



EMPLOYMENT TRIBUNALS

Claimant: Mr Akef Abuinsar

Respondent: Middlesex Learning Partnership

Heard at: Watford

On: 9,10,11,12,15,16,17 May
2023
6 July 2023 (In Chambers)

Before: Employment Judge Bansal
Members – Mr S Bury & Mrs L Thompson

Representation

Claimant: In person

Respondent: Mr Matthew Curtis (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that;

- (i) The Tribunal does not have jurisdiction in respect of the Claimant's claim of unfair dismissal and is dismissed;
- (ii) The Claimant's claim of unlawful direct discrimination; harassment and victimisation contrary to the Equality Act 2010 are not well founded and are dismissed;
- (iii) The Claimant's claim of wrongful dismissal is not well founded and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a Maths Teacher and Key Stage 5 Coordinator (KS5) between 3 June 2019 and 30 April 2021. After Early Conciliation between 17 July 2020 and 17 August 2020, he issued the first of two claims on 16 September 2020 claiming race discrimination, harassment and victimisation. After Early Conciliation between 27 July 2021 and 7 September 2021, he issued the second claim on 6 October 2021 claiming unfair dismissal; discrimination and wrongful dismissal. The claims are contested by the respondent.

2. These claims were the subject of four Preliminary Case Management Hearings held on 2 July 2021, 7 September 2021, 18 January 2022, and 14 April 2022. At these hearings

the tribunal clarified the claims and legal issues, and made case management orders for his hearing. At the Preliminary Hearing held on 14 April 2022, Employment Judge Warren ordered the respondent representative to prepare a final List of Issues in respect of both claims, which was to be agreed, if possible, and to be filed with the tribunal for this hearing.

3. The claimant is a litigant in person and was not represented. Mr Curtis of Counsel, represented the respondent.

4. The tribunal heard evidence from the claimant. He did not call any other witness. The claimant had obtained a witness order for the attendance of Mr Andrew Mashida (a former Assistant Head Teacher). The claimant voluntarily decided not to call him. Mr Mashida who was in attendance at the tribunal at the start of the hearing was discharged from the witness order and left the tribunal.

5. The respondent called five witnesses, namely Mr Cong San, (Assistant Head Teacher); Mr Andrew Singer (Trustee); Mr John Jones (Head Teacher), Ms Tracey Hemming (CEO); Mrs Jacqueline Smith (Trustee) Mrs Kate Boulter (Trust Clerk).

Hearing Bundle

6. For this hearing, the tribunal was provided with an agreed bundle of documents ("hearing bundle"), the list of issues; a cast list and chronology; and a reading list prepared by Mr Curtis.

7. The tribunal was presented with a large hearing bundle comprising 1345 pages, which was poorly organised. During the course of the hearing, the tribunal read and considered the documents referred to in the reading list and in the parties witness statements, and those which were referred to during evidence.

Hearing

8. At the start of the hearing, the tribunal dealt with some preliminary matters.

9. As the claimant was a litigant in person, the tribunal considered it necessary to ensure the claimant was prepared for the hearing and understood the procedure. The tribunal first ascertained the claimant was in possession of a hard copy of the hearing bundle; the respondent witness statements and agreed list of issues. Next, the tribunal explained the procedure to be followed; how the witnesses will give evidence and the opportunity to cross examine the witnesses. The claimant confirmed his understanding. Further, the tribunal enquired if the claimant required any adjustments to assist him during the hearing. The claimant requested sufficient comfort breaks, which he was assured would be made.

10. The tribunal then referred the parties to the List of Issues prepared by the respondent representative, in accordance with the Tribunal Order made by Employment Judge Warren at a Preliminary Hearing on 14 April 2022. In discussion, the claimant confirmed he had received a copy, but did not have this with him. The tribunal provided a copy to the claimant. The tribunal explained to the claimant the purpose and significance of this List of Issues, and advised that the tribunal would determine the complaints in accordance with this List of Issues.

11. Mr Curtis, pointed out an issue relating to the unfair dismissal complaint, namely that the respondent disputes that the claimant had the required two years continuous service to pursue an ordinary unfair dismissal claim. He pointed out that there was a dispute with the claimant's start date of employment. The claimant claimed it was 3 April 2019, whereas the respondent contents it was 3 June 2019. Following this discussion, the claimant confirmed his understanding and agreement to the List of issues.

12. The tribunal then considered the timetable for this hearing. Originally this case was listed for a 10 day hearing, but was reduced to 7 days. Mr Curtis provided a provisional timetable. In discussion it was agreed every effort would be made to ensure that all evidence and submissions would be concluded by the last day.

13. After dealing with these preliminary matters, the tribunal adjourned for reading time and to start hearing the evidence at 2pm. The claimant asked that he start his evidence the next day, as this was his preference. The tribunal refused his request, on the basis he had had ample time to prepare for this hearing, and there was no justifiable reason to delay this hearing further. In the afternoon, the claimant gave his evidence and was cross examined by Mr Curtis.

14. The second day was taken in cross examination of the claimant, with intervention for regular rest breaks for the claimant.

15. The third and fourth days were postponed due to the ill-health of the claimant. On the morning of the third day, the claimant sent an email to the tribunal confirming he would not be attending due to his ill health, that he was suffering from severe headaches, numbness in his left side and was unable to sleep during the night. On the morning of the fourth day, the claimant emailed the tribunal confirming he was not well and would not be attending the tribunal, however, he was determined to continue with his case. He supplied a copy of his prescription of his medication prescribed by his doctor the previous day. The hearing was postponed to recommence on the next working day Monday 15 May.

16. The claimant attended on 15 May (day 5). As a consequence of the two lost days, the tribunal timetabled the remaining three days to ensure all the witness evidence would be completed. The Tribunal was mindful the claimant as a litigant in person, had no experience of dealing with cross examination. The claimant was during the hearing reminded to ask relevant questions and to focus on the agreed List of issues. During the course of cross examination of the respondent witnesses, the claimant continued to make long statements and referred to issues not covered in his evidence or were not relevant to the claims. The tribunal assisted the claimant, when considered necessary to frame his questions.

17. In the afternoon of the last day, (day 7) the respondent evidence was completed. There was insufficient time to hear submissions. The decision was reserved, and the case was adjourned with the tribunal panel to meet in chambers at a date to be agreed.

18. The tribunal made directions for the parties to serve written submissions, if they so wished, which Mr Curtis confirmed he would do. The parties were set a timetable to exchange their submissions by 9 June and then to serve their replies, if required by 7 July. Both parties served their submissions in accordance with the timeline. The claimant presented a two voluminous written submissions of 18 and 39 pages. Both parties submissions were read and taken into account in the tribunal deliberations.

List of Issues

19. The agreed List of Issues is annexed to this Judgment.

Findings of fact

20. Having considered all of the evidence, on the balance of probabilities, the tribunal made the findings of fact, as set out below. Any reference to a page number is to the relevant page number in the hearing bundle.

21. The respondent school is part of the Middlesex Learning Partnership Trust. The Trust runs 3 schools, which includes the respondent.

22. At the time of the claimant's employment, the Head Teacher was Mr John Jones. He remains in post. He has overall responsibility for the running of the school. Mr Jones reports to Mrs Tracey Hemmings (CEO). The Deputy and Assistant Head Teacher report to Mr Jones.

The Claimant

23. The claimant is a British Citizen of Palestinian descent. He is a qualified teacher of mathematics of over 20 years' experience having also taught in Dubai, and for the last two decades in London schools.

24. The claimant first started his employment with the respondent via an agency on 3 April 2019 as a Supply Teacher, teaching Maths. The claimant was working and paid by the agency. Neither party produced documentary evidence confirming the terms of agreement with the agency. On his appointment, the respondent did not issue the claimant with a letter of appointment or terms of employment.

25. Soon after the claimant started, the respondent advertised for a permanent role of Maths Teacher. The claimant applied for the role and was interviewed by Mr Andrew Mashida (then Assistant Head Teacher KSS). He recommended the claimant for appointment. By letter dated 10 May 2019, the claimant was offered the permanent full time position of Teacher of Mathematics, with effect from 3 June 2019. The letter also confirmed he was offered the role of Assistant Curriculum Leader (Key Stage 5 Maths) with effect from 3 June 2019, and that this post was for a fixed term until 31 August 2020. He received additional pay for this role. (p248) The claimant accepted the position by email dated 15 May 2019, following which the respondent issued a formal letter of appointment dated 17 May 2019, with a Statement of Terms and Conditions of Employment. The appointment was conditional on a satisfactory DBS check; medical report, written references and evidence of and a valid permission to work in the UK (p250). The Statement of Main Terms & Conditions, expressly stated the date of commencement; his continuous service date and first working day as 3 June 2019. (p251-254) The claimant confirmed his acceptance of the terms and conditions by signing and returning one copy of this document, which is dated 17 May 2019. (p254)

26. In evidence, Mr Jones (Head Teacher) explained the claimant started as a supply teacher for one term before he became permanent. The claimant's recruitment stood out because it was not in line with their process in respect of appointing supply teachers. He said, he was aware the claimant was looking for a permanent position, and that an exception was made for the claimant to apply for this position. He explained normally, they would not interview until the teacher had worked with the respondent for about a year.

