EMPLOYMENT TRIBUNALS

Claimant: X

Respondents: (1) Y
(2) Z
(3) CORE Education Trust

Heard at: Birmingham

On: 3-7, 10 October 2022

Before: Employment Judge J Jones
Mr P Wilkinson
Mr N Chavda

Representation
Claimant: In person
Respondent: Mr R Powell (counsel)

JUDGMENT having been sent to the parties on 12 October 2022 and written reasons having been requested by the Claimant on 12 October 2022 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background, claims and issues

1. This was a claim of direct sex and race discrimination, harassment and victimisation arising from the claimant's work at the third respondent as an agency teacher. The claimant worked on a number of occasions between March and November 2020 at the third respondent's schools via an agency called SMILE ("the agency"). The first respondent was the Head Teacher at an Academy operated by the third respondent ("the school") at the time of the events in question and the second respondent is a PE/Health and Social Care Teacher who was working at the school at the material time.

2. The claim was derived from a claim form submitted by the claimant on 2 March 2021. Early conciliation took place between 1-2 March 2021 in connection with all three respondents. The circumstances of the claims arose

from allegations made by parents at the school about the claimant's alleged conduct during a PE lesson.

3. When the claim was issued, it included claims of unfair dismissal, race discrimination, discrimination on the grounds of religion or belief, disability discrimination, sex discrimination and whistle-blowing detriment. The claims were the subject of 3 preliminary hearings, as a result of which the issues were honed through a combination of strike out orders and withdrawals by the claimant. The remaining claims and issues in the case were summarised by Employment Judge Broughton in an Order dated 3 March 2022 (p838). They comprised the following claims of harassment and/or direct discrimination because of race and/or sex, and a whistle-blowing detriment claim.

   Harassment complaints:

   3.1 Failing to adequately check the credibility of the "erection" allegation before escalating the matter (R1-3)
   3.2 Forwarding a "false" allegation with regard to the claimant being alone in a classroom with a female student with the door closed without checking it (R1-2) to fit a narrative (sex only)
   3.3 Fabricating an allegation that the claimant opted to do girls' PE to fit a narrative (R2) (sex only)
   3.4 "fishing" for allegations to fit a grooming narrative (R1) (sex only)

   Direct discrimination complaints:

   3.5 Adopting the agency's findings and retaining a record of the "false" allegations (R1,3)
   3.6 Biased and/or inadequate investigation including failing to speak to relevant witnesses including the claimant (R1-2)
   3.7 R1 not independent
   3.8 Failure to refer to the DSL (R1-2)
   3.9 Referral of "baseless" / inadequately checked allegations to the LADO/ DBA/SLT(R1)
   3.10 Instigating the investigation as a result of the PE lesson (R2) (sex only)
   3.11 Suggesting that the claimant needed further training (R1) (sex only)
   3.12 Any of the treatment not found to have been harassment.

   During the course of his evidence, the claimant clarified that allegation 3.9 above was a complaint that the first respondent had referred baseless or inadequately checked allegations to the Local Authority Designated Officer ("LADO"), DB (the co-Head Teacher at the school) and/ or Saiqa Laiqat (the third respondent's Director of Education and the first respondent's line manager).

4. On the third day of the hearing, the respondent drew to the Tribunal's attention that, although it did not appear in the list of issues, the claimant had an extant public disclosure detriment claim which had not been struck out in Employment Judge Broughton's Order following the public preliminary hearing in March 2022. The claimant was asked if he wished to pursue this allegation and confirmed on the fourth day of the hearing that he did. It is set out below.

