EMPLOYMENT TRIBUNALS

Claimant:	Ms J Haroon	
Respondent:	(1) The Governing Body of Manorcroft Primary School (2) Ann Wheeler (3) Melanie Harbor (4) Emma Bell	
Heard at:	Reading	**On: 7,8, 9,10 and11 February 2022 (and in chambers discussions on 7 April 2022)**
Before:	Employment Judge Gumbiti-Zimuto Members: Ms J Cameron and Mr A Morgan	
Appearances **For the Claimant:** **For the Respondent:**	 In person Mr P Doughty, counsel	

JUDGMENT

The claimant's complaints of unfair dismissal, discrimination on the grounds race, discrimination on the grounds of religion and belief, and unlawful deduction of wages are not well founded and are dismissed.

REASONS

1. In a claim form presented on the 29 September 2020 the claimant brought complaints of direct race discrimination, health and safety detriment and dismissal, and unlawful deduction from wages. The first respondent is the Governing Body of Manorcroft Primary School, the second respondent is Miss Ann Wheeler the Head Teacher, the third respondent is Miss Melanie Harbor the School Business Manager, and the fourth respondent is Mrs Emma Bell the Assistant Head Teacher.

2. The claimant gave evidence in support of her own case and relied on the evidence of her husband Mr Haroon Khalid. Miss Wheeler, Miss Harbor, Mrs Bell, Mrs Gillian Quiney (Chair of Governors), Mr Christopher Temmink (Governor), Mrs Lynne Hill (HR Consultant), and Mrs Una Webb (Clerk to the Governors) gave evidence in support of the respondents' cases. All the witnesses produced witness statements as their evidence in chief. The

Tribunal was also provided with a Trial Bundle of documents containing 1767 pages of documents. The claimant also produced a bundle of documents which replicated in a different order the documents provided in the Trial Bundle. Any page references in this judgment are to the pages from the Trial Bundle. From these sources we made the following finds of fact.

Findings of fact

3. The first respondent is the Governing Body of Manorcroft Primary School ("the school"). Manorcroft Primary School is a community school.

4. The claimant describes herself as an Asian Pakistani Muslim woman who wears a hijab and offered her obligatory prayers in her breaks.

5. The claimant was employed as a Learning Support Assistant (LSA), working in early years, on a term time only temporary contract, to provide maternity cover from 9 March 2020. Under the claimant's contract the school had a right of termination on notice. The claimant was interviewed and appointed to the post by Mrs Emma Bell (Assistant Head) and the school's Deputy Head Teacher.

6. Mrs Bell was the claimant's line manager and responsible for the claimant's induction. The claimant's induction involved the use of an induction checklist for the first time. The claimant states that she was referred to as a guinea pig by Mrs Bell. Although Mrs Bell does not remember doing so, she accepts that it may well have been the case that she used that phrase in reference to using the induction checklist for the first time. The claimant takes exception to this use of the phrase guinea pig; she says she believes it was "*religiously motivated and was used as an insult*".

7. During her evidence the claimant was asked if she understood what the phrase guinea pig means. She replied that Mrs Bell "*was calling me guinea pig … I was the first person put on a new contract. I find the word pig offensive. For me, calling me pig of any kind is against my religion. The word pig is offensive to me.*" It was put to the claimant that this phrase was used in reference to the fact that she was the first one to use the new induction procedure. The claimant agreed, saying, "*Yes. I was their test subject that is why they use phrase guinea pig.*" The claimant was asked if she can tell us what a guinea pig is. The claimant's response was "*I know what a guinea pig is, but I will not tell you what it is. I went through the induction process and was told it was a new process, that I was a guinea pig.*"

8. The Tribunal accept the evidence of Mrs Bell that the use of the phrase guinea pig was intended merely to signify that the school had not used the induction checklist before, and the claimant was the first person with whom it was used. The comment was not intended in any offensive sense, nor could it fairly and rationally be understood as such.

9. The claimant started work on 9 March 2020 and continued until 20 March 2020, a period of ten days, during which time the claimant was still undergoing her induction period at the school.

10. As a result of covid-19 on 20 March 2020, on the direction of the Department for Education (DfE), the school was closed indefinitely to most pupils. This is commonly referred to as the lock down.

11. On 23 March 2020, a whole staff meeting was held to discuss the school's response to the lock down. The claimant did not attend.

12. On 24 March 2020, the school opened for children of key workers and vulnerable children only. An average of 8 pupils attended school daily until re-opening started on 2 June 2020. There was an initial rota set up including most staff who had not indicated they needed to shield. The claimant requested not to be added to the rota as her husband had underlying health issues that made him particularly vulnerable to covid-19. As the claimant was not on the rota, she was not sent copies of the rota and related email correspondence as it was not relevant to her. All staff during this period whether in school or not were on full pay, including the claimant.

13. The claimant kept in contact with the school mainly via Mrs Bell and by email. The claimant informed Mrs Bell in one of her emails (on 17 April 2020) that she was willing to be placed on the childcare rota. The claimant was included in rota from Week 5 beginning 1 June 2020. The rota, which was for cover only whilst the school was providing emergency childcare provision, was overtaken by events when on 11 May 2020 the school received DfE guidance advising that it needed to plan for re-opening on 1 June 2020.

14. The claimant was included in the school re-opening plan, as the claimant had expressed a willingness to be placed on the rota it was believed that the claimant was going to return to school on re-opening. INSET[1] sessions were arranged for the teachers and the LSA's on separate days. The LSA's session was arranged to take place on the 1 June 2020. The purpose of the INSET day was to talk through the school re-opening plan. The school was to re-open in a staged manner starting with reception, key workers children and vulnerable children on 2 June, with further years coming back on 8 June and 15 June.

15. On Friday 29 May 2020, in the evening, the claimant emailed Mrs Bell asking to talk. Mrs Bell read the email late on Sunday evening and replied asking the claimant to call her on Monday morning.

16. On Monday 1 June 2020 the clamant spoke with Mrs Bell she advised her she would not be coming into work on 2 June 2020 and could not work with children going forward. The claimant explained her husband's vulnerabilities

[1] In service training.

and her anxiety about passing the coronavirus on to him if she were to contract coronavirus. The claimant did not attend the INSET day.

