



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr I Haq

**Respondent:** (1) United Learning Trust  
(2) Alyson Littlewood  
(3) Ed Saville

**Heard at:** Manchester Employment Tribunal (by CVP)

**On:** 22, 23, 24 May 2023  
13 and 14 July 2023 (in chambers)

**Before:** Employment Judge Dunlop  
Mrs J Byrne  
Mr C Cunningham

## Representation

**Claimant:** In person  
**Respondent:** Miss S Firth (Counsel)

# JUDGMENT

1. The name of the first respondent is amended to “United Learning Trust”.
2. The claimant was unfairly dismissed by the first respondent.
3. There is an 85% chance that the claimant would have been dismissed in any event had a fair procedure been followed. A fair procedure resulting in dismissal would have concluded, at the earliest, with the claimant being given notice on 26 July 2023.
4. The Tribunal makes no further reduction in respect of contributory fault.
5. The claimant’s claims of direct discrimination and harassment on the grounds of race are not well-founded and are dismissed.
6. The second respondent (Alyson Littlewood) unlawfully victimised the

claimant contrary to s.27 and s.108 Equality Act 2010 by providing a negative reference to a prospective employer. The first and second respondents are each liable for that act of victimisation in accordance with s.109 and s.110 Equality Act 2010 respectively.

7. The claimant's other allegations of victimisation are not well-founded.
8. The Tribunal has jurisdiction to consider the claimant's one successful allegation of victimisation, having regard to the time limit provisions contained in s.123 Equality Act 2010.
9. The appropriate orders in respect of compensation for the claims which have succeeded will be determined at a remedy hearing on a date which will be notified to the parties (if not agreed between the parties).

# **REASONS**

## **Introduction**

1. Mr Haq is a British Indian man. He joined Marsden Heights Community College as a Geography teacher in 2015. That school is now operated by the first respondent Trust. The events giving rise to this claim commenced in spring term 2021, when concerns were raised as to Mr Haq's performance through the school's system of coaching/professional development review.
2. Mr Haq does not accept that those concerns were genuine. He strongly objected to the idea that he should be required to accept "informal support". This resulted in periods of sickness absence through the 2021-2022 academic year, which are more fully detailed below.
3. Mr Haq was dismissed by a decision of the Attendance and Dismissal Committee on 6 July 2022. He was placed on garden leave until his termination date of 31 August 2022.
4. He claims that the dismissal was unfair and an act of race discrimination. He also complains about various other matters leading up to his dismissal, asserting that they amount to direct discrimination, harassment and/or victimisation based on his race. There is a further victimisation complaint about a reference provided after Mr Haq had left his employment.

## **The Hearing**

5. The hearing was listed to take place over three days by CVP. We record that the CVP connections were less than perfect, with the hearing suffering from somewhat muffled sound and Mr Haq's connection dropping out from time to time. Overall, the panel were satisfied that a fair hearing was possible despite these difficulties, and that neither party were disadvantaged.

6. A timetable for the hearing had been agreed by the parties and set down by Employment Judge Sharkett at a preliminary hearing, which took place on 30 November 2022.
7. According to the timetable, the Tribunal was to spend the first morning reading the witness statements and key documents and discussing housekeeping matters, before starting Mr Haq's evidence in the afternoon. We received a witness statement prepared by Mr Haq and statement from each of the two individual respondents, along with one additional respondent witness. Miss Littlewood is the headteacher of the school; Reverend Saville is the Chair of Governors and chaired the panel which decided to dismiss Mr Haq and the other witness, Mr Parker, is the governor who chaired the appeal panel.
8. The witness statement presented by Mr Haq was very short. Some of the key aspects of the case were dealt with briefly, some were not touched at all. The witness statements presented by the respondent appeared better at first glance, as they were professionally presented. Upon further reading, however, it transpired that they also dealt with matters in a superficial way at best. There was no real attempt to provide an overall narrative of the complex history of Mr Haq's final year of employment and there was very little attempt to cross-refer to documents.
9. Mr Haq had produced written 'responses' to the respondent's statement. Although we read these briefly, we indicated to Mr Haq that that was not a normal part of the Tribunal's process, and that he would be expected to challenge the respondent's evidence by asking questions of the witnesses in cross-examination.
10. We were also presented with a bundle running to 486 pages which had been prepared by the respondent's solicitors. This bundle was not set out in chronological order and contains a number of repeated documents. It was poorly indexed and difficult to navigate. As tends to be the case with poorly-prepared bundles, whilst it was much bigger than it ought to have been, it still managed to omit a number of the key documents. The combination of the poor bundle and poor witness statements made it very difficult for the Tribunal to gain a thorough understanding of the competing evidence in the case.
11. We were informed by Miss Firth just before lunchtime on the first day that there were new documents to be disclosed by the respondent. Those documents then began to land, in a piecemeal fashion, by way of attachments to a series of emails. Miss Firth acknowledged that this was an unacceptable way of seeking to introduce new documents in such large quantities and it was agreed that the respondent would undertake to produce an indexed and paginated addendum bundle, in one PDF file. The respondent ultimately needed two attempts at this, with the final version running to some 58 pages. By the time this was produced, it had become clear that we would be unable to commence Mr Haq's evidence on the afternoon of day one, as planned. Mr Haq needed time to consider the new documents before he commenced giving his evidence. We therefore adjourned overnight to allow him to do that.

12. On the morning of day two, Mr Haq confirmed he had no objection to the documents being admitted (we understand that some of them had been sought by him in any event) and was happy to commence with giving his evidence. The fact that certain key documents appeared only in the addendum bundle is illustrative of the lack of care that had gone into the preparation of the main bundle. Miss First's instructing solicitor, Mr Gwynne-Thomas, joined the call, at the request of the Tribunal, to discuss the housekeeping problems during the afternoon of Day 1. No explanation was provided, although Mr Gwynne-Thomas did acknowledge that the way in which the bundle had been prepared was unsatisfactory, and offered an apology.
13. We will say more about Mr Haq's evidence below but note here merely that his very lengthy answers, and seeming difficulty in providing a direct answer to questions he was asked, significantly added to the time it took for his cross examination. During the afternoon of day two, when Miss Firth was still in the middle of her cross-examination of Mr Haq, we interposed the evidence all Rev. Saville. The reason for this was that Rev. Saville had an important and unavoidable medical appointment the following day.
14. Miss Firth was unable to complete her cross examination of Mr Haq on the afternoon of day two. He was therefore still giving evidence on the morning of day three, and his evidence concluded around at 11:40am. Miss Firth cross-examined Mr Haq on all the matters set out in the List of Issues and (properly in the Tribunal's view) did not seek to take unfair advantage of the fact that Mr Haq had failed to deal with all of these matters in his witness statement.
15. Miss Littlewood then gave evidence followed by Mr Parker. Mr Haq asked relatively few questions of any of the respondent's witnesses, despite prompting for the Employment Judge. Having regard to the overriding objective, and the need to put the parties on an even footing, so far as possible, the Tribunal panel asked some questions of each of the witnesses, focussing on the matters raised in the list of issues. We concluded the evidence at around 3:30pm on day three, having lost a full day from the timetable set out by Employment Judge Sharkett.
16. Miss Firth indicated that she had prepared a skeleton argument of around 17 pages. Mr Haq informed us (understandably) that he felt unable to properly absorb and consider Miss Firth's skeleton argument, and prepare he wanted to say, in the remaining time available. Neither party wished to return to the Tribunal make oral submissions on another day, and Mr Haq in particular, was keen to rely on written submissions to conclude the case. We therefore set dates for the parties to exchange submissions in writing and to provide comments (if necessary) on the submissions provided by the other party, before we commenced our deliberations.
17. These written submissions were duly provided and we have paid careful attention to each of them. Mr Haq's submission included new factual material, which had not been introduced in evidence, and we were careful to disregard that. As we explained to Mr Haq, when setting date for the

exchange of written submissions, the submissions are an opportunity to summarise or highlight the evidence already given, but not to introduce new evidence which the other party has no opportunity to challenge.

18. In considering the case, we have had regard to the documents in the bundle which were referenced in the witness statements, those referenced in a chronology prepared by Miss Firth (which the parties agreed would also serve as a key document reading list) and those referred to by the parties in cross-examination and in their submissions. There were many documents in the bundle which were not referred to by either party, and it should not be assumed that we have had regard to them.