27. The said Statement made reference to the respondent's Grievance and Disciplinary Policies and procedures. The hearing bundle contained copies of these policies, including the Attendance Management/Attendance Policy and the Equality Policy & Objectives. Neither party referred to these policies in evidence.

The Claimant's role and management

28. From the date of his appointment as a Supply Teacher until December 2019, the claimant was line managed by Mr Mashida. From December 2019, Mr Cong San became his Line Manager.

29. Upon becoming a permanent teacher in June 2019, the respondent carried out routine monitoring of the claimant's performance. This took the form of learning walks and lesson observations. This monitoring is carried out for all teachers regardless of their experience or length of service.

30. Mr Jones confirmed that sometime in September 2021, Mr Mashida raised his concerns about the claimant's performance and asked him to join with him to a follow-up observation session. He explained this request was unusual because they were normally done by members of the Dept. He was asked to do so, as Mr Mashida wanted support as he found the claimant to be confrontational when he gave feedback.

31. Mr Jones attended a lesson observation on 4 October 2019. He found the lesson not a high quality lesson and there were many areas of inadequacy. At the end of the lesson, he and Mr Mashida gave the claimant their feedback. The claimant did not accept the

feedback and was argumentative. In his experience he had not witnessed this, type of behaviour and attitude from a teacher. Mr Jones and Mr Mashida then decided to do a second observation, which they did on 11 October 2019. (p258-259) This lesson was no better, with similar issues. Mr Jones identified four key areas where he was not at the required standard. The feedback session again proved to be as challenging as the previous one. As a result of this, Mr Jones informed the claimant that there would not be another lesson observation that term, but there would be another one in the new term in January. This decision was taken to give the claimant time to digest the feedback and show improvement.

32. Mr Jones concluded that his observation reflected the concerns expressed by other Managers, who found the claimant to be challenging, not responsive to feedback and argumentative.

33. In evidence, the claimant confirmed by October 2019, he experienced personal difficulties. He had a period of homelessness which resulted in him having to sleep in his car, and that his two year old son was in a coma in Bethlehem. He explained he informed Mr Bradley Watts (Curriculum Leader of Mathematics) about this.

December 2019

34. In December 2019, Mr San (Assistant Head Teacher- Curriculum Impact, Data and Assessment) became the claimant's Line Manger following the departure of Mr Mashida. Mr San also taught KS5 Maths and Year 12 A Level Further Maths.

35. Mr San's main interactions with the claimant started in September 2019, in the capacity of KS5 Maths teacher, as the claimant was the Maths KS5 Coordinator. During this period, he found issues with the Scheme of Works which the claimant was responsible to prepare and do in his role, in that these were not produced to him, and that the claimant had produced different schemes of work for the classes which was not correct.

36. In October 2019, Mr San was assigned to undertake coaching sessions with the claimant. All new staff were allocated a member of the Senior Management team to do coaching sessions, with the intention to provide feedback and action. (p707-712) Mr San made observations which caused him concern. For example, the claimant hurriedly put together an end of term assessment for the students, which they were not made aware of was due. There was an incident, which the claimant disputed, when an internal assessment paper was left on the classroom desk, which the claimant had left. The paper was leaked to other students, which then required a new assessment paper being prepared.

37. In December 2021, Mr San was appointed into the role of Director of Maths. He then no longer did the coaching sessions but continued to be involved in lesson observations with the claimant. As part of his new role, Mr San undertook a review of the Dept and the Dept Development Plan with Mr B Watts.

38. On 18 December 2019, the claimant produced Year 12 Assessment, This was reviewed by Mr San, who directed the claimant to re-draft this taking into account his comments, and to produce this by Monday 6 January 2020, being the first day back in the new term.

2020

39. On 13 January 2020, Mr Watts emailed the claimant explaining that the Dept Development Plan was being reviewed and instructed the claimant to prepare an action plan; how it will be implemented and timescales for each point. (p271) On 17 January 2020, Mr Watts by email requested the claimant to complete part of the curriculum plan by 21 January 2020, and also asked for the action plan which was due that day. The claimant

did not reply. By email dated 20 January 2020, Mr Watts asked the claimant for an update and to send the due action plan.

40. The claimant sent the action plan with 35 action points. (p276-278) According to Mr San the plan was not what was expected. It contained 35 points, whereas the claimant was asked to limit it to 5 key action plans. However, the plan was reviewed by Mr Watts at a meeting held on 23 January 2020. At this meeting Mr Watts provided feedback to the plan, highlighting key actions and dates for compliance. Further other issues were discussed, in particular, the low student attendance numbers in his classes and students wanting to change from his classes. The claimant had not been monitoring or managing the attendance and had not been reporting this to management. Further, the claimant was told to ensure the KS5 topics were being taught in accordance with the plan. One other issue concerned the marking scheme for the Year 12 assessment, which the claimant left on the desk unattended. A student got hold of this document and cheated in the assessment. This claimant was reminded not to leave important documents unattended.

41. By email on 27 January 2020, all teachers were reminded about ensuring the KS5 teaching reviews deadlines were completed by 31 January 2020. By email of the same date Mr Watts reminded the claimant to ensure the review was completed by the deadline.

42. By email on 31 January 2020, sent at 21.20hrs, Mr San expressed his concern following a conversation with the claimant. Mr San expressed his concerns that the Year 12 data reflection would not be completed on time, with this being a crucial part of his KS5 role; attendance at KS5 had been inconsistent, and that as KS5 lead he had not got a handle on this; and that multiple students in Y12 & Y13 had raised concerns regarding his lessons and wanting to change classes. Mr San asked the claimant to share these issues with him, and to discuss the next steps at their next meeting. (p281)

43. On 11 February 2020, the claimant emailed an A-Level mathematics assessment and requested feedback from Mr Watts; Mr San and Mr Chentouf (teacher). Mr San replied, "*where have these papers come from?*". The claimant replied by email stating, "*Your tone and manner of communicating to me in your email I find to be highly unprofessional and frankly insulting. Are you attempting to mock and ridicule me? I view this as a form of workplace bullying and harassment*". Mr San replied by email, stating, "*I am not sure how I am mocking you or ridiculing you but I will apologise if it has come across that way. I was just wondering where the papers have come from.....*". (p284) The claimant did not reply. The scheduled meeting with Mr San and Mr Ammar Khan went ahead without issue.

44. On 12 February 2020, the claimant attended a meeting with Mr Jones. No notes of this meeting were taken. The claimant said this was an impromptu meeting whereas Mr Jones said it was a planned meeting. The meeting was to discuss and review his action plan. Mr Jones went through the plan, and noted the missed deadlines, and amended some of the actions which were agreed to be over ambitious. Mr Jones reminded the claimant of his professional obligations and the standard required. It was agreed that they would have a review meeting in a few weeks. Mr Jones did not find the meeting hostile, although he detected the claimant was not comfortable in the meeting as it focused on his performance issues. He considered he gave good, clear and constructive feedback. Mr Jones did recall the claimant making him aware of a family bereavement to which he offered his condolences. At this date, Mr Jones had concerns about the claimant's performance and intended to have a follow up after the half term break.

45. From 21 February 2020 to 29 March 2020, the claimant was absent from work, due to "stress at work". The claimant was prescribed anti-depressants and sleeping pills. During this period, the claimant was also fast tracked for suspected gastrointestinal cancer.(p636-637) On 16 April 2020, the claimant attended at the Hospital A&E Dept due to severe illness and possible Covid infection. (p638) From 20 April to 24 April, the claimant was absent due to Covid 19.

46. Following the national lockdown due to Covid 19, starting in March 2020, teaching was done remotely.

47. The claimant returned to work on 27 April 2020. On this day, Mr San held a meeting with the claimant via Teams, to discuss his phased return to work and work expectations now that the teaching was done remotely. Mr San showed him how to use Teams and Hegarty Maths, which the claimant said he had used in the past. They agreed a timetable up to week commencing 11 May 2020. This was confirmed in a summary document emailed to the claimant following the meeting.(p288-289) To assist the claimant he was assigned a buddy. Further, he also arranged a meeting with Natalie Clark to get some further training on remote learning.

48. By emails dated 28 April 2020, Mr San asked the claimant to confirm by email that he had received the meeting summary document; that he had read and understood this document, and that he was completing the checking/feedback for 10yMa2 as discussed.

49. In terms of his phased return, it was agreed that he would be required to give feedback to one class for one week, and 4 weeks later for 2 classes only. This was below his maximum allocation.

