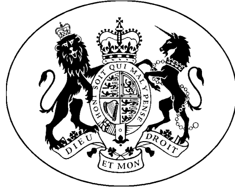

EMPLOYMENT TRIBUNALS

Claimant: D Rouillon

Respondent: Shirley High School Performing Arts College

Heard at: Croydon (via video) **On:** 21st, 22nd and 28th February 2022
Chambers discussion: 14th June 2022

Before: Employment Judge Howden-Evans
Tribunal Member Khawaja
Tribunal Member Von Maydell-Koch

Representation:
Claimant: In person
Respondent: Mr Peacock, Solicitor

RESERVED JUDGMENT

The tribunal's unanimous decision is that:

1. The Claimant's complaint of constructive unfair dismissal is well founded. The Respondent has unfairly dismissed the Claimant.

2. The Claimant's complaints of direct race discrimination and harassment related to race are not well founded and are dismissed.

REASONS

1. References to the hearing bundle appear in square brackets throughout this Judgment.

Background

2. The Respondent is a co-educational multicultural academy school in the London Borough of Croydon. It first opened in 1954 and currently has around 1,100 pupils aged 11-18 years. It currently employs 157 members of staff. It has been awarded specialist status as a performing arts college.

3. The Claimant commenced employment with the Respondent on 1 September 2013. She was employed, initially as a Teacher of English and Media Studies, and more latterly as a Teacher of English, until her resignation letter of 24 May 2019 took effect at the end of her contractual notice period (1 term) on 31 August 2019.

4. On 24th June 2019, Claimant commenced sick leave and did not return to school prior to the expiry of her notice period.

5. On 26th November 2019 the Claimant contacted ACAS. ACAS early conciliation procedures continued until 26th December 2019.

6. The Claimant presented her ET1 claim on 26th January 2020 [p2 to 7]. This alleged unfair constructive dismissal and race discrimination.

7. On 2nd March 2020, the Respondent submitted their ET3 Response [p10 to 20]. The Respondent had requested further information and the Claimant provided this ahead of a preliminary hearing on 25th August 2020.

8. At the preliminary hearing Employment Judge Truscott, directed that a further preliminary hearing should be listed to determine whether some of the Claimant's discrimination allegations had been made out of time. Unfortunately the Claimant did not receive notice of the second preliminary hearing and did not attend; subsequently she made written submissions and the Tribunal concluded it would further the overriding objective for the time issues to be determined at the final hearing.

The Issues

9. At the start of the final hearing, the employment judge discussed the List of Issues – this resulted in the Claimant making an application to amend her claim to re-label some of the allegations. Having heard submissions from both parties, the Tribunal permitted the Claimant to make amendments. By closing submissions, the List of Issues to be determined were:

Time limits

1. *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 27th August 2019 may not have been brought in time.*

2. *Were the direct race discrimination and harassment related to race complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*

    2.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*

2.2 If not, was there conduct extending over a period?If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.3 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
2.3.1 Why were the complaints not made to the Tribunal in time?
2.3.2 In any event, is it just and equitable in all the circumstances to extend time?

Unfair dismissal

The Claimant resigned with notice on 24th May 2019 with her last day of employment being 31st August 2019.

3. *Was the Claimant constructively dismissed? To determine this the Tribunal will answer the following questions: Did the Respondent do the following things:*

3.1 On or around 21 September 2018, not recommend the Claimant for pay progression.

3.2 On or around 1 October 2018, put the Claimant under unreasonable pressure by insisting she sign a Performance Improvement Plan that she did not accept and then not permit her to make an amendment.

3.3 On or around 2 October 2018, notify the Claimant that she was to face a competency meeting in circumstances where she considered the 5 points of competency were unfair.

3.4 In or around 6 March 2019 decide to not uphold a grievance complaint submitted by the Claimant and then failing to provide reasonable support whilst she was suffering from anxiety and stress.

3.5 Unreasonable delay responding to the Grievance and responding to the Grievance Appeal (submitted on or around 1 May 2019).

3.6 By Jackie Swift, make the following inappropriate comments of a racial nature:

3.6.1 during the Academic year 2015-16, an alleged comment by Jackie Swift inferring that Aboriginal pupils in her country of origin were not as developed or as intelligent.

3.6.2 during the Academic year 2015-16, an alleged assumption by Jackie Swift that a pupil the Claimant had referred to her for sanction following disruptive behaviour was black.

3.7 On unspecified dates between October 2018 and July 2019, in the ways listed below, subject the Claimant to: 1) unfair workloads and deadlines; (2) excessive work scrutiny; (3) unprofessional and unfair comments in team meetings; (4) isolating and ignoring her;

a. Moving Year 10 exams closer to the Year 7 exam week, which meant the Claimant had excess amounts of exam marking, as the only teacher with two Year 7 classes and a Year 10 class. No extra time was given to the Claimant to complete marking and data entry.

b. Requesting an entire Year 10 class exams to mark for moderation when moderation usually requires sampling of 3 – 6 pieces of work.

c. Requesting an entire Year 7 class for moderation outside of moderation practices and not requested from any other department members.

d. Stating to the team that a particular intervention had been put on and was there for practically all of the Claimant's class because they were doing so badly and their progress was bad.

4. *Did that breach the implied term of trust and confidence? The Tribunal will need to decide:*

   4.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

   4.2 whether it had reasonable and proper cause for doing so.

5. *Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.*

6. *Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach and will also consider whether the Claimant delayed too long before resigning.*

Direct race discrimination (Equality Act 2010 section 13)

7. *The Claimant identifies herself as being a black person and she compares her treatment with the treatment of non-black people at the Respondent school.*

8. *Did the Respondent do the following things:*

8.1 Between November 2018 and March 2019 fail to adequately investigate the Claimant's grievance.

8.2 Between May 2019 and July 2019 fail to objectively consider the Claimant's grievance appeal.

8.3 When the Claimant told Virginia Fair she was unwell with stress (during a sickness absence review), did the Respondent fail to offer the Claimant support including counselling.

Here the Claimant compares herself to Jackie Swift, who the Claimant asserts is a white English teacher and the Claimant alleges when Jackie Swift was struggling with stress, the Respondent offered her counselling.