Public interest disclosure detriment complaint
(as set out in paragraph 25 of the Order of Employment Judge Britton, 4 August 2021, p128)

"*The claimant contends that his protected disclosure was the communication of information to the third respondent regarding the lack of ventilation in a class room during a meeting between himself and a visiting Police Officer. The claimant contends that he believed the information disclosed tended to show that the third respondent was failing to comply with its health and safety obligations. The claimant contends that he reasonably believed his disclosure to be in the public interest."*

The alleged disclosure was made in a letter the claimant wrote to the agency on 20 November 2020 in which the claimant stated when describing a particular classroom, "*the room was so stuffy, I suddenly started to drip sweat at one point*".(p313) The claimant contended that the respondents had been granted access to this letter by the agency.

The alleged detriment which the claimant said was linked to this disclosure was the closure of the investigation into his conduct as "unsubstantial" (which the claimant accepted was a typographical error by the agency and should have ready "unsubstantiated") (para 22 Order of EJ Britton, 25 October 2021, p148).

5. Finally, the issue of time limits arose in connection with the discrimination complaints. The respondents contended that all the discrimination complaints were out of time. It was submitted that the last act of discrimination alleged against the first respondent occurred on 20 November 2020 when she spoke with the agency, and that of the second respondent on 18 November 2020 when she gave information to the first respondent about the incidents under initial consideration. It was said that the claims were 10 and 8 days out of time respectively therefore, against the first and second respondent, and that the complaints against the third respondent, being based on its vicarious liability for the former, were similarly out of time.

The Hearing

6. The hearing took place in person, save that, due to national rail strikes, the Tribunal sat remotely on Wednesday 5 October 2022, with the consent of the parties. Despite a number of the claims having been struck out, the time estimate remained as 10 days but it was possible to complete the evidence and submissions and for the Tribunal to deliberate and give judgment within 6 Tribunal days.

7. The Tribunal took regular breaks during the hearing and adjustments were discussed and implemented to assist the claimant in light of his disability of dyslexia. These included the provision of documents on coloured paper and the provision of additional time for the claimant to read documents produced during the hearing.

8. The Tribunal received in evidence an agreed file of documents which was initially 1388 pages in length. At the beginning of the hearing, an extract from the third respondent's Equality and Diversity policy was added to the bundle at page 1389 by consent. The claimant also inserted a newspaper cutting at page 1396, although as it turned out this proved not to be relevant to the issues. References to page numbers in these reasons are references to the pages of that agreed file, unless otherwise stated.

9. The Tribunal was also provided with an agreed cast list and written closing submissions from respondents' counsel.

10. The claimant, the first and the second respondent each produced witness statements, gave oral evidence and were cross-examined.

Findings of fact

11. Based on this oral and documentary evidence, the tribunal made the following findings of fact.

    11.1 The third respondent is a charity and secondary specialist Academy Trust for pupils aged 11 to 16 serving a catchment area in Birmingham, with a pupil capacity of 3,460. It employs staff and has trustees who are responsible for the performance of the academies in the trust. The third respondent currently operates 4 individual academies, including the school at which the events in question in this case took place.

    11.2 The school is on two sites. The site at which the claimant was working was for children in years 7 to 9. There were approximately 500 students at that site. The intake of the school is ethnically diverse. At the time in question, black African and Afro-Caribbean children were in the majority, making up 37% of the school population (p1295).

    11.3 The claimant identifies as a Black British male, with both African and Caribbean heritage. He is dyslexic and that impacted on his early education. However, he went to University and gained a degree, became a sports coach and fully qualified as a teacher in 2014. Since that time he has carried out a number of placements as a supply teacher across the midlands area. He enjoys his work and felt called in particular to teach and coach children who may not have had the easiest start in life. He is especially alive to the need for young male pupils to have teachers they can identify with, both from a gender and racial perspective. He has always had, and retains, a clean enhanced DBS check.

    11.4 As required by law, both the third respondent and the school had Safeguarding and Child Protection policies. These followed the Department of Education Statutory Guidance "Keeping Children Safe in Education" ("KCSIE"), which is reviewed annually (p489). KCSIE makes it clear (para 214 onwards, p545) that allegations against

supply teachers are to be dealt with in the same way and in accordance with the same guidelines as employed teachers. Employing agencies are obliged to comply with the same policies and liaise with schools to ensure that this is so.

