



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms M Zigah

**Respondent:** St Teresa's Catholic Primary School and The Rosary Trust

**Heard at:** East London Hearing Centre

**On:** 16, 17, 18 and 19 November 2021  
17 December 2021 (in Chambers)

**Before:** Employment Judge Russell

**Members:** Mr P Quinn  
Mr L O'Callaghan

**Representation:**  
**For the Claimant:** Mr A Adamou (Counsel)  
**For the Respondents:** Mr R Jones (Counsel)

## JUDGMENT

1. The claim of direct discrimination because of race fails against each Respondent.
2. The claim of harassment related to race fails against each Respondent.
3. The claim of victimisation fails against each Respondent.
4. The complaint for automatic unfair dismissal because of a protected disclosure fails against each Respondent.
5. Claims of sex discrimination, ordinary unfair dismissal, unauthorised deduction from wages and detriment by reason of a protected disclosure are dismissed upon withdrawal.

## REASONS

1 By claim forms presented to the Employment Tribunal on 7 July 2020 and 26 December 2020, the Claimant brings complaints of harassment related to race, direct race discrimination, victimisation and automatic unfair dismissal because of a protected disclosure. Claims of sex discrimination, ordinary unfair dismissal, unauthorised

deduction from wages and detriment by reason of a protected disclosure were previously withdrawn and are dismissed.

2 The Claimant decided not to pay a deposit in respect of certain further acts of race discrimination, victimisation or harassment. An agreed schedule of outstanding issues was produced for this hearing, comprising 14 acts relied on as direct race discrimination, harassment and victimisation. During the course of the hearing, the Claimant withdrew the first three detriments as an act of victimisation as these pre-dated the first alleged protected act. In submission, the Respondent conceded each of the protected acts in the victimisation claim but did not concede that they also amounted to protected disclosures.

3 The outstanding issues therefore were as follows:

*Direct race discrimination.*

3.1 Did the Respondent subject the Claimant to the following treatment?:

- (a) The complaint made by Ela, Julia and Simone to the principle head teacher, Marie Kelly sometime in January 2020.
- (b) The Respondent subjecting the Claimant to a disciplinary investigation from 8 January 2020.
- (c) The Respondent allegedly having additional meetings with witnesses taking additional statements from them and the witnesses being given the opportunity to know the allegations and evidence in the investigation.
- (d) The duration of the Claimant suspension.
- (e) The Respondent's alleged failure to treat the Claimant's complaint on 5 March 2020, at the disciplinary investigation meeting as a protected act.
- (f) The recommendation that the Claimant be subjected to a disciplinary hearing on the allegation of threatening violence towards a member of staff.
- (g) The Respondent's findings that it was difficult to corroborate the Claimant's alleged racial abuse incident and could not find any evidence that it happened.
- (h) The Respondent's alleged failure to carry out a reasonable disciplinary investigation.
- (i) The Respondent's alleged failure to carry out a reasonable grievance investigation.
- (j) The grievance outcome dated 22 June 2020.
- (k) The Respondent's alleged refusal to provide the Claimant with evidence that was considered in the grievance investigation such as the notes of the meeting on 8 January 2020, paperwork and notes of the meeting on 9

January 2020 and further investigation paperwork that she could respond to the grievance outcome.

- (l) The Respondent's delay to provide the Claimant documents she requested relating to the grievance investigation.
  - (m) The Respondent's failure to provide the Claimant with the further documents referred to in the grievance investigation/ appeal outcome.
  - (n) The Claimant's dismissal.
- 3.2 Who was the real or hypothetical comparator relied upon by the Claimant, whose circumstances are not materially different to the Claimant's?
- 3.3 Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators?
- 3.4 If so, can the Claimant prove primary facts on which the tribunal can properly and fairly conclude the difference in treatment was because of the Claimant's race. Can the Respondent prove a non-discriminatory reason for any approved treatment?

*Harassment related to race*

- 3.5 Did the Respondent engage in any unwanted conduct as identified in paragraphs 3.1(a) to (n) above and in the comment made that: **"if you want to be white like us, you need to have a shower"**.
- 3.6 If so, was any of the conduct related to race?
- 3.7 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
- 3.8 Was it reasonable for such conduct to have the effect on the Claimant in all of the circumstances?

*Victimisation*

- 3.9 The Respondent accepts that each of the following is a protected act:
- (a) Her complaint on the 5 March 2020, at the disciplinary investigation meeting;
  - (b) Her refusal to return to work on amended duties and the information she allegedly provided on the impact on the amended duties and working arrangement on her childcare and being a single parent.
  - (c) The Claimant's grievance dated 21 May 2020.
  - (d) The Claimant employment tribunal claim lodged on 7 July 2020.

3.10 If so, did the Respondent carry out any of the treatment set out below because of that act namely, each of the alleged act as relied upon in paragraphs 3.1 (d) to (n) above?

3.11 If so, do any of these act amount to a detriment?

*Unfair dismissal because of a protected disclosure*

3.12 Did the Claimant do the following:

(a) Complain on 5 March 2020 at the disciplinary investigation meeting about the incident in September 2019 when Julia and Ela splashed soap on the Claimant and told her that if she wanted to be white like them, she needed to shower.

(b) Refused to return to work on the amended job duties and working arrangements and providing information to the Respondent on 18 May 2020 on the impact of the amended duties and working job arrangements on her childcare being a single parent.

(c) Raised a grievance on 21 May 2020.

(d) Lodged a tribunal claim on 7 July 2020.

3.13 If so, can the Claimant show that the alleged act amounted to a protected qualifying disclosure specifically:

(a) That she disclosed information;

(b) That it was to one of the prescribed categories of people listed in section 43c- 43h of the Employment Rights Act 1996.

(c) That it related to one of the six types of failure set out in section 43b(1)(a) - (f) Employment Rights Act 1996 and if so, which failure?

(d) That she had a reasonable belief that the information disclosed tended to show one of the relevant failures took place or was taking place or likely to take place.

(e) That she had a reasonable belief that the disclosure was in the public interest.

3.14 If so, can the Claimant prove primary facts from which the Tribunal can properly and fairly conclude that the reason or the principle reason for the dismissal was that she made one of the protected disclosures listed.

*Time*

3.15 In respect of any alleged act or failure, has the Claimant presented her claim in the time limit set out in section 123(1) of the Equality Act 2010. The

Respondent would contend that given the dates the Claimant commenced ACAS early conciliation and lodged her ET1 form, the Claimant cannot rely on any acts or deliberate failure to act that occurred before the 23 February 2020.

- 3.16 If not, do any of the alleged acts of discrimination that are prima facie to the time form part of conduct extending over a period to which the last act in that series took place in time.
- 3.17 In respect of each act found to be out of time and not forming part of conduct extending over a period, would it be just and equitable for the tribunal to extend time.

4 The Tribunal heard evidence from the Claimant on her own behalf. From the Respondent, we heard evidence from Ms Deborah Chapman (School Business Manager), Ms Marie Kelly (Head Teacher), Ms Bridget Harris (Head Teacher of St. Thomas More Primary school), Ms Julia Rundell (Kitchen Assistant) and Mr Peter Johnson (Vice Chair of the School Governors). We were provided with an agreed bundle of documents and read those pages to which were taken in evidence. During the course of hearing, we were also provided with copies of two letters dated 6 January 2020 from Ms Kelly to Simone (a final written warning and a letter of expectation) and screenshots of the metadata to show when each was created. The Tribunal admitted these documents in evidence as they were relevant to the issue of less favourable treatment and there was no prejudice to the Claimant in doing so. We were also provided with an agreed chronology and cast list.

5 The Tribunal has made only those findings of facts necessary to decide the issues before us.

### **Findings of fact**

6 The Second Respondent is an educational trust comprising a number of Catholic schools ("the Trust"). The First Respondent is a primary school within the Trust ("the School"). At the material time, the School employed approximately 40 employees, mostly white British and European and the Claimant was the only black employee. There is currently one black employee, a teaching assistant. The pupil cohort is ethnically diverse.

7 The Claimant initially worked at the School as an agency cleaner. She was encouraged by the site manager and Ms Chapman to apply for direct employment as a Kitchen Assistant. The Claimant was successfully interviewed by Ms Chapman and commenced employment on 6 September 2018, working Monday-Friday 11.30am to 1:30pm on a term time only basis. The Claimant continued to provide cleaning services as an employee of the agency. Also working in the kitchen were: Simone (Catering Manager), Ela (Kitchen Assistant) and Julia (Kitchen Assistant).

8 There was an unfortunate incident on 24 or 26 September 2019, nothing turns on the date. Mrs Kelly asked the Claimant to send up lunch to a student who was in her office. Due to some miscommunication between the Claimant and Simone, it was Simone who took the lunch. There was some disagreement between Simone and Mrs Kelly as a result. Simone raised her voice, made some inappropriate comments and left School without permission. She was then absent due to sickness until January 2020. The Claimant was very upset about the incident, which she believed had arisen from her

misunderstanding, and by a text from Simone saying that the Claimant had cost her her job. Nevertheless, between October and Christmas 2019, the Claimant continued to work in the kitchen with Ela and Julia. There were no significant issues in the employment relationship between the three women during this period although, as the term drew to a close, Ela and Julia became concerned that the Claimant appeared quieter and more withdrawn.