50. On 4 May 2020 at 14.08hrs, Mr San sent an email to the claimant, in which he explained what he was required to do as discussed, and that he should ensure he is online and contactable between 8am-3pm to deal with any student questions. By a later email to the claimant sent that afternoon at 17.30hrs, Mr San stated that no feedback had been posted and neither an update to his class on TEAMS. However, Mr San did this for him to keep the students engaged. Mr San asked the claimant to get in touch if he required support. The email ended pointing out that he had not been responsive that day, and it did not appear he had been online as required. He was reminded that he was expected to be on line and that contactable between 8am-3pm.(p300)

51. Mr San also noted that when the claimant started setting his work, this was typically done in the early hours of the morning. He flagged this up to HR as he was concerned about his well-being. (p301-302)

52. On 5 May 2020, Mr San had an exchange with Mrs S Presence (HR Manager). In his exchange he reported at the claimant's lack of contact and response and not updating him about his progress and well-being.(p301)

53. During the month of May 2020, Mr San found the claimant to be unresponsive; was not meeting the time line in the phased return plan; was not completing the feedback and required work; was not online at the directed times; and refused to speak with Mr San for his review call, wanting to contact by email instead.

54. On 15 May 2020, Mrs Presence held a First Stage Absence Review Meeting with the claimant by video call. At this meeting, the claimant confirmed he had recovered from Covid 19, and was fit for work, but was not sleeping well. Mrs Presence confirmed his working in the early hours was a concern from a wellbeing perspective. The claimant explained as he had difficulty sleeping he was working in the early hours. He explained that he sometimes slept between 1pm and 5pm, and that was the reason why he was not online or contactable. It was agreed that Mr San would have a review meeting to ascertain if he could move to 75% of his timetable. (p303-305)

55. The claimant expressed his view that since the end of January 2020 he felt undermined and was angry at how he had been treated and that he would be raising his issues on return to school. He said he concerns relating to the conduct of Mr San and Mr Watts. He said he had in February 2020, verbally raised these with Mr Johns. Mrs Presence mentioned to the claimant that he had been asked to raise any concerns in writing and to date had not done so. The claimant was given the opportunity to raise a formal grievance by 4pm Friday 22 May 2020.

56. Following this meeting, the claimant was referred to Occupational Health to review the claimant's sickness absence, to consider any workplace adjustments and his health

concerns. The consultation was by telephone call on 18 May 2020. The report confirmed the claimant was fit for work, although he was suffering from anxiety and depression. The claimant reported that he has suffered harassment at work which triggered stress at work, and effected his performance at work. The claimant disagreed that he was being supported by the respondent to get him back to the required standard. The report recommended the respondent to consider a workplace stress Risk assessment and to temporarily change the claimant's Line Manager until his ongoing issues and concerns were fully addressed. (p319-322)

57. On 19 May 2020 Mr San emailed the claimant requesting an update and reply to his pervious emails, which he had not done. The claimant replied by email on 21 May 2020, in which he stated, *" I fail to understand what you are attempting to achieve by deliberately annoying me with your email."* In this email the claimant mentioned he had made it known to him and Mrs Presence that he was unable to sit and remain on a chair for more than one hour due to medical issues at he was suffering from sleepless nights. He added, *"It is blatantly evident from your behaviours that you have significant issues with me and that you are a persistent workplace bully. If your bullying towards me does not cease from this point forward you will leave me with no other option but to stop communicating with you completely. It has also been requested that I should stop communicating with you due to your disrespectful mannerisms towards me."* (p323)

KS5 Coordinator role

58. On 27 April 2020, at the claimant's return to work meeting, Mr San invited the claimant to apply for the role of KS5 Coordinator. His current role was for a fixed one year term. It was due for renewal at the end of June. In reply, the claimant sent a hostile email on 27 May 2020 at 12.35pm to Mr San. (p239-330) In summary the email stated; he found the invitation tokenistic and that he was not genuine in offering or considering him for the position; that he found the invitation insulting and disingenuous due to his past interactions, conversations and conduct with him; asked him to stop intimidating and infantile scheming towards him; that he was aware of his plans for the Maths Dept and he learnt that either he or Hisham would lose their leadership positions; and that he wanted to remove him from his leadership post at the school; that he found the invitation to apply unnecessary, insincere and unwanted conduct; his gesture intimidating and a form of work place bullying; Further, he stated, *"I am stating categorically that I am not interested at all in the position you have invited me to apply for ..."* The claimant added, *"Furthermore, I am also aware of the ime when you rushed to communicate with the senior team, on the first day of the academic year 2019, to inform them that I was "clueless" and "useless as KS5 Coordinator".I am also aware of your statement that you would "kick the teachers ass" if they do not do their tasks. Your approach to staff professional development is hugely distasteful, unprofessional and grossly questionable."* (p328-330)

59. On 28 May 2020, Mr San forwarded the email to management, in which he denied the claimant's allegations. In evidence to the tribunal, Mr San said, he found the email hostile and aggressive. He was upset with its contents and that he considered there was an ulterior motive. Contrary to the claimant's claims, he had he had done his best for the claimant but he was pushing back every step of the way. He denied ever calling the claimant or anyone else "clueless" "useless as a KS5Coordinator," or had said he *"would kick the teachers ass"*.

60. With regard to the invitation to apply for the role, he explained that he did not contact the claimant about this in March, as the claimant was on sick leave, and did not want to cause him any stress. As the claimant was on sick leave, the process was delayed to give him an opportunity to apply.

61. In evidence, the claimant acknowledged that the contents of the email was harsh. He explained that he wrote the email when he was not mentally fit and had a foggy mind. He said, it was easy for him to act irrationally and with anger. He claimed he was apologised to Mr San during their mediation session, and that Mr San accepted his apology. I evidence, Mr San disputed that the claimant had made any apology to him.

62. This email caused Mr Jones concern about the claimant's conduct. He considered this warranted an investigation.

63. On 2 June 2020, Mr Jones asked Miss Gemma Leonard (Deputy Head Teacher) to become the claimant's stand in Line Manager, in view of the issues with him and Mr San. (p332) Mr San gave a handover to Miss Leonard. Miss Leonard emailed the claimant that day to confirm her role, and they agreed a meeting for 4 June 2020 at 2pm by teams.

64. On 3 June 2023, Mrs Presence carried out a Stress Risk Assessment. In this assessment it was recorded that the claimant complained he felt he was being bullied in respect of his performance but felt supported by Miss Leonard. The claimant said he did not require any equipment to support his home working as he has a tablet and desktop, however it was agreed he would be provide with a mobile phone to make calls to students. A review date of 2 July 2020 was agreed. (p337-340)

65. On 3 June 2020, Mr Jones invited the claimant to a meeting on 5 June, to discuss a number of issues on an informal basis. The claimant was advised he could bring with him his Trade Union representative. The claimant was advised if he did not attend this would be deemed a refusal to follow a reasonable management instruction and would be disciplinary issue. (p997) The claimant replied, and confirmed there was no requirement for his attendance at the meeting. (page 999.) Accordingly, the meeting did not take place.

66. Mr Jones then contacted the claimant to invite him attend a meeting arranged for 11 June 2020 at 12.00 noon. By email on 10 June 2020, Olivia Callea Senior Regional Official of the NASUWT wrote to Mr Jones confirming she was representing the claimant and wanted details about the meeting and under what procedures was this meeting being called. According to Mr Jones this meeting did not go ahead. The claimant in his statement claims he attended the meeting but there was little discussion. The tribunal was not provided with any notes of this meeting.

67. On 25 June 2020, Mr Jones sent an email to Mrs Presence, setting out capability and disciplinary concerns about the claimant, with a view to these being investigated under the disciplinary procedures. (p347)

68. On 30 June 2020, the claimant sent an email to Mrs Presence concerning the Risk Assessment Report. He considered the assessment was not adequate and was not undertaken in accordance with the Health & Safety Executive management Standards. He felt there was a conflict of interest in Mrs Presence conducting this assessment, and that she was acting in the interest of the respondent. He considered some information supplied to Occupational Health was false. He was not prepared to discuss teaching styles or performance management skills her. Further, he stated he would start to record all conversations with the school and that his grievance would be sent to the Chair of Governors due to his concerns about impartiality. (p348-349)

Formal Grievance

69. On 3 July 2020, the claimant raised formal grievance to the Chair of Board of Governors. (p350-267). It was a detailed grievance, in which he set out his concerns and gave a chronology of events. The principal complaints were that he considered the respondent had acted in a manner, calculated to undermine the implied term of mutual trust and confidence by its failure to adhere to its policies in the way he had been treated and managed; the respondent had acted in a discriminatory manner, (by being bullied and harassed by Mr San with Mr Jones approval) on the grounds of his race and failed to provide him with a safe place at work free from oppression. He requested the respondent observe the implied term of trust and confidence and not act in an unreasonable manner; to take steps to remedy his grievances, and not observe the Equality Act.