8.4 When the Claimant was stressed and struggling with her workload and asked for an extra 2 days to complete the Year 7 and Year 10 exam marking, was the Claimant denied any extra time to complete this marking and data entry.

Here the Claimant compares herself to Charlotte Griffiths, who the Claimant asserts is a white English teacher. The Claimant alleges that when Charlotte Griffiths was stressed and struggling with her workload, the Respondent made arrangements for Charlotte Griffiths to have a reduced teaching timetable and reduced workload.

9. *Was that less favourable treatment?*

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

10. *If so, was this less favourable treatment because of race?*

Harassment related to race (Equality Act 2010 section 26)

11. *Did the Respondent do the following things:*

11.1 In October 2018 decided to commence a competence procedure in relation to the Claimant

11.2 In October 2018, in various emails, demand certain pieces of work from the Claimant, when the Claimant had already confirmed the work was not available

11.3 during the Academic year 2015-16, did Jackie Swift make a comment to the Claimant inferring that Aboriginal pupils in her country of origin were not as developed or as intelligent.

11.4 during the Academic year 2015-16, did Jackie Swift assume that a pupil the Claimant had referred to her for sanction following disruptive behaviour, was a black pupil.

12. *If so, was that unwanted conduct?*

13. *Did it relate to race?*

14. *Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

15. *If not, did it have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

The Hearing

10. The case was heard by an employment tribunal siting remotely via video link. During the 3 days listed in February 2022, we were able to hear all the witness evidence but there was insufficient time for oral closing submissions. By consent parties exchanged written submissions and then exchanged and filed their final written closing submissions. The tribunal had hoped to meet for its chambers discussion on 27th April 2022 but unfortunately the Employment Judge was unwell. The Tribunal met on 14th June 2022. The Employment Judge apologises to the parties for the delay in providing this decision.

11. At the final hearing, the Claimant presented her own case. Mr Peacock, Solicitor, represented the Respondent.

12. At the outset of the Hearing we discussed the timetable and order of evidence. The Tribunal read the bundle of documents (of 468 pages) and the 5 witnesses' statements.

13. We heard evidence on oath from

    13.1 Brigid Doherty, the Respondent's Vice Principal, who investigated the Claimant's grievance;
    13.2 The Claimant;
    13.3 Paul Templeman-Wright, who was the Respondent's Senior Vice Principal at the relevant time;
    13.4 Dr Jacqueline Swift, the Respondent's Head of English; and
    13.5 Gillian Manson, the Respondent's Chair of Governors who chaired the Governors' Staff Appeal Committee that considered the Claimant's appeal against the grievance outcome.

14. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the Tribunal had read each witness's statement, there was opportunity for supplemental questions (or in the Claimant's case, for the Claimant to address matters raised in the Respondent's witnesses' statements) before questions from the other side, questions from the tribunal and any re-examination (or in the Claimant's case, opportunity for the Claimant to clarify anything she felt she had not been able to explain fully in answering questions).

15. The Tribunal also had statements of support from former colleagues of the Claimant. Given the seriousness of the allegations and the number of factual disputes in this case, the tribunal took great care making its findings of fact.

Findings of Fact

Background

16. The Claimant commenced employment with the school in September 2013. We accept the Claimant is an experienced and capable teacher, having initially worked as a Teacher of English and Media Studies for the school and having previously been offered (and declined) promotion to the post of Head of Media Studies. The Claimant preferred being a classroom teacher, specialising in English. By the academic year 2016/17 the Claimant was assigned 100% to the English department in the school.

17. Between 2014 and 2016 the English department's Head of Department changed a number of times. Ms Swift joined the school as Head of the English Department during the academic year 2015-16 and was head of department at all relevant times.

18. Like all schools, the Respondent is under constant pressure to attain good results in external examinations. One tool that it uses (like many other schools) is Fischer Family Trust data ("FFT") which takes the scores that a pupil achieved in previous years (usually Year 6) and creates an aspirational target for that pupil in subsequent years and their GCSEs. The FFT50 target is informed by the exam performance (at GCSE) of pupils in the top 50% of schools that had attained similar scores in Year 6. FFT50 is considered to be the "average" score that a pupil would attain.

19. In the 2017/18 academic year, the Claimant had an FFT50 target set as part of her appraisal as she taught a Year 11 class (that sat their GCSE exams in Summer 2018).

20. The Respondent's English Department's GCSE results in Summer 2018 were disappointing. This led to staff in the English department having a specific FFT50 target inserted in their individual appraisals when they were discussed in Autumn 2018.

Issue 3.1: On or around 21 September 2018, did the Respondent not recommend the Claimant for pay progression?

21. The Claimant's appraisal was conducted in September 2018 by Ms Pilarchie, who was a new member of staff and was responsible for English at Key Stage 3 (Years 7 to 9). The Claimant told Ms Pilarchie that, having reached the top of the Main Pay Scale (being on MPS 6), the Claimant wished to apply for progression to the Upper Pay Scale; she provided Ms Pilarchie with a bundle of documents that supported her assertion that she had met the standards required to progress to the Upper Pay Scale.

22. Ms Pilarchie was unsure how to approach the Claimant's application as she had only just joined the school and did not know the Claimant's teaching ability. She sought advice from Mr Templeman-Wright. Following Mr Templeman-Wright's guidance, Ms Pilarchie recorded on the Claimant's appraisal

    "I acknowledge that [the Claimant]'s results are comparably better than what obtains in other subjects. However, owing to the fact her actual vs FFT50 results is -50% coupled with the fact targets were missed as a department and school, I am unable to support her application for a pay rise."

23. The Claimant knew this assessment had been provided by Mr Templeman-Wright. The Claimant was upset as she had spoken to Mr Templeman-Wright during the previous academic year to explain her Year 11 GCSE class included 4 pupils (ie 14% of her cohort) that had experienced exceptional circumstances that would have a huge impact on their GCSE performance and would make it very difficult for the Claimant's cohort of pupils to achieve the overall FFT50 target that had been set for the Claimant. Each of the 4 pupils had experienced long periods of absence in Years 9 to 11 as they included:

    23.1 a pupil whose brother had been murdered 2 years ago;
    23.2 a pupil with acute mental health illness;
    23.3 a pupil that had been accused of rape and was being prosecuted; and
    23.4 the pupil that made the allegation of rape.