## **The Issues**

19. At the case management hearing which took place before Employment Judge Sharkett on 30 November 2022 Mr Haq's claims were identified as being claims of unfair dismissal, harassment on ground of race and direct discrimination on grounds of race.
20. Employment Judge Sharkett also recorded that Mr Haq had raised with her that he wished to bring a claim of victimisation, based on the fact that Miss Littlewood had made negative comments about him to a prospective employer.
21. Employment Judge Sharkett attached to her case management order a 'template' list of issues. This required Mr Haq to confirm the acts of discrimination and harassment he wished to put forward. The template also encompassed the victimisation claim, and required Mr Haq to identify both the protected acts he was relying on, and the detriments which he said arose from having done those protected acts. However, Employment Judge Sharkett explicitly noted that Mr Haq would only be entitled to proceed with a victimisation claim if he made a successful application to amend his claim.
22. In accordance with Employment Judge Sharkett's case management orders, Mr Haq attempted to provide the further information required in order to proceed with his claim. He provided three documents, which set out in tabular form, the allegations he sought to pursue. There was one table for each of the types of claim – harassment, discrimination and victimisation.
23. The template list of issues and Mr Haq's tables appear in our bundle. At the start of the hearing Miss Firth produced a consolidated draft List of Issues, which was handed up as one of the (many) additional documents produced to the Tribunal. Miss Firth's document noted that although Mr Haq had produced information relating to his victimisation claim, he had never actually made an application to amend. However, it was further noted that the respondent had no objection to Mr Haq being allowed to amend his claim, save that it reserved the right to argue that the victimisation claim was out of time. We therefore permitted Mr Haq to amend his claim to advance the victimisation claim set out in the further particulars, subject to the time limit point. It transpired at a much later stage, once we had commenced our deliberations, that there was a difficulty with the way the List of Issues was framed in respect of victimisation. We will return to that below.

24. Both parties agreed that the List of Issues produced by Miss Firth was, subject to one point, complete and accurate.
25. The one outstanding point related to the unfair dismissal claim. The list of issues recorded the respondent was relying on capability as the potentially fair reason for dismissal within section 98(2) Employment Rights Act 1996 ("ERA"). However, at the start of this hearing Miss Firth applied to amend the response to rely on an alternative argument that the dismissal was for some other substantial reason. The specific reason relied on was the breakdown in the relationship between the parties. Having heard from both parties in respect of this application, the Tribunal granted the respondent's application to amend and gave oral reasons for doing so.
26. We reproduce here the List of Issues, taken from Miss Firth's document, as they were agreed to be at the start of the hearing. Our additions, reflecting the respondent's amendment application, are in italics.

#### Unfair Dismissal

1. **What was the reason for dismissal? The Respondent asserts that it was a reason related to capability, which is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996. *Alternatively, the respondent asserts that the reason was the breakdown in relationship between Mr Haq and the school, which amounts to some other substantial reason within s.98(1) ERA.***
2. **Was the decision to dismissal a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with those facts?**
3. **Did the Respondent adopt a fair procedure?**
4. **If it did not adopt a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?**
5. **If the dismissal was unfair did the Claimant contribute to the dismissal by culpable conduct?**

#### S.13 Direct Discrimination (Race)

6. **Did the Respondent subject the Claimant to the following treatment:**
  - 6.1. Alyson Littlewood refusing to give him a new appraiser in September 2021;
  - 6.2. Alyson Littlewood not making a referral to OH in December 2021;
  - 6.3. Alyson Littlewood ignoring the report provided by OH in January 2022;
  - 6.4. Ed Saville ignoring 2 formal grievances in April 2022 and May 2022;
  - 6.5. Ed Saville taking no action to protect the Claimant from racial discrimination in April 2022 and May 2022;
  - 6.6 Ed Saville not providing the Claimant with sufficient notice of the meeting in May 2022; and
  - 6.7. Dismissing the Claimant in July 2022
7. **Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? C relies on the following comparators:**

7.1 Sonya Brooks

7.2 No comparator specified. The Respondent presumes a hypothetical comparator.

7.3 Mrs Bevan

7.4 No comparator specified. The Respondent presumes a hypothetical comparator.

7.5 No comparator specified. The Respondent presumes a hypothetical comparator.

7.6 No comparator specified. The Respondent presumes a hypothetical comparator.

7.7 Mrs Bevan, Mrs Semple, Mrs Maclean, Mrs Hartley, Mrs Jeeves, Mrs Pilkington

8. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
9. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

#### **S.26 Harassment**

10. Did the Respondent engage in unwanted conduct as follows:
  - 10.1. Alyson Littlewood instructing Helen Butler to make lesson visits without prior agreement;
  - 10.2. Alyson Littlewood sending a threatening email in September 2021; and
  - 10.3. Being coerced to leave a department meeting in April 2022 by Alyson Littlewood
11. Was the conduct related to the Claimant's protected characteristic?
12. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her?
13. Was it reasonable for such conduct to have had the effect on the Claimant in all of the circumstances?

#### **S.27 Victimisation**

14. Did the Claimant carry out a protected act? The Claimant relies upon the following:
  - 14.1. Submitting his second grievance (April 2022);
  - 14.2. Mentioning that a referral had been made in ACAS in July 2022; and
  - 14.3. Making unfavourable comments to another school in September 2022
15. Do the above amount to protected acts?
16. If there was a protected act, did the Respondent carry out any of the treatment set out below because of the act?
  - 16.1. In May 2022, being threatened with formal support by Alyson Littlewood following the submission of his second grievance;
  - 16.2. Being dismissed the following day after mentioning that a referral had been made to ACAS;

**16.3. Having his offer of employment was rescinded with another employer following a reference submitted by Alyson Littlewood;**

- 17. Can the Claimant demonstrate a causal link between the protected acts and the alleged detriments?**

**Time limits**

- 18. The Claimant entered Early Conciliation on 5 July 2022 and a certificate was issued on 7 July 2022. He then submitted 2405347/2022 on 8 July 2022 and 2405497/2022 on 11 July 2022.**
- 19. Therefore, any act or omission which occurred on or before 5 April 2022 is prima facie out of time.**
- 20. Do any acts constitute conduct extending over a period such as to bring them in time?**
- 21. If not, would it be just and equitable to extend time?**
- 22. In relation to the victimisation claims, the date the application is made is the relevant date for limitation purposes. Assuming this is 22 May 2023, C's claims are prima facie out of time. Would it be just and equitable to extend time?**
- 23. It will also be apparent from the List of Issues that no attention had been given to the respective positions of the three respondents and which claims each was said to be responsible for. Again, we return to this below.**

**Findings of Fact**

***Background and 2021 review process***

- 27. Mr Haq commenced employment with the school in April 2015. He is a Geography teacher and, at some point prior to the events with which we are concerned, he was appointed a Senior Lead Practitioner. This is a promotion which provides an alternative route for experienced teachers to progress up the pay scale whilst remaining in the classroom, rather than taking on managerial responsibilities.**
- 28. We understand that the school had had a difficult period, with more than one change of leadership, when Miss Littlewood joined as headteacher in January 2017. The school was, at that stage, in special measures. Miss Littlewood described that the leadership team had worked together with the staff to improve the performance of the school.**
- 29. Miss Littlewood also described the school's professional development review ("PDR") process. We accept her evidence about how this process was run. (It was unfortunate that this matter was not covered in more detail in her witness statement). Broadly, each member of staff in the school had a PDR reviewer/assessor. These were initially drawn from a very small pool of senior leaders in order to ensure consistency in the standards being applied across the various departments.**
- 30. Each member of staff would meet with their reviewer during November to set annual targets. There would be a mid-year review to assess progress**



against these targets, and then a final meeting in October the following year when the targets would be signed off as completed or not completed.

31. At some point Miss Littlewood assigned Helen Butler as Mr Haq's reviewer. Ms Butler had retired from the school in summer 2019 but she returned in September 2020 to support Miss Littlewood in a senior management role. Mr Haq has emphasised that she was not a geography subject specialist and the respondent does not dispute this.
32. Part of a reviewer's role was to coach the member of staff towards achieving their objectives. We have had sight of a coaching log, reproduced in the form of capability reports prepared by Ms Butler. This log gives details of short visits made to Mr Haq's classroom on various dates between 24 April 2021 and 8 June 2021. The comments include positive observations as well as constructive criticism of various aspects of Mr Haq's teaching. Although we did not hear evidence from Ms Butler, the relatively detailed nature of this log conflicts with Mr Haq's evidence that Ms Butler's visits to the classroom were extremely short (up to 90 seconds). Mr Haq continuously referred to Ms Butler asking questions of two girls who had been in the school for only a couple of weeks, having recently moved to the UK with little spoken English, and using their failure to answer to justify a conclusion that Mr Haq was failing his students. It is evident from the logs, however, that even if this incident did take place as described Ms Butler's conclusions were drawn from a number of lessons involving a number of different groups of students.
33. Whilst we cannot positively conclude that Ms Butler's concerns were justified in every respect, we reject Mr Haq's characterisation of them as entirely spurious, as we do not find Mr Haq's evidence on this point to be credible given its inconsistency with the contemporaneous documentation.
34. In terms of Ms Butler's motivation for criticising Mr Haq, Mr Haq has told us that he raised concerns about the respondent's practices in relation to the process of awarding teacher-assessed grades for GCSE Geography (teacher-assessed grades were awarded as a result of covid-related exam cancellations in 2020 and 2021). He believes that, having done so, Miss Littlewood was angry with him and determined to use Ms Butler as a way to bully him, with the aim of forcing him to leave the school or dismissing him for performance issues. The issue around the teacher-assessed grades was another 'black hole' in the evidence of both parties, and it was difficult for us to fully understand the point. We note that even if Mr Haq was correct in his assertion that this caused Miss Littlewood to take against him, that has little bearing on this claim in which he complains of treatment motivated by his race. There is no 'whistleblowing' claim, and we therefore make no specific findings as to what disclosures Mr Haq did or did not make about teacher-assessed grades.
35. Ms Butler met with Mr Haq on 10 June 2021 and discussed the concerns that she had identified in her coaching role. These were specifically in the area of "checking for understanding". Ms Butler proposed that Mr Haq would be offered "informal support" for a period of six weeks. This would involve one-to-one meetings focusing on developing strategies Mr Haq could use

to improve in the specific area identified. The informal support process would end with a review meeting, following which the support could be discontinued (if successful), it could be extended, or the school could move to a formal capability process.