14 July 2020

70. On 14 July, Mr Jones sent an email to the claimant in which he expressed his concern that Miss Leonard had reported that he had not read the processes and risk reduction measures in the guide to the partial school return, (following Covid) which had been communicated well to all staff. Mr Jones considered this failure was not acceptable professional conduct and confirmed it would be investigated as a disciplinary matter. The claimant replied by email on 15 July 2020 disputing what Miss Leonard had reported, and strongly denied the allegation. He made it clear that he had read the guide fully and understood this. (p362)

3 September 2020

71. In accordance with its Grievance Policy the respondent forwarded the claimant's grievance of 3 July for investigation to Brinder Bal (HR Investigations & Policy Lead). The grievance meeting was held on 3 September 2020 at 10.30am. In attendance was the claimant, Mr Andrew Singer (MLP Trustee and Grievance Manager), Brinder Bal (Grievance Investigation Officer) and Sue Palmer, who was the notetaker. The claimant attended without a representative. The meeting was conducted by Brinder Bal and Mr Singer. The claimant was advised the meeting was to seek clarification of his grievance and was not a hearing. Brinder Bal explained the next steps and that the Mr singer would determine the outcome of the grievance. They went through the claimant's grievance. Towards the end of the meeting, the claimant claimed he felt the meeting was rushed and wanted to take longer. (p372-375)

Claimant's absence 21 September 2020

72. On 7 September 2020, the claimant went on sickness absence. He presented his Fit Note which was backdated from 31 August 2020 to 21 September 2020. The reason for his absence was stress at work. (p1165)

73. The claimant returned to work on the first day of the new term on 24 September 2020. He then presented a further Fit Notes from 25 September 2020 to 18 October 2020 for stress at work (p386); The claimant remained absent until his return on 23 November 2020.

Investigation and outcome of the claimant's grievance

74. The grievance was investigated by Brinder Bal. She was appointed as an external investigator and is independent of the respondent and the Trust. She presented a detailed investigation report dated 30 October 2020. It was 42 pages. The report fully set out the scope of the investigation, the evidence collated, the persons interviewed which included Mr Jones, Mr San, Mr Shah (Deputy Head of Curriculum) Mr B Watts, Mr H Chentouf, and Ms S Presence., and findings on each of the complaints. The outcome was that the findings and conclusion did not support the claims of bullying and harassment; race discrimination,; breach of contract and health and safety contraventions. (p403-446)

75. By letter dated 6 November 2020, Mr Singer confirmed the outcome of the Investigation Report, and confirmed his acceptance of the findings and conclusions of this report. He re-confirmed the findings made. The claimant was given a right to appeal against this decision to Tracey Hemmings (CEO). (p447-449)

76. In evidence Mr Singer explained his role in this process was to hold a grievance meeting; assess all the evidence; undertake any further investigations if required and confirmed the outcome. He recalled the meeting was set for 90 minutes but was extended to a further 30 minutes as the claimant felt he had been rushed at 90 minutes. He was of the view the claimant was provided with ample opportunity to put forward his points and concerns. His concerns were discussed. He felt he had been set to fail and there was an agenda to remove him from his post. He would not give anything tangible other than saying he perceived anything that was different was due to his race. He did not consider he required any professional support. He did state that he felt rushed and was not happy with

the meeting. His request to record the meeting was refused. Mr Singer confirmed the investigation findings were fully considered and he was satisfied with the findings. He refuted that the grievance was not fairly or reasonably considered.

77. By email dated 18 November 2020, the claimant appealed the grievance outcome. He submitted a detailed 9 page letter of appeal, with an appendix of 17 pages. (p451-477) The claimant addressed each of the outcome findings.

78. On 23 November 2020, the claimant had a return to work meeting with Mr Watts and Mrs Presence. At this meeting, the claimant's request to reduce his working hours to part time hours (60%) on a phased return up to Christmas was agreed. An induction plan for the next two days was agreed with the claimant not having to undertake any teaching but to update himself. It was also agreed that a mediation meeting with Mr San would be set up, and he would also be referred to Occupational Health. (p479-361)

Grievance Appeal hearing -15 December 2020

79. The claimant's appeal to the grievance was listed for 15 December 2020. Due to the claimant's personal circumstances namely his ill health and his father's sickness, the appeal was moved to 13 January 2021.

80. The appeal was conducted by a panel of three, Mr Bob Pannell (Chair) Mr Akin Akintola (AKA) and Amar Rai. The claimant attended with his Union Representative Ms Olivia Callea. Also present were Mr Singer, Binder Bal, and Chris Neale (HR Adviser) and notetaker Kate Boulter. The meeting started at 9.30am and finished at 1.07pm. It was a detailed meeting at which all points of appeal were raised and discussed. In his final statement to the panel, the claimant stated that the investigation was not done properly as it found no evidence of unlawful harassment. He did not understand how his entire grievance had been dismissed and how the grievance could have taken place without interviewing him. The claimant asked the Panel to do what the investigator had failed to do and investigate the case. He said he was not too pleased that the Panel had not taken into account the points of law stated in his appeal letter.

81. In response, the final statement from the Grievance Manager stated that there was a detailed investigation report. The conclusions were reached based on the evidence. The claimant was given full opportunity to discuss his grievance and put forward his evidence. No evidence was found to support his complaints of bullying and harassment.

82. The Panel confirmed upheld the outcome of the appeal. In its letter dated 20 January 2021, the Panel confirmed it was satisfied that the investigation into the grievance had been conducted fairly, had considered all the points raised and the decision taken by Mr singer to not uphold the grievance had been reasonable in the circumstances. The letter confirmed its findings and that it is final. (p510-512)

Investigation Meeting 29 January 2021

83. By letter dated 21 January 2021 the claimant was invited to attend an investigation meeting on Friday 29 January 2021 at 9.00am into his alleged conduct, namely (i) failure to follow reasonable management instructions; (i) use of offensive, inappropriate and unprofessional behaviour, which is a failure to meet the Teachers Professional Standards, and (ii) unauthorised absence. The letter confirmed that Jacqui Smith was appointed as the Investigating Officer, and this meeting was not a disciplinary meeting. (p513)

84. In evidence, Miss Smith explained that the allegations of conduct to be investigated were during the period from 2019 to January 2020, and because of the claimant's absence during 2020, and his raising a grievance this investigation was delayed. The respondent did not consider it was appropriate to proceed with this until the grievance process was concluded. The process was further delayed as the claimant was absent following medical absences and bereavement leave from February to March 2021.

85. On 29 January 2021, Miss Smith held the fact finding meeting. The claimant was accompanied by his representative Olivia Callea. Also present was Chris Neale HR Advisor. The claimant was given the opportunity to present his own evidence and respond to the allegations.

86. Miss Smith established that given the claimant's career as a Teacher he possessed the professional experience and expertise enable him to effectively undertake the responsibilities of his role, and that it was reasonable to expect that he had a good understanding of the Teaching standards. She considered the claimant's ability to express himself was of a very high order. He was articulate and used descriptive language effectively.

87. In relation to the three specific allegations, from her discussions with the claimant and her investigations, Miss Smith came to the following conclusions. On the first allegation, failure to follow reasonable instructions, there was evidence of missed deadlines; the school policies or procedures for reporting and giving feedback were not followed; there were issues with the Scheme of works and lack of compliance with remote teaching procedures. On the second allegation, of unprofessional behaviour, she concluded there was evidence from his emails to other staff, in particular to Mr San on 27 May 2019 and his refusal to attend a meeting with Mr Jones in July 2020, which showed his unprofessional behaviour. In relation to the third allegation, whilst there was evidence of missed classes, and absence this was in a period when the claimant experienced difficult personal circumstances. In conclusion, Miss Smith was of the view that the claimant's behaviour fell below the Teachers Professional Standards.

Mediation Meeting – 12 February 2021

88. On 12 February 2021, the claimant with Mr San attended a Mediation Meeting with Mr Pete Colby, Director of Pragmatism (UK) Ltd an external organisation appointed by the respondent. This was a confidential meeting and organised to improve their working relationship and communication going forward. The mediation dealt with the claimant performance issues, their communication and training. The claimant who was off sick and due to return to full time work on Monday 22 February 2021 and requested flexible working (3 days a week) in summary, the report, the contents of which agreed by both parties, confirmed that they had difficult conversations, but had worked well together to establish a way forward, and had conducted themselves professionally in the session. (p520-521)

Occupational Health consultation 17 February 2021

89. On 17 February 2021, the claimant had a telephone assessment with Dr S Islam Occupational Health Physician. In his report dated 18 February 2021, he reported the claimant was fit to work with temporary adjustments. The adjustments he suggested was a phased return to work over a 4-6 weeks starting at 50% of his normal hours. The claimant returned to work on these adjustments. (p522-524)

Disciplinary Meeting – 21 April 2021

90. By letter dated 16 March 2021, the claimant was invited to attend a disciplinary meeting scheduled for 30 March 2021. At the request of the claimant this was re-arranged to 21 April 2021.