17. Mrs Bell informed the headteacher, Mrs Ann Wheeler, that the claimant would not be coming to school. The headteacher sent an email to the claimant outlining the school's position and informing her that the school business manager, Mrs Melanie Harbor, would be in contact with her.

18. Later that day Miss Harbor contacted the claimant to discuss the school re-opening plan. In this telephone conversation, the claimant complains that Miss Harbor forced her to agree to be put on unpaid leave. We did not find that this was the case.

19. During the conversation Miss Harbor explained the protective measures that had been put in place in the school. The claimant was clear that she was not returning to work in the current circumstances. The claimant explained that her husband was vulnerable due to underlying health conditions, that he was clinically vulnerable (and not clinically extremely vulnerable). The claimant confirmed that she herself was neither clinically vulnerable nor extremely clinically vulnerable.

20. The claimant states that in this conversation, on 1 June 2020, she asked about her being reassessed, a risk assessment and the available work options, including work from home or work in isolation. The claimant says she was refused everything and told her only option was to come back to work in the classroom without socially distancing or to be put on unpaid leave. This version of events is disputed by Miss Harbor.

21. We accept the evidence given by Miss Harbor that it was explained to the claimant that there may be some short-term options for working outside the classroom, but it was the claimant that did not want to explore them. The claimant was told that the school would be able to offer her a period of unpaid leave, which the claimant agreed to, and it was further agreed that they would discuss matters again in 10 days. The claimant did not object or indicate she was unhappy with this position.

22. The options available to the claimant were set out in an email from Miss Harbor to the claimant (p868). The claimant asked that she be given a letter confirming that she was being placed on unpaid leave. Miss Harbor did not provide this to the claimant because she was extremely busy, she did not provide such a letter for any member of staff.

23. Clinically vulnerable member of staff HB was offered a week of work out of classroom assisting with the preparation of work for Education and Healthcare Plans, after which she had to return to working in the classroom.

24. DM was a member of staff living with someone who was clinically extremely vulnerable. On 1 June 2020 DM asked for work outside the classroom. At that time the admin team were short staffed, and it was agreed DM could work 2 mornings a week in Admin. When the admin worker returned to work

DM was offered additional work in Forest School teaching, this required specialist knowledge of the Forest School environment, equipment and pedagogical methodology which DM had but the claimant did not. DM was an experienced Forest School assistant and a trained secondary school teacher. DM was the only LSA who could take on this role.

25. SM was a member of staff who was classed as clinically vulnerable. SM was offered a short-term project, after which she was placed on unpaid leave. Unlike the claimant who sent her email to the school on 29 May (which was not seen until 31 May), SM had contacted the school during the half term (between 25-29 May) and so a search for alternative work was possible before 1 June. The offer to the claimant of work outside the classroom for a short-term was comparable to the facility given to SM.

26. The question whether the claimant was to remain on unpaid leave was to be reviewed after 10 days. The claimant and Miss Harbor spoke again on the 10 June 2020.

27. We accept the contested evidence given by Miss Harbor that on 10 June 2020 she again explained to the claimant that the school might be able to find the claimant some work outside the classroom for a short period but she would need to go back to the classroom when pupil numbers increased. The claimant still felt it was unsafe to return to work.

28. During this conversation Miss Harbor asked the claimant whether she had read the risk assessment on “PARAGO”. It was disclosed to Miss Harbor that the claimant did not have access to PARAGO. PARAGO is the school’s online document management system. The staff have accounts on PARAGO. Documents are available on PARAGO, such as school policies and some communications to staff are disseminated using PARAGO. A PARAGO account should be set up for a member of staff during the induction process. Miss Harbor is responsible for setting up the PARAGO account. Miss Harbor explains that in the claimant’s case the induction process was interrupted due to the school closure in response to covid-19 pandemic and so her induction process was not completed. This was an oversight caused by the workload created by the lock down and the re-opening of school. Miss Harbor on realising that the claimant did not have a PARAGO account set one up for her.

29. The claimant and Miss Harbor spoke on 11 June 2020, they discussed the school risk assessment and the claimant asked about a personal risk assessment. Miss Harbor agreed to do a personal risk assessment for the claimant.

30. We accept the contested evidence given by Miss Harbor that she again discussed the possibility of a short-term role outside the classroom and the claimant did not want to pursue this. The alternative to this option was a further period of unpaid leave. Following this conversation, the claimant wrote to Miss Harbor in the following terms

> *As discussed today I agree to extend my unpaid leave till the end of June. I don't feel safe due to all my circumstances explained earlier and the DfE and the government haven't provided any conclusive safe guards to protect the BAME even after the report on excessive deaths or provided any reassurance that it is safe in school without social distancing while telling MP's that they can self-diagnose themselves as Clinically vulnerable and can stay home. My fears are based on health and safety concerns and I don't agree to the suggestion of HR that I am making myself unavailable to work.*

31. The claimant notified Miss Harbor of the "BAME" Report[2], this was a government report which referred to the vulnerability of certain racial groups in respect of covid. The claimant interpreted the report as stating that she would now be considered as clinically vulnerable and this should be considered as part of the school risk assessment.

32. The school received guidance from various sources, the DfE, the local authority and Strictly Education. The advice that the school was given on 14 June 2020 revised the template for a personal risk assessment that included being BAME as a covid-19 risk factor. On the school's initial re-opening plan, the claimant was not considered clinically vulnerable. The plan identified those staff who were clinically vulnerable or extremely clinically vulnerable. When the revised guidance was issued the claimant was still not shown as clinically vulnerable on the revised school re-opening plan.

33. On 15 June 2020 the claimant questioned why she was placed in the "other category" used to report on pupil and staff numbers to the DfE. "Other" referred to people off school for reasons related to covid who were not clinically vulnerable or extremely clinically vulnerable. The claimant again asked for a personal risk assessment and a letter confirming that she was placed on unpaid leave.

