



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101368/2022

**Heard at Dundee on 24, 25, 27 and 28 October and by CVP on
30 November 2022**

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**Employment Judge Campbell
Tribunal Member A Perriam
Tribunal Member R A'Brook**

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Ms R Mallet-Ali

**Claimant
Represented by:
Ms L Campbell,
Solicitor**

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Perth & Kinross Council

**Respondent
Represented by:
Ms M McLaren,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that the respondent did not commit acts of direct race discrimination against the claimant contrary to section 13 of the Equality Act 2010, and the claim is dismissed.

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REASONS

Introduction

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1. This claim arises out of the claimant's employment with the respondent which ended with her resignation. She alleges that the respondent was responsible for a number of instances of direct race discrimination. The respondent contests the claim.

E.T. Z4 (WR)

2. The hearing took place on the above dates and the tribunal deliberated on 20 December 2022.
3. Evidence was heard, in order, from the claimant and from the following individuals employed by the respondent: Mr Ally Mills, Depute Head Teacher; Mr Stuart Clyde, Head Teacher; Ms Gillian Davey, Human Resources and Mr Donald MacLeod, Quality Improvement Officer.
4. The tribunal found each witness to be generally credible and reliable. There was not a great deal of dispute between the parties over the evidence of the key events and circumstances. Where there is a dispute over a relevant evidential point that is dealt with below.
5. A joint bundle of documents was produced and numbers in square brackets below are references to the page numbers of the bundle. This hearing was to determine remedy if appropriate as well as liability, and the claimant also provided a schedule of loss.
6. The parties provided an agreed list of issues which is reproduced below.
7. At the end of evidence each representative provided written submissions and spoke to them briefly. The submissions were noted by the tribunal in reaching its decision.

Relevant law

8. The Equality Act 2010 (the Act) prohibits certain types of discrimination, including in employment, against individuals who possess or are connected to certain protected characteristics. Race is a protected characteristic. Racial origin or ethnicity can fall within that term also. A person can be unfairly discriminated against because it is perceived they have a protected characteristic, even if they themselves would consider that they do not.
9. Section 13 of the Act renders unlawful any act of direct discrimination with reference to a protected characteristic. In the employment context, an employer will directly discriminate against an employee if it treats them less favourably than it treats, or would treat others because of a protected characteristic. In that context, 'others' refers to a person or persons in

circumstances with no material difference to those of the alleged victim, except for the protected characteristic itself. The reference to how an employer 'would' treat others allows a claimant to base their complaint on a hypothetical comparator as well as a real one. An employer may be liable for the actions of its employees.

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10. The burden of proof in a direct discrimination claim falls initially on the claimant. They must establish a prima facie case, or 'primary facts' which at least potentially would be sufficient to allow a tribunal to conclude that unlawful discrimination took place. If they cannot do that, their claim will normally be unsuccessful and the respondent will not be under a duty to show that it acted lawfully. However, if a claimant can establish a prima facie case, the burden of proof moves to the respondent to justify its provisionally discriminatory behaviour - ***Royal Mail Group Ltd v Efofi [2021] UKSC 33.***

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15 **Legal issues**

11. The parties had agreed that the legal issues to be determined were as follows – these have been slightly amended in their wording by the tribunal:
12. Was the claimant discriminated against on grounds of her ethnicity contrary to section 13 of the Act as a consequence of:
- 20
- a. The respondent offering her a demotion to enable her to return to work (after a period of illness-related absence)?
 - b. The respondent's handling of her grievances?
 - c. A lack of support by the respondent during reported incidents of racist behaviour by pupils? and/or
 - d. The respondent not considering alternatives to the claimant returning to work at her own school after her illness?
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13. Did the respondent offer the claimant a demotion to enable her to return to work?
- 30 14. Did the respondent not consider alternatives to the claimant returning to work at the school (other than her coming back to her substantive role there)?

15. Has the claimant suffered any detriment?
16. Was the claimant's race (specifically ethnicity) the reason for any detrimental treatment?
17. Has the claimant been treated less favourably than an actual or hypothetical comparator with the same characteristics other than her race?
18. If so, is the claimant entitled to compensation under section 124 of the Act?

Respondent's application for strike out of the claim

19. At the conclusion of the claimant's evidence Ms McLaren made an application to have the claim struck out. Her submissions and those of Ms Campbell for the claimant were heard. The tribunal then deliberated before giving its response and reasons orally. It decided to refuse the application.
20. A summary of the parties' positions and the tribunal's reasons is as follows.
21. Ms McLaren argued that the claimant's case based on her evidence was not that individuals had acted in a discriminatory way but rather that the respondent itself was institutionally racist. Her claim appeared to be closer to one of indirect rather than direct discrimination. She had made a concession that none of the individuals she interacted with consciously intended to do wrong.
22. Ms Campbell stated that the claimant's case was against both the respondent as an employer and its employees on a vicarious basis. It would be inequitable to strike the claim out part way through the hearing.
23. The tribunal considered that the claimant's concession was of some evidential value as to how she perceived what was happening at the time, but not determinative. Other things she said in evidence were clearly consistent with her claim of direct discrimination as set out in her original claim form.