9 On 6 January 2020, the new spring term started and Simone returned to work. Mrs Kelly and Simone met to discuss the incident in September 2019, Simone raising her voice, leaving without permission, the text sent to the Claimant and issues arising from her sickness absence. Simone accepted that she should not have behaved as she did in September 2019. Notes of the meeting were included in the bundle. Having regard to the content of the notes and contemporaneous documents, the Tribunal accepts that Mrs Kelly's notes are a genuine and contemporaneous record albeit typed up from initial handwritten notes.

10 Mrs Kelly's notes of the meeting set out in bullet points the same matters contained in a letter dated 6 January 2020 to Simone which has been described as a "letter of expectation". The metadata confirms that the letter of expectation was created on 6 January 2020 at 13:31 and last modified on the same date at 13:52. It refers to the meeting earlier that day and is consistent with Mrs Kelly's notes. The Tribunal is satisfied that this a genuine letter which was sent to Simone on 6 January 2020.

11 Following the meeting, Mrs Kelly sought further advice from HR. They advised that she issue a final written warning in respect of Simone's conduct in September 2019. A copy was provided to the Tribunal. It is dated 6 January 2020 and the metadata shows that it was created on 6 January 2020 at 16:49 and last modified the same day at 16:53. Although dated 6 January, it refers to the return to work meeting as taking place the day before. On balance, we accept Mrs Kelly's evidence that whilst drafted on 6 January 2020, it was only sent to Simone on 7 January 2020. The final written warning was in relation to "recent conduct", which we find was the September 2019 incident, and refers to an earlier written warning in July 2019. Simone was advised that another breach of the code of conduct would result in dismissal and the letter would stay on file for 12 months from the date of writing. The Tribunal accept that this is a genuine document, contemporaneously produced and sent to Simone.

12 The Tribunal considered the letters sent to Simone to be significant for the following reasons. First, the Respondent's disciplinary procedure does not provide for a letter of expectation as a disciplinary sanction although it does refer to the possibility of informal action which may include warnings about conduct or performance falling short of the standard expected and that any such statement of concern could be verbal or recorded in writing. Second, the disciplinary procedure provides that there will be an investigation and disciplinary meeting before issuing any formal disciplinary sanction. The employee has the right of appeal. A final written warning would remain live for 24 months from the date of the decision. In Simone's case, the final written warning was issued without a formal investigation or disciplinary hearing, was stated to last 12 months, did not offer the right of appeal and was for the same conduct for which she had already been issued an informal letter setting out concerns and expectations. Finally, Mrs Kelly took no action more severe than the informal letter of expectation without taking HR advice.

13 At the end of the school day on 6 January 2020, Mrs Kelly spoke with Ela and Julia to see how the day had gone. The Tribunal accepts as plausible and consistent with the broader evidence of problems in the kitchen, that Ela was really upset and Julia was fed up. They both said that the Claimant had ignored them all day and that Simone appeared cross with them.

14 On 7 January 2020, Ela and Julia went separately to see Mrs Kelly to hand in written letters of resignation. Both gave the reason as the bad atmosphere in the kitchen. Mrs Kelly declined to accept either letter of resignation and asked both to wait to see if things would improve. Neither Julia nor Ela in fact resigned. We accept Julia's evidence that whilst the kitchen was usually an upbeat, fun and good place to work, once Simone returned it became very hostile, with no one speaking and she decided that she had had enough. The Tribunal finds on balance that Simone's return to work was the cause of the difficult working environment in the kitchen.

15 At about 1.45pm on 8 January 2020, Mrs Kelly and Ms Chapman met with the Claimant. Mrs Kelly informed the Claimant that the other kitchen staff had said that she was not talking to them, that this was creating a bad atmosphere, so much so that Ela and Julia had offered to resign. The Claimant told Mrs Kelly that nobody in the kitchen had done anything to upset her and that she was quiet and withdrawn due to domestic issues. They discussed the Claimant's mental health and any support the School could offer.

16 Mrs Kelly then went to the kitchen to speak with the other kitchen staff. Ela and Julia told her that the Claimant had been in contact with Simone whilst off sick; simultaneously telling Ela and Julia that she was scared of Simone and would leave if she returned whilst also texting and visiting Simone, telling her that Ela and Julia could not be trusted. This was based on WhatsApp or text messages between the Claimant and Simone and, we find, could only have come from Simone sharing with them the contents of a private conversation. There was no good reason to share the messages with her colleagues and the Tribunal infers that Simone showed them to Ela, Julia and Mrs Kelly with the purpose of causing trouble for the Claimant, perhaps as she still blamed her for the misunderstanding which led to the incident in September 2019.

17 In the messages, the Claimant enquires about Simone's health and expresses her wish that Simone to return to work. The Claimant did say that Ela and Julia do not talk to her as she is "just a cleaner". In her final message, in the context of Simone saying that she did not want to come back, the Claimant said: **'please do not say that, as they cannot stop you from coming back and they are all bum-eating J.'** By contrast, in the messages Simone stated that she was not wanted back as Ela and Julia were loving their new role, only the Claimant that wanted her back, that Ela and Julia were "a pair of bitches" and that she cannot stand Julia.

18 Mrs Kelly's notes state that the Claimant's comments to Ela and Julia about Simone were untrue as she had been texting and visiting Simone, telling her that if she did *not* come back she (the Claimant) would leave, that Ela and Julia could not be trusted and were "bum lickers" who did not want Simone back. Having seen the messages, the Tribunal finds on balance that this is an inaccurate interpretation of the exchange. It was Simone, not the Claimant, who suggested that Ela and Julia could not be trusted and did not want her back. As for the "bum lickers" comment, that is not what the Claimant had said. Her comment "they cannot stop you from coming back" was a direct response to Simone's suggestion that the Respondent was preventing her return, referring to "them

above us”, not Ela and Julia. In context, the rather strange “they are all bum-eating J” was not a reference to Ela and Julia. Read overall and in context, the Claimant’s messages cannot reasonably be interpreted as stating that Ela and Julia could not be trusted or that they were bum lickers who did not want Simone back.

19 During the same conversation, Simone, Ela and Julia told Mrs Kelly about a date in September 2019 when the Claimant had allegedly threatened to do violence to Ms Chapman. All three suggested that they had had to hold the Claimant back to prevent her from going ahead with her threat of violence. Mrs Kelly’s note states that this was given as an example of how volatile the Claimant could be and how much the other kitchen staff had supported her in the past by not reporting it. The Tribunal finds on balance that the complaint was made in the context of a belief by Simone, Ela and Julia that the Claimant had been two-faced in her dealings with them and was not at all because of her race.

20 Whilst Mrs Kelly had gone to the kitchen expecting to reassure them that they had not upset the Claimant, she was instead presented with the above information suggesting that the Claimant had been two-faced in her comments to Simone on the one hand and Ela and Julia on the other. Mrs Kelly formed the belief that the Claimant had been playing the kitchen staff off against each other and, as she put in her contemporaneous note, had been extremely dishonest about the situation in the kitchen. Given our findings above about the messages, the Tribunal find that Mrs Kelly misinterpreted the situation in deciding that it was the Claimant who was the cause of the tension, rather than Simone.

21 The Tribunal did not find reliable Mrs Kelly’s evidence about her conclusion that the Claimant had been dishonest. Rather than accept that she had mis-interpreted the messages or not read them thoroughly at the time, she instead sought to suggest that there were other messages which contained the critical information about the Claimant. No such messages were in the bundle and the Tribunal had no doubt that if they existed, they would have been included. The Tribunal finds that Mrs Kelly was giving evidence that she thought would best excuse her error rather than simply accepting honestly and openly that she had been wrong to criticise the Claimant in such strong terms. Her belief that the Claimant had been extremely dishonest was unwarranted on the basis of the messages.

22 Mrs Kelly met again with the Claimant at around 4pm on 8 January 2020 and told her what the other kitchen staff had said. The Claimant completely denied any wrongdoing and asked that there be a meeting the following day with her colleagues. Mrs Kelly initially agreed. There is a conflict of evidence:

- Mrs Kelly’s evidence is that during the meeting, the Claimant said that she was leaving anyway, she did not like working in the kitchen, she was going to resign because she wanted to go back to college. Mrs Kelly told the Claimant to think about things before making any rash decisions as things could be sorted out.
- The Claimant’s evidence is that she expressed no intention to resign at any stage.