11.5 KCSIE also describes the process of carrying out an "initial consideration" of any allegation received that falls within its remit (paragraph 218f). Thereafter, once an actual investigation (as opposed to an "initial consideration") has taken place, KCSIE defines the potential outcomes that can be recorded as follows:

- "**Substantiated**: there is sufficient evidence to prove the allegation;
- **Malicious**: there is sufficient evidence to disprove the allegation and there has been a deliberate act to deceive;
- **False**: there is sufficient evidence to disprove the allegation;
- **Unsubstantiated**: there is insufficient evidence to either prove or disprove the allegation. The term, therefore, does not imply guilt or innocence;
- **Unfounded**: to reflect cases where there is no evidence or proper basis which supports the allegation being made."

11.6 The school's own Safeguarding & Child Protection Policy ("the policy") that was current at the time the Tribunal was concerned with was published in September 2020 (p703). Key roles were identified in the policy – these included a Lead DSL (Designated Safeguarding Lead), deputy DSL and other DSLs. At the time in question, the first respondent, as well as having a role to play under the policy as Head Teacher, was also a DSL.

11.7 The policy is a lengthy document and the Tribunal considered it in full. In particular, its attention was drawn to the "Key procedures" section in Part Two which sets out the procedures to be followed in response to the raising of a concern from any source about a child. Section 22 sets out the steps to be followed in response to an allegation about a member of staff :

22.0 Responding to an allegation about a member of staff

See also Birmingham Safeguarding Children Partnership procedures on allegations against staff and volunteers.

22.1 This procedure must be used in any case in which it is alleged that a member of staff, Governor/Trustee, visiting professional or volunteer has:

• Behaved in a way that has harmed a young person or may have harmed a

young person
• Possibly committed a criminal offence against or related to a young person; or
• Behaved in a way that indicates s/he may not be suitable to work with young people
• Behaved towards a child or children in a way that indicated s/he may pose a risk of harm to children.

22.2 Although it is an uncomfortable thought, it needs to be acknowledged that there is the potential for staff in school to abuse students. In our school we also recognise that concerns may be apparent before an allegation is made.

22.3 All staff working within our organisation must report any potential safeguarding concerns about an individual's behaviour towards children and young people immediately.

22.3.1 Allegations or concerns about staff, colleagues and visitors (recognising that schools hold the responsibility to fully explore concerns about supply staff) must be reported directly to the Headteacher who will liaise with the Birmingham Children's Trust Designated Officer (LADO) Team who will decide on any action required. The Headteacher should inform CORE Chief Operating Officer of any such allegations.

22.3.2 If the concern relates to the Headteacher it must be reported immediately to the Chair of the Governing Body, who will liaise with the Designated Officer in Birmingham Children's Trust (LADO) and they will decide on any action required.

22.3.3 If the safeguarding concern relates to the proprietor of the setting then the concern must be made directly to the Birmingham Children's Trust Designated Officer (LADO) Team who will decide on any action required.

11.8 This section of the policy is supplemented by Appendix 3, which includes the following further instructions:

If a child makes an allegation about a member of staff, **Governor/Trustee,** visitor or volunteer the **Headteacher** must be informed immediately. The **Headteacher** must carry out an urgent initial consideration in order to establish whether there is substance to the allegation. The **Headteacher** should not carry out the investigation himself or interview pupils. However, they should ensure that all investigations including for supply staff are completed appropriately.

……

If the actions of the member of staff, and the consequences of the actions, raise credible child protection concerns the **Headteacher** will notify Birmingham Children's Trust Designated Officer (LADO) Team[1] (Tel: 0121 675

1669). The LADO Team will liaise with the Chair of Governors and advise about action to be taken and may initiate internal referrals within Birmingham Children's Trust to address the needs of children likely to have been affected.