24. It was also recognised that direct discrimination can occur whether the alleged perpetrators intend it or not.
25. The tribunal was also reluctant to strike out the claim before all of the evidence was heard. It was possible if not likely that evidence given by the respondent's witnesses, either in chief or under cross-examination, would assist the tribunal in reaching decisions on the issues. It was not proportionate to halt the hearing part way through and made more sense to conclude the evidence.
26. The tribunal was not therefore persuaded that the claim had no reasonable prospect of success at the point when the claimant's evidence was concluded.
27. Ms McLaren made a secondary application for a deposit order. Oral reasons for refusing that were given during the hearing. Those were essentially the same as the reasons summarised above for refusing strike out, notwithstanding the slightly different test which applied – i.e. that there would have to have been little reasonable prospect of success rather than none at all.

Findings of fact

28. The tribunal made the following factual findings based on the evidence before it and as relevant to the legal issues to be decided.

Background

29. The claimant is a teacher of Home Economics. The respondent is a local authority with responsibility for providing schooling in the Perth and Kinross area. The claimant was employed by the respondent between the dates of 24 February 2020 and 11 November 2021 as a Principal Teacher of Home Economics in the Bertha Park high school in Perth.
30. The claimant describes herself as being of Pakistani ethnicity, although of UK or Scottish nationality.
31. The school newly opened in 2019 and has built up its pupil intake a year at a time. It therefore began with just first year pupils, who moved up to second year in the following academic year at the same time as a new

intake of first year pupils arrived, and so on. During the claimant's period of employment there was not therefore a full set of year groups.

32. Similarly, the school began with a Head Teacher, two Depute Head Teachers and heads of individual departments, before additional teachers were recruited as the pupil base increased. For the claimant and other Principal Teachers within their given subjects, this meant that they were the only teacher of that subject to begin with. They were assisted by classroom assistants and at times student teachers.
33. As the school was newly established, it was in the process of devising and implementing a number of policies and ways of working which were still in the course of development when the claimant was employed, and by the time she left. The school is nevertheless subject to Scottish Government regulatory rules as well as other rules implemented by the respondent across all schools in its area.
34. The Head Teacher of the school is Mr Stuart Clyde. The school has two Depute Head Teachers, namely Mr Ally Mills and Ms Christine Couser. The claimant reported initially to Mr Mills and latterly to Ms Couser as explained in more detail below. There were also at least two guidance teachers, Ms Ainslie and Ms Cuthbertson.
35. The claimant has worked for approximately 14 years as a teacher, in both Scotland and England. She was recruited after a successful interview and began in February 2020. She got on well with her manager, Mr Mills. Very shortly after starting in the role the Covid-19 pandemic caused the school to move from attendance in person to online learning. This involved, for example, the claimant recording lessons on video which pupils would follow from home. Staff meetings also took place virtually.
36. After the summer holidays of 2020 the new academic year began. In or around August 2020 restrictions were eased and teachers including the claimant returned to the school for at least part of their working time. There was a return to exclusively home-base working around December 2020 in response to a surge in the Covid-19 virus, and then staff and pupils returned to the school in April 2021.

Allegations of use of racist language or behaviour by pupils

37. On a number of occasions pupils used language in the presence of the claimant, or behaved, in a way which the claimant considered to be racially motivated.
- 5 38. The first occasion was when the claimant was present in the school in the autumn of 2020. A pupil addressed her using the word 'Wagwan', which is a predominantly West Indian patois form of greeting. The claimant has no ethnic connection with that area or culture, and speaks with a Scottish accent. She considered the comment was racially motivated as she was
10 the only non-white member of staff in the school. She said to the pupil that in the context it was a racist comment.
39. Following the return of pupils and staff to the school in April 2021 there were further similar incidents.
- 15 40. On 19 April 2021 the claimant was teaching a class along with a student teacher named Sophie Forbes. A group of pupils who were friends began speaking with an Indian accent. One of the pupils was the individual who has used the 'Wagwan' greeting the previous autumn. The claimant felt this was mocking her origins and skin colour. She called Ms Ainslie, one of the guidance teachers, who came to the class. She, the claimant and
20 one of the pupils went to a separate office where it was explained to the pupil that this was not acceptable conduct. A call was made to the pupil's parents.
- 25 41. On 29 April 2021 a pupil in the claimant's class repeated back something she had said but in an exaggerated Indian accent. The claimant took the pupil out of the class to explain that this was unacceptable. The pupil appeared to understand, and was allowed to return to the class. He did the same thing again and was removed and spoken to by a guidance teacher. He was brought back to apologise to the claimant.
- 30 42. On 6 May 2021 a different pupil from the same class as the pupil referred to immediately above acted in the same way, by repeating something said by the claimant in an Indian accent. The claimant contacted a guidance

teacher who took the pupil out of the class and spoke to them. Mr Clyde also spoke to them and then brought the pupil to the claimant to apologise.

