assistant and LC was a level 2. The duties undertaken by the two were broadly similar and interchangeable as was the length of experience of the two with the Claimant having experience as a Teaching Assistant going back to 2016. Further comment on this is made on the conclusions section of this judgement.

22. The Tribunal did not accept the limited evidence of the Respondent that the Claimant could not undertake her duties supporting her one-to- one pupil from home remotely. The Tribunal accepted the Claimant's evidence that she could have continued to support him with emotional support even though it was suggested to us that the pupil's mother wanted him to be involved in remote classroom activity. Furthermore, the Tribunal found that the arrangements involved in LC working from home remotely would have been broadly similar to the Claimant working from home. As it happened the Respondent did no investigation directly with the Claimant as to how she could work from home remotely and what she could offer in terms of experience and skills working remotely prior to the

decision to end her agency assignment was taken by Ms Alcock on 28 January 2021. It was clear to us based on the timeline of events produced by Ms Alcock that she did not address her mind to any alternative options of remote working for the Claimant before taking the decision to end her assignment. This again surprised us as it appeared to us that the Claimant had asked a legitimate question of Ms Alcock of why LC was allowed to work from home in similar circumstances and she was not. Ms Alcock chose not to answer this question despite being given two opportunities to do so.

Law

Direct Race discrimination

23. By s39(2) Equality Act 2010, an employer must not discriminate against an employee by subjecting him to a detriment or dismissing him. By s39(7) EqA dismissal includes constructive dismissal. By s40 EqA an employer must not harass his employee.

24. Direct discrimination is defined in s13 EqA 2010.

25. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

26. Direct discrimination is defined in s13(1) EqA 2010: "(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."

27. By s9 EqA 2010, race is a protected characteristic and race includes colour; nationality; ethnic or national origins.

28. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," s23 EqA 2010. The requirement for comparison in the same or not materially different circumstances applies equally to actual and to hypothetical comparators, as highlighted in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.**

29. In **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065** (at para 29) Lord Nicholls explained that outside the field of discrimination law:

> "Sometimes the court may look for the 'operative' cause or the 'effective cause'. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [1999] ICR 877, 884-885, a causation exercise of this type is not required either by section 1(1)(a) [direct discrimination] or section 2 [victimisation]. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminatory act as he did?"

30. In Khan the Chief Constable had withheld a reference from a police officer who had brought race discrimination claims against the force. The Chief Constable could not give a reference because the proceedings were still live, and he did not want to be prejudiced by any reference given at that stage. Thus, as a matter of "but for" causation, had it not been for the race discrimination claims, a reference would have been supplied. At paragraph 77 Lord Scott observed under the heading 'The causation point':

> "Was the reference withheld "by reason that" Sergeant Khan had brought the race discrimination proceedings? In a strict causative sense it was. If the proceedings had not been brought the

> reference would have been given. The proceedings were a causa sine qua non. But the language used in s.2(1) is not the language of strict causation. The words "by reason that" suggest, to my mind, that it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified."

31. In **Amnesty International v Ahmed [2009] ICR 1450**, Underhill P explained at para 3

> "We turn to consider the "but for test" [...] This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed, if it were there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

32. In relation to the direct discrimination claims based on race, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was contravened, and discrimination did occur. We also considered the well-known provisions of **Igen Ltd v Wong [2005] IRLR 258** in this respect, which we do not repeat here. The recent Supreme Court case of **Efobi v Royal Mail Group Ltd [2021] UKSC 33** reiterates the above guidance. The case also gives guidance on how a Tribunal should deal with the absence of a witness and whether and adverse inference can be drawn from this.

Victimisation

33. Section 27 EqA provides for unlawful victimisation

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
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> (2) Each of the following is a protected act—
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> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

34. For causation the Tribunal considered the case of **Chief Constable of West Yorkshire and Khan [2001] UKHL 4**. The Tribunal have to look to the real reason for the act complained of and what consciously or unconsciously was the reason.

35. The Tribunal is required to go through a three-step process. Step 1: was there a protected act (or a belief that one had occurred or might occur)? Step 2: has the victim been subjected to a detriment? Step 3: was the victim subjected to a detriment because of the protected act?

Conclusion and Findings

36. In the first instance the Tribunal had to determine if the Claimant had been subject to direct discrimination by the Respondent on grounds of the Claimant's race. The Claimant identified herself as a black British woman. She is a single mother taking care of two children (a boy and a girl) of school age. Her son was a vulnerable person and at serious risk if he contracted covid due to his cancer diagnosis. She said that she was subject to direct race discrimination contrary to section 13 of the Equality Act 2010 in that she was not offered the opportunity to work from home in January 2021 when a female white teaching assistant was permitted to do so at the beginning of the third national lockdown due to the covid pandemic. She also said that the termination of her agency assignment in these circumstances amounted to less favourable treatment of her due to her race.