34. On 17 June 2020 Miss Harbor sent the claimant a personal risk assessment. Miss Harbor completed sections of the risk assessment, without speaking to the claimant, by copying details from the claimant's recent emails into relevant sections of the risk assessment.

35. The claimant and Miss Harbor have very different perceptions of what took place. Miss Harbor says she expected the claimant to look at the risk assessment and inform her of the changes needed. The claimant says she was sent the risk assessment with her sections already completed and was told that she needed to read the highlighted section and let Miss Harbor know if she was happy with it. The claimant says she was not allowed to fill in her section of the form and false information was deliberately put in other sections. Miss Harbor denies at any time refusing to make any changes to

[2] Report by Public Health England on the effect of Covid-19 on BAME communities

the risk assessment. The documents do not support the claimant's perception on this point. She got it wrong. The email from Miss Harbor sending the risk assessment on the 17 June 2020 read as follows:

> *Sorry for the delay in sending the risk assessment to you but I was waiting for the latest version before sending [it] to you. I have completed most parts of it I just need you to read the highlighted section which are your return-to-work options and let me know if you are happy to return on the basis set out.*

And then on the 19 June 2020

> *Just wanted to check you had received the risk assessment? Please can you return with your comments as soon as possible so we can plan for staffing for the last few weeks of term.*

36. When the claimant and Miss Harbor spoke on 23 June 2020 the claimant had not yet read the risk assessment.

37. They spoke again on 24 June when the claimant gave her response to the risk assessment. The claimant said the information in the risk assessment was "*wrong and never discussed me".* Miss Harbor says she told the claimant that she could edit the risk assessment as she saw fit, but the risk assessment score would still show the claimant was a medium low risk. We accept Miss Harbor's evidence. The claimant although maintaining her headline point that she was not permitted to change the risk assessment accepts that a discussion took place with Miss Harbor where she said changes to the risk assessment would not change the level of risk found in respect of the claimant. This does not chime with Miss Harbor refusing to change the risk assessment. Rather it implicitly recognizes the claimant's ability to vary the content of the risk assessment. It is in our view more likely than not that the conversation as recalled by Miss Harbor is correct.

38. The claimant and Miss Harbor discussed the question whether the claimant could remain on unpaid leave until the end of term. It was explained to the claimant the effect of this would be that the clamant would remain unpaid until 31 August 2020, the end of the academic year. Miss Harbor explained to the claimant that there were now no roles outside the classroom as the number of pupils required all LSAs to be working in the classroom. The only options now available to the claimant were a return to her original role or unpaid leave. The claimant confirmed that she would like to return to work. The claimant was asked to attend a meeting with the headteacher on her return to work.

39. The school's Complaint Procedure was available to all staff on the website and within the internal PARAGO portal system. The procedure states that all staff grievances need to follow the internal procedures within the 'Grievance Policy & Procedures' document. Where the grievance is about the Headteacher, then it should be put it in writing to the Chair of Governors

delivered to her via the school office, in an envelope marked 'Chair of Governors, Private & Confidential. On 24 June 2020 the claimant requested a copy of the grievance procedure "*to make a complaint*". On 25 June, the headteacher sent the claimant a copy of the grievance policy and procedures. The claimant sent an email to Mrs Una Webb (the clerk to the governors), asking where she can send her written complaint, whether it can be sent by "*email or post or hand delivered*". The claimant asked to be provided with the email address of the chair of governors. Mrs Quiney (the chair of governors) was not comfortable with this and did not accede to the request. Mrs Quiney was not aware that the claimant was self-isolating at the time. There was no significant delay in providing the claimant with the grievance procedure which was available on the school's website (p960). The Tribunal do not consider that the claimant's criticisms of Ms Gill Quiney and Mrs Una Webb have any justification, they were not attempting to prevent or delay the claimant in making her complaint against the headteacher. The procedure for making a complaint against the headteacher was that it should be made in writing to the chair of governors through the school office.

40. The claimant did not attend school on 29 June 2020 she was awaiting the results of a covid test for her husband. The school absence reporting procedure requires employees to report absence every day until they return to work.

41. The claimant had been appointed on a temporary contract to support reception year. By 20 June 2020 the school considered that it could meet the needs of children with four permanent members of staff employed as LSAs. On 26 June 2020 the school's senior leadership team met to review the budget in light of financial losses due to Covid-19. A decision was made to terminate the claimant's temporary contract.

42. The school had two LSA resignations and advertised for LSAs both for KS2, one working 1:1 with a child with specific Education Care and Health Plan needs. Following interviews on 24 June 2020, two new LSAs were appointed to start in September 2020. These LSAs were to provide support to Key Stage 2. In the time that the claimant had been employed she had not demonstrated the skills to work with the older year groups.

43. On 30 June 2020 there was a meeting of governors to agree staffing for September 2020. It was agreed that the claimant's temporary maternity cover position presented a potential financial saving, and to make savings across Early Years and KS1 a decision was made to terminate the claimant's temporary contract. On 30 June 2020, the claimant was notified of the decision to give her notice with effect from 31 August 2020. She was informed of her right to appeal the decision. The claimant was paid for her notice period.

44. The claimant returned to work on the 1 July 2020 and had a return to work meeting. Present at the meeting with the claimant were Miss Wheeler and Mrs Bell. At that meeting the school reopening plan, the whole school risk

assessment, a personal risk assessment and health and safety addendum were discussed. During the meeting the claimant was asked if she wanted to add anything or had any concerns or questions. The claimant did not comment on this or express concerns. The claimant did not agree or disagree with what had been written on the risk assessment form. The claimant did not comment on this or express concerns. The claimant was able to take away a copy of the risk assessment to read it at her leisure. The claimant did not mention her husband's health in the meeting. A minute of the meeting was made, and a copy of the typed minutes were given to the claimant on 2 July 2020. The claimant was asked to confirm the minutes, the claimant sent some minor amendments to the minutes which were added by Mrs Bell. The claimant's amendments were reflected in the final version (p1029-1030).

45. The claimant's door pass was not working on the claimant's return to work on 1 July 2020. There had been issues with some door passes for a number of members of staff. Miss Harbor restored the passes of any staff having problems. No door passes were deactivated by Miss Harbor at this time. Miss Harbor circulated an email telling staff who experienced problems to come into the office so she could reset their passes. The claimant did not ask to have her pass reset.