- 5 43. On 10 May 2021 there were two incidents a short space apart. The first involved a pupil using the term 'Wagwan' more than once towards the claimant. He was sent to another part of the school where the claimant came to speak to him. The second involved the same pupil who had behaved inappropriately on 6 May 2021. Again, he spoke in an exaggerated Indian accent. He was removed and again spoken to by Mr Clyde. He did not return to that class but was present from the time of the next class onwards.
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44. On 20 May 2021 a pupil behaved aggressively towards the claimant outside her classroom. As the claimant was walking away a student teacher heard the pupil mocking the claimant by using an accent although the claimant did not hear anything herself at the time. This was reported by the claimant to Mr Mills.
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45. On 24 May 2021 another pupil used the greeting 'Wagwan' on entering the claimant's lesson. A guidance teacher was called who took the pupil away. They did not return to class afterwards and walked off while the guidance teacher and the claimant were speaking.
- 20 46. On 25 May 2021 a pupil was asked to leave the class for behaving disruptively. As he left he put on an Indian accent. A guidance teacher took him away and he did not return to the class afterwards, but could be seen waiting outside.
- 25 47. After each incident the school's approach was to take the pupil (or one of them if a group) out of the class and for there to be a conversation involving the claimant, a guidance teacher, Mr Clyde or a combination of those individuals. The pupil was usually returned to their class if there was time before the end of the lesson. If there was not, they would come back for the next lesson.
- 30 48. The school consciously takes what it calls a 'restorative' approach to pupil behaviour which breaches its expected standards. Broadly, this involves having a discussion with a view to persuading the pupil to change their

behaviour by understanding why it is not acceptable, rather than any more punitive steps. This was the approach taken in response to the claimant's reported incidents of pupil behaviour above.

49. As the number and frequency of reported incidents increased the claimant felt more strongly that the school was not doing enough to prevent them occurring or to otherwise protect her. She wished the offending pupils to be excluded from her class. She also wanted the school to report the incidents to the police as hate crimes.
50. The school did not have power to exclude any of the pupils the claimant complained about from school altogether – i.e. to suspend them from school. Scottish Government regulations dictate that exclusion in that sense is only permitted in two situations, namely:
- a. if the parent of the pupil fails to comply, or to allow the pupil to comply, with the rules of the school, or
 - b. if in all of the circumstances allowing the pupil to remain in the school would likely be seriously detrimental to order and discipline in the school or the educational wellbeing of its pupils.

Neither of those criteria applied to the situations the claimant was reporting.

51. However, the claimant was aware of 'internal' exclusion being used as a less severe method of dealing with behavioural problems in other schools. This took the form of removing the pupil from their normal class and providing them with the same, or other lessons, in a different part of the school. This did not breach Scottish Government guidance.
52. Bertha Park did not have capacity to provide internal exclusion in this way at the time when the claimant was seeking it. This was predominantly because it was not yet fully staffed on account of building up its numbers of pupils and teachers year on year. In addition, the practice did not fit with the school's approach to discipline which was less focussed on punishment and more aligned with education.
53. Mr Mills was initially reluctant to report the incidents to the police. He considered that the earlier incidents were isolated, and had been dealt

with by a combination of conversations with the pupils and their parents. As the incidents continued and became more regular, he did report them to the police.

54. On 7 May 2021 Mr Mills emailed a Community Policing officer named Andrew Beattie, seeking support in speaking to the pupils the claimant had reported. That was the day after the third reported incident and by this point he had formed the view that speaking to each pupil individually after every event of allegedly racist behaviour could be an insufficient way of halting any problem that may have been emerging.
55. Another officer, PC Donald Florence, contacted Mr Mills on 10 May 2021 by telephone. Mr Mills gave an account of the situation as at that date. He then telephoned the claimant to update her and ask for a list of names, dates and incidents which PC Florence had said he would act upon by visiting the homes of those concerned. Up to this point Mr Mills' view was that the situation should be tackled educationally rather than by taking up proceedings against individuals, but said to PC Florence that he would be guided by him.
56. At a later point PC Florence emailed Mr Mills to give an account of a visit he had made to one of the pupils and their parents at their home.
57. On 11 May 2021 a PC Scott Menmuir contacted Mr Mills as he had noted the logging of an alleged racist incident. He offered to attend the school to provide help with a wider student briefing. Mr Mills accepted the offer. There was an exchange to discuss when PC Menmuir could come to the school. Mr Clyde became involved and asked if it could be sooner rather than later. He also explained that there was a small number of pupils for whom assistance was required in particular, and asked if they could be spoken to individually before any more general briefing or presentation to the school as a whole.
58. PC Menmuir attended the school on 28 May 2021 and spoke to all but one of the pupils the claimant had reported, six in total. The other was not at school that day.