The Tribunal found that the first respondent had been trained to define "credible child protection concerns" in the context of safeguarding as concerns about something that *could have happened*, regardless of its likelihood, and further that this was the definition she used when she dealt with the concerns that were raised about the claimant.

11.9 The claimant was booked to work at the school on Friday 13 November 2020. Cover bookings were overseen at the school by the deputy Head, MS. The claimant was required to cover 3 lessons, including the last lesson of the day (period 5, after lunch) which was a PE lesson for a year 8 class. PE lessons took place off site at a local Leisure Centre ("the Centre"). The children were taken to the Centre from school by coach. The claimant accompanied the second respondent with the children and was at no stage teaching the class alone.

11.10 At the Centre, the second respondent split the children into girls and boys and allocated herself to teach badminton to the boys at one end of the sports hall. The girls were to be taught basketball by an external professional basketball coach, Ricardo d'Alva, and the second respondent asked the claimant to assist Mr d'Alva, which he did.

11.11 The children exhibited some challenging behaviour particularly at the start of the lesson and some of the girls in particular were not engaged and paying attention. The second respondent spoke to them about their behaviour. It was common ground that some members of this year 8 class could be difficult to manage.

11.12 On the way back on the coach, the claimant overheard one child calling another child a "paedophile" and challenged this. This took place towards the front of the coach. He did not tell the second respondent.

11.13 Also on the way back on the coach, the second respondent, who was sitting between the middle and the back of the coach, overheard some of the girls giggling and gossiping and, from their demeanour, she formed the view that something may have happened during the lesson to cause this. When the children got off the bus, the second respondent took the girls in question to one side and asked them what was going on. The girls' only response was that the claimant was "weird" but they would not say any more. The second respondent did not take the matter any further, concluding that she had no or insufficient information to merit a report of anything untoward.

11.14 On Monday 17 November 2020, the claimant was again booked to work at the school. In the afternoon he covered a lesson during which a police officer came in to talk to the children. At the end of the lesson, the claimant was speaking to a female child in the classroom with the

door closed when he noticed another member of staff walk past and look in. The claimant found that classroom stuffy and uncomfortable during the lesson, but he did not report this to anyone at the time.

11.15 At or about 5pm that day, the first respondent received a telephone call from the parent of a child, who we shall call child A. She was in the presence of another parent, whose child we shall refer to as child B. Both parents alleged that their daughters had told them that, during a PE lesson approximately two weeks ago the claimant had been teaching "with a hard on". Child B's mum did not want her to come into school but agreed she could when the first respondent promised to ensure that the claimant would not teach the child for the time being. The parent said that the claimant always taught with a hard penis and that the child was too scared to tell a teacher. A's mum added that the claimant had called the children forward during the lesson and that his "private part moved". She said that her daughter had told the teacher Jodie Smith that day, 17 November 2020. The first respondent advised the parents that their concerns would be investigated.

11.16 The Tribunal found that the first respondent made a note of the matters that had been raised during this phone call (p301) and set about following the steps in the policy as to how, as Head Teacher and a DSL, she should deal with the matter. Having heard the evidence of the first respondent, who impressed the Tribunal as a credible, self-reflective and professional witness, the Tribunal accepted that she reached no conclusion at this time (or indeed later) as to whether the allegations were true or not and remained alive to the fact that false allegations can be made against teachers and that she had a duty of care towards the claimant, as well as an obligation to protect children, follow procedure and adopt best practice in safeguarding.

11.17 Accordingly, the first respondent began by carrying out a risk assessment to establish whether there were any immediate child protection concerns that she needed to take steps to minimize. She concluded that there were not, especially because of the time of day, which was after school hours and therefore the children and the claimant were very unlikely to come into contact with each other further at all that day.

11.18 Secondly, the first respondent considered whether the matters raised had met the threshold test to be dealt with in accordance with KCSIE and the school safeguarding policy (see the 4 bullet points in paragraph 22.1 of the school policy extracted above). She concluded that they did and, in evidence, the claimant did not dispute this, accepting that the allegations were serious.