46. On 1 July 2020 the claimant returned to work until the end of term in the same socially distanced bubble. There was email communication between the claimant and members of the school leadership team (SLT). Some of this correspondence caused concern among the SLT because of its aggressive tone.

47. On 12 July 2020, the claimant appealed the decision to terminate her employment. The content of the appeal came as a shock to the headteacher. Miss Wheeler and the claimant had spoken on two occasions, one of those was the claimant's first day when the headteacher welcomed the claimant, in the time that the claimant had been employed at the school, the other was on the claimant's return to work. On 14 July 2020, the formal written grievance against Miss Wheeler and Miss Harbor was sent to the school's chair of governors. The appeal and grievance were almost identical.

48. The school's Complaint Procedure was available to all staff on the school website and within the internal PARAGO portal system. The procedure states that all staff grievances need to follow the internal procedures within the 'Grievance Policy & Procedures' document. Where the grievance is about the Headteacher, then it may be put it in writing to the Chair of Governors delivered to her via the school office, in an envelope marked 'Chair of Governors, Private & Confidential.

49. The claimant asked to be provided with the email address of the chair of governors. Mrs Quiney was not comfortable with this and did not accede to the request. Mrs Quiney was not aware that the claimant was self-isolating at the time.

50. The claimant was invited to attend an appeal hearing on 21 July 2020 at 10am. The claimant was asked to submit details of witnesses and supporting documents by 16 July 2020.

51. On 16 July 2020 the claimant requested an extension of time to present evidence and also requested an adjournment of the meeting set for 21 July 2020.

52. Mrs Quiney wrote to the claimant on 17 July 2020, saying that all supporting evidence must be emailed to her or delivered to the school office by 8.00 am on Monday 20 July, but that the hearing will take place on Tuesday 21 July at 1.00 pm. The claimant was also told the hearing would be a multi-purpose hearing to deal with both the grievance and the appeal against dismissal. The claimant sent an email to Mrs Quiney on 19 July stating that she would not be attending and requesting the investigation into her grievance is done before the appeal. The claimant said that although her evidence is ready, she will not provide it to a biased panel.

53. The panel to hear the claimant's grievance and appeal comprised of Mrs Quiney and Mr Christopher Temmink, a governor, who had not had previous contact with the claimant. Ms Lynn Hill, HR consultant, also attended the hearing to provide HR advice and an independent clerk attended to take notes.

54. The claimant was in school on 21 July 2022, she did not attend the multi-purpose hearing or send representation on her behalf. The multi-purpose meeting went ahead on 21 July 2020 at 1pm to consider the claimant's appeal against dismissal and her grievance. The evidence that had been submitted was considered, this included the claimant's grounds of appeal. The claimant did not submit any other evidence. The headteacher presented her case and answered questions from the panel. The panel also called Miss Harbor to answer questions regarding the allegations against her. Both Miss Harbor and Miss Wheeler denied all the allegations contained in the claimant's grievance and appeal.

55. The panel decided to uphold the decision to terminate the claimant's temporary contract. The panel found that in view of the financial position of the school early termination of the claimant's temporary contract was a reasonable thing to do in the circumstances. The early termination of the claimant's contract meant the school was able to save money.

56. The panel decided that it could not properly investigate the claimant's grievance without evidence from the claimant; the claimant had not provided times, dates, instances or anything the panel could tangibly investigate. The panel decided to give the claimant more time to present evidence in support of her grievance.

57. The claimant was sent an outcome letter by email on the 27 July and by post on the 28 July 2020.

58. In the period from the 3 July until the end of term Mrs Bell was very busy in her role as Assistant Head teacher. From time to time she had contact with the claimant, face to face communication between the claimant and Mrs Bell remained cordial despite the tone of some of the claimant's email correspondence. Mrs Bell did not watch the claimant *"the whole day every day to see if [she] talk to other staff".*

59. 22 July 2020 was the end of term and the claimant's last working day. The claimant's gate pass was deactivated on this day. There was no reason for the claimant to go in to school after this date.

60. The claimant says that on the 23 July 2020 the claimant received a letter from Mr Temmink. The claimant says that this letter showed Mr Temmink's bias, and that the letter was intending to put pressure on the claimant because she made a subject access request. We were not provided with a letter of that date, there was however an email dated 22 July (p1361). In this email Mr Temmink states to the claimant that her recent emails had become increasingly alarming in their content *"especially in their frequency and tone"* and that the claimant's colleagues "*are starting to feel harassed and intimidated"* and that the claimant had "*accidentally started to do the very thing you have raised a grievance about.*"

Law

61. Section 13(1) of the Equality Act 2010 defines direct discrimination as follows: *"(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."* It requires a comparison between the claimant and either an actual or a hypothetical comparator. A comparator, be it actual or hypothetical, should be the same in all material respects other than the protected characteristic as the complainat.

62. There is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved.

63. We are also considering a claim in respect of detriment and dismissal related to raising health and safety. Section 44 (1) of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that, being an employee at a place where there was no health and safety representative or safety committee, she brought to her employer's attention, by reasonable means, circumstances connected with

her work which she reasonably believed were harmful or potentially harmful to health or safety.

64. Section 100(1) ERA provides an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that being an employee at a place where there was health and safety representative or safety committee, she brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

Parties' submissions

65. The claimant's closing submissions were brief. Some of the points that the claimant made were not related to the issues that we have to decide. The claimant was in her submissions essentially asking us to accept her evidence and reject the evidence given for the school. The claimant says she was required to provide evidence that she was clinically vulnerable when the school knew it was not her but her husband who was clinically vulnerable. The claimant asked us to conclude that she requested work and that she made multiple requests for a risk assessment but Miss Harbor did not do a risk assessment because she knew if the school did a risk assessment they would have to provide her with work outside the classroom like others. The school provided socially distanced work for white people but not for the claimant. The claimant stated that the school did not provide her socially distanced work. The classroom work was not socially distanced. The claimant contends that she and her family were treated as third class citizens when they had a real risk of death. The circumstances were not normal there was a real fear of death. When the school look to recruit people to work in school they want empathy but they do not have it themselves in their dealing with the claimant.