59. The claimant was encouraged by Mr Mills to log each occasion of inappropriate behaviour by a pupil. He told her to use the 'Seemis' system to do so, which is a database held by each school containing notes of various types in relation to each pupil. It is used for example to log issues with attendance or any special arrangements for a given pupil.
60. However, logging the incidents on Seemis would not bring them to the attention of the respondent's Quality Improvement Officer, Donald MacLeod, or otherwise ensure they were escalated to the point where they would be acted upon. For that, a 'DASH' form had to be completed. This would then be stored on the respondent's central system rather than the school's, it would come to the attention of Mr MacLeod and it would be actioned as he saw to be appropriate depending on the nature of the referral.
61. The claimant was alerted to the need to complete DASH forms by her trade union representative and she did so for each incident she wished to raise on or around 25 May 2021. Reports were therefore submitted as follows:
- a. Incident on 19 April 2021 [167-170]
 - b. Incident on 29 April 2021 [183-186]
 - c. Incident on 6 May 2021 [191-194]
 - d. Incident on 10 May 2021 at 10.00am [171-174]
 - e. Incident on 10 May 2021 at 10.10am [195-198]
 - f. Incident on 20 May [179-182]
 - g. Incident on 24 May [175-178]
 - h. Incident on 25 May 2021 [187-190]
62. The DASH form is set up as a template with information about each incident to be filled in. The claimant did so for each incident to provide the key details. The next section is to be completed by a member of 'Senior Leadership Management'. Mr Mills completed those sections. They describe what happened and also what steps were taken in response. The final part of the form is for the Head Teacher to provide comments. Mr Clyde completed those sections. He gave his own comments and recommendations. Finally there is space for the respondent's Corporate

Health, Safety and Wellbeing Team and Quality Improvement Officer to add comments.

63. The contents of each form are not repeated here, but the tribunal accepted them to be a generally accurate summary account by each person who provided input.

Action plan

64. In March 2021 an action plan was put in place for the claimant by Mr Clyde. It was intended to run until 24 June 2021 and was documented [83]. It proposed to deal with three broad themes which had arisen in relation to the claimant's way of working, as follows:

- a. 'Relationships' – her working relationships with her colleagues and also pupils, especially those with greater needs;
- b. 'Support from Line Manager' – it was proposed that the claimant met each Thursday afternoon to review the plan and discuss any relevant matters; and
- c. 'Home Economics Resources' – this was designed to address some issues which had arisen in relation to other departments using equipment or materials of the claimant's department, and how that should be managed.

65. The plan set out briefly some expectations which corresponded the three main themes. Those were that professional relationships across the school would improve, or continue to improve, issues which had led to visits and communications from the claimant's colleagues to Mr Mills and the school's Business Manager would be addressed at the weekly meetings, and that the resources of the Home Economics department would be appropriately managed and shared.

66. The claimant was initially reluctant to participate in the plan but went along with her union representative's advice to agree to it. She did not necessarily feel she had done anything wrong but saw the process as an informal one.

67. Pursuant to the action plan, the claimant had a series of meetings with Mr Mills. Those on 29 April, 6 May, 14 May and 20 May were noted by

Mr Mills. He tended to email the notes to the claimant after each meeting, save for the additional comments added to each some months later under the heading 'AOB', as explained further below.

- 5 68. The claimant initially engaged positively with Mr Mills in the meetings. She wished to improve in the areas which had been identified. However, she became more frustrated and disengaged from the process in the latter meetings as she felt that her increasing number of complaints of racial behaviour by pupils were not being adequately responded to. In conjunction with this she believed that it was no longer fair for the plan to be in place.
- 10 69. On 24 May 2021 at 16.54 Mr Mills emailed the claimant to provide an update on what was being done in relation to her complaints about pupils [230]. Mr Mills said that he had made contact with PC Scott Menmuir who would be coming into the school to speak to the pupils concerned individually, before addressing the whole school. He referred to two of the pupils having additional support needs, saying that there was no quick fix but that work would continue to be done. He offered to have the claimant referred to Occupational Health. He said that these matters could be discussed further at the next meeting under the action plan.
- 15 70. The claimant emailed Mr Mills back later that day. An extract from her email was produced [93]. She requested a number of further details about the referral to police, including who PC Menmuir was, and details of specific referrals and outcomes. She wanted to be sure in particular that the matters were being dealt with by an officer with the power to investigate potential crimes and not a community police officer. She acknowledged the additional needs of the pupils but did not see this as mitigation for racism. She did not believe that a referral to Occupational Health was necessary.
- 20 71. On 26 May 2021 the claimant asked Mr Mills if she could meet with him that day. This was outside of the agreed time slot but she had three further incidents with pupils to report. The meeting was arranged and the claimant's email of 24 May 2021 was discussed.
- 25 30