24. The Claimant's evidence was that she had a conversation with Mr Templeman-Wright in 2017/18 when she raised her concerns that her overall FFT50 target would be significantly affected by these 4 pupils. In cross examination, Mr Templeman-Wright could not recall having a conversation about these 4 students but eventually accepted the Claimant had (in 2017/8) raised concerns about her FFT target in conversation with him. The tribunal accept in 2017/8 there was a conversation between the Claimant and Mr Templeman-Wright during which she raised concerns about the feasibility of achieving this target in light of the exceptional circumstances that some of her pupils faced.

25. Other pupils in the Claimant's classes performed well in their 2018 GCSE exams: with 4% of her pupils achieving grades that were 3 grades higher than their predicted grade; 14% of her English Language students and 18% of her English Literature students achieving grades that were 1 grade higher than their predicted grade.

26. The Claimant was understandably upset that Mr Templeman-Wright was choosing to "not support" her application for salary progression based upon her FFT50 results which he knew were adversely affected by circumstances that

were beyond her control. There appears to have been no attempt to consider the various competencies that could have supported her application (see the competencies that could have been taken into account on p295 – this included teaching quality, contribution to whole school development, extra curricula work)

27. The Respondent has suggested that, notwithstanding the lack of support from a line manager, there was nothing stopping the Claimant from submitting her application for progression to the Upper Pay Scale to Mr Barrow, the Principal. The Tribunal accept it is highly unlikely that a teacher would submit such an application without the support of their line manager or the senior leader that was responsible for their department and it was highly unlikely it would succeed without either manager's support.

Issue 3.2: On or around 1 October 2018, did the Respondent put the Claimant under unreasonable pressure by insisting she sign a Performance Improvement Plan that she did not accept and then not permit her to make an amendment?

28. In September 2018, each teacher was provided with their new personal Performance Improvement Plan for the academic year 2018/19. Teachers that taught Year 11 (GCSE year) in the English department had an identical "Key Action" inserted into their PIP which read *"At KS4 the minimum expectation for your class is to achieve FFT50".*

29. In September 2018 the Claimant asked Ms Pilarchie to amend this action point by adding the words *"subject to the makeup of the class and teacher professional judgment".* She refused to sign the PIP until this wording had been added. On 28th September 2018 the Claimant added this extra wording to a copy of the PIP, signed it and placed it in Ms Pilarchie's pigeon hole. Ms Pilarchie believed the Claimant was not allowed to amend this action point so Ms Pilarchie returned the unsigned PIP to Mr Templeman-Wright (who had responsibility for performance management) with a note saying *"[The Claimant] has refused to sign the PIP due to her disagreement with the FFT50 target".*

30. In September 2018, other members of the English department were allowed to amend this particular action point:

    30.1 Dr Swift (Head of English) allowed Ms Stewart to add *"At KS5 no blue but with an awareness of the challenges that some of our students face*" to the same action point when she was undertaking Ms Stewart's appraisal.

    30.2 Dr Swift allowed C Harding to add *"but recognising the make-up of the class"* to the same action point when she was undertaking C Harding's appraisal.

31. On 1st October 2019, Mr Templeman-Wright called the Claimant into his office and insisted she sign the PIP without any extra wording being added to the Key Action that read *"At KS4 the minimum expectation for your class is to achieve FFT50".* The Claimant refused to sign it and repeated her request for the extra wording to be added.

32. Subsequently Mr Templeman-Wright and Dr Swift invited the Claimant to attend an Informal Competence Procedure meeting with them on 5th October 2018. The Claimant's refusal to sign the PIP with the unamended Key Action *"At KS4 the minimum expectation for your class is to achieve FFT50"* was 1 of the 5 specific issues that were raised with the Claimant during this meeting. Whilst Mr Templeman-Wright might not have been aware that Dr Swift had allowed other staff to amend this particular Key Action point in their appraisals, Dr Swift certainly was aware that she had already permitted amendments to this Action Point; the Tribunal do not understand why the Claimant was being criticised (and subjected to informal competency procedures) for requesting an amendment similar to one that Dr Swift had already allowed other staff to make.

Issue 3.3: On or around 2 October 2018, did the Respondent notify the Claimant that she was to face a competency meeting in circumstances where she considered the 5 points of competency were unfair?

33. By email of 2nd October 2018, Mr Templeman-Wright and Dr Swift invited the Claimant to attend an Informal Competence Procedure meeting with them on 5th October 2018. This meeting was to discuss 5 specific issues:

    1. "Department Data Drop return"

       The background to this issue was on Monday 24th September 2018, Dr Swift emailed the English teachers asking them to let her know which pieces of work they would be using to assess their Year 11 classes during that half term. She asked for information to be provided by 9am Tuesday 25th September 2018, which provided teaching staff less than 24 hours to answer her query. Dr Swift needed this information for a management meeting she was attending with her own line manager, Mr Templeman-Wright at 9am on Tuesday 25th September 2018.

       This query was not a "department data drop" as that is a particular event that is scheduled in the department calendar and requires a teacher to input data for all pupils; the tribunal accept witnesses' evidence that missing a department data drop deadline would be a matter of professional conduct as it would have an impact on other school deadlines such as producing reports. However this was not a department data drop - instead, this was a piece of information that Dr Swift realised she should have previously asked teachers to provide as Mr Templeman-Wright might ask for it during their meeting the following day.

       Due to several commitments on that particular Monday, including teaching every lesson, running a lunchtime club, meeting students after school and attending a staff meeting after school, the Claimant did not see this email until the morning of Tuesday 25th September and did not respond before the deadline.