66. *The respondent presented written submissions which we have also taken into account.*

Conclusions

67. The Tribunal recognise that the period during which these events occurred was unprecedented. There was uncertainty and much fear. The management of the most banal everyday events could present challenges for many people. In reaching our decision we keep that in mind.

Direct discrimination because of race and/or religion and belief (Equality Act 2010 section 13)

68. On 29 May 2020, did the second respondent send a Covid-19 re-opening plan to all staff except the claimant? The claimant was invited to attend an INSET day on 1 June 2020. The claimant was not sent a copy of the re-opening plan. No other LSA attending the INSET day was sent a copy of the re-opening plan. The re-opening plan was provided to staff at the INSET

day. There were two INSET days one for the teaching staff and one for the LSAs.

69. The claimant spoke with Mrs Bell on the morning of the 1 June 2020 and informed her that she would not be attending the inset day. The claimant explained that because her husband had been advised *"to shield due to the increased risk of death by covid because of his Asian background and multiple underlying health conditions"* she wanted to shield as well because her accommodation made it impossible for her and her family to self-isolate within the property. The claimant did not receive a copy of the re-opening plan because she was not one of the staff who attended the INSET day. Further the claimant had to be removed from the rota of staff working from the 2 June 2020. It was not until the 12 June that the claimant received a copy of the re-opening plan when it was sent to the claimant in error. The letter was originally not sent to the claimant because it was not relevant to her on 1 June because the claimant was not returning to work at that time and had not attended the INSET day where the rota was distributed.

70. On 1 June 2020, did Miss Wheeler email the claimant refusing to accept the claimant's doctors letter and told her that she would be put on unpaid leave if she refused to come back to work in class? In her email of 1 June 2020 Miss Wheeler wrote to claimant:

> "Emma spoke to me this morning and passed on the news that you wouldn't be starting back to work today, joining the rest of the staff team. I have to say that I'm a little disappointed that you haven't let us know before now. We've been planning intensively for the last 3 weeks and have allocated all staff to new teaching/support positions, including yourself. Now we will need to re-draw the plan at what feels like the 11th hour.
>
> The DfE guidance is very clear, if you are in the clinically extremely vulnerable group, then you must stay at home - very few people are actually in this category and you will need a copy of the official shielding letter from the NHS.
>
> The next category is clinically vulnerable - we currently have 4 people in this group. The advice for this group is to work from home, if possible, but if you can't, then work on site, socially distanced. We are asking those 4 members of staff to come to work, because as you'll appreciate, we cannot do our jobs from home.
>
> Please can you let me know which of the above 2 categories you fall into? If it is the first one, then we will need a copy of your official NHS letter, not a local GP letter.

> Unfortunately if you're not in either of the 2 above categories, but are choosing to shield for personal reasons, according to HR you are making yourself 'not available for work'.
>
> Therefore, we would need to have a discussion as you will be put on period of unpaid leave."

71. The claimant was told what the school's position was. This made reference to the need for the claimant to produce an NHS shielding letter, if it applied to her, and made it clear that a local GP letter was not sufficient. The claimant did not have a shielding letter and did not produce or offer a letter from her GP at this time. The claimant was told clearly that if she was not in either of the 2 categories mentioned, "*but are choosing to shield for personal reasons"* she was *"according to HR ... making yourself 'not available for work'".* This would result in a period of unpaid leave. There is no evidence that this was unique to the claimant, it applied to all staff in the same position as the claimant.

72. On 1 June 2020, did Miss Harbor call and email the claimant, force her to agree to be put on unpaid leave, refuse to provide other options such as socially distanced work, work from home, work in isolation or furlough and refused to carry out a personal risk assessment for the claimant? Miss Harbor spoke to the claimant on 1 June, the claimant was unwilling to come into work, they discussed the DfE Guidance as it was understood by Miss Harbor and it was ascertained by Miss Harbor that the claimant was not clinically vulnerable, but her husband was. It was the claimant who refused to discuss the options available for working outside the classroom. Miss Harbor explained that she could offer the claimant a period of unpaid leave and to discuss the matter again in 10 days, the claimant agreed to this. Mrs Harbour did not force the claimant to agree to unpaid leave or refuse any other available options. Miss Harbor did not refuse to carry out a personal risk assessment; at that stage on a school wide risk assessment had been carried out. A risk assessment at that stage for the claimant was not critical as she was not willing to return to work. There was work for the claimant to do in school if she was willing to undertake it. Furlough is not applicable where an employer has work available for the employee to carry out and the reason it is not carried out is because the employee is unwilling to undertake it. In any event among public sector employees furlough was not available.

73. Did the respondent fail to provide a letter saying that the claimant had been put on unpaid leave? The claimant asked for a letter confirming that she was placed on unpaid leave. Such a letter was not provided by Miss Harbor. Miss Harbor did not provide a such letter to anyone. The reason she gave for this was because she was very busy. There was no evidence that suggested that the claimant's race or religion was a factor.

74. On 1 June 2020, was the claimant's school pass was deactivated by Miss Wheeler or Mis Harbor? The evidence given is that Miss Harbor had

reports of a number of staff who had problems with their pass. She did not deactivate the claimant's school pass. Miss Wheeler played no part in respect of the activation or deactivation of the pass.

75. After 2 June 2020 (the date of a report by Public Health England on the effect of Covid-19 on BAME communities) the respondent failed to carry out a re-assessment of the claimant's personal circumstances and failed to provide other options such as socially distanced work, work from home or work in isolation? The claimant contends that after the BAME report she was classed as clinically vulnerable but the respondent, Miss Harbor, refused to carry out a re-assessment of the claimant's personal circumstances. The school's position was that a personal risk assessment was only necessary for those with specific vulnerabilities, and those who were clinically vulnerable were sufficiently covered by the school risk assessment.