23 On 9 January 2020, the Claimant attended School as agreed. Mrs Kelly explained that there would not be a joint meeting of the kitchen staff as the others felt that it would be too confrontational. Mrs Kelly told the Claimant that that she had seen the text messages between her and Simone, including the bum licker/bum eater comment. The Claimant said that the phrase meant something different in her culture as a phrase to



describe when you have opened up to someone and they have used the information against you, not in the sense of being two-faced. She denied any wrongdoing, either in connection with her colleagues or the alleged threat to Ms Chapman. Again, there is a conflict of evidence:

- The Claimant's evidence is that she offered to show Mrs Kelly the text messages on her own phone but Mrs Kelly declined. Mrs Kelly told the Claimant that she was going to have to let her go, in other words to dismiss her. Mrs Kelly said that she had worked with the other staff for seven years and they would never lie to her. At the end of the meeting, Mrs Kelly said that the School would pay her till the end of the month and provide a reference if requested. Immediately following the meeting, she received a call from the agency informing her that the School had told them not to provide her with anymore cleaning shifts. The Claimant conceded in cross-examination that she told Mrs Kelly that she intended to go to college. On 10 January 2020, she telephoned the School and asked for a letter confirming dismissal.
- Mrs Kelly's evidence, supported by Ms Chapman, was that they discussed again the text messages and the alleged threats to Ms Chapman. The Claimant denied any wrongdoing. She told the Claimant that she knew all three staff members well and that they had always been honest and trustworthy; she did not understand why they would lie to her and concoct an untrue story. At the end of the meeting, the Claimant said that she was going to resign as she did not want to work there anymore. Mrs Kelly asked if she was sure and, if so, she would accept her resignation without requiring her to work her notice given the atmosphere in the kitchen. The Claimant said that was going to give up her agency cleaning work too. She did not dismiss the Claimant and would not have done so without HR advice as she was aware that there was a procedure to be followed. On 10 January 2020, the Claimant asked for a letter to confirm her resignation, not her dismissal. Having heard nothing further from the Claimant, and on HR advice after giving her some further time to cool off, she drafted a letter on 14 January 2020 to confirm the resignation.

24 On balance, the Tribunal prefers the evidence of the School as to the content of discussion on 8 and 9 January 2020. It is supported by the contemporaneous notes taken by Mrs Kelly and the letter drafted on 14 January 2020. It is also consistent with the Claimant's failure to attend work on 10, 13 or 14 January 2020. Moreover, the Tribunal finds that Mrs Kelly was heavily reliant on HR advice when dealing with the issues raised with Simone and the Claimant. It is not plausible that she would have dismissed the Claimant during the meeting without first taking HR advice. The Tribunal finds that the Claimant was particularly upset to be accused by her colleagues, with whom she thought she had a good working relationship, of being the cause of the problem, something which she strongly and vehemently denied. The strength of the Claimant's sense of injustice was evident as she gave her evidence to this Tribunal. This was a heat of the moment resignation on 8 January 2020, repeated the following day after being given time to reflect by Mrs Kelly.

25 On 15 January 2020, having received the letter confirming resignation, the Claimant telephoned Mrs Kelly and said that she wanted to return to work. By this date, the Claimant had taken some legal advice and the Tribunal finds that she had reflected upon her situation and decided to remain in employment rather than resign. Mrs Kelly took HR

advice and agreed not to insist upon the resignation but to hold a meeting on 24 January 2020 to discuss the situation with the Claimant. This is also consistent with the Claimant having resigned in the earlier meetings rather than being dismissed. It is not plausible that if the Claimant had indeed been dismissed that Mrs Kelly would have allowed her to return to work.

26 On 27 January 2020, having agreed that the Claimant could remain in employment, Mrs Kelly completed a disciplinary suspension risk assessment in connection with the alleged threat of violence against Ms Chapman by the Claimant. Ela provided a letter to Mrs Kelly setting her recollection in which she described the Claimant as being very upset and angry with Mrs Chapman whom she believed kept checking up on her and had complained to the agency. Ela describes the Claimant demonstrating an aggressive attitude and seeking a confrontation with Mrs Chapman despite being asked by Simone to calm down and relax and that they all believed that the Claimant might go to the office and hurt Mrs Chapman.

27 Julia also provided a statement to Mrs Kelly. Julia said that on the day in question, the Claimant appeared to be very angry, saying that she was heading to the office to have it out with Ms Chapman. Simone had asked her to calm down otherwise she would lose both kitchen and the cleaning jobs. Julia described the Claimant as pacing backwards and forwards, appearing very aggressive and angry because Ms Chapman had been checking up on her hours. She said that Simone was blocking the Claimant from leaving the kitchen and had asked her and Ela to keep an eye on the Claimant to keep her from leaving the kitchen. Simone told them that the Claimant had said that she would “punch her lights out”. Julia did not hear this but did hear the Claimant constantly say that she was going to have it out with Mrs Chapman. Later in the day, Simone told them that she did not doubt that they had stopped Ms Chapman from either being hurt or verbally assaulted by the Claimant.

28 Simone declined to provide a statement. In a contemporaneous note taken by Mrs Kelly of their discussion on 14 January 2020, Simone said that she was not writing a statement so that she could be set up, apparently believing that she would be criticised for not dealing with the Claimant’s behaviour properly on the day. It is evident from the note that Simone expressed hostility to the Claimant, suggesting that she had pulled the wool over Mrs Kelly’s eyes, before stating: ‘**I wish I had not held her back, I wish I had let her go for Deborah [Chapman]**’, and that “**Deborah was a bloody bitch and deserved it**”. Simone then called Mrs Kelly a liar, got up and walked out. The note concludes with a reference to Simone calling another member of staff “**a bloody interfering cow**”. On 15 January 2020, Simone sent a letter of resignation, citing amongst other things, accusations and falsities since her return from sick leave and loss of trust in the workplace but did not refer to a final written warning. The Tribunal accepts as truthful and plausible Mrs Kelly’s evidence that if Simone had not resigned, she would have been dismissed for her conduct in circumstances where she had recently received a final written warning for similar insubordinate conduct.

29 The Tribunal finds that it should have been clear to Mrs Kelly on 8 January 2020 that the allegations of threatened violence to Mrs Chapman were potentially unreliable. This should have been even more apparent by 14 January 2020 in light of Simone’s conduct in their meeting. Whilst there was clear evidence that the Claimant was angry and wanted to challenge Mrs Chapman, the alleged threat of violence was hearsay, not heard directly by either Ela or Julia. At its highest, it appears to be Simone telling Julia

and Ela that she had heard such a comment and that she feared that the Claimant would be potentially violent. The Tribunal find that in all of the circumstances and, in particular, Simone's role in the complaint, Mrs Kelly should have treated with some scepticism the allegations against the Claimant which, on the evidence of Ela and Julia, appeared entirely out of character as both made clear that they had never seen the Claimant angry like that before.

30 The Claimant's suspension was confirmed by letter dated 27 January 2020 relying on an allegation of potential gross misconduct, namely verbally threatening violence towards a member of staff. A headteacher from another primary school within the Trust, Ms Harris, was appointed to investigate. The suspension letter stated that the Respondent would review the suspension periodically throughout the process.

31 On 7 February 2020, Mrs Kelly wrote to the Claimant informing her that the investigation was ongoing and that her suspension would be reviewed at the end of the month. Further witness statements were taken by Ms Harris on 14 February 2020 as part of her investigation.

- Julia's statement said that the Claimant had been really angry on the unknown date in September 2019, saying she was going to storm to the office and "**sort Deborah out**". She suggested that Simone had calmed the Claimant down, but she had remained upset and angry. Julia was worried that the Claimant would go and shout at Mrs Chapman. Simone told the Claimant not to go to the office in case she said something she would regret; she blocked the Claimant's exit but did not have to hold her back. Julia said that she did not hear the Claimant say that she would hurt Mrs Chapman but was visibly angry and loud.
- Ela's statement described the Claimant as being cross because Mrs Chapman had phoned the agency to query her hours. She said that the Claimant was upset and aggressively said that she was going to go to Deborah with aggression and tell her, maybe do something to her. Ela suggested that the Claimant had used some sort of slang term suggesting that she was going to hurt Mrs Chapman but that she could not understand the term. She described the Claimant as "**having aggression in her voice and eyes**" but said that nobody had had to hold her back. It was only on 13 March 2020, when she contacted Ms Harris again, that Ela said she recalled the slang term as "**she was going to smash her lights**".
- Ms Chapman was not aware of the incident when it happened, it was only in January when she was in the kitchen with Mrs Kelly that Simone had told her that Maria (the Claimant) wanted to "**punch her lights in**", how angry the Claimant was and how she had to be prevented from going to the office. Again, the Tribunal finds that Ms Chapman's evidence was hearsay based on Simone's account after her return to work.

32 A disciplinary investigation meeting was held on 5 March 2020. The Claimant attended and notes were taken. In advance of the meeting, Ms Harris was not provided with notes of the accounts provided by Ela and Julia on 14 January 2020 or the meeting with Simone. Nor was the Claimant provided with copies of the statements provided to Ms Harris as part of her investigation.