    2. "Curriculum Maps"

       The background to this issue was on 26th September 2018, Mr Templeman-Wright had observed one of the Claimant's Year 11 lessons

and noted that she was completing speaking and listening assessments with pupils rather than teaching poetry. The Year 11 departmental curriculum maps indicated Year 11 classes would be preparing for poetry exams during the autumn term (as the exams would be taking place at the end of November 2018). Mr Templeman-Wright mentioned this to Dr Swift in September 2018 and Dr Swift raised this with the Claimant in September 2018. The Claimant explained the class had already spent several lessons preparing for the poetry exam and were getting jaded so she had decided to use a single lesson to complete speaking and listening assessments which should have been completed in Year 10, but some pupils had missed due to absence. The Claimant explained she was conscious that Ms Pilarchie was going to struggle to find time for Year 11 pupils to catch up with these missing Year 10 speaking and listening assessments, so the Claimant was using her professional judgment and trying to support Ms Pilarchie and the English department by clearing these tasks whilst she had spare lesson time. The Claimant believed this "curriculum maps" query had been resolved so she was surprised to see it being raised again, this time in an informal competence meeting.

3. "Baseline Assessments"

   On 2nd October 2018 Ms Pilarchie sent an email to Dr Swift noting that *"[the Claimant's] marking was way too harsh. She was not crediting students, though as you explained the department discussed a cap on KS3. I believe the grade went up by ten in one case. It was a total miss of the rubric and quite outstanding compared to other teachers."*

   The Claimant taught the top set and at Key Stage 3 ("KS3" which is Years 7 to 9). Prior to September 2018 there had been English department staff briefings during which staff were encouraged to be conservative in their marking and not reflect true high grades when they were achieved (and similar guidance was given in the departmental staff handbook). In effect marks were being capped at Key Stage 3 to ensure pupils and parents had reasonable expectations at Key Stage 4 (GCSE) and to demonstrate steady progress between Years 7 to 11. In addition, in 2017/18 the government had introduced 1 to 9 as the GCSE grades so staff were getting used to moving from the well known A to G grade boundaries to the new 1 to 9 grade boundaries.

4. "FFT50 expectation"

   The tribunal has already discussed the background to this issue.

5. "Working within the department"

   This being raised as an issue during informal competency procedures, suggested the Claimant had difficulty with teamwork. Dr Swift's evidence was that she was concerned the Claimant was withdrawn and this was impacting on her relationship within the team. Dr Swift was not being fair in suggesting the Claimant was not a team player – in October 2018 Dr

Swift knew that in recent months the Claimant had covered colleagues' lessons for months to support them when they were feeling overwhelmed with stress. Dr Swift knew the Claimant was a team player. Dr Swift's real concern was that the Claimant was only interacting with Dr Swift when necessary and had stopped dropping by for casual chats.

34. We accept that inviting the Claimant to an "Informal Competency" meeting to discuss these matters with Dr Swift and Mr Templeman-Wright was heavy handed management. It reflected the pressure that Mr Templeman-Wright was placing on staff (including Dr Swift) and was a reflection of the breakdown in the relationship between Dr Swift and the Claimant. The Claimant had been offended by comments that Dr Swift had made in previous years, which had caused the Claimant to only interact with Dr Swift when necessary. These were all matters that Dr Swift should have been able to ask the Claimant about in a quick chat on her own. Inviting the Claimant to a meeting with Mr Templeman-Wright at which these matters were identified as being "significant concerns" about her competency [see page 206] was an unreasonably hostile step.

35. At the end of the meeting on 4th October 2018, a review date of 8th November 2018 was set.

Issue 3.4: In or around 6 March 2019 did the Respondent decide to not uphold a grievance complaint submitted by the Claimant and then fail to provide reasonable support whilst she was suffering from anxiety and stress?

36. On 6th November 2018 the Claimant emailed her grievance to Mr Barrow, Principal of the school. In her grievance she alleged Mr Templeman-Wright and Dr Swift had acted in a bullying intimidating and unprofessional manner towards her. She objected that her progression to the upper pay scale was not being supported and explained the reason that had been provided for this (as set out in paragraphs 21 to 26 above). She also explained the informal competency meeting and the 5 issues raised were a *"targeted measure to put me under pressure to comply with unreasonable and unfair demands"* .

37. By letter of 6th November 2018 Ms Doherty, Vice Principal took on the role of investigating officer and invited the Claimant to attend an informal grievance meeting on 16th November 2018. That meeting took place and the Claimant attended with her union representative. During that meeting Ms Doherty listened to the Claimant's grievance and subsequently wrote to the Claimant suggesting how the various complaints could be organised and considered during the grievance.

38. In November 2018 Ms Doherty invited Mr Templeman-Wright and Dr Swift and other witnesses to separate meetings to investigate the Claimant's grievance. Ms Doherty undertook extensive investigations into the Claimant's grievance.

39. Ms Doherty provided the Claimant with a brief update on 5th December 2018 indicating she hoped to start drawing up her findings and recommendations in the next few weeks.

40. By 10th December 2018 Ms Doherty was waiting for a further witness statement and proposed the deadline for completing the grievance was extended to 4th January (providing her 5 more working days) to complete the grievance.

41. Subsequently, the grievance outcome meeting was arranged for 18th January 2019 to fit in with diaries of Ms Doherty the Claimant and her union representative. On 17th January 2019 the Claimant asked for the meeting to be rearranged as she was unwell and not in school. Everyone attempted to arrange a meeting on 15th February 2019, but at short notice that meeting had to be rearranged as a result of changes to the dates of the school ski trip.

42. The grievance outcome meeting took place on 6th March 2019. The Claimant attended with her trade union representative. In Ms Doherty's grievance outcome report she concluded *"Although [the Claimant] may feel the informal competency process was a means by which to bully and belittle her…it would appear that this certainly was not the intention. The complaint is not substantiated."* Ms Doherty recognised *"the evident breakdown in professional working relationship between [the Claimant] and Dr Swift"* and recommended mediation.

43. The tribunal note on 15th January 2019 Dr Swift had sent an email to Ms Doherty (the grievance investigator) stating *"Morning Bridge Having reflected on your advice I have revised my document and removed the offending comments in my conclusion to the grievance. Yes, perhaps too vitriolic and out of step – tone wise – with the rest of the document. Thanks for being a mate. Cheers."*

44. The tribunal have not seen the original document that Dr Swift provided to Ms Doherty (ie the document that existed before any amendments to remove offending comments). The tribunal note this was the first time that Ms Doherty had investigated a grievance. It appears that Ms Doherty had suggested a witness (ie Dr Swift) rewrite statements she made during the grievance – this is incompatible with Ms Doherty being a truly impartial investigator.