76. When the advice that the school was receiving was changed, the school carried out a personal risk assessment of the claimant. There was a risk assessment on 17 June 2020 that took into account the claimant's revised risk rating after the BAME report. The claimant was sent a risk assessment which was completed by Miss Harbor the claimant had to be chased by Miss Harbor to respond to the risk assessment (p937). The claimant complained in her evidence that the respondent did not take into account her husband's circumstances. The school's guidance did not take into account the husband because he is not employed at the school.

77. The claimant says that the respondent did not offer her socially distanced work. There is a difference of understanding of the definition of socially distance work in the context of the school. The claimant appeared to take into account the children in her definition of socially distanced work, something that she recognised as impossible to achieve. The school however considered work socially distanced where the staff worked in socially distanced way to each other. According to the school's definition of social distance work, all the work at the school was socially distanced.

78. There was no work in isolation that was available for the claimant to do and it was not possible for the claimant to do the work of a LSA from home, such work did not exist.

79. On 8 June 2020, did the respondent cancel the claimant's 3-month review? The claimant had been at work a total of 10 days at the point of the 3-month review should have taken place. The claimant in answer to questions admitted that she had not done any work and there was nothing to review.

80. Did the respondent fail to provide the claimant with a copy of the whole school risk assessment until 10 June 2020? The claimant was not provided with the whole school risk assessment until 10 June 2020. The risk assessment was put on PARAGO when the claimant did not have access to PARAGO. When this was discovered, it was immediately rectified and

the claimant given access to PARAGO. The explanation given by Miss Harbor for the failure to provide the claimant with a PARAGO account was that because the claimant's induction was interrupted by the closure of the school due to covid-19. The Tribunal accept this as the explanation for the failure to provide the claimant with access to PARAGO and also that it was not until the claimant raised this with Miss Harbor that it was realised that the claimant did not have access to PARAGO.

81. Did the respondent force the claimant to accept unpaid leave from 11 June 2020 again until 30 June 2020? The claimant was not forced to accept unpaid leave: she was offered the opportunity to return to work in what the school considered a socially distanced manner. The claimant did not interpret socially distanced work in the same way as the school. The claimant considered work to be socially distanced to include maintaining social distance from the students. The school had at various times limited scope to offer work that fitted with the claimant's definition of socially distanced work. The school did make such an offer to the claimant, but the claimant declined to discuss it further on the 10 June 2020.

82. On 12 June 2020 did the respondent send to the claimant the third version of the school re-opening plan (she had not received the earlier two versions) and the plan failed to class the claimant as clinically vulnerable? The claimant was sent the school re-opening plan, the plan did not refer to the claimant as clinically vulnerable. At the stage that the school re-opening plan was sent to the claimant the guidance to the school did not indicate that the claimant was to be treated as clinically vulnerable.

83. On 17 June 2020 did Mel Harbor send the claimant a personal risk assessment with the claimant's concerns section already filled in and the claimant was not allowed to fill in her concerns section? On 17 June 2020 Miss Harbor sent the claimant a personal risk assessment. Miss Harbor had completed sections of the risk assessment without speaking to the claimant. Miss Harbor had obtained the information included in the risk assessment section to be completed by the claimant with details taken from the claimant's recent emails. The risk assessment took into account the fact that the claimant's risk rating as revised by the BAME report. Miss Harbor had to chase the claimant to get a response from her to the risk assessment (p937). It is correct that the respondent did not take into account the claimant's husband's circumstances. The claimant had been asked by Miss Harbor *"to read the highlighted section which are your return-to-work options and let me know if you are happy to return on the basis set out."* Miss Harbor was chasing the claimant about the risk assessment on 19 June and then when Miss Harbor and the claimant spoke on 23 June the claimant had not read the risk assessment. They spoke again on 24 June when the claimant said the information in the risk assessment was "*wrong and never discussed me".* The claimant was told that she could edit the risk assessment as she saw fit, but the risk assessment score would still show the claimant was a medium low risk. The claimant did not make any suggestions of changes to the risk assessment.

84. During the period from 24 June 2020 to 29 June 2020 did Ann Wheeler delay in providing the claimant with a copy of the grievance procedure? Did Una Webb refuse to provide contact details for the chair of governors for the claimant to make a grievance? Did Gill Quiney refuse to allow the claimant to make a grievance by email? The claimant got the grievance procedure on 25 June, she had first requested it on 24 June and the procedure was available on the school's website. There was no significant delay in providing the claimant with a copy of the grievance procedure. The claimant sent an email to the Mrs Webb, the clerk to governors, asking where she can send her written complaint, she asked whether it can be sent by "*email or post or hand delivered*". The procedure for making a complaint against the headteacher was that it should be made in writing to the chair of governors through the school office. Mrs Webb was not attempting to prevent or delay the claimant in making her complaint against the headteacher. The claimant had asked Ms Quiney (the chair of governors) for her address so she could send her the grievance, Ms Quiney was not comfortable about giving her address told the claimant it could be left at the school office. Ms Quiney did not know that the claimant was self-isolating at home and believed that the claimant was in school. Ms Quiney gave evidence that had she known that the claimant was self-isolating at home she would have agreed that the claimant could send her grievance by email: we accept that evidence.

85. On 29 June 2020, the claimant was told by email by Mel Harbor and by telephone by Ann Wheeler that she had failed to report absence, even though the claimant had been told by Ann Wheeler on 26 June 2020 to isolate until the claimant's husband received the results of his covid test. Ann Wheeler told the claimant to 'watch her tone'. The school absence procedure requires the teacher to report their absences from work every day. The claimant was self-isolating at home on the 29 June awaiting the results of covid tests for her and other family members. On Friday 26 June the claimant had informed the headteacher that she was awaiting covid test results. The school expected the claimant in school on Monday 29 June. When the claimant did not attend school on Monday 29 June the claimant was contacted by Miss Harbor who told the claimant she had been expected at school that day. There followed a tetchy email exchange between the claimant and Miss Harbor in which the claimant was told that she was required to report her absence daily. The aggressive and confrontational emails led Miss Wheeler to tell the claimant to watch her tone. The headteacher wrote to the claimant: "*It is professional courtesy to communicate with us daily re: any staff absence. This would have been explained to you at induction. Please be mindful of the tone of your emails going forward."*

86. On 30 June 2020 the respondent gave the claimant notice of dismissal on 31 August 2020 even though at the same time there was a live advert for LSA vacancies online on 22 June 2020 and the respondent held interviews for the posts on 2 July 2020. The respondent gives the explanation for the claimant's dismissal as financial reasons. The school at about that time had put out a vacancy for an LSA. The role was for a higher grade role that the

claimant did not meet. We accept the school's evidence about the timing and reasons for the claimant being given notice.