91. On 31 March 2021, the claimant emailed Mrs Presence in which he explained that to attend the meeting in person would be too stressful, as this would exacerbate his anxiety related disorder and depression. Consequently he was asking management to make a reasonable adjustment and undertake the hearing via written form. (p548) The claimant submitted a detailed 12 page statement in response to the allegations and detailing his issues in employment. (p571-582) This was accepted by the respondent as his response.

92. On 13 April 2021, the claimant requested as a reasonable adjustment to have an audio recording of the meeting. The respondent agreed to this request subject to compliance by

all parties to the GDPR requirements and obtaining the consent of the all parties. (p531-532)

93. A day before the hearing, (20 April) the claimant sent an email to Kate Boulter of the respondent, stating, *"I am having severe headache and numbness coupled with sleep deprivation. I almost collapsed yesterday. I have been advised by my GP not to attend the meeting tomorrow or school for three weeks. It is very important for me to attend he hearing and I would request that the school postpone the hearing until I am fully recovered and well enough to attend.."* (p544) This request was considered by Sarah Roberts (Commissioning officer) who refused the request on the grounds that it was appropriate to complete the meeting as planned. The claimant had submitted his written statement on 31 March 2021 and that his request for the meeting to be held in written form, and for it to be recorded was agreed. Further the respondent considered the time factor. This disciplinary meeting had been outstanding for some 10 months and it was important for all parties to complete the process without further delay. (p546-547)

94. Kate Boulter on receiving the email from the claimant requesting a postponement, requested the claimant to forward the document received from his doctor signing him from work. The claimant provided a letter dated 1 August 2020, addressed To whom it may concern, from Dr A Al Jabbouri MBChB of Oasis Clinic based in London (p366)

Claimant's Second Grievance - 19 April 2021

95. On 19 April 2021, the claimant submitted a second formal grievance of 10 pages, complaining that the respondent had omitted to recognise its statutory duties germane to his health and safety at work;... Further he complained that the respondent had failed to conduct a fair, professional and sensitive investigation; failed to follow the ACAS guidelines regarding grievance and disciplinary investigation; and that he was subject to harassment, discrimination and victimisation because of his race. (p534-543)

96. This grievance was considered by the Governors. By after dated 19 6 May 2021, Mrs J Smith (Chair of Governors) confirmed that no further action would be taken as this grievance was related to the previous grievance which had been fully investigated and he had exercised his right of appeal. Further, he had made references to issues subject of the disciplinary, which may be the subject of an appeal.(p597)

The disciplinary meeting -21 April 2021

97. The disciplinary meeting went ahead in the absence of the claimant and his representative on 21 April 2021. The meeting commenced at 8.30am. It was held remotely by zoom and was chaired by Ms Tracey Hemmings (CEO) with Simon Arnold and Jo Lewis. For the respondent, Miss Smith (Investigation Officer) attended and presented the case for the respondent. Following this the Panel were joined individually by the respondent witnesses namely, Mr San, Mr Watts, Miss Leonard, Mr Jones, Mrs Presence. Each witness was asked questions by the panel. At the end of the meeting Miss Smith summed up the case for the respondent. The Panel then considered its decision in private and ended the meeting at 3.55pm.

98. In their deliberations the Panel questioned the authenticity of the medical letter provided by Dr Al Jabbouri of Oasis Clinic dated 1 August 2020, which the claimant submitted with his written submission. The Panel observed that the letter contained no contact information for Dr Al Jabbouri except for a postal address. Also the Panel considered the wording of the letter to be unusual. Enquiries were made by the Panel about this letter. By email dated 23 April 2021, the Deputy Company Secretary of the London Clinic confirmed that on the premises there is no Clinic called the Oasis Clinic and neither does it have anyone by the name of Dr A Al Jabbouri MBChB employed or holding practicing privileges at The London Clinic. (p552)

99. In questions from the tribunal on this issue, the claimant gave the explanation that explained that he was referred to Dr A Al Jabbouri By a friend. He did not meet with him but only had a telephone discussion. He claimed the letter was prepared his daughter's purposes, but was not able to provide the reason for this. The tribunal did not find the claimant's explanation made sense or was credible.

100. By letter dated 28 April 2021, the Panel set out in great detail its decision to summarily dismiss the claimant on the grounds of gross misconduct. In summary, the decision was that the allegations of failing to follow reasonable management instructions and the use of offensive, inappropriate unprofessional behaviour which is a failure to meet the Teachers Professional Standards were proven. The letter set out in detail its findings and reasons for their decision. The Panel confirmed that the decision was not taken lightly, and because of the seriousness of his conduct it did not consider it appropriate to consider any alternative suitable options. The claimant was advised about his right of appeal. (p583-595)

101. By email on 8 July 2021 the claimant's Union representative submitted an appeal to the dismissal (p598-601) In summary, the claimant submitted he disagreed with the way the disciplinary action was taken and that the outcome was too harsh.

102. The appeal was held on 8 July 2021. The appeal was Chaired by Mr Ian Comfort with members Ms J Knight and Mr R Middleton. The claimant was in attendance and was accompanied by his Union representative. Also in attendance was Ms Tracey Hemmings for the respondent. At the hearing the Panel heard representations from both parties in respect of each of the points of appeal. In conclusion the Panel found that the disciplinary hearing should have adjourned pending further medical advice, however having looked at all the evidence the Panel found nothing in the decision to be wrong and nothing presented to the Appeal Panel undermined the decision to dismiss the claimant. Accordingly, the appeal was dismissed with no further right of appeal. This decision was confirmed by letter dated 16 July 2021(p599-607)

The Legal Framework

Unfair dismissal

103. Section 108(1) Employment Rights Act 1996, states, "*Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.*"

103. What was the reason or principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1)&(2) of the Employment Rights Act 1996 ("ERA") The respondent asserts the reason was conduct, which is a potentially fair reason.

103.1 If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

103.2 there were reasonable grounds for that belief;

103.3 at the time the belief was formed the respondent had carried out a reasonable investigation;

103.4 the respondent otherwise acted in a procedurally fair manner;

103.5 dismissal was within the range of reasonable responses.

Wrongful dismissal/Notice pay

104. Did the claimant fundamentally breach the contract of employment by an act of gross misconduct?

104. If the claimant was wrongfully dismissed, how much is he entitled to by way of damages for breach of contract?

Direct race discrimination

106. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.
107. Section 13 of the Equality Act 2010 provides that “*A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case) A treats B less favourably than A treats or would treat others.*”
108. Section 23 of the Equality Act 2010 provides that on a comparison of cases for the purposes of s13, there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.
109. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator.- ***Bahl v Law Society 2004 IRLR 799 (CA)***. Unreasonable behaviour alone cannot found an inference of discrimination but if there is no explanation for the unreasonableness, the absence of an explanation may give rise to this inference of discrimination. The Court of Appeal said that proof of equally unreasonable treatment of all is one way of avoiding an inference of unlawful discrimination, but it is not the only way. At paragraph 101 Gibson LJ said quoting from Elias J in the EAT in the same case; “*The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made.*”
110. The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not enough to establish discrimination. Something more is required, In ***Madarassy v Nomura International Plc (2007) ICR 867***, Mummery LJ said; “*The base facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, a sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*”
111. In determining whether discrimination has taken place, the tribunal must enquire as to the conscious or subconscious mental processes which led the alleged discriminator to take a particular course of action in respect of the claimant, and to consider whether a protected characteristic played a significant part in the treatment. (***Nagarajan v London Regional Transport and others (1999) ICR 887 (HL)***)

Harassment

112. Section 40 of the Equality Act 2010 provides that “*An employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A)*

harasses another (B)” if;

- (a) A engages in unwanted conduct related to a protected characteristic (race in this case); and
- (b) the conduct has the purpose or effect of :-
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

113. Section 26(4) of the Equality Act 2010, provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account;

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

114. The protection from harassment, which applies only if the conduct is related to a protected characteristic, is not designed to protect claimant’s from trivial acts that cause upset.

115. In relation to harassment the following authorities are relevant:

116. Richmond Pharmacology V Miss A Dhaliwal [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

117. Grant v HM Land Registry & EHRC [2011] IRLR 748 CA emphasised the importance of giving full weight to the words of the section when deciding whether the claimant’s dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created: *“Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”*

118 Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *“In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).*

The burden of proof

119. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold

that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

120. In Barton v Investec Henderson Crosthwaite securities Ltd (2003) IRLR 332, the EAT set out the guidance to tribunals on the burden of proof rules then contained in the Sex Discrimination Act 1975. This was approved by the Court of Appeal in ***Igen Ltd and others v Wong and others (2005) ICR 931***
121. The conventional approach involves a two stage approach by the tribunal. At stage 1 the question is; can the claimant show a prima facie case? If so, then the tribunal moves onto stage 2 and asks itself; is the respondent's explanation sufficient to show that it did not discriminate.?