45. The Tribunal note the Claimant was not referred to the employee assistance programme or counselling to support her with the stress associated with raising a grievance.

46. By email of 25th February 2019 the Claimant explained to Ms Doherty the impact the delay in concluding the grievance was having on her health. *"No thought has been given to the impact this may have on my mental wellbeing…I have been constantly aware of this unpleasantness hanging over my head. I find it highly unacceptable and indeed neglectful that I should be forced to continue in limbo like this. Whilst the school continues to behave in such a thoughtless way, I am forced to operate in what is a continually, and indeed increasingly, hostile environment".*

47. The Claimant was off work on 7th and 8th March 2019 with back problems. On 1st April 2019 the Claimant was off work for 1 day *"depressed and anxious".* The Claimant reported she was taking anti-depressants which were *"of some use".* She was off work for 3 days from 22nd May 2019 with migraine and was off work from 24th June 2019 until the end of her employment, with stress related illness.

Issue 3.5: Was there unreasonable delay responding to the Grievance and responding to the Grievance Appeal (submitted on or around 1 May 2019)?

48. The Claimant having been told the outcome of the grievance on 6th March 2019, by letter of 20th March 2019 the Chair of Governors wrote to the Claimant confirming the governors were upholding the findings and recommendations in Ms Doherty's grievance report. This letter confirmed the Claimant had a right of appeal, to the Chair of Governors.

49. On 5th April 2019 the Claimant emailed a letter of appeal to the Chair of Governors's personal email address. When there was no response to this she sent a letter of appeal addressed to the Chair of Governors which was received on 1st May 2019.

50. On 24th May 2019 the Claimant resigned from her post (see below).

51. By letter of 12th June 2019 the Clerk to the Governors invited the Claimant to attend an appeal hearing on 28th June 2019. There was no explanation for the delay in acknowledging receipt of the appeal, which ought to have been provided within 5 working days of receipt of the appeal. The Tribunal accept this was probably an accidental oversight on the part of the school's governors but accept this would have added to the Claimant's concerns and distress about her employer.

Issue 3.6: during the Academic year 2015-16, did Jackie Swift make a comment to the claimant inferring that Aboriginal pupils in her country of origin were not as developed or as intelligent and/or during the Academic year 2015-16, did Jackie Swift assume that a pupil the Claimant had referred to her for sanction following disruptive behaviour was black.

52. The Claimant had a recollection of two conversations which caused her offence but was not able to identify a time during the academic year when these conversations took place. There were no other witnesses to these conversations and Dr Swift has no recollection of either conversation. The Claimant accepts that she did not challenge Dr Swift at the time or refer to these conversations during her grievance. There are no contemporaneous documents relating to these incidents and we have no evidence as to the context in which any comments were made. Context is critical in assessing and understanding comments. Given the length of time that has elapsed and the lack of context, we cannot fairly make any findings of fact about these alleged conversations.

Issue 3.7 On unspecified dates between October 2018 and July 2019, in the ways listed below, did the Respondent subject the Claimant to: 1) unfair workloads and deadlines; (2) excessive work scrutiny; (3) unprofessional and unfair comments in team meetings; (4) isolating and ignoring her;

a. Moving Year 10 exams closer to the Year 7 exam week, which meant the Claimant had excess amounts of exam marking, as the only teacher

with two Year 7 classes and a Year 10 class. No extra time was given to the Claimant to complete marking and data entry?

53. On Monday 13 May 2019, Dr Swift sent an email to all of the teachers in the English Department confirming the Year 7 and Year 10 marking of assessments needed to be completed by that Friday (17th May 2019).

54. On Thursday 16 May 2019, the Claimant emailed Dr Swift, copying in Mr Templeman-Wright, explaining that she had two Year 7 classes and a Year 10 class and requested an extension of time.

55. Dr Swift responded the same day and agreed to an extension until Monday 20th May 2019

56. The Claimant responded requesting an extension to the end of Tuesday. Dr Swift responded the same day: *'... I'm afraid I really need you to have your exams marked so that the data is up-loaded Monday. However, Claudette is most happy to sit with you and help you input the data for your classes. Please be aware that these deadlines are not randomly set, but because there are other things that will occur in the wake of that input. So it is important that you do everything you can meet Monday's deadline. While I know I cannot direct you to mark over the weekend, the reality of teaching is that we all do a great deal of work out of hours and at home in order to meet our professional obligations. This is the nature of the job ...'*

57. The Tribunal accept that the Claimant was under pressure to meet this marking and data deadline, but do not accept that there had been any deliberate intention to put the Claimant under pressure by changing dates of assessments. We note that a small extension was provided to the Claimant and the offer of help by another colleague. We note the Claimant didn't make any mention that she was feeling unwell in her request. We found that this tight deadline was part of the relentless pace of meeting secondary school deadlines, many of which were outside the control of the individuals running the school and department.

Issue 3.7 On unspecified dates between October 2018 and July 2019, in the ways listed below, did the Respondent subject the Claimant to: 1) unfair workloads and deadlines; (2) excessive work scrutiny; (3) unprofessional and unfair comments in team meetings; (4) isolating and ignoring her;

b. Requesting an entire Year 10 class exams to mark for moderation when moderation usually requires sampling of 3 – 6 pieces of work?
c. Requesting an entire Year 7 class for moderation outside of moderation practices and not requested from any other department members?

58. The Tribunal accept the decision to request the entire Year 10 papers and an entire class of Year 7 papers for moderation stemmed from a genuine concern that the Claimant had approached the marking task (across the year) in a different manner from other members of the English Department. The Tribunal note that moderating an entire class's papers (as opposed to 3 to 6 papers) would have created extra work for the person undertaking the moderating too.

We accept this request was necessary and was not done to create an unfair workload for the Claimant.

Issue 3.7 On unspecified dates between October 2018 and July 2019, in the ways listed below, did the Respondent subject the Claimant to: 1) unfair workloads and deadlines; (2) excessive work scrutiny; (3) unprofessional and unfair comments in team meetings; (4) isolating and ignoring her;

d. Stating to the team that a particular intervention had been put on and was there for practically all of the Claimant's class because they were doing so badly and their progress was bad?