33 During the investigation meeting, the Claimant denied being angry at work and said she was not aware of anybody questioning her hours. When asked about what had happened on 8 January 2020, the Claimant said that she had been quieter than normal as she was feeling stressed and she thought that was why her colleagues had gone to Mrs Kelly to say that she was not talking. The Claimant maintained that she had not at any stage resigned. She was unhappy that she did not have a chance to talk with her colleagues in a joint meeting. The Claimant said that she had tried to show Mrs Kelly the text messages from Simone, but Mrs Kelly had not wanted to see them. When asked about the “bum licker/bum eater” text message, the Claimant said that the term meant something different in her culture – it was about letting people into your confidence and them then letting you down, she was referring to Julia and Ela. The Claimant denied making any threats against Ms Chapman, specifically that she was going to sort her out or smash her.

34 The Claimant suggested that the allegation may have been made because Simone, Ela and Julia did not like her and had discriminated against her. The Claimant expressly relied upon an occasion at some point in 2019 when Julia and Ela were in the kitchen and had splashed her with water and said: “if you want to be white like us, you need to have a shower”. In her witness statement to the Tribunal, the Claimant’s evidence was that it was in September 2019. In the investigation meeting, the Claimant described the general relationship in the kitchen as being fine until Simone went off sick and the others started pushing her away; they had been getting on OK in September 2019 when she was alleged to have been angry with Ms Chapman. The Claimant expressed dissatisfaction with Mrs Kelly’s handling of the situation and the failure to hold a joint meeting. Towards the end of the investigation meeting, the Claimant’s solicitor asked again about the comment by Julia and Ela and the Claimant confirmed that she had not reported it at the time. During the meeting, the Claimant was told that three people present at the incident had given statements and, later, that all information would be shared with her if there was a disciplinary hearing.

35 On 9 March 2020, Ms Harris interviewed Ela about the “shower” comment; she denied that it had been said. Ms Harris did not speak to Julia who was absent on fostering leave at the time. Neither Julia nor Ela were suspended following the Claimant’s allegation about the comment.

36 Ms Harris produced an investigation report dated 17 March 2020. She attached the evidence relied upon as appendices to the report. These included the February 2020 statements from Julia and Ela but not those given to Mrs Kelly in January 2020, nor did the appendices include Mrs Kelly’s note of the discussion with Simone on 14 January 2020. No statement from Mrs Kelly was attached but the Tribunal finds on the evidence before us that she provided a considerable amount of information to Ms Harris which the latter accepted as accurate without further investigation. By way of example, the chronology of events and the account of the meetings on 8 and 9 January 2020 are taken directly from Mrs Kelly’s notes including the statement that the Claimant had resigned. Also significant is the statement in the Harris report that two members of kitchen staff made independent witness statements to say that the Claimant could be volatile. Read objectively, there is no suggestion in the statements given to Mrs Harris by Julia and Ela that the Claimant was generally volatile; they gave evidence only about the incident of the alleged threat against Mrs Chapman. The word “volatile” comes from Mrs Kelly’s contemporaneous notes and supports our finding that Mrs Harris accepted the additional information provided by Mrs Kelly without further investigation or scrutiny, for example in

reading the statements provided by Julia and Ela to Mrs Kelly from which it would have been clear that neither had seen the Claimant angry like that before.

37 One of the appendices to the Harris report was an email sent on 15 January 2020 to Mrs Kelly by Mr Burton, the then Site Manager. He wrote that the Claimant had been very angry with Ms Chapman and wanted to confront her after the latter suggested that she had left her shift early. He says that he explained to the Claimant she needed to be calm and return to work but adds no evidence to support the allegation that the Claimant had threatened violence to Ms Chapman.

38 Ms Harris analysed what she considered to be inconsistencies in the Claimant's account, for example denying that anyone had checked her hours or that she had been angry in any way. Mrs Harris concluded that there was evidence to show that the Claimant was aware that Ms Chapman had questioned her time-keeping and that this had led to her anger on the day in question. She further concluded that there were witnesses stating that the Claimant had to be prevented from confronting Mrs Chapman, had made the threat of violence and had behaved in a volatile manner. Objectively considered, the Tribunal does not find this conclusion supported by the statements of Julia and Ela or the email from Mr Burton. Ela's subsequent recollection of the "smash her lights" comment should have been treated with extreme caution due to the delay in recollection and significant risk that it was not unprompted.

39 Ms Harris recommended that there should be a disciplinary hearing to consider the allegation of verbally threatening violence to a member of staff. The Tribunal finds that in reaching her conclusions, Ms Harris unquestioningly accepted as accurate the information provided to her by Mrs Kelly in the chronology and notes, despite the fact that it was strongly contested by the Claimant and relied heavily upon Simone's untested account. It was not a thorough report and, in fairness, Ms Harris accepted in evidence that there were shortcomings in her investigation.

40 In respect of the Claimant's allegation about a racially offensive comment, Ms Harris concluded that there were no witnesses, Ela had denied it and Julia was unavailable to comment; the Claimant was unsure when it happened and had not reported it before this investigation. Ms Harris concluded that the lack of reporting at the time and the lack of detail meant that there was little additional evidence upon which she could rely. Ms Harris concluded that as there was a harmonious working relationship between the kitchen staff at the time, it was unlikely that the Claimant would have been subjected to racial discrimination. Ultimately she decided, that she was not required to reach a firm conclusion as it was not part of the disciplinary investigation.

41 A further assessment of the Claimant's suspension was undertaken between 20 March and 31 March 2020. It had been delayed from the end of February 2020 as the parties were engaged in without prejudice discussions with a view to resolving the dispute. By the end of March 2020, as a result of the Covid-19 pandemic, there was a nationwide lockdown and extensive social distancing in those workplaces still open. There were fewer pupils as schools had been closed save for arrangements for children of essential workers and vulnerable children. Ms Chapman was working from home. As a result, Mrs Kelly was satisfied that the Claimant could return to work without contact with either Ms Chapman or other kitchen staff. HR advice at the time suggests that there should be a mediation meeting between all staff to enable them to work together professionally in the future, that the Claimant's suspension be lifted and a letter of expectation be issued about

working together harmoniously and reporting issues in a timely manner. The Claimant was informed that her suspension was lifted with effect from 1 April 2020.

42 The Claimant did not return to work on 1 April 2020 or notify the School of the reason for her absence. On HR advice, Mrs Kelly wrote to the Claimant on 3 April 2020 to inform her that this was regarded as unauthorised absence and her pay would be stopped if she did not return to work on 7 April 2020. The Claimant did not reply and Mrs Kelly again wrote, this time to inform the Claimant that it would be dealt with as a disciplinary matter if no response was received by 10 April 2020. The Claimant again did not reply but no further action was taken as the parties entered into further without prejudice discussions during which the School did not require her to attend work.

43 On 13 May 2020, Mrs Kelly wrote to the Claimant to advise her that as no agreement had been reached, she was required to attend a meeting on 15 May 2020 to discuss amended duties in light of the reduced school service due to the pandemic. Mrs Kelly stated that the outstanding disciplinary investigation would continue and a disciplinary hearing would be convened as soon as practicably possible. The letter did not mention any further action in respect of the Claimant's allegation of a racially offensive comment or the previously proposed mediation.

44 At the return to work meeting on 15 May 2020, Mrs Kelly proposed amended working hours to ensure social distancing. Instead of working 11.45am to 1.45pm, the Claimant would work 12.30pm to 2.30pm. The Claimant was unhappy with that proposal as it would mean that she would not be serving, largely washing up and washing the floor. The Claimant asked for time to think about it. Mrs Kelly assured the Claimant that as a key worker, her children would be entitled to childcare provision and that a letter confirming key worker status would be provided.

45 On 18 May 2020, the Claimant sent an email saying that she would not be able to work the amended hours due to childcare responsibilities and difficulty getting to work on public transport. In her oral evidence, the Claimant accepted that as she did not live in Colchester or have a car, she would not have been able to work her normal hours in any event due to problems with public transport. Mrs Kelly replied reminding the Claimant that school employees were key workers and a failure to attend would amount to unauthorised absence.

46 The Claimant failed to attend work on 18 May 2020 and Mrs Kelly wrote to advise her that the School may commence disciplinary action in relation to her unauthorised absence. Mrs Kelly wrote again on 22 May 2020, noting that the Claimant had not replied, to inform her that her pay would not be reinstated and if there was no contact within a week, she would be subject to disciplinary action which could result in dismissal.

47 On 21 May 2020, the Claimant submitted a formal grievance to the Governors. She stated that she was African, Black Ghanaian, a single parent of three young children and set out seven instances of what she said was unfair or discriminatory treatment.

- (1) The meetings on 8 January 2020, including an assertion that she had been dismissed following allegations that she had threatened physical violence against Ms Chapman. She had been suspended, subject to disciplinary investigation and threats of additional disciplinary allegations and dismissal.

- (2) Multiple disciplinary investigations meetings, with changing allegations and evidence. Ms Harris had had additional meetings with witnesses that she was not aware of.
- (3) On 15 May 2020, she was required to return to work from suspension on changed job duties and hours.
- (4) She had made an allegation of a racially offensive comment in the disciplinary investigation on 5 March 2020.
- (5) She had not been paid since April 2020.
- (6)&(7) Generic allegations of other staff not being treated in the way that she had been and being subjected to racial discrimination, harassment, victimisation and loss of wages.