Victimisation

122. Section 27(1) of the Equality Act 2010, provides "*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.*
123. Section 27(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."*
Section 27(3) – Giving false evidence or information, or making a false allegation, is Not a protected act if the evidence or information is given, or the allegation is made in bad faith.
124. s39(4) provides that it will be unlawful to victimise an employee by subjecting him to a detriment.
125. No comparator is required to establish victimisation. What is necessary is that the employee establishes that they did a protected act and that they have suffered a detriment. Thereafter, it is necessary to consider the reason why the detriment was suffered.
126. The test of causation "because" is not to be approached by asking "but for the claimant doing the protected act would the treatment have occurred" but by asking whether the protected act was the reason for the treatment. *Greater Manchester Police v Bailey (2017) EWCA Civ 425.*

Wrongful Dismissal

127. Section 3(2) ERA and Article 3 of Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/1623 gives the tribunal jurisdiction to hear claims for damages for breach of contract of this kind provided the claim arose on termination of the contract of employment and has been brought in time.
128. Subject to any defining terms in the contract of employment, summary dismissal is only permissible if the claimant's conduct amounted to a repudiatory or fundamental breach of contract. The employer must show that the employee behaved in such a way as to fundamentally undermine the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract). The conduct must be a deliberate and wilful contradiction of the

contractual terms or amount to gross negligence (a serious dereliction of duty) which undermined trust and confidence.

Discussion and Conclusion

129. The tribunal has applied its relevant findings of fact and the applicable law to determine the issues, by reference to the agreed list of issues.

Unfair dismissal

130. The tribunal first determined the claimant's continuous period given that there is a dispute between the parties, as outlined by Mr Curtis. The respondent's position is that for the claimant to bring a claim for ordinary unfair dismissal, he requires to have not less than two years continuous service ending with the effective date of termination.

131. On the facts the tribunal rejects the claimant's assertion that his continuous period of service with the respondent commenced from 4 April 2019. Therefore, he does not have the requisite two years continuous service to bring an ordinary unfair dismissal claim.

132. The tribunal found as a fact that his correct start date to be 3 June 2019 for the following reasons. From 4 April 2019, the claimant worked on a temporary basis via a contract with an agency through an agency, who paid him his wages. He knew this. There was no mutuality of obligation with the respondent. This is inconsistent with a contract of employment. The Statement of Terms and conditions of Employment signed by the claimant on 17 May 2019 expressly confirms the start date, and the continuous service start date to be 3 June 2019. At no time during his employment did the claimant query or challenge that his continuity of employment should be from 3 April 2019 as now being asserted. In the first Claim Form, and Particulars of Claim the date is stated as 3 June 2019. It is in the second Claim Form, that the start date is given as from 4 April 2019, and then without any commentary why this is the correct date when until then he fully understood and accepted his start date to be 3 June 2019.

133. Accordingly, the claim for ordinary unfair dismissal is dismissed for lack of jurisdiction.

Race Discrimination

134. In dealing with these complaints, we reminded ourselves that direct evidence is very rare and that the discriminators rarely accept or admit that they have discriminated. Accordingly, we have the power to draw inferences as to the reason why the claimant was treated as he was.

135. During the hearing, the claimant, in oral evidence was unclear and inconsistent on the grounds he was pursuing his discrimination claim. The claimant is Palestinian. In oral evidence, he claimed that the discrimination was on the grounds because he was non-white British or that he was not a native speaker. The tribunal determined that these claims would be determined on the basis of the claimant's protected characteristic being Palestinian, and that the treatment would be compared to a White British hypothetical comparator.

136. We therefore deal with each of the allegations as set out in the List of issues.

137.1 – Allegation 10.1 - "24/7/2020 – Mr San inviting the claimant to apply for his own post after the expiry of deadline (Para 48 ET1 particulars")

- (a) The facts are that the post of KS5 Coordinator held by the claimant was a fixed term post. He knew of its end date. The post had been advertised nationally in TES (Teachers Educational Supplement) on 25 February 2020 with a closing date of 23 March 2020. It was not advertised internally by the respondent. Had the claimant obtained a copy of TES he would have noted the advertisement. By the closing date the respondent had received two applications from internal candidates. Upon the claimant's return to work on 27 April 2019 after a period of sickness Mr San in a TEAMS meeting with the claimant advised him of the vacant role and invited him to apply, if he wanted. This was also confirmed in an email of the same date, in which the claimant was asked to let him or Mr Jones know. In evidence Mr San explained that he did not want to contact the claimant whilst he was off on sickness absence so as not to cause him any unnecessary stress. The claimant did not apply for this position, but complained to Mr San in his hostile email on 27 May 2020. In that email the claimant does not complain that this was an act of discrimination on the grounds of his race.
- (b) The tribunal does not find that the claimant has established a prima facie case. There is no evidence that the other two internal applicants were informed by the respondent of the advertisement at any time. There was no obligation on the respondent to inform the claimant of this vacancy. In fact, we find the claimant was treated more favourably as he was invited to apply for the role after the closing date had passed, which it did not need to do.
- (c) Even if the tribunal is wrong on this, and the burden does shift to the respondent, the tribunal is satisfied that the claimant has provided a non-discriminatory reason for not contacting the claimant during his absence and thus extending the deadline.

137. 2 Allegation 10.2 "18/05/2020 – Mr Jones providing false information to OH (Para 52 ET1 particulars)"

- (a) In evidence the claimant clarified that the false information provided to the Occupational Health Adviser, related to the reference that the claimant was on performance management to support him. The claimant took the view he was on a performance improvement plan, when this was not the case. The tribunal took into account Mr Jones evidence, and his explanation in his statement dated 7 October 2020 for the investigation conducted by Brinder Bal. We also noted the claimant's complaint in his email of 27 May 2020 to Mrs Presence in which he complains that this falsification was an example of workplace bullying and harassment. There is no mention or reference that this was done on the grounds of his race.
- (b) The tribunal accepts the evidence of Mr Jones that the claimant was not on a performance improvement plan, however like all teachers the claimant would have been on a performance management plan to reach his teaching targets. Mr Jones did not see the letter of referral to the Occupational Health and accepted the terminology was incorrect.
- (c) The tribunal had difficulty in understanding how this error in terminology could amount to less favourable treatment on the grounds of race. At that time the claimant was receiving additional support. Therefore the tribunal does not find that the claimant has established a prima facie case. If the tribunal is wrong on this, the tribunal accepts Mr Jones explanation and that this error had nothing to do with his race.

137.3 Allegation 10.3 – “14/07/2020 Mr Jones sending email to the claimant 14 July 2020 threatening investigation of matter occurred 29 June 2020”

- (a) On the facts the tribunal finds the claimant has not shown a prima facie case.
- (b) The tribunal accepts the respondent’s evidence namely that at a meeting on 2 July 2020 with Ms Leonard, the claimant confirmed he was not aware of the health and safety protocols put in place as he had not read the material. If that was not said Ms Leonard would not have reported this to Mr Jones. At this time the claimant had no issue with Ms Leonard as her Line Manager. Given the seriousness of this issue, at that time, Mr Jones was right to write to the claimant in the terms that he did. There was nothing wrong with this. His email was not motivated by race.
- (c) The tribunal finds that Mr Jones would have acted no differently towards any other employee of a different race in similar circumstances.

137.4 Allegation 10.4 – “ From 3/7/2020-6/11/2020 there was a flawed grievance process “

- (a) The tribunal had difficulty in understanding what were the particular flaws in the grievance process complained of. The claimant was asked to clarify these. The claimant in his reply to questions by the Employment Judge said that this issue was written by the previous Judge not him. The claimant was reminded that the List of Issues were agreed at the start of the hearing.
- (b) In discussion with the claimant it was clarified that the flaws he relied upon were related to the investigation process as carried out by Brinder Bal. The specific issues were as set out in 6.4, 6.5, 6.6 in the List of issues.
- (c) The tribunal considered the respondent’s Grievance Procedure, which does not prohibit the appointment of an external investigator. It does state that the person dealing with the grievance must be a senior manager who has not previously dealt with the matter. Brinder Bal is a HR Investigations & Policy Lead, with The Schools HR Co-operative. She is independent and external to the respondent. She was commissioned on 24 July 2020 to investigate the claimant’s grievance. The tribunal considers the respondent was entitled to engage Brinder Bal, particularly as it wanted an independent person to deal with the grievance. In questions to the Employment Judge the claimant replied that in his belief she was not independent and impartial as she was appointed and paid by the respondent. The tribunal took the view that there was no conflict of interest in appointing Brinder Bal. Further, her appointment is not less favourable treatment on the grounds of race or at all.
- (d) The claimant did not point out or show in evidence that he enquired with the respondent what procedures were in place to make the process fair and transparent. This complaint fails as he has not shown a prima facie case.