72. In the evening of 26 May 2021 the claimant telephoned the police about the incidents with pupils. She described them as potential hate crimes.

73. The claimant began a period of illness-related absence from the school on 27 May 2021. Meetings under the action plan therefore ceased.

5 74. The plan was due to be reviewed around 24 June 2021. Mr Clyde carried out a review based on what had been achieved before the claimant's absence began. He prepared a report [101-103]. Broadly, it recognised the efforts the claimant had made to improve and build relationships with colleagues but concluded that the claimant had further progress to make.
10 It was proposed that the plan be extended into the new academic year, with an initial meeting to take place on 15 September 2021. In light of the fact that the claimant had complained about Mr Mills in her grievance (discussed below), Ms Couser as the other Depute Head would take over those meetings and oversight of the plan.

15 *Grievance/absence contact and management*

75. Also on 26 May 2021, the claimant submitted a formal grievance to the respondent. This was done by an email to the respondent's Quality Improvement Officer Donald MacLeod at 11.32pm on that day [127-133]. Mr McLeod has responsibility for the whole of the respondent's local
20 authority area, and is not based at Bertha Park school.

76. The claimant attended a grievance meeting with Mr MacLeod on 21 June 2021. This was held virtually owing to Covid protocols operating at the time. The claimant had her husband present and also a trade union representative. An HR officer of the respondent also attended.
25 Mr MacLeod clarified aspects of the written grievance with the claimant, and she was given the opportunity to expand on what she had said.

77. Mr MacLeod then instructed a colleague named Brian Mackie, an Assistant HR Officer, to investigate the matters raised in the grievance. He did so and prepared a report of his findings which was completed on
30 25 August 2021 [107-125]. The report had eight appendices [126-210].

78. Mr Mills provided to Mr MacLeod copies of his notes taken at the meetings under the action plan. He added further thoughts at that stage to each note

under the heading 'AOB'. He also prepared a note of the meeting the claimant had requested on 26 May 2021 and added a 'Summary' of the whole process as he viewed it [93-95].

5 79. Mr MacLeod wrote to the claimant on 25 August 2021 – the date of Mr Mackie's report – by way of an update [211-218]. The majority of the letter is taken up by summarising what was said at the grievance meeting on 21 June 2021. As such and in the absence of a set of minutes of that meeting, it is taken to be a sufficiently accurate summary of the discussion. He concluded by informing the claimant of Mr Mackie's appointment as
10 investigator, and said he would be in touch further.

80. Mr MacLeod next wrote to the claimant on 17 September 2021. This was to confirm that Mr Mackie's investigation had been concluded and that she was being invited to a further virtual meeting on 28 September 2021. He enclosed Mr Mackie's report and its appendices. He said that he did not
15 intend to call any witnesses at the meeting, but that the claimant could do so provided she specified their details in advance.

81. Before that meeting, the claimant attended a virtual wellbeing meeting with Ms Couser on 22 September 2021. They discussed a recently issued occupational health report dated 2 September 2022 [251-252]. The
20 claimant was experiencing sleep loss and anxiety, but it was believed that she would feel better after conclusion of the grievance process. There was tentative discussion about the claimant returning to work some time in October. Her fit note at the time ran until 13 October 2021.

82. The claimant also recounted her experience of returning to the school
25 briefly at the start of the new term, on an in-service day and therefore with teachers present but no pupils. This had caused her a great deal of stress and fear about the repetition of any further incidents with pupils.

83. Ms Couser noted that the OH report suggested that the claimant should
30 return to a different school initially as part of her rehabilitation. The claimant believed this could be helpful. She had said that she expected her GP and psychologist would each recommend she did not return to Bertha Park, if asked. Ms Couser said that the possibility of the claimant

moving to a different school as either a Principal Teacher or teacher in Home Economics had been explored, but there were no vacant places.