48 On 8 June 2020, Mrs Kelly informed the Claimant that she would await the outcome of the grievance investigation before taking any further disciplinary action, albeit pay was not reinstated.

49 The School instructed Mr Johnson, Vice Chair of Governors, to investigate the grievance. Mr Johnson was provided with a copy of the disciplinary policy, Mrs Kelly's notes of events on 8 and 9 January, documents relating to suspension, Ms Harris' investigation report and the correspondence about the Claimant's continued absence from work. The only person interviewed by Mr Johnson was Julia, on 11 June 2020. Julia absolutely denied that any racially offensive comment had been made. Mr Johnson did not interview Mrs Kelly about her conversations with the Claimant and the other kitchen staff or the disciplinary process. The Tribunal finds this a material omission given that the subject matter of the grievance dealt substantially with Mrs Kelly's conduct. In fairness to Mr Johnson, in cross-examination and with the benefit of hindsight, he accepted that he would interview Mrs Kelly if he were to do the investigation again.

50 As the Claimant had indicated that she preferred for the investigation to be conducted in writing rather than to have a hearing, on 11 June 2020, Mr Johnson sent her a list of questions to answer. In the list of questions, Mr Johnson asked for further information and evidence in support of the Claimant's grievance complaints. For example, any evidence that Mrs Kelly had ended the cleaning contract with the agency, asked for clarification of the threats of additional disciplinary allegations and dismissal and, for any evidence supporting the allegation of a culture of racial abuse and tense relationships, including any previous incidents. In terms of the more generic allegations of different treatment and discrimination, he asked the Claimant to provide him with any evidence that she had relating to this and to explain in her own words what had happened.

51 The Claimant's response was provided by email on 19 June 2020. The answers to the questions posed were extremely brief and, quite often, added little if any further information. When asked for further details and evidence in support of her allegation of a culture of racial abuse and tense relationships, the Claimant replied: "I have no answer". When asked for examples of different treatment and supporting evidence, the Claimant relied only upon the notes of 5 March 2020 meeting and the contents of her grievance. The Tribunal finds that this somewhat circular response means that the only specific allegation of race discrimination relied upon in the grievance was the "shower" comment

by Ela and Julia. Finally, in response to Mr Johnson's request for details of anybody with relevant evidence whom she wanted to be interviewed, the Claimant again replied: "I have no answer."

52 By a 3-page letter dated 22 June 2020, Mr Johnson informed the Claimant that her grievance had not been upheld. His letter addressed each of the points of the Claimant's grievance and explained why it was not upheld. The Tribunal finds that Mr Johnson accepted as true the information provided by Mrs Kelly without properly testing it against the Claimant's conflicting account. For example, in respect of (1), Mr Johnson relied upon Mrs Kelly's notes of the meetings on 8 and 9 January 2020 to reject the assertion that the Claimant had been dismissed. Mr Johnson found that the disciplinary allegations had remained constant and appropriate procedures had been followed.

53 As for the "shower" comment, Mr Johnson found that the Claimant had provided no evidence to substantiate that allegation or the further allegation of a culture of racism. Mr Johnson appeared to criticise the Claimant for not reporting the allegation at the time, suggesting that she should familiarise herself with the procedure for reporting racial abuse and that he had spoken to other unnamed members of staff who confirmed that the process was clear. The Tribunal finds any such criticism misplaced given that Mr Johnson was unable himself to provide a straightforward answer as to what the procedure actually was. It is a further example of Mr Johnson accepting the School's account at face value without undertaking an independent investigation of whether or not it was accurate. Overall, however, we find that the only reason Mr Johnson rejected the Claimant's allegation about the racially discriminatory "shower" comment was because there was insufficient evidence to find that it had been made.

54 Mr Johnson also rejected the suggestion that the Claimant had been treated less favourably than any other members of staff again on the basis that she had failed to provide any evidence in support of her allegations. Finally, Mr Johnson recommended mediation to restore working relationships between the kitchen staff as soon as conveniently possible. He concluded that the relationship in the kitchen team may not always have been easy, but the School had attempted to support the Claimant and had acted appropriately. Whilst he acknowledged she may have been caused distress, Mr Johnson did not accept that the Claimant had been treated unfairly. The Claimant was advised of her right to appeal.

55 The Claimant's case is that the conduct of the grievance investigation and its outcome were acts of direct discrimination because of race and or harassment related to race. The Tribunal had careful regard to the evidence given by Mr Johnson. On balance, we found him to be a candid and honest witness who accepted where his investigation could have been more thorough. There is no evidence to suggest that any lack of rigour was because of the Claimant's race or primary facts from which we could infer the same. To the contrary, the Tribunal found that Mr Johnson was a decent man trying to do his best despite his failure properly to scrutinise the assertions of Mrs Kelly and hampered by the lack of detail and evidence provided by the Claimant on key points of her grievance.

56 On 30 June 2020, the Claimant asked to be forwarded notes of the meetings on 8 and 9 January 2020 and the further investigation meeting notes referred to in the grievance outcome letter. The Claimant's case is that the School and/or Trust refused to provide that evidence. The Tribunal finds that there was no such refusal. On 1 July 2020,



Mr Johnson wrote asking the Claimant to clarify exactly what documents she required and noted that she was out of time for an appeal.

57 The Claimant submitted her notice of appeal on 1 July 2020. The grounds of appeal were that Mr Johnson had taken into account evidence of which she was not aware (Mrs Kelly's notes of the meetings on 8 and 9 January 2020 and the further witness statements taken in Ms Harris' disciplinary investigation). She repeated her request for all relevant documentary evidence. Mr Wetton, the Chair of Governors, was appointed to hear the appeal.

58 On 7 July 2020, Mrs Kelly wrote to the Claimant to inform her the School would await the appeal decision before deciding next steps on her unauthorised absence. The same day, the Claimant presented her first Employment Tribunal claim in which she alleged discrimination.

59 On 8 July 2020, the Claimant was asked to provide further clarity about her grounds of appeal and, in particular, to specify by 15 July 2020 the documents sought. The Claimant did not respond and the deadline was extended to 24 July 2020. On 24 July 2020, the Claimant replied:

**"Following your request for additional clarification and information I confirm**

- 1. that the grounds of appeal are as stated in my appeal form**
- 2. I am requesting the notes of the meetings that were held with me and also the investigation documents for my grievance, these documents were referred to in the grievance outcome."**

60 On 31 July 2020, Mr Wetton wrote to the Claimant attaching Mrs Kelly's notes of the meetings on 8 and 9 January 2020 and the notes of the investigation meeting on 5 March 2020. In his letter, Mr Wetton expressed disappointment that the Claimant had not provided the clarity on the reasons for the appeal but proposed a remote appeal hearing on 11 August 2020. The Claimant was asked to confirm that she would attend but did not reply. The appeal hearing went ahead in her absence, by letter of the same date, the Claimant was informed that her appeal was unsuccessful.

61 On 24 August 2020, Mrs Kelly wrote to inform the Claimant that she was required to return to work as the grievance process had concluded. The absence was unauthorised and in breach of the disciplinary procedure and, if she did not hear from the Claimant by 27 August 2020 to arrange a meeting to discuss absence, it would be progressed as a disciplinary matter which could result in dismissal. The Claimant did not reply.

62 On 28 August 2020, Mrs Kelly wrote to inform the Claimant that her unauthorised absence from work and lack of any contact or explanation amounted to gross misconduct. The Claimant was summarily dismissed with effect from 29 August 2020. The Claimant was advised of her right to appeal by a deadline of 7 September 2020. The Claimant did not appeal against her dismissal.

#### *The "shower" comment*

63 In order to decide the harassment claim, the Tribunal must find on balance whether or not the "shower" comment was made. There are material inconsistencies in the Claimant's case on this point. The Claimant's first account of the alleged comment was given in the investigation meeting with Ms Harris on 5 March 2020. Her allegation was

that at some time in September 2019, Julia and Ela were in the kitchen, had splashed her with water and said to her, 'if you want to be white like us, you need to have a shower'. In her claim form, the Claimant says that the Julia and Ela were washing the dishes, that it was Julia who splashed soapy water on her and had said "if you want to be white like me (us), you need to have a shower." Neither the account given to Ms Harris nor set out in the claim form suggest that Simone was present, yet in her witness statement, the Claimant's evidence is that Simone was present and said nothing. In cross-examination, the Claimant maintained that the comment had been made by both Julia and Ela, who said it at the same time, laughing. The Tribunal did not find it plausible that both women would spontaneously have made such a comment, in unison using exactly the same words, where there is no suggestion of other race-related comments by either.

64 The Tribunal took into account the denials given by Ela and Julia. We bear in mind that it is easy simply to deny a comment and harder for a Claimant to prove it, especially where there is no contemporaneous complaint or record.

65 On balance, the Tribunal finds that the "shower" comment was not made. There is an inherent lack of plausibility in the Claimant's account in cross-examination and her detail about the comment, in particular Simone's presence or otherwise, demonstrates a material inconsistency. The Claimant failed to raise any contemporaneous complaint about a comment which, if made, is seriously offensive and overtly racist. The strength of the Claimant's subjective belief that the comment was made was evident in her evidence but we find, regrettably, that she is an unreliable witness on this point.