36. The initial meeting to work on the informal support plan was scheduled for 14 June 2021. Mr Haq declined to attend that meeting and no meaningful progress was ever made with the informal support plan. When Mr Haq was asked about his failure to attend he simply replied at length about why Miss Butler should not have been arranging a meeting with him about this matter in the first place.
37. We find that Mr Haq was genuinely both offended and extremely defensive about the criticisms that had been levelled at him. He considered himself, as a lead practitioner, to be a leader within the school in terms of teaching practice. He believed that Ms Butler, as a non-subject specialist, was not qualified to make judgements on his teaching (albeit that it was not his subject knowledge which was being criticised).

### **Grievance**

38. Having refused to meet with Ms Butler, Mr Haq raised a formal grievance against her dated 21 June 2021 and addressed to Miss Littlewood. The grievance made various complaints about Ms Butler's practice in relation to the PDR process making allegations such as that Ms Butler had conducted "exorbitant" visits to the classroom; that she had impermissibly changed the dates of the coaching window; that she had failed to look at books in a "subjective and systematic" manner and that comments that she had made in relation to a possible formal capability process were "veiled threats". There was no mention in the grievance about Mr Haq's race (or, indeed, anyone else's race) nor was there any mention of the allegations about exam irregularities.
39. Shortly after submitting this grievance, on 23 June 2021, Mr Haq commenced sickness absence due to work-related stress. Mr Haq did not return to work before the school closed for the summer holidays.

### **2021-22 Academic Year**

40. Mr Haq did return at the start of the new term in September. We accept Miss Littlewood's evidence (although this is poorly documented) that she and Ms Butler continued to attempt to meet with Mr Haq to discuss the concerns raised in the PDR process and agree a way forward in respect of these following his return to work. Mr Haq was not willing to meet with them. On 26 September 2021 Miss Littlewood sent a short e-mail to Mr Haq as follows:

*Good morning Iqbal,*

*Further to my email on the 22nd of June that made you aware that I would consider formal disciplinary action if you continue to refuse to attend meetings at my request, I would like to meet with you in the*

*boardroom on Wednesday 29 September at 11:40am. If you do not attend the meeting I will proceed to consider disciplinary proceedings*

*Kind regards  
Allison*

41. The earlier June e-mail referred to does not appear in the bundle of documents.
42. Whilst Mr Haq's refusal to attend meetings was a serious matter, and the threat of disciplinary action was one legitimate way to address it, we find that a pride and obstinance on Mr Haq's part was met with equal stubbornness of the part of Miss Littlewood. A different managerial approach might have tried to lower the temperature of the dispute, rather than raise it, for example by reassuring Mr Haq that the aim of the informal support process was to help him to improve, rather than orchestrate his removal, and/or by listening to Mr Haq's concerns as to why Ms Butler's conclusions were (in his view) unjustified and perhaps by offering more observations, or observations by a different member of staff, before proceeding with the informal support.
43. A meeting did take place on the 29 September between Mr Haq and Ms Ingham, who is the deputy head teacher, as opposed to Miss Littlewood. That meeting was, in effect, an absence review meeting and it was noted that Mr Haq's attendance record was a cause for concern. He was set a target for improved attendance, specifically, that there should be no further absence before Thursday 16 December (i.e. the end of term). The letter stated that if attendance improvement was not sustained this may result in a stage one absence review meeting being arranged. There was to be a further meeting, in any event, on 16 December.
44. The June grievance against Ms Butler was passed to Rev. Saville to consider. We understand that Mr Haq was in agreement with this course of action as he considered Rev. Saville to be more independent than Miss Littlewood. It appears from Rev. Saville's statement, and the outcome letter, that he met with Mr Haq and Ms Butler in order to consider the grievance. In respect of Mr Haq's meeting, it appears that he attended with his union representative. Again, there is no record of those meetings within the bundle of documents so far as we were made aware.
45. By an outcome letter dated 13 October 2021, Rev. Saville dismissed Mr Haq's grievance against Ms Butler. He was of the view that Ms Butler had acted appropriately and within the school's processes and procedures. He also rejected Mr Haq's contention that Miss Butler's approach had changed following him raising issues about exam irregularities. Towards the end of the letter, Rev. Saville dealt with Mr Haq's proposed solutions. He noted that Mr Haq had requested a new line manager, and commented as follows:  
  
*"You confirmed this request was for a new PDR reviewer. Given the grievance is not upheld, I am not recommending a change to the PDR reviewer."*

46. Rev. Saville acknowledges that in the grievance meeting with Mr Haq he proposed that a “fresh start” was needed. Mr Haq seems to have taken this to mean that he should have a new PDR reviewer. We are satisfied that that was not ever intended by Rev. Saville, nor suggested by him, because in his view a new reviewer would only be offered if the grievance was successful.
47. In response to questions from the Judge, Rev. Saville accepted that it might sometimes be appropriate to change a reviewer, even in circumstances where a grievance had not been upheld, for example to move on from a breakdown in relationships. His position was that it would not have been feasible to do that in this case, due to the small number of reviewers and their limited capacity. We consider that to be unfortunate given the strength of Mr Haq’s reaction to Ms Butler. It is, of course, possible that a new reviewer would have identified the same issues and that Mr Haq would have reacted in the same way, but it is also possible that there was an element of personality clash and that a new reviewer could have offered a successful fresh start.
48. By a document dated 19 October 2021, addressed to Rev. Saville, Mr Haq raised another grievance against Miss Littlewood. This grievance did mention the exam irregularities issue and alleged that Miss Littlewood was “still resentful” about Mr Haq having raised this issue. It complained that Miss Littlewood was still seeking to pursue an “unwarranted and disingenuous” informal support plan. It did not mention race.
49. There was an appraisal meeting scheduled on 20 October 2021, which Mr Haq did not attend. He subsequently commenced another sickness absence on 2 November 2021, which would ultimately last until 2 April 2022. Again, the reason for absence recorded on his sickness certificates was “work related stress”. We find that, essentially, the reason for absence was that the school wished to press ahead with the informal support plan and Mr Haq felt unable to engage with that. Each side was entrenched in their position and that created an impasse between the parties.

### ***Events during sickness absence***

50. On 3 November 2021, Mr Haq raised another grievance against Helen Butler. The substance of this grievance was that Mr Haq objected to Ms Butler being his reviewer as it was “inevitable” that she would be vindictive towards him and try to “punish” him for raising the earlier grievance. He asserted that other staff members had been given new reviewers and that it was “discriminatory” not to do the same for him (although he did not identify this as discrimination related to race or any other specific protected characteristic.)
51. We pause here to note that there was (again) a paucity of evidence as to other members of staff changing reviewers. In his further particulars document Mr Haq asserted that another teacher, called Sonya Brooks, had been permitted to change reviewer, but he did not lead any evidence about this. The respondent denied that was the case.