137.5. Allegation 10.5 “From 9/1/2020 to 30/4/21 there was a flawed disciplinary process”.

- (a) Similar to the complaint above, the claimant did not particularise his complaint. In discussion with the claimant, he confirmed he relied upon the issues set out in 10.9, 10.10, 10.11, 10.12, 10.13, Accordingly, the tribunal gave consideration to these issues.
- (b) The tribunal finds that this complaint fails as he has not shown a prima facie case. The tribunal deals with each issue,

- (i) there is no requirement for an employer to provide details of allegations in advance of an investigation meeting. It is not a requirement or breach of the ACAS Code either. However, the Tribunal is satisfied that the claimant was given details of the allegations to the meeting with Miss J Smith held on 29 January 2021. Mrs Presence in her email to the claimant on 29 January 2021, stated, “ You were given the allegations in advance of the meeting which is the basic structure of the meeting..” (10.9)
 - (ii) in evidence the claimant did not show or direct the tribunal to his queries he made regarding the investigators training fitness for the role and conflicts of the investigator; (10.10; 10.12)
 - (iii) the tribunal is satisfied from the correspondence referred to and the evidence of the witnesses who dealt with the disciplinary process that the claimant was made fully aware of process to be followed and that he would be given opportunity to put forward his representations, and that he would be provided with information in advance of the meetings; he would have the right of appeal; and could be accompanied at these hearings.(10.11)
 - (iv) the tribunal accepted the evidence of Miss Smith who was the Investigator Officer, that she did take into account the claimant’s statement and representations in making her decision. (10.13)
- (c) The tribunal finds each of the above complaints fail as the claimant has not shown a prima facie case.

137.6. Allegation 10.6 – “ 12/2/20- Meeting with Mr Jones where he was unsympathetic to the claimant (Para 44 ET1 Particulars)

- (a) In considering this complaint, the tribunal accepts the evidence of Mr Jones, that the meeting was challenging given the issues he had to discuss with the claimant. We also accept that the claimant found the meeting uncomfortable because it focused on his performance and his Action Plan which was an issue. We also find Mr Jones was sympathetic to the claimant given his personal circumstances and that he had recently had a bereavement. Accordingly, the tribunal does not find the claimant has on the facts shown a prima facie case on this complaint.

137.7 Allegation 10.7 – Various dates- Mr San not understanding the claimant’s accent (Para 42)

- (a) The tribunal finds the claimant has not shown a prima facie case. In evidence the claimant did not provide any incident to support this allegation. In evidence Mr San categorically denied making any comments to the claimant or anyone else about the claimant’s accent, or about the claimant’s verbal communication. We found Mr San a credible witness.

137.8. Allegation 10.8 - Making false or unnecessary, or exaggerated allegations of gross misconduct against him

- (a) The tribunal finds the claimant has not shown a prima facie case. The tribunal finds that in the context of the claimant’s conduct and on-going performance issues the respondent was justified in raising the concerns. The tribunal rejects the claim that the concerns expressed were false, unnecessary or exaggerated. The tribunal is satisfied from the abundance of correspondence and meeting notes that the claimant’s conduct which had been the subject of continuous discussion was capable of amounting to gross misconduct in accordance with its disciplinary procedures. The tribunal found the evidence of Miss Smith credible and the finds

of her investigation supported the respondent's position. The tribunal is satisfied that the respondent would have acted no differently towards any other employee, irrespective of their race, in similar circumstances.

137.9 Allegations 10.9; 10.10; 10.11 10.12 & 10.13

- (a) The tribunal dismisses these allegations for the reasons set out above at Para 137.5.

137.10 Allegation 10.14 – Not postponing the hearing

- (a) The tribunal finds the claimant has not shown a prima facie case. The respondent was entitled to proceed with the hearing in the absence of the claimant, for the reasons explained by Sarah Roberts (Commissioning Officer) in her email to the claimant of 20 April 2021, and further explained by Ms T Hemmings at the Disciplinary Hearing held on 21 April 2021. The tribunal is satisfied there were good reasons to do so, and that in any event there is no evidence to show that the decision not to postpone was because of the claimant's race.

137.11 Allegation 10.15 – Not upholding his Appeal

- (a) The tribunal finds the claimant has not shown a prima facie case. In evidence the claimant did not pursue this claim and neither challenged the respondent's witnesses. In any event, the tribunal finds that on the facts the respondent was entitled not to uphold the claimant's appeal, for the clear and detailed reasons confirming the misconduct was proven on the facts. .

137.12 Allegation 10.16 – Dismissing him

- (a) The Tribunal finds the claimant has not shown a prima facie case. We considered carefully the reasons for the dismissal, and in particular the contents of the dismissal letter. On the facts, we were satisfied the respondent genuinely believed the claimant had committed the acts of misconduct complained of, and these amounted to gross misconduct. The respondent was entitled to summarily dismiss the claimant. We found no evidence that the panel were motivated by race in dismissing the claimant. In fact, Ms T Hemmings had never met the claimant.
- (b) Further, the tribunal is satisfied the respondent would not have acted no differently towards any other employee, irrespective of their race, in similar circumstances

Harassment

138. We now turn to each of the allegations as set out in the list of issues.

138.1 Allegation 13.1 4/9/19 – Mr San saying, "Claimant is clueless and useless as a maths KS5 Co-ordinator" (Para 28 ET1 particulars)

- (a) The tribunal noted that the allegation is that these alleged remarks were not made directly to the claimant but that he became aware about these. In evidence the claimant was unable to confirm who told him, and when. In evidence and in cross examination, Mr San emphatically denied making these remarks at all.
- (b) The tribunal accepts that if these alleged remarks had been made they would have amounted to unwanted conduct and that they would have had the purpose of effect of violating the claimant's dignity. However, the tribunal accepted Mr San's evidence, and therefore do not find that the these remarks were made at all. This claim is not made out.

138.2 Allegation 13.2 18/12/19-12/02/20 – Mr San provided false information about KS5 assessment to Mr Jones
Allegation 13.3 23/1/20 – 14/2/20 – Concerns/criticisms by colleagues and senior staff re; teaching style and student attendance (Para 35-37 ET1 Particulars)m

- (a) In evidence the claimant made general comments, without being specific and did not present any evidence to make out his claim. However, the tribunal considered the evidence presented by the respondent relating to Mr San's observations regarding the KS5 assessment made in January 2020, and the concerns expressed by Mr San and Mr B Watts relating to his teaching style and student attendance issues. We were satisfied that these were genuine and justified concerns raised in view of the claimant's performance and conduct which had nothing to do with the claimant's race. These claims have not been made out.

138.3 Allegation 13.4 12/2/20 The way in which a meeting with Mr Jones conducting a meeting with the claimant on 12 February 2020
& Allegation 13.7 – 12/2/20 – Meeting with Mr Jones where he was unsympathetic to the Claimant (Para 44 ET1)

- (a) The tribunal made findings of fact about the conduct of Mr Jones at the meeting on 12 February 2020 at Para 137.6. We found Mr Jones acted professionally and was sympathetic towards the claimant. In evidence, the claimant did not provide sufficient details about the manner of this meeting, or adduce any evidence. Accordingly, these allegations are not made out.

138.4 Allegation 13.5 – Mr Jones providing false information to OH (Para 52 ET1)

- (a) The Tribunal made findings of fact about this allegation at Para 137.2. The tribunal acknowledges the claimant would have found it to be unwanted conduct which would have violated his dignity or have that effect. However, the tribunal accepted Mr Jones explanation and find that this error made in the use of the terminology was not related to the claimant's race at all.

137.5 Allegation 13.6 – Mr Jones sending to the claimant 14 July threatening investigation of matter that occurred 29 June 2020

- (a) The tribunal made findings of fact about this allegation at Para 137.3. The tribunal accepts that the sending of the email was to the claimant unwanted conduct which violated his dignity, and that he felt it was harassment. In any event, the tribunal finds that the email set was reasonable to send and justified based on the claimant's. There is no evidence to infer the email sent was related to his race.

138. The tribunal found that throughout the hearing, and as it is evidenced in the claimant's voluminous emails and documentation to the respondent, his perception was and continues to be that, the treatment he claims to have suffered is unfair and because of his race. The tribunal is aware that unlawful discrimination cannot be inferred from unreasonable or unfair treatment. There has to be something more which is suggestive of a racist motive. On the facts the tribunal found no such evidence, either direct or by inference, to show that the claimant's race was an issue at all.