37. The Tribunal reminded itself that with a claim for direct race discrimination, the Claimant must show that she was treated less favourably than a real or hypothetical comparator. The less favourable treatment must be because of her race. This required the tribunal to consider the reason why the Claimant was treated less favourably: what was the Respondent's conscious or subconscious reason for the treatment? The tribunal had to consider the conscious or subconscious mental processes which led the Respondent to take a particular course of action in respect of the Claimant, and to consider whether the protected characteristic of race, played a part in the treatment. In relation to direct discrimination based on race, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that she was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, the Tribunal must hold that the provision was contravened, and discrimination did occur.

38. The Respondent sought to argue that LC was not a comparator for the purposes of section 23(1) of the EqA as this required that there be no material difference between the circumstances of the two. We accepted that LC had been employed by the school as a Teaching Assistant since September 2015 and in September 2016 this became a permanent position, and she was contracted permanently to the school. The Claimant was an agency worker only commencing service with the school in January 2020. However, broadly speaking the Claimant and LC's role as Teaching Assistants at the school were similar with the Claimant providing one to one assistance to a child with special needs and LC providing teaching assistance to a class. However, the Claimant had experience of providing teaching assistance to a class in her previous assignments and she was more qualified than LC being a level 3 Teaching Assistant. As a result, the Tribunal found that LC was an evidential comparator for the purposes of the Equality Act.

39. The Respondent sought to persuade us that the Claimant had not made out a prima facie case of less favourable treatment based on her race and that the burden of proof had not shifted to the Respondent. We did not accept this submission. The Tribunal did not accept the limited evidence produced by the Respondent that the Claimant could not undertake her duties supporting her one-to-one pupil from home remotely, as the Claimant could have continued to support the child with emotional support even though the mother of the pupil said she wanted him to be involved in remote classroom activity. The Respondent through Ms Bruce did not provide us with a satisfactory explanation of why this could not be done and, of course, we had no evidence at all from Ms Alcock in this point. Furthermore, the arrangements involved in LC working from home remotely would have been broadly similar to the Claimant working from home. We found that the Respondent did no investigation directly with the Claimant as to how she could work from home remotely and what she could offer both in terms of experience and skills working remotely prior to the decision to terminate her contract was taken by Ms Alcock on 28 January 2021. It was clear to us based on the timeline of events produced by Ms Alcock that she did not address her mind to any alternative options of remote working for the Claimant before taking the decision to end her assignment. This again surprised us as it appeared to us that the Claimant had asked a legitimate question of Ms Alcock of why LC was allowed to work from home in similar circumstances and she was not. Ms Alcock chose not to answer this question despite being given two opportunities to do so.

40. The Claimant asserted that she was the mother of a vulnerable school age boy who was suffering from cancer, and she should also have been permitted to work from home as the circumstances were broadly comparable with LC. The Respondent asserted through Ms Bruce, that it could not permit the Claimant to work from home because she could not conduct one to one teaching assistance remotely. However, it was clear to us that LC was permitted to work from home, and she was able to provide teaching assistance remotely. We could not understand how LC could undertake her teaching assistance duties remotely, but the Claimant could not. No evidence was produced to us to distinguish between the two. The Respondent suggested to us that its duties towards agency staff were somehow less than its duties it is required to provide agency staff. However, again, no evidence of this was produced to us. Even if this was true, we are of the view that with the legal protections offered to agency staff, the Respondent would have some difficulty in persuading us of such an assertion.

41. We were told by Ms Bruce that the parent of the child with special needs that the Claimant was supporting wanted the child to be involved in classroom activity remotely and that it did not need the Claimant to provide emotional assistance to the child remotely. We were not persuaded by this evidence which we thought was added very much as an

afterthought by the Respondent. We preferred to accept the evidence of the Claimant who told us that she could provide such support remotely. The Respondent also through Ms Bruce asserted that there was no other work that the Claimant could do remotely working from home. Again, we did not accept this evidence. It came from Ms Bruce who was not involved in the day-to-day activities of the Claimant. It did not come from Ms Alcock and neither was it mentioned in her time line of events. It was the Tribunals view that this explanation was arrived at after the termination of the Claimants services. Little thought was taken by the Respondent prior to the termination of the Claimants services by Ms Alcock of how the Claimant could be accommodated working from home. This was in stark contrast to LC who was allowed to work from home presumably with the necessary hard and software to do so. The Claimant had a good work record and there were no performance or disciplinary issues with her. The Tribunal was not satisfied that the explanation provided by the Respondent at the hearing was reasonable as to why she could not work from home especially given her good work record, superior qualifications and adaptable experience.