52. A grievance meeting in respect of the second grievance was scheduled for 11 November 2021, but Mr Haq did not attend due to being on sickness absence.
53. On 30 November 2021 Mr Iqbal received a letter from Miss Littlewood thanking him for his contribution to the school during covid, and enclosing a £150 gift voucher. Mr Haq has asked us to find that this letter demonstrates that he was performing well and that the supposed performance concerns were spurious. On this point we prefer the evidence of Miss Littlewood that the letter was a standard letter, sent to all staff with the intention of thanking them generally for their efforts during an exceptional period. It was not intended to reflect the particular performance of any individual recipient. We find that this letter is therefore of no assistance in helping us to determine whether the performance concerns raised about Mr Haq were genuine and/or justified.
54. Due to Mr Haq's on-going sickness absence, a referral to occupational health was made in December 2021 and a report dated 29 December 2021 was duly produced. The report records that no medication or counselling has been recommended in respect of Mr Haq's stress at work, and that his GP has advised that he rest. The key passages of the report are as follows:
- From an occupational health perspective the way forward is to address the internal matters as soon as possible and move the issue forward in order that all parties are not in a stalemate situation. Once the grievance has been completed he would then be in a position to return to work.*
- I would also advise that when any relationship have broken down, where that colleague is in a supervisory position with him, mediation (which would have been the first level) should be considered. If this is unsuccessful then consider being offered another supervisor. The overall internal matters are a matter for the school to address with the support of HR.*
- Functionally, until Mr Haq has addressed his grievance and matters remain unaddressed, this tends to add to stress all round.*
55. There were absence review meetings due to take place on 6 January and 2 February 2022. Mr Haq did not attend either of these.
56. A grievance meeting for the second grievance was scheduled for 23 February 2022. Effectively, this had been held in abeyance due to Mr Haq's sickness absence, but an attempt was now being made to move it forward given the comments in the occupational health report. Given Mr Haq's indication that he would not attend, Rev. Saville decided to determine the grievance in writing. Mr Haq was given the opportunity to make further written representations, which he did, following which Rev. Saville produced an outcome letter dated 24 February 2022. Rev. Saville's conclusion was that the grievances were not upheld.
57. There were further absence review meetings scheduled for 17 March and 23 March 2022. Again, Mr Haq did not attend either of those meetings. Mr Haq did, however, return to work on around 2 April 2022 after an absence of some five months.

**April 2022 return to work**

58. An episode occurred following Mr Haq's return to work at sometime in April 2022. Mr Haq was attending a departmental meeting when Miss Littlewood entered the room in which the meeting was taking place and requested that he leave to come to talk to her. Mr Haq's characterisation of this interaction is that Miss Littlewood ordered him to leave the meeting, and this was an act of bullying or harassment. Miss Littlewood's account is that she had scheduled for Mr Haq to meet with her to discuss various matters related to his return to work. Mr Haq had not turned up to that meeting and had attended the departmental meeting instead. She had therefore attended the departmental meeting and requested that the subject leader release Mr Haq to attend a meeting with her, which the subject leader had done. Although Mr Haq had then accompanied her to the boardroom, he had refused to engage with her when she attempted to begin a discussion. Broadly, we prefer and accept the account given by Miss Littlewood. This is consistent with Mr Haq's history of refusing to attend meetings addressed towards his own attendance or performance. We consider it was natural, and perhaps inevitable, that Miss Littlewood would seek to meet with Mr Haq following his return to work after such a prolonged absence. We find there is nothing wrong in her attempting to do so and that Mr Haq refused to engage with her simply because he did not want this to happen.
59. It appears that Mr Haq lodged a further grievance against Miss Littlewood on 27 April 2023. This does not seem to appear in the bundle (the reference in the chronology is to a later letter dated 27 May 2023). In any event, Rev. Saville wrote to inform the claimant that the matters raised would be addressed in an upcoming appeal meeting. Mr Haq raised a concern that the grievance appeal meeting which was due to take place on 3 May clashed with the festival of Eid. The meeting was re-arranged to 18 May.
60. Mr Haq did not attend the meeting on 18 May. He did, however, on that date raise two further grievances – one against Ms Butler and one against Miss Littlewood. The grievance against Ms Butler reiterates old allegations about her conduct whilst acting as a reviewing in April-May 2021. The grievance against Miss Littlewood makes the allegation (for the first time so far as we can determine) that Miss Littlewood has discriminated against Mr Haq on the grounds of his race. When questioned by Miss Firth as to why he had not raised this earlier if he believed it to be the case, Mr Haq responded that he was "*responding to a developing situation*" and that "*it took time for the situation to become clear*". The thrust of the discrimination complaint is Miss Littlewood's attempt to impose "*unwarranted and false support*". Mr Haq also asserted that Miss Littlewood was bullying two female Asian members of staff.
61. Miss Littlewood also wrote to Mr Haq on 18 May. Her letter was an invitation to a formal capability hearing, to take place on 6 June. The letter informed Mr Haq that the hearing would discuss his performance and that a possible outcome of the hearing would be a final written warning.

**Further sickness absence and dismissal**

62. Mr Haq was signed off sick again from 24 May 2022. He did not return to work between this date and his dismissal. The formal capability meeting scheduled for 6 June 2022 did not take place.
63. By letter dated 20 June 2022 Mr Haq was invited to a meeting of the Attendance and Dismissal Committee of governors. The letter informed him that a potential outcome of the meeting might be the termination of his contract of employment with the school. The meeting was due to take place on 6 July 2022.
64. The respondent obtained an occupational health report in advance of the meeting. The report, dated 28 June 2022, largely repeated the conclusions of the December report. There were no defined medical issues preventing Mr Haq from returning to work, but he could not do so until his concerns were resolved. We note, of course, that Mr Haq remained under medical illness certification from his GP. The report mentions that Mr Haq felt that he had been discriminated against on grounds of race. It is evident from the report that the issue Mr Haq wished to have resolved was the decision from the previous spring to make him subject to the informal support procedure. The report recommended that a "reconciliation meeting" take place as soon as possible.
65. A reconciliation meeting was arranged to take place on 5 July 2022, one day before the proposed capability meeting. We note at this stage that Mr Haq's absence was covered by a medical certificate which ran to 11 July 2022 and gave the reason for absence as "work related stress". The meeting took place between Mr Haq, supported by his union representative, and Miss Littlewood, supported by the school's HR providers. There are no notes of the meeting. Miss Littlewood sought assurances that Mr Haq was prepared to return to work. We find that Mr Haq was superficially in agreement with that proposal, but then came up with a number of reasons why it would not work out. We find that Mr Haq's union representative proposed that Mr Haq might come into work for a few days, without having teaching responsibilities, prior to the expiry of his sickness certificate and that Miss Littlewood was open to this proposal. Mr Haq was not open to this proposal. The reason that he gave the Tribunal in evidence was that he "would not break" the sickness certificate. We find that Mr Haq did not give a straight answer in the meeting. He was being encouraged by both union and school to turn up in the morning and understood that meeting would go ahead if he didn't turn up.
66. Following the reconciliation meeting, Mr Haq sent an email to Miss Littlewood (copying Rev. Saville and other) on 5 July 2022 at 01.39 (184). This was a confrontational email in which Mr Haq made threats of legal proceedings and to report Miss Littlewood to the police. However, he also stated that he would be attending his GP on 11 July, with a view to being certified to return to work on 12<sup>th</sup> July 2022 (i.e. on the expiry of his current sickness certificate). He stated that "*it is my intention to return to work the day after and can confirm this to you by the end of the day.*"
67. Mr Haq contacted ACAS and commenced Early Conciliation on 5 July 2022. At 8.29pm on 5 July 2022 Mr Haq sent another email, this time to Lucy

Woodward (United Learning HR), Miss Littlewood, Rev. Saville and Mr Halshaw. The email read as follows:

*“I think it is important for you to know that the matter of racial discrimination and racial harassment has been referred already to ACAS and they will get in touch with you soon to deal this matter on my behalf, before I proceed to employment tribunal.”*

68. This email was relied on by Mr Haq as constituting a protected act for the purposes of his victimisation claim and the respondent conceded that it was a protected act. (That being the case, it is illustrative of the poor state of preparation of this claim that a copy of the email was only introduced into evidence as part of the addendum bundle.)
69. Mr Haq did not attend the meeting scheduled for 6 July, nor did he attend work at all on that day. We find that Mr Haq was conscious of the date of his medical certificate and was reluctant to return before this, this was part of the reason for his non-attendance. However, it was not the only reason. He remained completely opposed to the idea but that “informal support” was still going to be in place and was simply unable to accept that. The Attendance and Dismissal Panel, chaired by Rev. Saville, decided to dismiss Mr Haq and a letter was sent on 8 July informing him of their decision. That was a detailed and considered letter, which specifically referenced the breakdown in relationships and observed that it appeared unlikely that any future return to work would be successful or sustained having regard to that breakdown. The letter stated that Mr Haq’s employment would end on 31 August, but he would be paid in lieu of notice until 31 December 2022.
70. Mr Haq appealed against his dismissal by letter dated 11 July. The appeal was heard on 2 September by a panel chaired by Mr Parker. Mr Haq attended the meeting. The appeal panel upheld the decision to dismiss. They also noted that Mr Haq had continued to submit sickness certificates after 12 August 2022, and on that basis decided that he would not have returned to work even if the dismissal meeting had been delayed.