59. The Tribunal did not hear sufficient evidence to be able to make any findings in relation to this allegation.

Resignation letter

60. By letter dated 24th May 2019 the Claimant resigned from her position with the Respondent, giving 1 term's notice. In this letter the Claimant explained she had served on the teaching staff for six years and for the most part it had been a really fulfilling experience, *"However, this past academic year, from September 2018 to the present, I have been forced to work in an increasingly hostile environment. The poor treatment and blatant isolation inflicted on me by senior staff members with direct responsibility for English is such that my physical emotional and mental health have suffered….I have ongoing grievances against management and senior management level individuals from October 2018; to date these have not been resolved".*

Issue 8.1, did the Respondent do the following thing: Between November 2018 and March 2019 fail to adequately investigate the Claimant's grievance?
Issue 8.2, did the Respondent do the following thing: Between May 2019 and July 2019 fail to objectively consider the Claimant's grievance appeal?

61. The Tribunal are satisfied that the Claimant's grievance and grievance appeal were handled in exactly the same way that a hypothetical comparator's grievance and grievance appeal would have been handled. We noted that this was Ms Doherty's first grievance investigation and whilst she made mistakes (eg suggesting a witness might want to rewrite their statement) she did use her best efforts to investigate the grievance. We also accept the Respondent used their best efforts to objectively consider the grievance appeal.

Issue 8.3, did the Respondent do the following thing: When the Claimant told Virginia Fair she was unwell with stress (during a sickness absence review), did the Respondent fail to offer the Claimant support including counselling?

62. Here the Claimant compares herself to Jackie Swift, who the Claimant asserts is a white English teacher and the Claimant alleges when Jackie Swift was struggling with stress, the Respondent offered her counselling.

63. This allegation was added to the list of issues on the first day of the hearing, which meant there were no documents relating to this allegation and the Claimant was the only witness called in relation to this allegation. The

Claimant's memory of any conversation with Ms Fair was hazy. The tribunal felt we did not hear sufficient evidence to fairly make findings of fact in relation to this allegation.

Issue 8.4, did the Respondent do the following thing: When the Claimant was stressed and struggling with her workload and asked for an extra 2 days to complete the Year 7 and Year 10 exam marking, was the Claimant denied any extra time to complete this marking and data entry?

64. Here the Claimant compares herself to Charlotte Griffiths, who the Claimant asserts is a white English teacher. The Claimant alleges that when Charlotte Griffiths was stressed and struggling with her workload, the Respondent made arrangements for Charlotte Griffiths to have a reduced teaching timetable and reduced workload.

65. We repeat the findings of fact in paragraphs 53 to 57 of this judgment. We note the Claimant <u>was</u> provided a small extension of time to complete the marking.

66. We note that the Claimant had been off work on 1st April 2019 for 1 day *"depressed and anxious"* and had reported she was taking anti-depressants which were *"of some use",* but there had been no further reference to depression or anxiety prior to this marking task.

67. We note this marking task was the week commencing Monday 13 May 2019 and crucially, in her request for an extension of time, the Claimant did not give any indication that she was feeling unwell.

68. We do not accept the Claimant was treated less favourably than Ms Griffiths or a hypothetical comparator would have been treated in these circumstances.

Issue 11.1, did the Respondent do the following thing: In October 2018 decide to commence a competence procedure in relation to the Claimant

69. We repeat our findings in paragraphs 33 to 35 of this judgment.

Issue 11.2, did the Respondent do the following thing: In October 2018, in various emails, demand certain pieces of work from the Claimant, when the Claimant had already confirmed the work was not available?

70. The Tribunal did not hear sufficient evidence to be able to fairly make findings of fact in relation to this allegation.

Issue 11.1, did the Respondent do the following thing: during the Academic year 2015-16, did Jackie Swift make a comment to the Claimant inferring that Aboriginal pupils in her country of origin were not as developed or as intelligent?

71. We repeat our findings at paragraph 52 of this judgment.

Issue 11.1, did the Respondent do the following thing: during the Academic year 2015-16, did Jackie Swift assume that a pupil the Claimant had referred to her for sanction following disruptive behaviour, was a black pupil?

72. We repeat our findings at paragraph 52 of this judgment.

The Law

Relevant law - discrimination

73. The provisions of the Equality Act 2010 ("EqA") apply to these claims. EqA protects employees from discrimination based on a number of "protected characteristics". These include race (see Section 9 EqA).

74. Chapter 2, EqA lists a number of forms of "prohibited conduct". In this claim, the Claimant alleges two types of prohibited conduct: direct discrimination and harassment.

The claim of direct discrimination

75. S 39(2) EqA provides an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.

76. Direct discrimination is defined by S13 EqA (so far as is material) in these terms:

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

77. Direct discrimination is comparatively simple: It is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. The protected characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment. At other times, it will not be obvious, and the Tribunal will need to consider the matters the decision maker had in mind, including any conscious or sub-conscious bias. No hostile or malicious motive is required. However, direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic.

78. The Claimant has to demonstrate less favourable treatment: it is not enough to show she has been treated differently.

79. S 23(1) EqA provides there should be no material difference in circumstances between the claimant and any comparator or hypothetical comparator (save for the protected characteristic of race).

The claim of Harassment

80. S40 EqA provides an employer must not harass an employee.

81. Harassment is defined in S26 EqA, which provides:

"(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

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

82. The effect of s26 is that a claimant needs to demonstrate 3 essential features: unwanted conduct; that has the proscribed purpose or effect; and that relates to her race. There is no need for a comparator.

83. The EHRC Employment Code explains that unwanted conduct can include "a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour".

84. "Unwanted" is the same as "unwelcome" or "uninvited."

85. When considering whether the conduct had the proscribed effect, the tribunal undertakes a subjective/objective test: the subjective element involves looking at the effect the conduct had on the claimant (their perception); the objective element then considers whether it was reasonable for the claimant to say it had this effect on him (see Richmond Pharmacology v Dhaliwal [2009] ICR 724). The EHRC Employment Code notes that relevant circumstances can include those of the claimant, including his/her health, mental health, mental capacity, cultural norms and previous experience of harassment; it can also include the environment in which the conduct takes place.