11.19 This meant that there should be an information-gathering exercise to enable the first respondent to carry out an "initial consideration" with a view to deciding whether there was a credible allegation and referring the issue to the LADO if appropriate.

11.20 The Tribunal considered the role of the LADO and found that it was one primarily of coordination, advice and oversight on issues of safeguarding. Having a person in this role, employed by a government funded local Children's Services Team is a way of bringing independence and expertise into issues of safeguarding in an effort to ensure that complaints do not go unheeded nor are they swept under the carpet by other agencies. The LADO has no powers of a punitive nature towards teachers although will of course liaise with the police as necessary. Its focus is firmly on the safety of children.

11.21 That evening, the first respondent telephoned Saiqa Laiqat, her own line manager, to make her aware of the allegation and seek confirmation, which she received, that her plan as to how to progress the matter was procedurally correct. She also notified her co-Head Teacher, for information only.

11.22 That evening the first respondent also notified Olivia Bakewell, the senior contact at the agency. It was agreed that the claimant should not attend the school the following day. This was a neutral measure and was designed to protect the claimant from coming into contact with the parents of the children, as well as keep the children from seeing the claimant.

11.23 The first respondent did not notify the claimant at this stage, nor did she arrange for the agency to do so. She told the Tribunal, and the Tribunal accepted, that this was because she viewed it as premature to do so until she had gathered further information and spoken to the LADO. There might turn out to be nothing in the allegation and a teacher could be very distressed by it overnight and with minimal if any professional support.

11.24 In the morning of 18 November 2020, the agency (Noreen Malik) telephoned the claimant and advised him not to attend the school for work as planned. The claimant believed from that phone call that he had been suspended from work by the agency and that it was something to do with a PE lesson at the school and that the police would not be involved.

11.25 The first respondent spoke to those teachers she believed might be able to shed light on the issue, based on what she had been told by the parents. These were the second respondent and Ricardo d'Alva, who had been present during the lesson, and Jodie Smith, who child A said she had told about the allegation. The second respondent explained what had happened on the coach back when she had spoken to the girls and Mr d'Alva said that nothing untoward had occurred to his knowledge during the lesson. Jodie Smith said that the previous day (Monday 17 November 2020) child A had been muttering "paedophile" under her breath during a session in extraction. When asked, she had told Ms Smith that she had told the second respondent and refused to expand. The claimant also asked Monika Sethi, cover coordinator, if any information had come to her knowledge and was told that it had

not.

11.26 Meanwhile, the first respondent delegated to Sharon Hyde the task of interviewing the children, which she did. One child preferred to write her account down which she did (p303). This narrative included the suggestion (erroneously) that the claimant had told the second respondent that he would work with the girls and also that the child had told the second respondent about the allegation on the way back from the lesson, and had also told Jodie Smith and another teacher. Sharon Hyde fed back to the first respondent what she had been told by the girls and this was recorded in note form in the Head Teacher's confidential log (p301-302). In summary, the children repeated the central allegation that they had witnessed the claimant teaching with an erection during PE. There was also an allegation that he had asked the girls to come up close and made a comment about one of the girl's legs and that she would be really good for basketball. Child A reported that she had "no reason to lie against the claimant" and that "he seemed like a good teacher" and added that a friend had told her that the claimant had been fired from her primary school for dragging a student.

11.27 As a result of the information gathering amongst staff and students, the first respondent concluded that there could be little doubt that all were describing the PE lesson that took place on 13 November 2020 and that the parental reference to "approximately two weeks ago" was erroneous. In the first respondent's experience, such dating confusions were not unusual.

11.28 Based on the information that she had gathered during this fact-find, the first respondent determined that the allegation "could have happened" and that she therefore was duty-bound to advise the LADO. She did so initially by telephone the same day, 18 November 2020. It is both commonplace and considered good practice for initial telephone discussions of this kind to take place with the LADO during which advice and guidance can be given before a formal written referral is made. The LADO advised the first respondent, based on the information gathered, that she should make a written referral, which she then did (p305).