### ***Post-dismissal events***

71. Mr Haq made two claims to the Tribunal on 8 and 11 July 2022 i.e. almost immediately after he had been notified of his dismissal, and before his employment formally ended. He named Miss Littlewood and Rev. Saville as respondents in both claims.
72. Subsequently, Mr Haq applied for a maternity cover role at another school, Harper Green. We accept Mr Haq’s evidence that he did not name Miss Littlewood as a referee for that position. It may have been that he named someone else in the school, or it may have been that he gave no referee from Marsden Heights. We find that he will have named Marsden Heights as his most recent employer.
73. Mr Haq complains that due to Miss Littlewood making “negative comments” about him to someone at Harper Green, a job offer was rescinded. He says



that he was told this after an interview by Peter Ware, an assistant head teacher at Harper Green.

74. The bundle includes a reference form completed by Miss Littlewood for Harper Green. It follows a template, including a number of questions, which are set by Harper Green. We reject Mr Haq's complaint that there was anything wrong in Miss Littlewood completing a reference in respect of him, despite the fact that she had not been individually named as a referee. We also reject the suggestion (that he seemed to be making) that she had gone out of her way to make negative comments about him outside the recruitment process. We accept Miss Littlewood's evidence, which accords with common sense and the experience of the panel, that references in education are almost invariably completed by the headteacher even if they are initially directed to another member of staff and, further, that for safeguarding reasons any prospective employer would seek a reference from the candidate's most recent school, even if the candidate had not suggested anyone at that school as a referee.
75. Although, therefore, we have no concerns about the simple fact of Miss Littlewood completing the reference, we do have concerns about its content. The main issues were as follows:
- 75.1 In response to the question "*In your view, does the applicant's overall performance suggest they are equipped to fulfil the responsibilities of the post for which they are applying?*" Miss Littlewood has answered "No" and, when prompted by the form to elaborate she has written "*Unless he were to work on his identified areas for improvement*". We find this answer reflects the intransigent position that the school leadership had adopted in relation to the improvements required of Mr Haq. It would have been possible for Miss Littlewood to answer "yes, with reservations" or, if answering "no" to provide a more balanced comment on Mr Haq's strengths and weaknesses. We consider that her stark assessment is much more damning than the original concerns raised by Miss Butler and identified in the capability report.
- 75.2 In response to a question about formal capability proceedings over the last two years, Miss Littlewood has stated that Mr Haq was subject to informal capability proceedings, and has declined to provide any further details. This can only refer to capability proceedings arising out of his performance, as the medical capability proceedings which led to his dismissal were addressed in the previous question. Miss Littlewood has therefore gone beyond what is required of the question (which asks only about formal proceedings) to highlight her concerns about Mr Haq. We also note that the wording of "informal capability" sounds more serious than the "informal support" which was what the internal process was actually called.
- 75.3 The panel were most concerned about an answer given to the question "*Did you find the applicant to be honest and trustworthy?*". The form provided only for a yes/no response and Miss Littlewood indicated "No". When questioned on this, Miss Littlewood was unable to satisfactorily explain this choice of response. She stated that it was based more on the "trustworthy" side of the question than the "honesty" side and she did not consider him trustworthy because trust had broken down. Further, she could not trust him to come to meetings or to engage

with her. The panel recognises that there were clearly serious relationship difficulties at Marsden Heights which could properly be reflected in other areas of this reference form. However, this is a question that was directed to honesty, and trustworthiness in that sense. Allegations of dishonesty had never formed part of the school's concerns about Mr Haq. Further, Miss Littlewood has answered the subsequent question, whether Mr Haq was reliable in carrying out his duties, with a "Yes". For those reasons, we found Miss Littlewood's evidence in relation to the honesty question difficult to understand and unconvincing.

75.4 There were a number of questions at the end of the reference which asked for a grade ranging from Excellent to Poor in respect of various capabilities. There was space for comments in respect of each question. We noted that Miss Littlewood made no comments, and therefore gave no explanation for her rating, in respect of 13 of the 15 questions. The panel find that it would be usual to explain a particularly strong or a particularly negative grade (there were several negative grades in this reference).

75.5 Question 15 asked for an overall recommendation. Miss Littlewood indicated that she would not recommend. The other options were "strongly recommend" or "recommend with reservations stated above". She made a comment underneath "unless he worked on identified areas". Given that comment, and the tone of the reference generally (including the answer to a question about redeployment), the panel found it difficult to understand why Miss Littlewood had chosen "do not recommend" over "recommend with reservations".

76. Miss Littlewood accepted in her evidence that at the time of filling in this reference, she knew that Mr Haq had submitted Tribunal claims against her which asserted that he had been discriminated against on the grounds of race. She was also a recipient of the 5 July email which set out Mr Haq's intention to make these claims and was accepted as being a protected act.

## **Relevant Legal Principles**

### ***Unfair dismissal***

77. Section 98 ERA, so far as relevant, provides as follows:

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
  - (a) the reason (or, if more than one, the principal reason) for the dismissal and**
  - (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
- (2) A reason falls within this sub-section if it-**
  - (b) relates to the capability or qualifications of the employee for performing work of the kind which he is employed by his employer to do**
- (3) In subsection 2(a) –**
  - (a) "capability" in relation to an employee means his capability assessed by reference to aptitude, health or any other physical or mental quality,**

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case

78. The burden of proof is therefore on the employer to demonstrate a potentially fair reason for dismissal.

79. The reason for the dismissal is the set of facts known to, or beliefs held by, the employer, which cause it to dismiss the employee. See **Abernethy v Mott Hay and Anderson [1974] ICR 323**. The 'label' which applies to those facts, in terms of the potentially fair reasons set out in the statute, is likely to be significant in determining whether a fair procedure was followed by the respondent. It does not, however, necessarily make the dismissal unfair if the employer has applied the wrong label either at the dismissal stage or when defending the claim.

80. Once a potentially fair reason has been established, the Tribunal will assess whether the dismissal was fair or unfair with reference to s98(4). The Tribunal must not substitute its views for those of the employer and must instead assess whether the employer acted outside the band of reasonable responses i.e. in a way which no reasonable employer would have acted in the circumstances.

### ***Direct discrimination of grounds of race***

#### ***Direct discrimination***

1. Section 13 of the Equality Act 2010 which provides that:

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

2. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which includes by subjecting him to any other detriment.

3. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

4. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

**“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision”.

5. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he was treated less favourably than his comparator and there was a difference of a protected characteristic between them. In general terms “something more” than that would be required before the respondent is required to provide a non-discriminatory explanation. 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, the question is whether it could do so.
6. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.
7. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?
8. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator’s action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?
9. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts.
10. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.
11. The way in which the burden of proof should be considered has been explained in many authorities. , including: **Barton v Investec Henderson**

**Crosthwaite Securities Limited [2003] IRLR 332; Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005] ICR 931; Madarassy v Nomura International PLC [2007] ICR 867; Royal Mail v Efobi [2021] UKSC 33.** In **Hewage v Grampian Health Board** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong**, as refined in **Madarassy v Nomura International PLC**.

12. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36; Bahl v The Law Society [2004] EWCA Civ 1070**. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race or sex or one who had not been on maternity leave, would have been treated reasonably.

### **Harassment**

13. Section 26 of the Equality Act 2010 provides (as relevant) as follows:

(1) A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect—
  - (i) violating B's dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

14. The leading case on harassment is **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**. In particular, we took account of the guidance set out in paragraphs 13-16 of that decision as to how the Tribunal should approach harassment claims.

### **Victimisation**

81. Section 27 EqA provides (so far as is relevant):

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

82. In terms of establishing the “reason why” the respondent acted in a particular way, the same principles apply as set out above in respect of direct discrimination. Victimisation claims are also subject to the shifting burden of proof set out in s.136 EqA.

### **Submissions**

83. Both parties relied on written submissions for which we were grateful. For brevity, we will not set them out at length here. Suffice to say that the claimant repeated his position about the key aspects of the case. Where he sought to introduce new evidence, we were careful to set that aside. Miss Firth set out summaries of the relevant law (which we consider to be uncontroversial) and then made factual submissions following the list of issues. We refer to some of her points in more detail below.

## **Discussion and conclusions**

### ***Unfair dismissal***

84. Considering first the reason for dismissal. We find that the reason for dismissal in this case was the respondent's perception that the claimant refused to engage with the 'informal support' process and the breakdown in relationships which was precipitated by this refusal.

85. We consider that it is more apt to consider this a "some other substantial reason" ("SOSR") dismissal, as opposed to a capability dismissal. As noted above, Miss Firth made a successful application to amend at the outset of the hearing to rely on "some other substantial reason" and the claimant was not prejudiced by this. In particular, the breakdown in relations was noted in both the dismissal and appeal outcome letters as forming part of the reasoning of the respective panels.