87. On 1 July 2020 at a meeting Ann Wheeler provided the claimant with a personal risk assessment with false details and refused to allow the claimant to fill in her concerns section. The information in the risk assessment, as described above, was gleaned from the claimant's emails setting out what the respondent believed to be an accurate representation of the claimant's position. The respondent was willing to allow the claimant to amend the content of the sections she was required to give input into. The claimant had not taken up the opportunity to do so. The respondent did not refuse to allow the claimant to fill in her concerns, she could have done so but she did not do so.

88. Did the respondent provide the claimant with inaccurate minutes of the meeting on 1 July 2020 and refused to make corrections requested by the claimant? The claimant was not refused the opportunity to make corrections or the minutes of the meeting. The respondent made it clear that it was happy to make the corrections requested by the claimant.

89. On 7 and 14 July 2020 Gill Quiney refused to hear the claimant's appeal against dismissal and grievance together but then changed her mind on 17 July 2020. There was no detriment involved to the claimant by this. Whether to hear a grievance and appeal (or some other issue) is not an uncommon HR procedural problem. The answer might be to conduct them separately or in another case to consider them together. Mrs Quiney was receiving advice from Mrs Hill on correct procedures to follow. Mrs Quiney initially believed that the claimant's grievance and her appeal against dismissal were to be dealt with separately. Mrs Quiney however observed that the claimant was dealing with both her dismissal appeal and her grievance together. The decision was made to combine the issues and hold what was referred to as multi-purpose hearing. By the 17 July the claimant was asking for an independent investigation of her grievance, the claimant did not consider that the respondent could deal with her grievance fairly.

90. On 10 July 2020 when the claimant requested additional time to appeal the dismissal decision, did Ann Wheeler or Mel Harbor delete her email to sabotage her appeal. We were unable to find any evidence to support the contention that either Miss Wheeler or Miss Harbor deleted any email in an attempt to sabotage the claimant's appeal. The claimant was given additional time to set out her appeal against dismissal.

91. On 13 July 2020 the claimant was excluded from an all staff email about transition days and roles for the next term and was not included in the list of staff to be involved in transition days or in the list of roles for next term. The transition days were for students to spend time with their teachers in the following school year. The claimant was not going to involved in teaching any group in the following school year. The transition day was irrelevant to the claimant because she would not be a teacher in school the following year. There is no detriment to the claimant in this regard.

92. Gill Quiney and Una Webb failed to acknowledge the claimant's grievance which she submitted by email on 14 July 2020. It is clear that there was no formal acknowledgement of the claimant's grievance. It was clear to the claimant that the respondent had put in place a process of dealing with her appeal, while the claimant might have wanted an independent investigation she could have been in no doubt that the respondent was putting in place a means by which to deal with her grievance. There is no detriment to the claimant. The grievance meeting was held and the claimant had the opportunity to provide her evidence relating to the grievance, she chose not to take it up because she did not like the fact that the respondent was dealing with her grievance and had not outsourced it to an outside organisation. The role of a school governor is to provide support and also to challenge the school's leadership team, to act as critical friend, with the purpose of driving school improvement. The role of the governor is strategic, it is not the role of the governor to be involved in the day to day running of the school. There is no detriment in school Governors being involved in appeal against termination or in dealing with the grievance.

93. Did Gill Quiney appoint Ann Wheeler as her representative at the appeal hearing? Did Gill Quiney appoint a biased panel to hear the claimant's appeal against dismissal on 21 July 2020? The claimant has misunderstood the role of Miss Wheeler at the appeal. Miss Wheeler was at the appeal to defend the operational decision of terminating the claimant's employment. The panel to hear the claimant's appeal was not biased, Mr Temmink was an independent governor who approached his role considering the claimant's appeal fairly.

94. The panel had no involvement with issues raised in the grievance or the appeal before being required to consider them. We had the opportunity of hearing the evidence of Mr Temmink and Mrs Quiney defending their actions in considering the appeal and grievance. They came over as well balanced and measured in their manner before us. There is no evidence from which we consider that there was a manifestation of something that might be considered as showing bias. The approach of the panel to the claimant's grievance was to say that it remained open to enable the claimant to introduce further evidence after the multi-purpose hearing which she chose not to attend. The panel could have proceeded to dismiss her grievance because of a lack of evidence to support it, instead the panel took the decision to leave it open to the claimant to have the opportunity to present evidence in support of her grievance.

95. Did the governors, before the hearing of the claimant's appeal against dismissal, help Ann Wheeler to prepare her case and told her what to submit, and minutes of the meeting on 21 July 2020 were tampered with, both before and after the meeting? This did not occur.

96. On 21 July 2020 Gill Quiney sent an email to the claimant despite the claimant telling her not to contact her anymore. There is no detriment to the claimant in this. Acting on the advice of Ms Hill, Mrs Quiney sent the

claimant the email because it was necessary to convey important information to her.

97. On 21 July 2020 the respondent failed to uphold the claimant's appeal against dismissal, was the appeal decision made by Lynne Hill, the respondent's HR consultant? The decision of the panel to dismiss the claimant's appeal has been explained in the respondent's evidence. The claimant did not attend the appeal. There is a cogent and coherent case in support of the decision to dismiss the appeal. The decision was not made by Mrs Hill.