## Law

### Discrimination (including victimisation)

66 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Disability is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

67 Harassment is defined in section 26 of the Equality Act 2010 as follows:

**"(1) A person (A) harasses another (B) if -**

**(a) A engages in unwanted conduct related to a relevant protected characteristic, and**

**(b) the conduct has the purpose or effect of -**

**(i) violating B's dignity, or**

**(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**

**(2) A also harasses B if—**

**(a) A engages in unwanted conduct of a sexual nature, and**

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.”

68 In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to a protected characteristic. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

69 In **Pemberton v Inwood** [2018] EWCA Civ 564, Underhill LJ revisited **Dhaliwal** in light of the introduction of s.26 and the difference in language to the predecessor harassment legislative provisions. Underhill LJ made clear that in considering whether conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for that conduct to be regarded as having that effect taking into account all other circumstances.

70 Section 27 of the Equality Act 2010 prohibits victimisation. The Claimant does not need to show a comparator but he must prove that he did a protected act and that he was subjected to a detriment because he had done that protected act. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome.

71 In considering the burden of proof for each of the claims brought under the Equality Act 2010, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

### Protected Disclosure

72 A qualifying disclosure requires a ‘disclosure of information’ which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996.

73 In **Williams v Michelle Brown AM** UKEAT/0044/19/OO, HHJ Auerbach set out a five stage approach to be followed: (1) there must be a disclosure of information; (2) the worker must believe that the disclosure is made in the public interest; (3) such a belief must be reasonably held; (4) the worker must believe that the disclosure tends to show one of the matters listed in s.43(B)(1) (a) to (f); and (5) such belief must be reasonably held.

74 The dismissal of an employee by reason of a protected disclosure is automatically unfair. In an unfair dismissal case, the protected disclosure must be the sole or principal reason (and not merely a material cause).

75 Unless the Claimant lacks the necessary qualifying service (and therefore bears the burden of proving that the Tribunal has jurisdiction to hear the claim), the burden of proving the reason remains on the employer. If the Claimant positively asserts that there was an inadmissible reason for his dismissal, such as making protected disclosures, he must produce some evidence supporting that case, **Kuzel v Roche Products Limited** [2008] EWCA Civ 380.

## Conclusions

### *Harassment related to race/direct discrimination*

76 The issues at paragraphs 3.1(a) and (b) are that the complaint made against her in January 2020 by her colleagues and Mrs Kelly's decision to commence a disciplinary investigation were unwanted conduct related to race, alternatively, less favourable treatment because of race. The Tribunal concludes that each was certainly unwanted conduct (in the alternative a detriment) but that race was in no way whatsoever the cause of either. In reaching that conclusion, we carefully considered whether the Claimant had proved primary facts from which we could conclude that the conduct was related to race or from which we could draw any safe inferences.

77 As for the complaint by Ela, Julia and Simone and Mrs Kelly's conclusion that the Claimant was to blame, the Tribunal considered whether this was made for some reason because of or related to race. As we set out in our findings of fact, there was a difficult working environment in the kitchen following Simone's return to work; Ela and Julia said that the Claimant was ignoring them and Simone was cross with them. In other words, the complaints were initially about both the Claimant and Simone. The Tribunal has inferred that Simone showed the others her messages with the Claimant with the purpose of causing trouble for her, perhaps still blaming her for the incident in September 2019. Having rejected the Claimant's evidence that the "shower" comment was made, there is no other evidence tending to show any conscious or sub-conscious hostility towards the Claimant because of or related to race. Further, we have found as a fact that the complaint about the Claimant's conduct in September 2019 was made in the context of a belief by Simone, Ela and Julia that the Claimant had been two-faced in her dealings with them and was not at all because of her race. For all of these reasons, the Tribunal concludes that the complaint was not in any sense whatsoever because of or related to race.

78 As for the decision to commence a disciplinary investigation into the allegation that the Claimant had threatened violence to Ms Chapman in September 2019, the Tribunal consider it relevant that Mrs Kelly was initially supportive of the Claimant who attributed

her quietness to domestic issues. It was only after she spoke to Ela, Julia and Simone in the kitchen on 8 January 2020 that Mrs Kelly concluded that the Claimant was the cause of the bad atmosphere. Mrs Kelly misinterpreted the Claimant's messages shown to her by Simone, which could not reasonably be interpreted as saying that Ela and Julia could not be trusted or that she did not want Simone to return to work. The Tribunal has found on balance that Mrs Kelly formed the belief that the Claimant had been playing the kitchen staff off against each other and, as she put in her contemporaneous note, had been extremely dishonest about the situation in the kitchen. The Tribunal has found that Mrs Kelly misinterpreted the situation in deciding that it was the Claimant who was the cause of the tension, rather than Simone, and was not prepared in evidence to admit candidly that she was wrong.

79 The Tribunal considered that both of these findings are sufficient to shift the burden of proof and we considered whether or not the Respondents have shown that the fact that Mrs Kelly jumped to a conclusion that the Claimant was to blame and therefore to accept at face value the allegation about her conduct in September 2019 was in any way whatsoever linked to race.

80 The Tribunal considered all of the primary facts which we have found as to the context of the messages and the complaint against the Claimant. On 8 January 2020, Simone, Julia and Ela were telling Mrs Kelly that it was the Claimant who had caused the problems. Whilst the Tribunal disagree with that assessment, we accept that Mrs Kelly genuinely, if erroneously, agreed with them. Mrs Kelly should have taken more care when faced with behaviour which might be best described as childish in suggesting that the Claimant had been two-faced, and should certainly not have concluded that she was guilty of dishonesty without a calm, clear and rational investigation. The complaint about the Claimant's conduct in September 2019 was made in the context of the other three kitchen staff seeking to demonstrate that the Claimant was volatile. Nevertheless, it was a serious allegation and one which required investigation. The Tribunal are not satisfied that a hypothetical comparator in the same or not materially different circumstances would have been treated differently or that the decision to initiate a disciplinary investigation was in any way related to race.

81 The Claimant's case is that Simone had behaved in the same way but had not been subject to complaint by her colleagues or disciplinary investigation; these are the primary facts from which she asks us to find and/or infer that there was a difference in treatment because of race or conduct related to race. The Tribunal is satisfied that the circumstances of Simone's misconduct were not the same or were materially different as there was no allegation of threatened violence in her conduct in September 2019. Undoubtedly Simone behaved inappropriately towards Mrs Kelly, she was rude and insubordinate but there is no suggestion that she threatened violence towards her. Furthermore, for this misconduct, Simone was issued with a final written warning without any proper disciplinary investigation or process. Insofar as Simone did behave verbally aggressively on 14 January 2020, both towards Mrs Kelly and in her expressed views about Ms Chapman, she resigned the following day. There was no disciplinary investigation commenced against Simone after she resigned just as there was no disciplinary investigation commenced against the Claimant when she resigned. It was only when the Claimant was allowed to retract her resignation, and therefore remain in employment, that the investigation commenced.

82 The decision to proceed to a suspension and disciplinary investigation was based upon an unreasonable assumption by Mrs Kelly that the Claimant was volatile and the cause of problems in the kitchen. This was undoubtedly in our conclusion unfair and unreasonable. However, unreasonable conduct is not of itself discriminatory conduct. Mrs Kelly had previously been supportive of the Claimant and had a good working relationship with her. Moreover, Mrs Kelly did not immediately and unfairly issue a disciplinary sanction as she had done with Simone but initiated a disciplinary investigation which would afford an opportunity for the Claimant to set out her case and for an independent and objective assessment of what had happened. Overall, and whilst we understand why the Claimant may feel that this was due to race, the Tribunal disagrees. Race had nothing whatsoever to do with the decision to commence the disciplinary investigation.

83 The third issue is an allegation that the Respondent had additional meetings with witnesses and that they knew the allegations and evidence in the investigation. This relates to the interviews conducted by Ms Harris with Ela, Julia and Ms Chapman in February 2020 and the additional statement provided by Ela in March 2020. The Tribunal concludes that this had nothing whatsoever to do with race. Mrs Kelly had spoken to the Claimant on 8 January 2020 about the alleged threat of violence to Ms Chapman. Ms Harris held an investigatory meeting with Claimant about the allegation on 5 March 2020. Mrs Kelly took statements from Julia and Ela; Ms Harris took statements from them as part of the disciplinary investigation. The information gathered by Mrs Kelly from the Claimant, Julia and Ela was not provided to Ms Harris. Whilst procedurally it would have been better had that information been shared with Ms Harris, there was no difference in treatment and there are no primary facts or inferences from which the Tribunal could safely conclude that this was in any way whatsoever related to or because of race.