11.29 The written referral to the LADO was on a standard template form, with limited space for information. The form is headed "Management of Allegations against Person in a Position of Trust (POT) Referral/Consultation". The first respondent transferred onto the form the summary of what she had been told by the parents and the output of the initial consideration, as set out in her notes. She added at the end of the form

"My observations of the teacher have been positive. He appears to care about ensuring students complete work and understands the importance of good relationships and following through on behaviour incidences. A few students have spoken to me over the last couple of

weeks saying they don't like the teacher. They have generally said this after they have been in trouble eg for talking."

11.30 The first respondent also kept a log of complaints/safeguarding concerns she was dealing with at the school. In it, she recorded the bare details of the complaint and added "unsubstantiated" in the outcome column.

11.31 The first respondent was told by the LADO that it was not a police matter in their view, that the school did not need to do anything further and that the outcome would be that the agency, as employer, would be tasked with carrying out an investigation. This was confirmed in writing to the first respondent by Norah Malik for the LADO the following day, 19 November 2020 (p397). The LADO included in the email the recommendation that the claimant be reminded about safer working practices and the "professional responsibility to himself to work in a safe way", adding that the first respondent was expected to share information with the agency.

11.32 On 20 November 2020, the first respondent spoke to Olivia Bakewell who confirmed that the agency would now do its own investigation. The first respondent agreed to share the LADO referral and email with the agency (p309). She then updated Noreen Malik for the LADO by email with what the agency had agreed to do next (p404-5). Finally, the first respondent updated the parents of the children on the steps that had been taken and they appeared to be satisfied.

11.33 This was, the Tribunal found, the end of the first respondent's primary work on this issue. She left the matter in the hands of the agency thereafter and was not, to her recollection, in fact updated as she had been promised on the outcome of the investigation before she left the third respondent's employment at the end of that school term.

11.34 Meanwhile, on 20 November 2020, Noreen Malik of the agency contacted the claimant by telephone. During what the claimant described as a lengthy phone call, the detail of the allegations was then discussed and the claimant expressed his position - essentially that the allegations were false. Following the phone call, Noreen Malik emailed the claimant in the following terms (p824):

Subject: … Academy

The following complaints/allegations have been raised:
• Chris had a 'hard-on' in lesson
• Chris commented on a girls long legs in PE and commented on how tall she was
• Chris was asked by a female PE teacher if he wanted to cover boys PE or girls PE and he chose girls
• A teacher walked past Chris's classroom and noticed the classroom door shut with him and one female student in there alone.

Noreen
Principal Consultant | *Smile Education Ltd.*

This email was not copied to the respondents and the Tribunal found that the first respondent was not aware of it until disclosure in these proceedings.

11.35 The claimant produced an immediate and full written response to this email which he sent to Noreen Malik the same morning (p825-9). This response included the following paragraph :

The windows to this room could not open and in hindsight I could have wedged there door, but then there is the image of me folding paper and shoving it under the door... so I left that option.

Also, the room was so stuffy, I suddenly started to drip sweat at one point. The children (falsely) saw this as a sign of "stress" and played up to it, not fully understanding that I am wearing a t-shirt, shirt and jumper. I could not put a chair in front of the door because it was not safe, so I just had to put up with the environment. Hopefully, this would all be on camera, if the person watching recorded the session. The door was closed during the talk by the Police Officer and remained that way for the majority of the lesson, expect the odd occasion when I tried to stand by the door to manually keep it open.

Again, the Tribunal found that this was not copied to the first respondent at the time and was not seen by her until the Tribunal process.

11.36 Olivia Bakewell and Noreen Malik of the agency met with the claimant via video conference on 8 December 2020. Following that meeting, a letter was sent to him (p822) confirming in writing that the outcome of the agency's investigation as his employer was that the allegations were unsubstantiated (although, as explained earlier, this was incorrectly typed as "insubstantial evidence"). He was advised that the matter was now closed and the agency looked forward to booking him for further assignments.