84. The claimant emailed Mr MacLeod a document on 24 September 2021 which contained a list of points she wished to make in response to the contents of Mr Mackie's report and a short statement by one of the student teachers who had been present in her class during some of the pupil incidents complained about [225-233]
85. The claimant joined the virtual meeting with Mr MacLeod on 28 September 2021 and her union representative was also present.
86. As with the initial grievance meeting, no minute was produced, but the key matters discussed were recorded in an outcome letter which Mr MacLeod sent to the claimant after he had deliberated, which was dated 29 October 2021 [239-244]. His response to the specific requests or outcomes sought by the claimant was as follows:
- a. A review would take place to ascertain how senior members of staff in schools could be trained in dealing with incidents of a racist nature;
 - b. The claimant's request that an agreed sanction be identified to deal with racist incidents could not be agreed. It was not consistent with the way the respondent engaged with young people in its schools. However, the respondent's existing Violence and Aggression policy would be reviewed to see if it was fit to deal with such incidents;
 - c. The claimant's request for clarity over the actions taken in response to each of the incidents she reported had been covered in the grievance report and its appendices;
 - d. A specific request in relation to any established occasion of lying by a colleague of the claimant did not need to be taken further, as there were no findings that any such person had lied; and
 - e. The claimant's request for pay to cover the part of her absence after her contractual sick pay ran out could not be decided by Mr MacLeod, and would need to be directed to the Director of Education of the respondent if the claimant still wished to seek this.

87. Mr MacLeod accepted that the claimant had not been given adequate information or support around submitting reports of the pupil incidents in the early stages. This was mainly due to Mr Mills' lack of experience in reporting issues of that nature, which resulted in him advising the claimant to record them under the Seemis system rather than using DASH forms. To that extent her complaint was upheld. However, the majority of her complaint was not upheld.
88. The letter confirmed that the claimant had the right to appeal against any of his conclusions within 10 working days. She did not appeal against the outcome of her grievance.
89. The claimant had a further virtual absence management meeting with Ms Couser on 6 October 2021. She had by then attended the second grievance meeting with Mr MacLeod but had not received the outcome letter. She was still uncomfortable about returning to Bertha Park and said that her therapist recommended she did not do so. She did however feel that returning to work generally would help, and asked if it would be possible for her to change places with a Principal Teacher of Home Economics in another school. Ms Couser asked her again how she felt about conducting a phased return in another school before resuming her role at Bertha Park. She said she felt unable to do so. Ms Couser touched on the possibility of a medical transfer, which is a process with specific requirements. It would have required a specific medical recommendation of a transfer, and if an alternative role could not be found within a short space of time there was the risk of dismissal on capability grounds. No firm position was expressed by the claimant at the time. She said she would take up a (non-Principal) teacher role in another school, but reluctantly as a last option as it constituted a demotion. It was agreed that a further meeting would take place after the grievance outcome was known.
90. Ms Couser wrote to the claimant on 9 November 2021 to discuss the above meeting, and to confirm that checks had been carried out into whether there were any Principal Teacher or teacher vacancies in Home Economics within the respondent's area, but there were none.

91. The next virtual meeting between the claimant and Ms Couser was on 9 November 2021. The claimant had received the outcome of her grievance and confirmed to Ms Couser that she did not intend to submit an appeal.
92. The claimant discussed that she was taking medication and could not see herself returning to Bertha Park. She reiterated that those providing care for her believed it would not be consistent with her recovery.
93. It was discussed that there were no open vacancies within the claimant's discipline across the respondent's schools. The claimant's sick pay had run out and she confirmed to Ms Couser that she was going to hand in her notice so that she could provide supply teaching and therefore work in other schools (including in other local authority areas) and begin earning again. Ms Couser recapped that all the respondent could offer her was a phased return in another school followed by a return to her role at Bertha Park. The claimant's union representative asked if the claimant's eight-week contractual notice period could be waived so that she could be able to begin supply teaching sooner. That was agreed in principle and confirmed later when Ms Couser wrote to the claimant on 16 November 2021.
94. The claimant submitted her resignation by letter to Mr Clyde on 11 November 2021 [395]. She referred to what she saw as the *'irretrievable breakdown in the employment relationship'* due to the way her concerns had been handled and her grievance had been responded to. She did not believe that her reports of abuse had been treated seriously and she believed undue delay in the process had added to her stress. As she saw it, her only option for returning to work was to go back to her previous role in which she felt unsafe. It had been confirmed by this point that she would not be held to her full notice period, and so she was able to confirm that the date of her letter was her resignation date.
95. The claimant's evidence was that she was aware of staff at Principal Teacher level working within the respondent's local authority area who had requested a transfer to another school and had their request granted, in some cases involving a switch in department or discipline. She was not able to give the specifics of who did so, which school they left, which they

joined, which subject they taught, when any transfer happened and whether there was any waiting period. Nor was there evidence of any surrounding circumstances, such as whether there were medical or other factors supporting a transfer beyond the individual's own desire to do so.