86. In Weeks -v- Newham College of Further Education UK EAT 0630/11 Mr Justice Langstaff said that ultimately findings of fact in harassment cases had to be sensitive to all the circumstances; context was all important.

87. It was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

88. Exactly the same point was made by Underhill P in Richmond Pharmacology

"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

"Violating" is a strong word. Offending against dignity, hurting it, is insufficient. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

89. In Warby v Wunda Group plc, UKEAT 0434/11, 27 January 2012, context was again emphasised

"…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;"

90. The Tribunal should consider the circumstances shown by the facts it found as a whole. In Read and Bull Information Systems Ltd v Stedman [1999] IRLR 299 , Morison J noted:

"It is particularly important in cases of alleged sexual harassment that the fact-finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each. As it has been put in a USA federal appeal court decision (eighth circuit) [USA v Gail Knapp (1992) 955 Federal Reporter , 2nd series at page 564]:
'Under the totality of the circumstances analysis, the district court [the fact finding tribunal] should not carve the work environment into a series of incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." '"

The burden of proof in discrimination claims

91. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the claimant establishes facts, from which the tribunal could properly conclude, in the absence of an adequate explanation, that there has been discrimination, the tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and*

Igen Ltd & others v Wong & others [2005] IRLR 258, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:

91.1. It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".

91.2. If the claimant does not prove such facts their discrimination claim will fail.

91.3. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

91.4. In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

91.5. It is important to note the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

91.6. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

91.7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a questionnaire….

91.8. Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

91.9. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [eg race], then the burden of proof moves to the respondent.

91.10. It is then for the respondent to prove that he did not commit that act.

91.11. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

91.12. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.

91.13. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the

tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

92. In *Madarassy v Nomura International plc [2007] IRLR 246*, the Court of Appeal warned against allowing the burden to pass to the employer where all that has been shown is a difference in treatment between the claimant and a comparator. For the burden to shift there needs to be evidence that the reason for the difference in treatment was discriminatory. It is also well established that treatment that is merely unreasonable does not, of itself, give rise to an inference that the treatment is discriminatory.

93. It is also established law that if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see *Laing v Manchester City Council 2006 ICR 1519)*.

94. Very little direct discrimination is overt or even deliberate. The tribunal should look for indicators from the time before or after the decision, which may demonstrate that an ostensibly fair-minded decision was, or equally was not affected by racial bias. (see *Anya v University of Oxford [2001] ICR).*

95. Having reminded ourselves of the authorities on the burden of proof, our principle guide must be the straightforward language of S136 EqA itself.

Time Limits

96. S123 EqA prescribes time limits for presenting a claim:

(1) …Proceedings…may not be brought after the end of-
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the tribunal thinks just and equitable
…
(4) For the purposes of this section-
(a) conduct extending over a period is to be treated as done at the end of the period;

97. The leading authority on determining whether "conduct extends over a period of time", or not, is the Court of Appeal decision in the *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530*. This established that the employment tribunal should consider whether there was an "ongoing situation" or "continuing state of affairs" (which would establish conduct extending over a period of time) or whether there were a succession of unconnected specific acts (in which case there is no conduct extending over a period of time, thus time runs from each specific act). As Lord Justice Jackson indicated in *Aziz v First Division Association [2010] EWCA Civ 304*, in considering whether there has been conduct extending over a period, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents.

Relevant law – Constructive dismissal

98. Section 95(1)c Employment Rights Act 1996 explains there can be a dismissal when an employee terminates their contract, with or without notice, in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct. This is known as a constructive dismissal.

99. In *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, Lord Denning MR explained that for an employer's conduct to give rise to a constructive dismissal, it must involve a <u>repudiatory breach</u> of contract: '*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'*

100. A breach of the implied term of trust and confidence is a repudiatory breach of the contract (see Morrow v Safeway Stores [2002] IRLR 9, Ahmed v Amnesty International[2009] ICR 1450).

101. In *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606,* the House of Lords confirmed that the implied term of trust and confidence means *"neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."*

102. This means in a constructive dismissal case, in relation to the employer's conduct complained of, the tribunal must consider

102.1. Whether, objectively, there was reasonable and proper cause for the conduct? and

102.2. Whether it was calculated or likely to destroy or seriously damage trust and confidence?

103. It is possible for the implied term of trust and confidence to be breached by a series of actions on the part of the employer that cumulatively amount to a repudiation of the contract. The Court of Appeal in *Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA*, confirmed that, to constitute a breach of trust and confidence based on a series of acts (or omissions), the act constituting the last straw does not have to be of the same character as the earlier acts; nor does it necessarily have to constitute unreasonable or blameworthy conduct. However the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful. As always, the test of whether the employee's trust and confidence has been undermined in this context is an objective one.

104. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, Underhill LJ in the Court of Appeal identified five questions to be asked by the employment tribunal in a case of constructive dismissal.

"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in Waltham Forest v Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? If it was, there is no need for any separate consideration of a possible previous affirmation.
(5) Did the employee resign in response (or partly in response) to that breach?"

105. In a case relying upon the breach of the implied duty of trust and confidence, it is not necessary to make a factual finding as to the employer's actual (subjective) intention; it is sufficient to make a finding as to whether, objectively, the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence.

106. In considering the reasonableness (or otherwise) of the employer's actions *"reasonableness is one of the tools in [the tribunal's] factual analysis kit for deciding whether there has been a fundamental breach"* per Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121. [2010] IRLR 445. 9.

107. In Buckland, the Court of Appeal clarified the correct test:

(i) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test applies;
(ii) If the acceptance of that breach entitled the employee to leave, they have been constructively dismissed;
(iii) It is open to the employer to show that such dismissal was for a potentially fair reason; and
(iv) If he does so, it will then be for the ET to decide whether the dismissal for that reason, both substantively and procedurally falls within the range of reasonable responses and is fair.

108. The employee must have resigned because of the employer's breach and not for some other reason. In *United First Partners Research v Carreras*[2018] EWCA Civ 323 the Court of Appeal held where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

Conclusions

Direct discrimination

109. The tribunal asked itself whether the Claimant had been treated less favourably than a non-black person would have been treated.