86. We are satisfied that the reason we have identified is sufficient to amount to a potentially fair reason. The hurdle which the respondent has to pass at that initial stage is relatively low. As this was an SOSR dismissal there are no prescribed procedural formalities. Instead, we must consider broadly whether the decision to dismiss, and the procedure followed, were within the band of reasonable responses.

87. The respondent was right (or at least reasonable), given the claimant's continued certified medical absence, to follow a capability procedure. It was also right, in our view, to identify that the key question was whether there was a realistic prospect of Mr Haq making a sustained return to work within a reasonable time frame.

88. We find that when Mr Haq failed to return to work on 6 July, and failed to attend the dismissal meeting, the respondent formed a genuine belief that there was no realistic prospect of return.

89. In just one respect, however, we find that they did not have reasonable grounds for that belief. Mr Haq had a sickness certificate which was due to expire only a few days later. On both sides' account, the reconciliation meeting had discussed an imminent return, and Mr Haq's email following it that evening had spoken about returning on the expiry of his sickness certificate.

90. We accept Mr Haq's evidence that he felt very uncomfortable about the suggestion that he should, or even could, return to work before the expiry

of that certificate, and was reluctant to do so. Whilst that was not the only factor which ultimately stopped him from coming into work on 6 July, we accept that it was a real one.

91. We take account of the very short time frame between the reconciliation meeting and the dismissal meeting and the fact that there was no written follow-up to the reconciliation meeting setting out what was understood to have been discussed/agreed for Mr Haq to reflect on. Those things, combined with the refusal to wait for a matter of days to see if Mr Haq's sickness certificate was actually renewed or not, suggest a rush to judgment on the part of the respondent. This is set against the background of the respondent's earlier intransigence over the question of identity of Mr Haq's reviewer.
92. In our judgment, any reasonable employer would have waited for the expiry of Mr Haq's sickness certificate on 11 July, to see whether he did return to work or, instead, whether another sickness certificate was produced. It was outside the band of reasonable responses for this employer to fail to do so.
93. The respondent has suggested that the fact that Mr Haq continued to produce sickness certificates after 12 July indicates that waiting for that short period would have made no difference. We do not agree that that follows. If Mr Haq had been given a very clear indication that he had reached the end of the road, and must attempt to return to work on the expiry of his sickness certificate, or else face dismissal, then his conversation with his GP would have been very different to a conversation in which he has already been dismissed.
94. For similar reasons, we find that the unfairness at the dismissal stage was not corrected at the appeal stage. We note that Mr Haq's appeal letter made reference to the fact that he had hoped to return to work on the expiry of the sickness certificate and having seen his doctor. By the time of the appeal, however, that opportunity (if it had ever existed) was closed.
95. For this specific reason, we find that Mr Haq's dismissal was unfair and that claim succeeds.
96. Essentially, this is a procedural unfairness point, and we must therefore assess what would have happened absent that unfairness, and make any necessary adjustments to Mr Haq's compensation, in accordance with the principle set out in **Polkey v A E Dayton Services Limited [1987] IRLR 503**.
97. Given all that had happened, it would be naïve to suppose that there was a high likelihood of a smooth and untroubled return to work by Mr Haq in summer 2022. We think that there is a small prospect that an accommodation would have been found which would have allowed the employment relationship to continue into the medium to long term. We base that on these factors:
  - 97.1 We have heard oral evidence Ms Butler left the school (again) around this time, so Mr Haq's wish to have a different reviewer would

have come about notwithstanding Miss Littlewood's opposition to that change.

- 97.2 Mr Haq had shown that he was able to return from the first portion of his sickness absence, and had sustained that return for several weeks.
- 97.3 Mr Haq had indicated in the reconciliation meeting (and subsequent email) that he did wish to return and considered that he would be fit to do so. That intention is reflected in the content of his (later) appeal letter.
- 97.4 Importantly, Mr Haq would have been aware that he could not remain on paid sickness absence indefinitely, both because of the risk of dismissal but also because his entitlement to remuneration would expire. Whilst the prospect of agreeing to informal support was distressing to him, the prospect of losing his job may well have been more distressing. (That is very much the tenor of his appeal letter).
98. We therefore conclude that, acting reasonably, the respondent would have delayed the dismissal meeting to a date shortly after 12 July 2022, whilst making it very clear to Mr Haq that if he did not return to work on the expiry of his sickness certificate dismissal was the likely next step. Further, acting reasonably the respondent would have taken steps to facilitate Mr Haq's return to work of the sort proposed by his union in the reconciliation meeting e.g. a phased return to teaching duties.
99. Absent the unfairness we have found, the dismissal may very well still have taken place. The date on which the decision was made would necessarily have been delayed to a date shortly after 12 July 2022. Given the need to convene a dismissal panel, we have found that the decision would have been made not before 26 July 2022. If dismissal was still the ultimately outcome, that delay may, or may not, have delayed the eventual termination date, given the particular arrangements which apply in respect of teachers. If necessary, we will hear submissions from the parties in due course as to whether it would have done so, and any resulting financial loss to Mr Haq.
100. In view of the factors set out above, we find that there is an 85% chance that Mr Haq would not have returned to work and only a 15% chance that he would have managed a sustained and successful return. We therefore conclude that his compensatory award should be reduced by 85% (save for any portion which relates purely to the difference in earnings arising from the short delay to the dismissal meeting discussed above). Whilst we recognise that there are other possibilities – for example that he could have sustained a very short return which delayed the dismissal by a few weeks – we are content that the figure of 85% does broad justice between the parties.
101. The respondent has submitted (further or in the alternative to its **Polkey** argument) that the compensatory award should be reduced to reflect the claimant's contributory fault. We find that the claimant was at fault in failing to engage with the various processes. However, we consider that there is significant overlap between that fault and the reasons we have outlined why it is unlikely that the claimant would have made a sustained return to work.



In the particular circumstances of this case, therefore, the fault is properly reflected in the 85% reduction we have already made.

102. The calculation of the claimant's basic and compensatory awards, including issues of mitigation/failure to mitigate, will be done at the remedy hearing.
103. Before moving on from unfair dismissal we pause to deal with one point raised by Mr Haq. He was entitled to be paid for the duration of his sickness absence for a period of time in accordance with Burgundy Book terms and conditions. (We understand this to have been six months on full pay and six months on half pay, although we make no determination as to whether those figures are correct.) Mr Haq argued that any dismissal which had the effect of curtailing his sick pay entitlement would be unfair for that reason. We reject that argument. The fact that someone is in receipt of sick pay is one factor, but only one factor, which can be taken into account in determining whether a capability dismissal is fair or unfair. Although we have found this was not, strictly, a capability dismissal, it was akin to one in many respects. In the circumstances of this case, we do not consider that the continuation of sick pay was a particularly important factor for the respondent to consider. The key question was whether there was a realistic prospect of a sustained return to work and that is what the respondent turned its mind to.
104. A claim of unfair dismissal can only lie against the legal employer, in this case the Trust. This claim therefore succeeds against the first respondent.

### ***Direct Discrimination***

105. At the outset of our discussion of Mr Haq's race claims, we echo a point made by Miss Firth in her submissions. It appears to be Mr Haq's position, from the way he expressed himself to us, that if someone treats him poorly (or in a way he considers to be poor treatment), and that person is of a different race to him, then race is implicated in that poor treatment, and there must be a valid claim of race discrimination. That is not the way the law works. The tests for establishing whether poor treatment (if found) is discriminatory are those we have set out and discussed above.
106. We have considered the allegations of direct discrimination in the order they are set out in the List of Issues.

### ***AL refusing to give C a new appraiser in September 2021 (Comparator – Sonya Brooks)***

107. We were unable to find that Mr Haq's comparator, Sonya Brooks was given a new appraiser, nor the circumstances in which this occurred. The respondent's witnesses would have had more reason to know about the circumstances of another employee and we accept their denials. Mr Haq gave very little evidence about this, and what we did hear was very vague.
108. The appropriate hypothetical comparator would be a white teacher who had been the subject of similar reviews and asked to progress to informal support, against their wishes. We agree with Mr Haq that (despite its name)

the imposition of 'informal support' could reasonably be considered to be a detriment as it was part of the capability pathway which could, ultimately, lead to dismissal. It was also an indication that a negative judgment had been made about Mr Haq's abilities in his job.

109. We are satisfied, however, that a white comparator would have been treated in exactly the same way. There is nothing to link Mr Haq's treatment to his race. Indeed, he himself did not link it to race until a much later stage. Further, there is a non-discriminatory explanation for the treatment. We find that both Miss Littlewood and Rev. Saville wished to exercise a right to manage the teaching staff, and considered it important that employees were not allowed to dictate the process. Whilst criticisms could be made of this approach, we are satisfied that it was unrelated to race, and that Miss Littlewood and Rev. Saville would have adopted the same stance in the case of a white comparator.