42. Reviewing the evidence presented to us as a whole, the Tribunal was satisfied that the Claimant had proved that she was less favourably treated by the Respondent when it failed to allow her to work from home from January 2021 where an evidential comparator LC was permitted to do so. There was enough evidence in this case to require the Respondent to provide a satisfactory explanation to us as to why the Claimant was not permitted to work from home in circumstances where there was a difference of race. The Respondent provided a second-hand explanation from Ms Bruce who was not the person that was actively considering the options open to the school at the time, and we were not satisfied by her explanation as to why the Claimant could not be accommodated working from home as was LC.

43. The actions of Ms Alcock in deciding to terminate the Claimant's assignment after she received the 10 pm text from the Claimant late at night at 11.03 pm without discussing her rationale with the Claimant amounted to the 'something else' that we needed to come to the conclusion that race played a part in Ms Alcock's actions in not only coming to the conclusion that the Claimant could not be accommodated working from home but also the termination of the Claimant's agency contract. We conclude that both assertions of less favourable treatment made by the Claimant were acts of race discrimination. It was clear to us that the Claimant had raised the issue of less favourable treatment due to race with Ms Alcock on two occasions on 28 January 2021 and on both occasions, Ms Alcock chose to ignore responding to her. Ms Alcock was not present to explain why she had ignored the Claimants two pertinent texts (2.30pm and 10pm). Ms Bruce's evidence to us could not explain this either. Indeed, Ms Bruce said to us that she would have responded to the questions that the Claimant asked.

44. The Tribunal then went on to consider the Claimant's claim of victimisation. The Respondent argued that the Claimant was not protected because her text of 10 pm to Ms Alcock was not a protected act under section 27 EqA because it did not mention race discrimination. We did not accept this to be the case. The Tribunal accepted the Claimant's reasonable explanation that although she believed at the time that she was being treated less favourably by the Respondent due to her race, she did not want to believe that in this day and age anyone could behave in that way. This was the reason that she had not been explicit, but she insisted that the text was self-evidently clear that she was complaining of less favourable treatment under the Equality Act, and this was due to her race. The Tribunal noted that this was the second text of the day (the first being at 2.30pm) which raised the issue of less favourable treatment of the Claimant compared

to LC and which again was not answered by the Respondent at all with any reasonable explanation for the apparent less favourable treatment. We find that Ms Alcock was very well aware that the Claimant was complaining of less favourable treatment due to her race.

45. The next matter for us was to consider was whether she suffered a detriment as a result of the protected act namely the termination of her agency assignment. The Tribunal found that the decision taken by Ms Alcock to terminate the Claimant's assignment was notified to the agency at 11.03 pm and this was not much over an hour after she received the text from the Claimant complaining of less favourable treatment under the Equality Act. Unfortunately, we were not able to ask Ms Alcock why she had acted so quickly after receiving the text to terminate the Claimant's contract especially given the fact that she knew the Claimant was coming in to work the next day with an expectation to undertake the rota that had been agreed with her less than a month before. We were told that the decision to terminate was taken because the Claimant had not come in to work on 28 January. However, Ms Alcock had arranged cover for the Claimants absence on this date by her own admission and was aware that she was coming to work on 29 January 2021. We were not able to ask Ms Alcock why she felt that the relationship had broken down irretrievably and why she felt that suitable alternative arrangements could not be made especially given the two texts that she had received on 28 January complaining of less favourable treatment of the Claimant compared to LC a white Caucasian Teaching Assistant employed at the school. We were also not able to ask her why if she was thinking of terminating the agency contract with the Claimant, she was not prepared to give the Claimant a warning that she was thinking of doing so. We were perplexed by the actions of Ms Alcock as it was clear to us that she was aware that the Claimant was a single mother looking after two children, one of whom was suffering from cancer and was clinically vulnerable. Therefore, we were satisfied that the Claimant did suffer a detriment which was the termination of her agency contract, and this was actioned by Ms Alcock. We were also not satisfied on the evidence presented to us that there was any reasonable evidence that the relationship had broken down. Although Ms Bruce sought to give answers to these questions, we did not accept her evidence as it was not direct evidence from the person that had decided to terminate the contract. Therefore, because of the proximity of the protected act and the decision to terminate (just over an hour late at night) we were satisfied that the protected act was the reason for the detriment suffered by the Claimant. We also find that Ms Alcock's complete failure to answer the question of less favourable treatment raised by the Claimant in her two texts supported our conclusion that the protected act was the reason for the detriment. In our view this was a clear act of victimisation contrary to section 27 EqA. The Claimant therefore succeeds with this claim.

46. Accordingly, the Tribunal upholds the Claimant's claims of direct discrimination and victimisation. A separate remedy hearing has been listed and directions given with regard to that hearing.

Employment Judge Hallen

Date: 11 May 2022