110. The direct race discrimination allegations were:

    8.1 Between November 2018 and March 2019 fail to adequately investigate the Claimant's grievance.

    8.2 Between May 2019 and July 2019 fail to objectively consider the Claimant's grievance appeal.

    8.3 When the Claimant told Virginia Fair she was unwell with stress (during a sickness absence review), did the Respondent fail to offer the Claimant support including counselling.

    8.4 When the Claimant was stressed and struggling with her workload and asked for an extra 2 days to complete the Year 7 and Year 10 exam marking, was the Claimant denied any extra time to complete this marking and data entry.

111. We found as a fact that these assertions were not proven. We found Ms Doherty had used her best endeavours to investigate the grievance and the Respondent had used its best endeavours to objectively consider the appeal. We did not hear sufficient evidence to make findings as to whether Ms Fair had been told the Claimant was unwell and/or had failed to offer support including counselling. We found the Claimant was provided extra time to complete the marking task.

112. We found there was no "less favourable treatment".

113. Further and in the alternative, the tribunal accept the Claimant was working in a stressful environment. The English departments results had not been good; the school and the whole department was placed under pressure. We heard evidence that other staff (including non-black staff) had been placed under pressure such that they became ill with stress. We are satisfied that, had a non-black member of staff asked for the same extension to complete marking, their request would have received exactly the same response. The English department was working to tight time limits in difficult circumstances.

114. The Claimant has not been able to establish facts, from which we could conclude there has been less favourable treatment. For the avoidance of doubt, we are satisfied that the Respondent's treatment of the Claimant, has at all times had nothing whatsoever to do with the Claimant's race. The Respondent has not subjected the Claimant to direct race discrimination.

Harassment related to race

115. The harassment allegations were:

    11.1 In October 2018 did the Respondent decide to commence a competence procedure in relation to the Claimant

    11.2 In October 2018, in various emails, did the Respondent demand certain pieces of work from the Claimant, when the Claimant had already confirmed the work was not available

    11.3 During the Academic year 2015-16, did Jackie Swift make a comment to the Claimant inferring that Aboriginal pupils in her country of origin were not as developed or as intelligent.

    11.4 During the Academic year 2015-16, did Jackie Swift assume that a pupil the Claimant had referred to her for sanction following disruptive behaviour, was a black pupil.

116. Of these allegations, we found that allegation 11.1 was proven as a fact; we did not find allegations 11.2, 11.3 or 11.4 to be proven as a fact.

117. We accepted that being invited to attend an informal competence meeting and facing informal competence procedures could amount to unwanted conduct for the purposes of s26 Equality Act 2010.

118. However we did not find that there was any connection to the Claimant's race. We accept this invitation reflected the pressure that Mr Templeman-Wright was placing on staff in general, including Dr Swift, in light of the poor English results. It was heavy handed management but we accept it was in no way whatsoever related to the claimant's race.

119. Having found there was no causal connection to the protected characteristic of race, it was not necessary for us to make findings about whether the conduct had the purpose or effect set out in s26 Equality Act 2010.

120. The Claimant has not been able to establish facts from which we could conclude there has been harassment related to race.

Constructive Dismissal

121. Of the employer's conduct that was said to have breached the implied term was we accepted that the following things <u>had</u> happened:

    3.1 *On or around 21 September 2018, not recommend the Claimant for pay progression.*

    3.2 On or around 1 October 2018, put the Claimant under unreasonable pressure by insisting she sign a Performance Improvement Plan that she did not accept and then not permit her to make an amendment.

3.3 On or around 2 October 2018, notify the Claimant that she was to face an informal competency meeting in circumstances where she considered the 5 points of competency were unfair.

3.4 In or around 6 March 2019 decide to not uphold a grievance complaint submitted by the Claimant

3.5 delay responding to the Grievance and responding to the Grievance Appeal (submitted on or around 1 May 2019).

122. We asked ourselves whether there was reasonable and proper cause for the conduct. Viewed objectively, we could not find reasonable and proper cause for

122.1. Mr Templeman-Wright choosing to "not support" her application for salary progression based upon her FFT50 results which he knew were adversely affected by circumstances that were beyond her control and there having been no attempt to discuss this with her (on his part) or consider the various competencies that could have supported her application;

122.2. The Claimant being pressured to sign the PIP without any amendment to the FFT target and being invited to an informal competency meeting to discuss this, when other staff had been able to amend this target and Dr Swift was aware they had been able to amend it;

122.3. The Claimant being managed in a heavy handed way by being invited to attend an informal competency meeting to discuss "significant concerns" about her competency when in fact these were minor matters that ought to have been discussed a quick chat with her manager;

122.4. The grievance investigating officer deciding to not uphold the grievance in which, objectively, she could not have been a truly impartial investigator as she had suggested the Claimant's line manager rewrite a statement that the line manager accepted contained "offending comments" and was "too vitriolic".

123. We asked ourselves whether this conduct was calculated or likely to destroy or seriously damage trust and confidence? We accept that viewed objectively, and cumulatively, this is conduct that was likely to destroy or seriously damage trust and confidence. This was particularly so, given the Claimant's long service with the Respondent.

124. The Claimant was working in difficult and stressful condition and hoped that the grievance or the grievance appeal would resolve her difficulties. The last straw for her was the delay in responding to her grievance appeal. Unfortunately, her grievance appeal was not acknowledged within the 5 days that it ought to have been acknowledged. When 23 days had elapsed since her letter of appeal dated 1st May 2019 (and 7 weeks since she had first emailed the letter of appeal on 5th April 2019) she resigned. We accept that viewed objectively, this delay was a further breach and was sufficient to add something more to the breach of the implied term.

125. We accept that the Claimant resigned in response to the Respondent's repudiatory breach of contract and had not affirmed the contract before resigning. The Respondent has not been able to demonstrate any fair reason for this dismissal. The Claimant succeeds with her constructive dismissal claim.

126. It is a great shame that the Respondent was not able to support the Claimant better and retain her as a teacher. From the evidence we have seen, she is a great loss to the school and to the teaching profession.

____

Employment Judge Howden-Evans

7 October 2022

____

Date