11.37 In fact, the claimant chose not to return to classroom teaching. It was clear to the Tribunal that he was devastated by the fact that these allegations had been made against him and struggles even now to believe that his record is clear, which it is.

11.38 The only remaining notes of the claimant's case appear in the referral form and accompanying notes which the LADO must retain, any confidential notes kept by the agency and the third respondent's Head Teacher's confidential log, all of which are subject to the relevant data retention policies.

11.39 The Tribunal found that the respondent did not say that it would not re-engage the claimant as a supply teacher other than an indication to

the agency that it would be preferable for the claimant not to work at the same site as the complainants on Tuesday 18 November 2020. The agency included in its own action plan to the LADO (p404) that for the claimant's own well-being he would not return to the school.

The law

Direct discrimination and harassment

12. Direct discrimination is defined in section 13 of the Equality Act 2010 (EqA) as follows: "*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".*

13. This definition is based on the comparison of the claimant with an actual or hypothetical other ("the comparator") who does not share the protected characteristic in question (in this case race or sex) but whose circumstances are otherwise the same.

14. How to define a comparator when making this legal comparison is further addressed in section 23 EqA which states that there must be "*no material difference between the circumstances relating to each case*".

15. Comparators have also been considered by the higher courts in a number of cases, the leading one being *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] IRLR 285, ICR 337. As Lord Scott explained in that case 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class.'

16. The Tribunal also considered *London Borough of Islington v Ladele* UKEAT0453/08/RN which provides a useful reminder that the key question in a direct discrimination claim is **why** the claimant was treated as he or she was. That can often be answered without needing to even construct a hypothetical comparator. In other words, if the reason for the treatment afforded to the claimant was in no way, directly or indirectly, linked to the protected characteristic, but was some other reason, then it cannot have been direct discrimination. This is sometimes referred to as the "reason why" test.

17. In considering claims of discrimination, the Tribunal must also have regard to the burden of proof as set out in section 136 EqA 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 subsection (2) does not apply if A shows that A did not contravene the provision."

    Applying this provision, the Tribunal asked itself first and foremost whether there was evidence from which it *could conclude* that the alleged discrimination or harassment had occurred, before considering whether it was

necessary to look at the respondent's explanation, if any, of the treatment in question.

18. Harassment has a special definition in discrimination law which is to be found in section 26 EqA. This states that

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
….
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

The Tribunal must therefore consider the subjective feelings or perception of the claimant to the conduct in question, but also whether or not, objectively speaking, such perception was one which a reasonable person could have.

19. Finally, when considering the applicable time limits, the Tribunal reminded itself that, if a claim is not in time, then the Tribunal does not have jurisdiction to consider it. The applicable time limit in this case is set out in section 123 EqA which states as follows:

*(1) **….** proceedings on a complaint within section 120 may not be brought after the end of—*
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) …
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

20. The Tribunal's discretion to extend time if it considers it just and equitable to do so must be exercised carefully having fully considered the balance of hardship between the parties. There is no presumption that Tribunals should extend time; the claimant must persuade the Tribunal that it is just and equitable to do so: *Robertson v Bexley Community Centre,* [2003] IRLR 434. Furthermore, the remedy of Employment Tribunal proceedings is considered to be sufficiently well known that ignorance of such recourse will not normally

be accepted as an excuse for non-compliance with any time limit (*Partnership Ltd v Fraine* UKAEAT/0520/10, *John Lewis Partnership v Charmaine* UKEAT/0079/11 and *Walls Meat Co Ltd v Khan* [1979] ICR 52). The statutory time limits should be sufficient for the claimant to investigate his or her options promptly and issue proceedings within the necessary 3-month period.