Victimisation

139 The claimant's relies on his grievance dated 3 July 2020, and 19 April 2020 as the protected acts, and the same allegations of direct discrimination as act of detriment. in so far as they postdate the protected acts.

140. The said grievances complain about acts of harassment and victimisation by others on the grounds of his race. The tribunal is therefore satisfied that the claimant made protected acts as relied upon.
141. On the basis that the first grievance is dated 3 July 2020, the allegations which pre-date this date cannot be relied upon and are therefore excluded.
142. The tribunal has at Paras 135.1-135.12 set out its findings and decision, which we do not repeat here. To succeed in a claim of victimisation no comparator is required but, to succeed, the tribunal would have to accept that the fact that the claimant had done a protected act, this materially influenced the individuals in question, namely, Mr Jones, Brinder Bal, Mr Singer, Mr San, Ms Hemmings, Sarah Roberts, Miss Smith, and Mr Pannel. On the findings of facts made and having considered the oral evidence of the respondent witnesses, the tribunal is satisfied the fact the claimant made the protected acts, these did not either influence or play any part in the individual actions and conduct. On this basis the claim must fail.

Wrongful dismissal

- 143 The tribunal is satisfied that the claimant was in breach of his employment terms by his conduct in failing to follow reasonable management instructions and using offensive, inappropriate and unprofessional behaviour as proven at the disciplinary hearing held on 21 April 2021. This conduct fundamentally undermined the employment contract, entitling the respondent to dismiss the claimant without notice.
144. In conclusion, all of the claimant's claims fail and are therefore dismissed.

Employment Judge Bansal

14 August 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
15 August 2023

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.....
FOR THE TRIBUNAL OFFICE

LIST OF ISSUES

Unfair Dismissal

1. What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)? The Respondent’s primary position is that the reason for dismissal was Mr Abuinsair’s conduct. In the alternative, the Respondent relies upon the ground of some other substantial reason, by reference to a breakdown in trust and confidence due to the Claimant’s alleged behaviour and conduct.
2. If the Tribunal finds the reason for dismissal was a potentially fair reason, it must then go on to apply the test of fairness set out in s.98(4) ERA. In particular, it must decide whether the Respondent in all respects acted within the so called, “band of reasonable responses”.
3. In the event that the Tribunal decides that the reason for dismissal was Mr Abuinsair’s misconduct, the test in s.98(4) will entail the Tribunal asking itself whether the Respondent held a genuine belief in Mr Abuinsair’s misconduct, based upon reasonable grounds after following a reasonable investigation.
4. Mr Abuinsair says that the reason for his dismissal was his race and not any potentially fair reason.
5. In respect of the test in s.98(4), Mr Abuinsair will say that the decision to dismiss was outside the range of reasonable responses because the allegations against him at best warranted a final written warning.
6. Mr Abuinsair will further say in respect of the test of fairness at s.98(4) that the dismissal was procedurally unfair for the following reasons:
 - 6.1. The allegations against him were either false, unnecessary or exaggerated;
 - 6.2. The Respondent did not consider the Occupational Health recommendations to allow him an advocate to represent him during the investigation and disciplinary hearing, to give him more time to consider documents and to send him an agenda in advance;
 - 6.3. The Chair of Governors failed to investigate the allegations in Mr Abuinsair’s second grievance of 19 April 2021;
 - 6.4. The Respondent did not provide answers to questions regarding the investigators training;
 - 6.5. The Respondent did not confirm what procedures were in place to make the process fair and transparent;
 - 6.6. The Respondent did not provide a reasonable answer regarding the investigator’s conflict of interest;
 - 6.7. The investigator rejected the entirety of his statement;
 - 6.8. The Respondent refused to postpone the disciplinary meeting in line with his GP’s recommendations; and
 - 6.9. The Respondent did not send Mr Abuinsair details of the allegations against him before the investigatory meeting.
7. If the Tribunal finds that the Respondent did not adopt a fair procedure, what percentage chance is there that Mr Abuinsair would have been fairly dismissed had a fair procedure been followed?

8. If the dismissal is found to be unfair, did Mr Abuinsair contribute to his dismissal with culpable or blameworthy conduct?

Direct Race Discrimination

9. Mr Abuinsair is Palestinian.
10. Did the Respondent subject Mr Abuinsair to the following treatment:
- 10.1. *27/4/20 Mr San inviting the Claimant to apply for his own post after the expiry of deadline (para 48 ET1 particulars);*
 - 10.2. *18/05/20 Mr Jones providing false information to OH (para 52 ET1 particulars);*
 - 10.3. *14/7/20 Mr Jones sending email to Claimant 14 July 2020 threatening investigation of matter that occurred 29 June 2020;*
 - 10.4. *From 3/7/20 – 6/11/20 there was a flawed grievance process;*
 - 10.5. *From 9/1/2020 to 30/04/21 flawed disciplinary process;*
 - 10.6. *12/2/21 – Meeting with Mr Jones where he was unsympathetic to the Claimant (para 44 ET1 particulars);*
 - 10.7. *Various dates – Mr San not understanding the Claimant's accent (para 42 ET1 particulars)*
 - 10.8. Making false, or unnecessary, or exaggerated allegations of gross misconduct against him;
 - 10.9. Did not send him details of the allegations before its investigatory meeting;
 - 10.10. Did not answer his queries regarding the investigator's training and fitness for the role as an investigator;
 - 10.11. Did not give him assurances regarding the fairness of the process;
 - 10.12. Did not answer his queries regarding concerns about the conflicts of interests of the investigator, who dealt with his first grievance and had rejected his second grievance;
 - 10.13. The investigator not taking account of his statement and relying and accepting entirely, the Respondent's statement;
 - 10.14. Not postponing the Disciplinary Hearing;
 - 10.15. Not upholding his Appeal; and
 - 10.16. Dismissing him?
11. Was such treatment less favourable treatment, i.e. did the Respondent treat the Claimant as alleged less favourably than it would have treated a white British person in not materially different circumstances? Mr Abuinsair relies upon a hypothetical comparator.
12. If so, was this because of Mr Abuinsair's race?

Harassment

13. *Did the Respondent engage in unwanted conduct as follows:*
- 13.1. *4/9/19 – Mr San saying "Claimant is clueless and useless as a maths KS5 co-ordinator" (para 28 Et1 particulars)*
 - 13.2. *Between 18/12/19 – 12/02/20 Mr San provided false information about KS5 assessment to Mr Jones (Item 2 Scott Schedule)*
 - 13.3. *23/1/20 and 14/2/20 Concerns/criticisms by colleagues and senior staff re teaching style and student attendance (para 35-37 ET1 particulars);*
 - 13.4. *12/2/20 The way in which a meeting with Mr Jones conducted a meeting with the Claimant on 12 February 2020 (amendment permitted by EJ Manley 7 Sept 21);*

- 13.5. 18/05/20 Mr Jones providing false information to OH (para 52 ET1 particulars);
 - 13.6. 14/07/2020 - Mr Jones sending email to Claimant 14 July 2020 threatening investigation of matter that occurred 29 June 2020;
 - 13.7. 12/2/21 – Meeting with Mr Jones where he was unsympathetic to the Claimant (para 44 ET1 particulars).
14. Was the conduct related to the Claimant's protected characteristic?
 15. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her? If not, did the conduct have the effect of violating his/her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation

16. Did Mr Abuinsair do a protected act and / or did the Respondent believe that he had done or might do a protected act? Mr Abuinsair relies upon:
 - 16.1. His grievance of 3 July 2020; and
 - 16.2. His grievance of 19 April 2021.
17. Mr Abuinsair relies upon the same allegations listed above as allegations of direct discrimination (save 10.1 and 10.7), as also being detriment inflicted upon him because of the protected acts, in so far as they postdate the protected acts.

Wrongful Dismissal

18. Mr Abuinsair complains that the Respondent dismissed him in breach of contract by not providing him with the notice to which he was entitled. Whether Mr Abuinsair was entitled to notice or not will depend upon whether he was guilty of gross misconduct, which will entail the Tribunal in making a finding of fact as to whether or not he was guilty of the allegation against him relied upon by the Respondent in dismissing him as well as whether any such allegations amounted to a fundamental breach of contract by Mr Abuinsair entitling the Respondent to dismiss him without notice.

Remedy

19. If Mr Abuinsair was unfairly dismissed, the remedy is compensation for financial loss:
 - 19.1. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that Mr Abuinsair would still have been dismissed had a fair and reasonable procedure been followed anyway?
 - 19.2. Would it be just and equitable to reduce the amount of any of Mr Abuinsair's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
 - 19.3. Did Mr Abuinsair, by blameworthy or culpable actions, cause or contribute to his dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
20. If the complaints of discrimination succeed, in addition to the question of compensation for financial loss, there will be the issue of what award should be made in respect of injury to feelings.