84 Turning to issue 3.1(d), the Claimant's suspension lasted just over two months. A planned review at the end of February 2020 was delayed due to without prejudice discussions which had nothing to do with the Claimant's race. The Tribunal also takes into account the difficult situation which pertained from late March 2020 by reason of the lockdown and the significant efforts being made by schools to arrange provision for of classroom teaching for children of key workers and home-schooling for the other children. The Claimant's suspension was properly reviewed after the discussions did not result in agreement and was lifted because lockdown and social distancing meant that the School no longer needed to keep the Claimant apart from Ms Chapman or her kitchen colleagues. None of this had anything to do with race at all.

85 It is convenient to consider issues 3.1(e) and (g) together as they relate to the same factual dispute. The Claimant's case is that Ms Harris failed to treat her complaint about the "shower" comment on 5 March 2020 as a protected act. In the course of the hearing, it became clear that by this the Claimant meant that Julia and Ela were not suspended and subjected to a disciplinary investigation into the alleged comment in the same way that she was when an allegation was made against her. Having regard to our findings of fact, the Tribunal conclude that whilst Ms Harris did not conduct a comprehensive investigation into the Claimant's allegation, she did not ignore it. Ms Harris did regard the Claimant's allegation as something serious which required further investigation. It is clear from her conclusion that it was unlikely that the Claimant would have been subjected to racial discrimination, that Ms Harris appreciated that this was an allegation of race discrimination (and therefore a protected act). The Tribunal accept that Julia was not interviewed because she was absent from work. Ms Harris endeavoured to obtain further

information from the Claimant, for example the date of the incident and whether there was a contemporaneous complaint, but none was forthcoming. The information available to Ms Harris was, therefore, the Claimant's allegation without supporting evidence and Ela's denial without supporting evidence. The conclusion that the allegation was difficult to corroborate is a product of the lack of contemporaneous or other supporting evidence and in no sense at all related to or because of race.

86 The Claimant was suspended pending investigation into the alleged threat of violence against Ms Chapman because of the perceived risk arising from her continuing to work in close proximity with Ms Chapman. Once that risk no longer pertained due to the effect of the pandemic, as Ms Chapman working from home, the Claimant's suspension was lifted. When the Claimant's suspension was lifted, it was on the basis that her working hours were amended to ensure social distancing which would also have the effect of her not coming into contact with Ela. The Claimant's allegation against Julia and Ela was made on 5 March 2020, at a time when neither the Claimant nor Julia were at work. In the circumstances, there was no need to suspend either Julia or Ela to avoid them coming into contact with the Claimant.

87 Due to the absence of supporting evidence, there was no formal disciplinary investigation but Ms Harris did not ignore the Claimant's allegation and a mediation session was recommended. For all of these reasons, the Tribunal does not accept that Ms Harris failed to treat the Claimant's allegation as a protected act or that her handling of it was in any way related to or because of race.

88 Issue 3.1(f) relates to Ms Harris' recommendation in her investigation report that the Claimant should be required to attend a disciplinary hearing to consider the allegation of verbally threatening violence to a member of staff. This should be considered alongside issue 3.1(h) which relates to her failure to carry out a reasonable disciplinary investigation. As set out in our findings of fact, the Tribunal has agreed with Mr Adamou's submission on behalf of the Claimant that Ms Harris did not carry out a thorough investigation. Chief amongst the shortcomings of the investigation, we consider, were her unquestioning reliance on information provided by Mrs Kelly and the notes of Simone's untested account taken outside of the formal investigation process. Mr Adamou submits that Ms Harris' failure to test Mrs Kelly's evidence and its reliance on evidence received from outside of the investigation which was not fully shared with the Claimant are relevant facts from which we can infer harassment and/or discrimination. From this, he asks us to infer that the inadequate investigation was in some way related to or because of the Claimant's race when looked at in context of the failure also adequately to investigate the Claimant's allegation of race discrimination against Julia and Ela.

89 Unreasonable conduct alone is not the same as discriminatory conduct. We took into account Mr Jones' submission that it is unusual to have a disciplinary investigation which could be said to be perfect and that there was no evidence that any procedural failing was due to the Claimant's race. However, the Tribunal considers that the extent of the disciplinary investigation was so fundamentally flawed as to constitute primary facts from which we could find that it was related to or because of race. Furthermore, Ms Harris had evidence from Julia, Ela and Mr Burton about the incident which did not support her conclusion that three witnesses said that the Claimant had had to be prevented from confronting Ms Chapman, had made the threat of violence or that this was an example of her volatile behaviour. For this reason, we conclude that the burden of proof has passed to the Respondents.

90 The Tribunal carefully scrutinised the evidence of Ms Harris who candidly accepted in evidence that she could have investigated more thoroughly and denied that any failures were due to race in any way. In considering her evidence, we bear in mind that it is rare that a witness will admit to discrimination and that there is no need for the Claimant to show conscious motivation on her part. However, the Tribunal has made its criticisms of Ms Harris' investigation with the benefit of hindsight and the objective testing of evidence by skilled professional advocates over the course of hearing which lasted four days. We found Ms Harris to be a plausible witness and accept her evidence that race played no part in her procedural failings. The Tribunal infer that as a Head Teacher herself, Ms Harris accepted without question the information provided by Mrs Kelly because of her status as another Head Teacher. The same would have been true for a hypothetical white employee subject to the same allegations and in respect of whom a Head Teacher had provided information. It had nothing to do with the Claimant's race.

91 Moreover, even though on careful scrutiny the evidence of the witnesses did not support a finding of a verbal threat of physical violence by the Claimant to Ms Chapman there was evidence which tended to show misconduct warranting a disciplinary hearing. In particular, the evidence that the Claimant was extremely angry and intended to go to the office to confront Ms Chapman such that her colleagues felt that they needed to dissuade her (even if not physically hold her back). This evidence was supported by Mr Burton who had not been involved in the incidents on 8 and 9 January 2020 and was therefore a more reliable, objective witness. Such behaviour was potential misconduct in a school kitchen, whether or not children were present to witness it.

92 Although not expressly set out in the issues, the Claimant's case at the Tribunal hearing was that the disciplinary allegations which she faced changed as the investigation progressed. The Tribunal disagree. The disciplinary investigation commenced by Mrs Kelly and undertaken by Ms Harris considered purely the allegation that she had verbally threatened violence to a member of staff. Insofar as there may have been other disciplinary allegations to answer, these related to the subsequent unauthorised absence and no disciplinary investigation was ever commenced. There was nothing unfair, far less discriminatory, in warning the Claimant that if she continued to refuse to return to work she may be subject to further disciplinary action.

93 Issues 3.1(i) to (m) all relate to the grievance investigation, outcome and appeal. The Claimant's case is that each was an act of harassment related to race and/or direct discrimination because of race. The Claimant's position in evidence and in submission was that every single stage of the process was tainted by race.

94 The Claimant's grievance submitted on 21 May 2020 made four specific complaints of race discrimination: (i) the meetings on 8 January 2020, the allegation of misconduct, her suspension and the disciplinary investigation; (ii) changing allegations (which we have considered unfounded for the reasons set out above); (iii) 15 May 2020 requirement to return to work from suspension on changed job duties and hours; and (iv) failure to pay her since April 2020. She also made two general complaints of race discrimination: (i) other staff were not treated in the way she had been; and (ii) being subjected to racial discrimination, harassment, victimisation and loss of wages. The final complaint was a statement of the fact that she had made an allegation of a racially offensive comment in the disciplinary investigation on 5 March 2020.



95 Mr Johnson properly sought further written information and evidence from the Claimant about the details of her grievance given that she had indicated a preference for the investigation to be conducted in writing rather than to have a hearing. The questions gave examples of the information and evidence required which would have enabled the Claimant to understand what was required of her. Mr Johnson expressly sought further details and evidence of the allegations of difference in treatment and discrimination. The Claimant's answers were extremely brief and added little if any further information. This is particularly true of the complaints of difference in treatment and discrimination, stating "I have no answer" and relying upon the notes of the 5 March 2020 investigation meeting and the contents of her grievance. As a result the only additional specific allegation in addition to those identified in relation to the disciplinary process, return to work and pay were the "shower" comment. The Claimant identified no witnesses in support of her grievance.

96 Whilst the Tribunal have found that it was a material omission for Mr Johnson to fail to interview Mrs Kelly, he did interview Julia and obtained Mrs Kelly's contemporaneous notes of events on 8 and 9 January 2020, documents relating to suspension, Ms Harris' investigation report and the correspondence about the Claimant's continued absence from work. Indeed, Mr Johnson accepted in evidence that he would interview Mrs Kelly if he were to do the investigation again. The Tribunal do not consider that this single material omission is sufficient to support the Claimant's case as set out in issue 3.1(i) that the Respondents failed to carry out a reasonable investigation. What is reasonable depends upon the nature of the allegations and the information provided by the employee in support. Here, Mr Johnson had very little information from the Claimant and his investigation when looked at in context was reasonable. By contrast with a disciplinary investigation initiated by the employer, this was an investigation into a grievance which the Claimant had chosen to bring. The Claimant had chosen not to attend a hearing and had failed to provide detailed information thereby limiting the evidence available to Mr Johnson.