***AL not making a referral to OH in December 2021***

110. Mr Haq did not provide us with sufficient evidence to understand this allegation. It appears that a referral was made in December 2021. It may have been that Mr Haq believes it should have been made at a different time, but to make a finding about that would simply be speculation on our part. As the respondent has pointed out, Mr Haq appeared to complain elsewhere about this referral being premature, rather than late.
111. In those circumstances, we are unable to make any finding of detrimental treatment. In any event, we repeat the comments above, we are content that Miss Littlewood's approach to managing Mr Haq was determined by her own insistence that he must acquiesce to the informal support process, and not by race.

***AL ignoring the report provided by OH in January 2022***

112. It was clarified during the hearing that Mr Haq was specifically referring to the paragraph in the report which recommended mediation with the supervisor (i.e. Helen Butler) and, failing that, consideration being given to offering Mr Haq a new supervisor. The report went on to note that the internal matters were a matter for the school to address with the support of HR.
113. There is some force in the respondent's argument that, at this stage, Mr Haq was refusing to attend meetings and so they were unable to move forward with any potential mediation. However, we also find that the recommendation was 'ignored' in the sense that it was never acknowledged in any correspondence from the school to Mr Haq. There was no suggestion made that mediation, or an alternative supervisor, was something that could be discussed in the meetings if Mr Haq attended. Nor was there any explanation as to why those things could not be considered.
114. In that sense, we find that Miss Littlewood did ignore the recommendations of the report and that this did amount to a detriment.

115. Mr Haq relies on a hypothetical comparator. That is a white employee who was the subject of a occupational health report in similar terms. Mr Haq has pointed to nothing which suggests that such an employee would have been treated any differently. We repeat our comments in respect of the first allegation. The burden of proof does not shift and the claim that this was an act of race discrimination does not succeed.

***ES ignoring two formal grievances in April 2022 and May 2022***

116. The claimant's grievance of April 2022 was not ignored. By an email dated 29 April 2022 Mr Saville acknowledged receipt of it and noted that it was a continuation of the original grievance against Miss Littlewood, which was due to go to appeal. He said that the matters in the latest letter would be addressed at the appeal hearing. We consider this was both appropriate and understandable in the circumstances.

117. The May grievances again reiterated the (now long-standing) dispute between the parties. They were submitted after the claimant had been invited to the capability meeting, and appear to have been submitted as a response to that invitation. Again, we consider that it was appropriate and understandable that the respondent did not commence a new grievance process.

118. In the circumstances, we find Mr Haq has not been subjected to any detriment. If he has, then we are satisfied that it had nothing to do with race (and repeat our earlier comments).

***ES taking no action to protect the claimant from racial discrimination in April 2022 and May 2022***

119. We have not found any race discrimination which took place which Mr Saville should or could have protected Mr Haq from. Mr Haq did not explain in his evidence what he believed Mr Saville should have done, nor how any alleged failure was said to be connected to his race. He did not explore this allegation in his questioning of Mr Saville. In the circumstances, this allegation does not 'get off the ground'. We are unable to make any findings in respect of it.

***ES not providing the claimant with sufficient notice of the meeting in May 2022***

120. We were not taken to the grievance policy and have been unable to make findings as to what notice ought to have been given of the grievance appeal meeting which ultimately took place on 18 May. We do note that the meeting was re-scheduled at Mr Haq's request, and that this point was not dealt with by Mr Haq in either his own evidence or in cross examination. We are unable to find that Mr Saville subjected Mr Haq to a detriment. Even if he did, there is no basis to conclude that this had anything to do with Mr Haq's race.

***Dismissing the claimant***

121. In respect of this allegation, Mr Haq has named six actual comparators who he says all had lengthy periods of absence which did not result in dismissal.
122. Again, the evidence on this, from both sides, was thin. Beyond naming the individuals, Mr Haq provided no evidence about their circumstances in his statement or in the documents. When questioned, his evidence was vague and lacking in detail. Mr Saville's statement referred to having checked the HR records for the employees named in the list of issues, and only one having had a long-term absence. Unhelpfully, however, the records had only been checked back to 1 November 2020, when the school joined the Trust. Given that the claimant was dismissed in summer 2022, there may well have been appropriate comparisons to be made with situations arising before November 2020. Rev. Saville and Miss Littlewood gave oral evidence about the employees named by Mr Haq. It does appear that there were some earlier extended absences. However, on the evidence we have heard these all related to medical conditions which were unrelated to work and were not complicated by the relationship breakdown which occurred in this case. On that basis, we cannot find that any of the named comparators were in the same material circumstances as Mr Haq.
123. We also considered whether a hypothetical comparator would have been dismissed. We are satisfied that he would. As will be clear from what we have said already, we found nothing to link Mr Haq's treatment with his race. His dismissal (including the aspects which we have found unfair) is fully explained by the fact that he refused to engage with the informal support which Miss Littlewood determined was necessary, and the subsequent breakdown in relationships.

### **Harassment on grounds of race**

#### ***Alyson Littlewood instructing Helen butler to make lesson visits without prior agreement***

124. This allegation dates back to spring 2021. We find that the process around performance review was confused and not well-documented. (A point also recognised in Rev. Saville's original grievance outcome). It does appear to be the case that the lesson visits were generally unannounced – that was the point of them.
125. Turning to the legal test for harassment, we are satisfied, firstly, that this was unwanted conduct as far as Mr Haq was concerned. However, it is not conduct which related (in any way) to the protected characteristic of race. The allegation therefore fails at the second hurdle.
126. For completeness, we also record that we would not have found that this conduct had the purpose or effect of violating Mr Haq's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him ("the proscribed effect"). If it did have such an effect that was not a reasonable reaction on the part of Mr Haq.

#### ***AL sending a threatening email in September 2021***

127. It was established that the alleged threatening letter was dated 26 September 2022. The terms of the letter are set out at paragraph 40 above. The letter was sent in circumstances where Mr Haq had failed to attend meetings with Miss Littlewood, and it warned him that she was considering disciplinary action if he did not attend a further meeting. In that sense, it ‘threatened’ disciplinary action.

128. As with the allegation above, we find that this was unwanted conduct as far as Mr Haq was concerned, but it does not otherwise satisfy the tests we must apply. Most importantly, there is no relationship between the letter and Mr Haq’s protected characteristic of race. Further, we do not find that it had the proscribed effect.

***Being coerced to leave a department meeting in April 2022 by AL***

129. This allegation relates to the events described at paragraph 58 above. As noted in that paragraph we broadly preferred the account of the meeting given by Miss Littlewood. We accept that the conduct was unwanted by Mr Haq. Again, however, it was not related to his protected characteristic of race. (This would be our conclusion even if we had preferred the account given by Mr Haq.)

130. Again, for completeness, we find that the conduct did not have the proscribed effect. That conclusion is based on our acceptance of the account given by Miss Littlewood.

***Victimisation***

131. The list of issues identified three potential protected acts for the purpose of the victimisation claim. That reflects the first column of the table of further information produced by Mr Haq. For convenience, they were:

**14.1 Submitting his second grievance (April 2022);**

**14.2. Mentioning that a referral had been made in ACAS in July 2022; and**

**14.3. Making unfavourable comments to another school in September 2022**

132. We find that the grievance of 27 April 2022 was not a protected act within the meaning of ss.27(2) EqA. Specifically, by writing this grievance Mr Haq was not doing anything for the purposes of or in connection with the EqA, nor was he alleging a contravention of the EqA. In his grievance, Mr Haq uses the word “victimisation” several times. Further, he appears to use it (at least on some occasions) in broadly the way that it is used in the EqA i.e. that he has been targeted for raising a previous complaint, in this case his previous grievances. (Rather than using the word in the more general sense that it is sometimes used, simply to mean that someone has been bullied or “picked on”).

133. However, although Mr Haq had brought previous grievances, those did not assert that he had been discriminated on the grounds of race (nor did

they reference any other protected characteristic within the EqA). As noted in our findings of fact, Mr Haq did not make any allegation of race discrimination until 18 May 2022. In those circumstances, we find that the reference to “victimisation” in the 27 April grievance cannot be construed as an allegation of a contravention of the EqA, nor something done for the purposes of or in connection with the EqA.

134. The respondent conceded that Mr Haq’s email dated 5 July 2022 (in which he informed various individuals that he had notified ACAS of his complaints) amounts to a protected act.

135. The third alleged protected act was “*making unfavourable comments to another school in September 2022*”. That is a reference to Miss Littlewood’s comments contained in the reference document. It cannot be a protected act done by Mr Haq. Its inclusion in the list of issues arises from a confusion on Mr Haq’s part about the two elements of a victimisation claim – the protected act and the resulting detriment. This is discussed further below.