5 Their ethnicity was not specified.

Post-termination matters and losses claimed

96. The claimant had a short period after her resignation in which she did not work. She applied for permanent roles and undertook supply teaching work. Her income varied from month to month and was specified in her
10 schedule of loss [398]. She calculated her financial loss at £10,807.55.

97. She sought £500 in respect of loss of employment rights through having to start a new period of continuous employment.

98. She secured a permanent role with a secondary school in Edinburgh, beginning in October 2022. She has a longer and more expensive
15 commute to work. There was an ongoing shortfall in earnings calculated at £420 per month.

99. The claimant assessed that the injury to her feelings caused by the alleged acts of discrimination fell within the middle band of circumstances described in ***Vento v Chief Constable of West Yorkshire Police [2002]***
20 ***EWCA Civ 1871*** and sought £20,000 in compensation.

Discussion and decision

100. The starting point for the tribunal in deciding this claim was the wording of section 13 of the Equality Act 2010.

101. For any given complaint to be successful, the employer must be shown to
25 have treated the employee less favourably than an appropriate comparator by reason of race – in this case the claimant's own ethnicity. An appropriate comparator is someone in circumstances materially the same as those of the claimant, other than in relation to their race.

102. Within the list of issues there are four complaints of direct race
30 discrimination, summarised as follows:

- a. The claimant was offered a demotion in order to return to work from illness;
- b. The respondent handled her grievance in a discriminatory way;
- c. The respondent did not give her adequate support in relation to the incidents of pupil behaviour she reported; and
- d. The respondent did not consider alternatives for the claimant returning to work from her illness other than coming back to her own role at Bertha Park.

The first and fourth complaints of direct race discrimination

10 103. The tribunal considered that complaints (a) and (d) above were connected, as both related to how the respondent managed her return to work after her illness. It noted that the comparator suggested by the claimant in relation to these complaints was a real comparator, namely one or more teachers who the claimant said from her own experience had been
15 allowed to switch schools with other teachers.

104. The issue the tribunal had was that, as referred to in the findings of fact above, there was a lack of evidence necessary to conclude that any suggested comparator was in circumstances involving '*no material difference*' from those of the claimant, as section 23 of the Act requires.
20 For any comparator the claimant referred to, it was not clear for example what circumstances caused them to seek a transfer to a new school within the respondent's area, to what extent if any the respondent itself might be held responsible for those circumstances, and therefore be said to be under any duty, moral or more formal, to facilitate a move, or how willing
25 the other party involved in the transfer was. It was not known whether any such person had different or similar race or ethnicity to the claimant. As the onus falls on the claimant in this regard, complaints (a) and (d) could not succeed.

105. For the sake of completeness the tribunal considered what would have
30 been the most probable situation had the comparator been hypothetical. It considered that such a comparator would have been a teacher in circumstances identical to the claimant except that they were white, as were all of the other staff at the school at the time. Rather than raise

complaints of racist language or behaviour against them by pupils, they would have raised similarly serious complaints of personally abusive conduct. The focus of that conduct might for instance have been an aspect of the teacher's physical appearance, or a particular habit or mannerism they used, or their sexual orientation. The conduct would have been verbal as it was for the claimant and not physical – i.e. assault. The comparator would have undergone a period of absence from work through illness as a result of the treatment in the same way that the claimant did.

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106. Taking that approach the tribunal reached the view that the respondent would have treated the hypothetical comparator teacher in the same way as the claimant, or at the very least no more favourably than it treated her. The tribunal accepted the respondent's evidence that it allows teachers to move between schools only in limited circumstances, and essentially where there is an existing vacancy and on the basis of medical evidence. There was no evidence available to the respondent at the time to flag up that another suitable vacancy would arise, whether permanently or as maternity cover. It also accepted that the alleged offering of a demotion, if it was offered at all, was a constructive temporary measure as part of a phased return to work. Given that the claimant had experienced stress returning to Bertha Park even without pupils present, it was a reasonable step to offer. The claimant was not offered a demotion, in the sense of being asked to step down from Principal Teacher to teacher whether in Bertha Park or another school, on any more permanent basis than this. She did say herself that she would consider stepping down to teacher if that allowed her to take up such a role in another school, but there were no vacancies and so the matter progressed no further.
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The second and third complaints of direct race discrimination