97 Further, the Tribunal has found that Mr Johnson was a candid and honest witness who accepted where his investigation could have been more thorough. There is no evidence to suggest that any lack of rigour was because of the Claimant's race or primary facts from which we could infer the same. To the contrary, the Tribunal found that Mr Johnson was a decent man trying to do his best despite his failure properly to scrutinise the assertions of Mrs Kelly and hampered by the lack of detail and evidence provided by the Claimant on key points of her grievance. The omission in the investigation was in no sense whatsoever related to or because of race.

98 Mr Johnson's grievance outcome letter dated 22 June 2020 was detailed and addressed each of the points of the Claimant's grievance and explained why it was not upheld. The Tribunal has found that Mr Johnson accepted as true the information provided by Mrs Kelly without properly testing it against the Claimant's conflicting account when rejecting her assertion that she had been dismissed and was misplaced in criticising the Claimant for not knowing the procedure for reporting racial abuse. Nevertheless, overall the Tribunal concludes that this does not undermine the integrity of his conclusions. Mr Johnson's conclusions about the allegation of changing disciplinary allegations, the "shower" comment and the allegation of a culture of racism were all objectively well founded on the evidence provided by the Claimant to him. The only reason Mr Johnson rejected the Claimant's allegation about the "shower" comment and the broader allegations of race discrimination were because there was insufficient evidence to support the allegations. Mr Johnson's recommendation of mediation to

restore working relationships between the kitchen staff which may not always have been easy and his recognition of the genuine distress of the Claimant was fair and balanced in the circumstances. The outcome of the grievance was in no sense whatsoever related to or because of race.

99 The Tribunal has not found that the Respondents refused to provide the Claimant with the evidence considered in the grievance investigation. Nor was there delay in providing those documents. The Claimant's request was answered the very next day when Mr Johnson asked her to clarify exactly what documents she required, even though she was out of time for an appeal. When the Claimant's request was repeated in her notice of appeal on 1 July 2020 without specifying the documents, the Respondents gave her until 15 July 2020 to do so. When the Claimant did not respond, the deadline was extended. One week after the Claimant confirmed what documents were sought on 24 July 2020, the Claimant was provided with Mrs Kelly's notes of the meetings on 8 and 9 January 2020 and the notes of the investigation meeting on 5 March 2020. Issues 3.1(k), (l) and (m) are not made out on the facts.

100 The final alleged act of direct discrimination is the Claimant's dismissal; it is also relied upon as an act of harassment. The School had decided to await the outcome of the Claimant's grievance and appeal before insisting that she return to work. The appeal decision was communicated to the Claimant on 11 August 2020. Mrs Kelly did not act with haste but waited until 24 August 2020 to write to the Claimant to inform her that she was required to return to work and to reply by 27 August 2020 to arrange a meeting to discuss her absence. The Claimant was expressly warned that failure to do so would be regarded as a disciplinary matter which could result in dismissal but nevertheless did not reply. It was only after this deadline passed that the Claimant was summarily dismissed for gross misconduct with effect from 29 August 2020. By this date, the Claimant had been absent from work for five months following the lifting of her suspension on 1 April 2020. Some of this period was with the effective consent of the Respondents due initially to the settlement discussions and latterly the grievance process. However, there were periods in between when the Claimant still refused to return to work when required to do so. More significantly, in the view of the Tribunal, by 29 August 2020 the Claimant had refused to reply to the School on more than one occasion and was effectively ignoring the reasonable management request. The new school year was due to start and it was important that the School knew whether or not it would need another kitchen assistant. The Claimant's persistent refusal to return and/or to engage with the School were the sole reason for her dismissal. The Tribunal has no doubt that in the same circumstances, a white employee would have been treated in exactly the same way. This was in no way related to or because of race.

101 In addition to the issues set out in the direct discrimination claim, the Claimant also alleges that the "shower" comment was a further act of harassment related to race. The Tribunal has found as a fact that the comment was not made.

102 For these reasons, all claims of harassment related to race and/or direct discrimination because of race fail and are dismissed in respect of each Respondent.

### *Victimisation*

103 The Respondents conceded during the hearing that each of the complaints on 5 March 2020, the refusal to return to work on amended duties due to childcare problems,

grievance and Tribunal claim were protected acts. The detriments relied upon are those set out at paragraphs 3.1(d) to (n).

104 The Claimant was suspended in January 2020, before the first of the protected acts. The suspension was lifted on 1 April 2020 when the effects of the pandemic lockdown meant that the School no longer needed to keep the Claimant apart from Mrs Chapman or the other kitchen staff. The review due at the end of February 2020 was delayed due to the without prejudice discussions. There is no evidence to suggest that Ms Harris was involved in the suspension or that Mrs Kelly prolonged it after 5 March 2020 because of the complaint about the “shower” comment. The Harris report was only produced on 17 March 2020 in any event. In the circumstances, the Tribunal conclude that the sole reason for the duration of the Claimant’s suspension was concern about contact between her and her colleagues in light of the allegation against her. As soon as this concern no longer applied, suspension was lifted even if the Claimant refused then to return to work. The duration of the suspension had nothing to do with the protected act.

105 The Tribunal refers to our conclusions above on issues 3.1(e) and (g) about the treatment by Ms Harris of the Claimant’s complaint about the shower comment. As we set out, Ms Harris did not ignore the complaint and did regard it as something serious requiring further information. There is no evidence from which we could infer that the investigation would have been more comprehensive if the Claimant had alleged an offensive comment unrelated to a protected characteristic. The extent of the investigation and the conclusion would have been exactly the same.

106 Whilst Ms Harris’ investigation and recommendation of disciplinary action were materially flawed for reasons set out above, the Tribunal repeats its conclusion that the criticisms made are with the benefit of hindsight and scrutiny in this hearing and there was evidence to support a recommendation of disciplinary action (even if not on the precise allegation of a verbal threat of violence). It is material that it was not put to Ms Harris in cross-examination that her investigation was less thorough or that she recommended disciplinary action because the Claimant had done a protected act. The Tribunal concludes that there is no evidence whatsoever to suggest that this was an act of victimisation as alleged in issues 3.1(f) and (h).

107 As a matter of fact, the Tribunal has concluded that there was no failure to carry out a reasonable grievance investigation or refusal, delay or failure to provide documents requested relating to the grievance investigation and outcome.

108 As for the grievance outcome (issue 3.1(j)), we repeat our conclusions above that this was a detailed decision addressing each of the points raised on the basis of the limited evidence provided to Mr Johnson. Mr Johnson understood the seriousness of the contents of the grievance, including the complaints of race discrimination, and made a decision based solely on the evidence. Again it is material that whilst it was put to Mr Johnson in cross-examination that his grievance outcome was because of race, it was not put to him that he had failed to uphold the grievance because it included a complaint of race discrimination. The Tribunal concludes that the protected acts of the Claimant had nothing whatsoever to do with the decision of Mr Johnson not to uphold the grievance.

109 Finally, in respect of the dismissal, the Tribunal does not find that the Claimant has proved primary facts from which we could conclude that the decision to dismiss was because of any of her protected acts. The chronology shows that Mrs Kelly regarded the

Claimant's unauthorised absence and failure to engage as a cause for concern irrespective of her "shower" allegation on 5 March 2020, grievance or subsequent ET1. Mrs Kelly did not accept that the Claimant's childcare responsibilities were an adequate reason for her continued absence as her children would be entitled to in-school education by reason of her critical worker status. However, failure to agree with the content of a protected act is not evidence from which we could safely find that doing that protected act was a material cause of the subsequent dismissal. By the date of dismissal, the Claimant had refused to return to work and refused to reply to Mrs Kelly's letters for a lengthy period. The new school year was starting and the Tribunal takes judicial notice that by September 2020 the intention was that schools would re-open in full, not just for the children of critical workers. The protected acts were in no sense at all a material or effective cause of dismissal.

110 All claims of victimisation fail and are dismissed in respect of each Respondent.

*Automatic Unfair Dismissal because of a Protected Disclosure*

111 For the purposes of deciding the automatic unfair dismissal claim, the Tribunal has found it convenient to assume that the Claimant *had* shown that each of the matters relied upon did amount to a protected disclosure without making any finding or reaching any conclusion on the point (essentially taking the Claimant's case at its highest).

112 The real issue is, in our view, one of causation. For the claim under s.103A to succeed, the Tribunal would need to be satisfied that the sole or principal reason for dismissal was a protected disclosure. Even bearing in mind that the burden of proof is on the employer, the Tribunal concludes that it was not. The sole reason for the Claimant's dismissal on 29 August 2020 was because she had refused to return to work since her suspension was lifted on 1 April 2020, she continued to refuse to return to work even after her grievance and appeal had concluded and she did not reply to Mrs Kelly's attempts to arrange a meeting in advance of the new school year. By the date of the dismissal, the unauthorised absence was longstanding and consistent (even allowing for periods when a return to work was not enforced). The Claimant's unauthorised absence and repeated failure to reply to Mrs Kelly were the sole reasons for dismissal.

113 The automatic unfair dismissal claim fails and is dismissed.

Employment Judge Russell  
Dated: 23 June 2022