136. We turn now to the detriments alleged by the claimant, and deal with them in order.

***In May 2022, being threatened with formal support by AL following the submission of his second grievance***

137. This is a reference to Miss Littlewood’s letter dated 18 May 2022 which invited Mr Haq to a formal capability meeting on 6 June 2022. Given that this predates the one protected act that we have found to have taken place, it cannot logically be an act of victimisation. Further, we are content that Miss Littlewood’s motivation in inviting Mr Haq to a formal capability hearing was based on his failure to engage with the informal process, rather than the grievances he had raised against her.

***Being dismissed the following day after mentioning that a referral had been made to ACAS***

138. The decision to dismiss was taken in a meeting on 6 July by the Attendance and Disciplinary Committee of Governors. The 5 July email had come in late in the previous evening. Only one member of the Committee, Rev. Saville, was a recipient of the email. We are satisfied, as we have noted above, that the respondent dismissed the claimant due to the view they had taken that he would be unable to sustain a return to work in the foreseeable future and due to the breakdown in relationships. We are satisfied that having decided to proceed with the hearing on the 6<sup>th</sup>, and not give Mr Haq opportunity to return on the expiry of his sickness certificate, the decision of the committee as to the termination of his employment was settled. It is unlikely that Mr Haq’s email was discussed at this juncture and, even if it was, we are content it would have played no significant part in the decision of the Committee to dismiss.

***Final alleged detriment - reference***

139. The final alleged detriment as per the list of issues is said to be “*having his offer of employment rescinded with another employer following a reference submitted by Alyson Littlewood*”. Harper Green school is not a respondent to this claim. The allegation, framed in this way, cannot lie against any of these respondents. However, Mr Haq had clearly alleged as part of his further information that Miss Littlewood had “made unfavourable comments to another school” in September 2022. That was characterised in the List of Issues as a protected act, when it clearly should have been characterised as a detriment. We have therefore proceeded on the basis that the detriment relied on is the unfavourable reference completed by Miss Littlewood. To do otherwise would have been unjust to Mr Haq. He had made it clear, right from the discussion with Employment Judge Sharkett, that the key act of victimisation he was concerned with was the information provided by Miss Littlewood to Marsden Green.
140. It will be clear from the factual narrative set out above that in the period between the 5 July email and the completion of the reference, the claimant had lodged his claims. The act of presenting those claims would amount to a protected act by virtue of s.27(2)(a) EqA, unless the claims were both false and made in bad faith (s.27(3)). We note that the respondent has not relied on s.27(3) in relation to the 5 July email (or at all).
141. We were troubled to some degree by the fact that common sense suggests that Miss Littlewood may have been motivated more by the actual claims brought by Mr Haq (which were not relied on as protected acts, although undoubtedly would have been had he had representation) than by the email of 5 July, which was acknowledged to be a protected act.
142. In its submissions, the respondent relied entirely on the good faith point, and did not seek to argue that Miss Littlewood *had* victimised the claimant, but had done so purely due to the claims rather than the email, and therefore the victimisation was outside the scope of the pleaded claim. Such an argument would have been unattractive, but we consider it would also have been weak. As outlined above, the law requires only that the protected act play a “significant” part in the motivation for the detrimental act. In terms of the effect on the actor, there is an almost total overlap between an email which asserts race discrimination and harassment, informs the recipient that ACAS have been notified and informs the recipient of the writer’s intention to proceed to Tribunal, as against the act done a few days later of actually presenting those claims to the Tribunal.
143. In relation to the reference allegation, we consider that the claimant has proven facts sufficient to shift the burden of proof. We recognise that, in completing the reference, Miss Littlewood owes an obligation to the receiving party not to mislead in terms of the matters that she includes or omits. We take the view that there are some aspects of the reference, which Mr Haq would fairly consider to be negative, but which in our view merely reflect this obligation. We also hold in mind that there are other aspects of the reference which are positive, or at least satisfactory. Broadly, however, the panel members, drawing on their industrial experience, consider this to be an unusually damning reference which has a punitive flavour. The particular concerns are as set out above in our findings of fact, and we also

take note of the fact that there was absolutely no attempt made in the reference to include any positive material, despite the fact that Mr Haq was a long-standing member of staff, who had been promoted to Lead Practitioner status and whom, on the evidence we heard from both parties, had not encountered any problems prior to the events giving rise to this case.

144. Miss Littlewood's failure to adequately explain her decision to give a "no" answer to the "honest and trustworthy" question is a critical factor in our decision that the claimant has proven facts from which we could conclude, in the absence of a credible explanation, that the decision to provide a reference in this form was tainted by victimisation.
145. We then turned to the respondent's explanation, which is simply that Miss Littlewood gave a factual, honest and genuine assessment in good faith. We take account of the fact that just as employers will very rarely admit discrimination, they will equally rarely admit victimisation. The fact that Miss Littlewood does not acknowledge that she was influenced by the protected act does not take us very far. The respondent produced little else by way of evidence – there was no policy about the completion of references, nor any other references produced by way of comparison. We were simply asked to accept that these questions were answered in good faith and, on the balance of probabilities, we find we are unable to do that.
146. We find that Miss Littlewood's response to the reference request was motivated by what she saw as the unjust claims of discrimination and harassment that had been levied against her. We cannot say that she would have acted any differently if the reference request had come in in the period between her being notified of the claimant's intention to make those claims, and the claims themselves being made. We consider that both the email and the claims themselves were therefore "significant" in her motivation, in the sense that knowledge of either one of them would have been sufficient to prompt Miss Littlewood to act as we have found that she did.
10. Our conclusion therefore is that Miss Littlewood victimised the claimant by providing a materially worse reference than he would have received absent the protected act. Miss Littlewood is liable for this act of victimisation as an individual respondent, and the Trust is jointly liable as Mr Haq's employer. (See s.109 and s.110 Equality Act 2010).

### **Time limits**

147. Time limit points potentially arose in respect of many of the alleged acts of direct discrimination, harassment and victimisation. As we have found that Mr Haq succeeds in only one of those allegations, we have considered the time limit point only as it relates to that part of the claim.
148. The respondent has invited us to consider whether the victimisation claim related to the reference had been presented late, and, if so, whether it is outside the jurisdiction of the Tribunal to consider it. It will be recalled that this claim was formally added by way of amendment at the outset of



the final hearing. Sometimes, time limit points will be determined definitively at the point of determining whether permission to amend should be given. It is permissible, however, to permit an amendment subject to time-limit points and it was appropriate for us to take this approach in circumstances where the respondent consented to the amendment subject to that point.

149. Miss Firth is correct to assert that claims introduced by amendment are taken to have been presented at the date the amendment application was made. She is also right to say that technically, in this case, Mr Haq had made no application to amend until the start of this final hearing. We bear in mind that the one meritorious victimisation complaint could not have been brought when Mr Haq presented his original claims, as it post-dated them. The matter arose at some point in September 2022 and was raised by Mr Haq in the case management preliminary hearing on 30 November 2022. Employment Judge Sharkett recorded not simply that Mr Haq wanted to raise a victimisation claim in general terms, but specifically that he wanted to raise a claim about the comments made by Miss Littlewood to his prospective employer. Under the case management orders, the additional information was to be provided by 16 December 2022 and Mr Haq in fact provided his tabulated documents on 6 December 2022. Had Mr Haq simply included a cover email stating “I apply to amend my claim to include a claim of victimisation as per the attached” then the new claim would have been in time, with reference to the date of the act complained of.

150. The respondent was able to respond to the victimisation claim, and did so in an amended response produced in accordance with Employment Judge Sharkett’s case management orders. The respondent never raised the fact that the claim had not been formally amended until the outset of the final hearing. Further, there was correspondence between the claimant and the respondent’s solicitor (copied to the Tribunal) in the run-up to the hearing, which makes it clear that this was an allegation which the claimant was seeking to advance, and no point was taken that it was not already included in the pleaded case.

151. In those circumstances we consider that the application to amend is out of time in a technical sense only. The discretion to extend time where it is “just and equitable” to allow the claim to be presented at a later date contained in s.123 EqA is a broad one. We have no hesitation in exercising it in the circumstances of this case.

### **Remedy and next steps**

152. We are unable to make findings on the evidence we have as to whether the Mr Haq’s job offer was likely to have been withdrawn, in any event, based on an untainted reference, as we recognise that an untainted reference would still have been a poor reference in certain respects. We will invite the parties to make submissions on this, along with the appropriate assessment of any injury to feelings award, at the remedy hearing. Either side may call evidence in relation to these matters if they wish to do so.

153. The remedy hearing will also assess the appropriate basic and compensatory award for unfair dismissal, taking account of the findings

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made above that the dismissal would have taken place at a slightly later date, and that there is only a small chance it would not have taken place at all, leading to an 85% reduction in compensation for losses incurred after that date.

**Employment Judge Dunlop**

Date: 10 August 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
17 August 2023

FOR EMPLOYMENT TRIBUNALS