98. Did the respondent fail to provide the claimant with the school's bundle for the hearing? The respondent says the claimant's union representative was provided with a copy of the bundle. The document in the bundle at p1321 does not make that clear. We note that the claimant refused to provide her documents to respondent for the purpose of the appeal (see paragraph 68 of the claimant's witness statement where she states that she "refused to provide my evidence to the panel as I believe the only purpose of that hearing was to take my evidence and hand it over to each teacher so that she can fabricate more lies"). The claimant did not attend the hearing in any event. Taking all these factors into account if the claimant did not receive a copy of the bundle, and it is not clear that she did not, there was no detriment in all the circumstances. The panel had the bundle and went through the case. The claimant's documents had been withheld by her and any disadvantage this caused was down to her actions.

99. On 22 July 2020, did Ann Wheeler deactivate the claimant's gate pass even though her last day of employment was 31 August 2020? Miss Wheeler did not deactivate the claimant's gate pass. The claimant's gate pass was deactivated by Miss Harbor. There was no detriment caused to the claimant by her doing this on the 22 July, that day was the last day of term and the claimant had no business at the school after that day. The claimant in her evidence stated that she had no reason to go back to the school after the 22 July. The school in any event was closed.

100. On 23 July 2020, did Christopher Temmink email the claimant accusing her of discriminating against staff. The claimant's evidence referred to the wrong date. The correct date of the relevant email is 22 July 2020. The letter did not contain an accusation, it stated how the claimant's emails were affecting other colleagues and informed her that she had accidently started to behave in the manner that she had complained of. There is no detriment to the claimant in this email's content.

101. On 27 July 2020 Christopher Temmink sent the claimant an outcome letter with the outcome of the appeal against dismissal but saying he was not able to investigate the grievance and it would be left for September 2020. We came to the conclusion that there was no detriment here. To the extent that the claimant is complaining about the dismissal of the claimant's appeal against the decision to dismiss her we consider that the decision of the appeal panel was a conclusion that they reached after a proper

consideration of the claimant's appeal and one that they were entitled to make. The evidence does not support a suggestion that the decision was in any sense affected by the claimant's race or religion. The appeal panel kept the claimant's grievance open so that she could produce evidence in support of her grievance.

102. Towards the end of the claimant's employment, did Emma Bell watch the claimant all day every day for three to four days? This was denied by the Mrs Bell. We found Mrs Bell to be a clear and credible witness and consider that as this would be a busy time in the school calendar for Mrs Bell that she would not have been able to spend time watching the claimant as alleged. We concluded that this did not occur, the claimant may have genuinely felt that she was being watched all the time by Mrs Bell, we conclude that she was wrong about that.

103. On the first transition day, at an assembly, did Ann Wheeler asked everyone "can you see any new LSAs?" and then said "no, because we did not hire any", looking at the claimant. Miss Wheeler gave evidence that normally at assemblies any new teachers who have been employed attend, however the school had no new teacher starter, she stated at one of the assemblies that she led that the students would recognise all the teachers' faces in the Hall this year as there were no new teachers joining the teaching team. Miss Wheeler was unaware that the claimant was attending the assembly and the comment was not addressed to the claimant.

104. In respect of the matters that we have found to have been proved by the evidence we heard we have considered whether the claimant was subjected to less favourable treatment? In doing this we have asked ourselves whether the claimant was treated worse than someone else was treated. The Tribunal have not found that the claimant has been treated less favourably in any instance.

105. There must be no material difference between the circumstances of any real or hypothetical comparators and the claimant. The claimant did not make reference to any specific comparators in respect of the various events save for the people who were given work in the school during the lock down period. The same offer was made to the claimant in relation to options for work, but the claimant refused the options available. The claimant's circumstances were therefore not the same there was material difference.

106. The claimant's complaints of direct discrimination on the grounds of race or religion are not well founded and are dismissed.

Health and safety detriment and dismissal (Employment Rights Act 1996, sections 44 and 100)

107. The claimant says that on 1 June 2020 she told Mrs Bell that her doctor had advised her husband to shield due to increased risk of death by covid because of his Asian background and multiple underlying health conditions and she would like to shield as well as they live in a one bedroom apartment

and there is no place to self-isolate. The Tribunal is satisfied that this is a substantially fair representation of what happened. It was clear that the claimant was saying that working in school was likely to be harmful to her health. In doing this the Tribunal is satisfied that she brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

108. The claimant says that she was subjected to detriments as set out in record of preliminary hearing at paragraphs 1.2.2 to 1.2.13 and 1.2.15 to 1.2.30. The Tribunal have considered all these matters and from the findings of fact set out above concluded that other than the matter set out at 1.2.24[3] the matters either did not happen as the claimant complained of or alternatively did not amount to a detriment.

109. As to the allegation that *"On 21 July 2020 the respondent failed to uphold the claimant's appeal against dismissal, and the appeal decision was made by Lynne Hill, the respondent's HR consultant*". We are satisfied that this amounts to a detriment. The dismissal of the claimant's appeal against the decision to dismiss her is a decision the appeal panel reached after a proper consideration of the claimant's appeal and one that they were entitled to make. The evidence does not support a suggestion the decision was in any sense affected by the claimant's having raised a complaint about health and safety issues. The appeal panel kept the claimant's grievance open so that she could produce evidence in support of her grievance. The suggestion that the decision was made by Miss Hill was not proved.

110. If the Tribunal is wrong and any of the matters listed in the record of preliminary hearing at paragraphs 1.2.2 to 1.2.13 and 1.2.15 to 1.2.30 other than 1.2.24, we are not satisfied that the claimant has shown that it was because she raised a matter about health and safety.

111. We have gone on to consider what the reason for the claimant's dismissal was. Was the reason or principal reason for the dismissal a prohibited health and safety ground? We have concluded that it was not. The reason for the claimant's dismissal was explained by the headteacher as arising from the need to make savings in the school budget. The reasons for dismissal were financial. The claimant was not unfairly dismissed.

112. The claimant did not present any evidence to support her case in respect of unauthorised deductions. This claim is therefore dismissed.

[2.] Namely that: *"On 21 July 2020 the respondent failed to uphold the claimant's appeal against dismissal, and the appeal decision was made by Lynne Hill, the respondent's HR consultant*"

_____
Employment Judge Gumbiti-Zimuto

Date: 10 May 2022

Sent to the parties on: 19 May 2022

For the Tribunals Office

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