107. In a similar way the tribunal considered that complaints (b) and (c) were related. Both were to do with how the respondent managed and supported the claimant in the period when she was at work, i.e. before her absence through illness. For these complaints the claimant relied on a hypothetical comparator.
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108. The tribunal considered that the appropriate hypothetical comparator for the claimant was as described in paragraph 105 above. This would have been the person in circumstances most similar to the claimant but for the protected characteristic of race.
- 5 109. It was argued in the claimant's closing submissions that the pupil incidents were connected to the claimant's ethnicity. On the evidence before the tribunal, that is accepted.
110. The claimant criticised the respondent in a number of ways, principally as follows:
- 10 a. The incidents were played down where the pupil in question had additional support needs;
- b. The school's traditional restorative approach to the incidents was unsuccessful and not appropriate;
- c. In particular, pupils were not excluded from the claimant's classes
15 after she reported that they had displayed racially motivated behaviour;
- d. The claimant was not generally supported adequately by her more senior teachers;
- e. The management team of the school were not sufficiently well
20 trained and did not appreciate the effect of the pupils' behaviour on the claimant;
- f. The management team were by nature less inclined to sympathise with the claimant compared to another form of abuse of a teacher who was white, such as assault;
- 25 g. There were delays in the process, including in relation to when the incidents were reported to the police;
- h. There was an unsatisfactory response to her request that sanctions be imposed; and
- i. The action plan was extended.
- 30 111. The tribunal considered these matters and the whole of the evidence as presented to it. It was unable to find any example of the claimant being treated any less favourably than a hypothetical comparator would have been treated.

112. In stating this conclusion, the tribunal wishes to make clear that it accepted the claimant's evidence of the pupil behaviour incidents that she reported. As stated above, it also found that those incidents occurred because of her ethnicity. Her evidence is also accepted as to the effect this had on her, to the extent of making her too unwell to work in the school.
113. The above said, the particular terms of the Act are such that the claimant has to establish primary facts which at least potentially would allow for a conclusion that she had been less favourably treated than a suitable comparator because of race.
114. The tribunal considered that there were no such primary facts which would achieve that end. In any event, it found the respondent's evidence sufficient to allow it to reach the conclusion that a comparator would have been treated in the same way as the claimant.
115. To be more specific, the tribunal considered that the senior teachers at Bertha Park would have responded in the same way to an analogous situation not involving race. They would have taken the same restorative approach to misconduct and they would have made certain allowances for any pupil's additional needs in the early stages. They would have first spoken to the pupil, and then to their parent or guardian if considered necessary. They would not have sought to exclude the pupil from their classes and they would not have contacted the police at the outset.
116. Similarly, Mr Mills would have given the same support and advice to the comparator that he gave to the claimant. This would have included his unfortunate but unintended error in explaining which forms should be used to report the incidents, and the delay in action that this brought about.
117. The tribunal found that the claimant's senior teachers did have an adequate appreciation of the nature of the pupil incidents being reported, and their effect on the claimant. However, that was a situation which built up cumulatively with each further incidence. The school would most likely have responded in the same way, namely by discussions with the pupils in the early stages and ultimately a report to the police as matters escalated. The claimant was offered support throughout the process, including under the action plan.

118. The claimant clearly wished criminal proceedings to be initiated, and sanctions to be imposed by the school itself. The school did not adopt that ethos. This was a general policy decision and not one chosen specifically in response to how it viewed the claimant's complaints. On the evidence available, it would have done the same for a comparator. In any event, the scope of the school's power was to report matters to the police. It was then for the police to decide on a response to any such reports.
119. Nor was the extension of the action plan by reason of race. The evidence suggested that it was extended merely as it had partially but not fully achieved its objectives before the claimant's absence prevented it from being completed within the originally intended timescale.
120. Similarly and for completeness, the tribunal could not identify any other aspect of the action plan, the handing of her grievance, the management of her absence and potential return to work, and her interaction with colleagues generally that suggested that a comparator would be differently and more favourably treated than the claimant.
121. Complaints (b) and (c) cannot therefore succeed.
122. The above conclusions deal with issue 1 of the list of issues. In relation to issue 2, and as set out above, it is found that the claimant was only offered a demotion in the context of a phased return to work, and not beyond that.
123. In relation to issue 3, it is found that the respondent gave limited consideration to alternatives to the claimant returning to her substantive role at Bertha Park, but that in reality those would generally be limited and in the circumstances there were none.
124. The tribunal considers that issues 4, 5 and 6 fall to be dealt with together, and have been covered by the findings above.
125. In terms of issue 7, as the claim is unsuccessful it is not necessary to review such matters as losses, mitigation and compensation.

Conclusions

126. The tribunal recognises that the claimant sustained racially motivated verbal abuse from pupils on a number of occasions in April and May 2021,

and that this was distressing to her to the point that it impacted on her health. However, according to the particular provisions of the Equality Act 2010, for the reasons above the respondent did not treat her less favourably than it treated, or would have treated, a relevant comparator by reason of race. Her claim therefore must be dismissed.

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Employment Judge:
Date of Judgment:
Date sent to parties:

B Campbell
29 December 2022
06 January 2023

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