21. It can be a useful exercise to consider the factors set out in section 33 Limitation Act 1980 in considering the exercise of discretion in relation to time limits: the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the respondent has cooperated with any requests for information, the promptness with which the claimant acted once she knew of the facts giving rise to the claim; and the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action, although this list should not be applied slavishly (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA, Civ 27).

"Whistle-blowing" detriment

22. A worker has the legal right not to be subjected to a detriment on the ground that he or she has made a protected disclosure (section 47B Employment Rights Act 1996 (ERA)).

23. A "protected disclosure" in this context is a "qualifying disclosure" as defined by section 43B ERA, which in turn states that it means a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of a number of breaches of duty. In this case, the claimant relied upon a disclosure of information which he said tended to show "that the health or safety of any individual has been, is being or is likely to be endangered" by actions or omissions of the third respondent.

24. The respondents accepted that the alleged protected disclosure (as set out in paragraph 11.35 above) was made to the claimant's employer, the agency.

Conclusions

25. The tribunal reached its conclusions unanimously by applying the law described to the facts it had found. In doing so the tribunal took each claim in turn as set out in the list of issues.

26. First, the whistle-blowing detriment claim. The Tribunal was not satisfied that the claimant made a protected disclosure when he wrote to the agency on 20 November 2020 referring to a stuffy classroom. The classroom had means of ventilation (windows and a door) and the claimant acknowledged that the door could have been propped open. Whilst no doubt uncomfortable, the temperature of the room was not said to have put the health and safety of any individual at risk nor was there any evidence that it did so. There was no evidence that the temperature of the room was of concern to anyone other than the claimant and the public interest requirement was also not satisfied.

27. In any event, the Tribunal found that the correspondence of 20 November 2020 in which the claimant's alleged protected disclosure was made was sent to the agency but was not sent on to the respondents and thus any alleged treatment of the claimant thereafter could not have been the consequence of it. This claim therefore failed.

28. For the avoidance of doubt, it was not necessary for the Tribunal to go on and consider whether the alleged detriment (the closure of the investigation as unsubstantiated) was indeed such and it did not do so.

29. Secondly, the harassment complaints. The Tribunal did not find that the first respondent "fished" for allegations about the claimant to fit a grooming narrative or otherwise. The first respondent followed the procedure she was professionally duty-bound to follow when receiving complaints from a parent. The reason why the claimant was referred to the LADO was because that complaint was received and because the Department of Education policy, as translated by the school, required it. Whilst it is entirely understandable why the claimant, or any teacher, might want his or her say before an allegation is referred to the LADO, that is not a step prescribed or recommended by the policy guidance. There is an "initial consideration" phase. This is what happened here as the first respondent took steps to check out the allegations. The matter then goes to the LADO – essentially for advice on next steps, unless the initial consideration indicates that the allegation simply could not have happened. The Tribunal accepted the evidence of the first respondent that this is a low threshold and that best practice in safeguarding is to involve the LADO in any and all cases of this nature, unless exceptionally concluding that something simply could not have taken place, for example because a teacher or pupil was simply not there at the material time. The purpose of referring to the LADO is not punitive nor is it the issue of a report against a particular person. It is a step in a process designed solely to protect and safeguard children and young people.

30. Further, the Tribunal found no evidence that the first or second respondent had forwarded any allegation that the claimant had been alone in the classroom with a female pupil to any third party. This only arose in the email from the agency to the claimant on 20 November 2020. On the balance of probabilities, the Tribunal concluded that it was most likely to have arisen from the discussions in the lengthy telephone conversation between the claimant and Noreen Malik that morning, being then replicated in the agency's follow up email and the claimant's own written response. The second respondent did not say that the claimant opted to do PE with the girls, neither did the first respondent. This allegation appeared in the statement from one of the children and found its way into the agency's emailed allegations, somewhat carelessly. It did not come from the respondents, however.

31. Putting this in the specific context of the text of the harassment allegations for clarity, the Tribunal found:

    <u>Failing to adequately check the credibility of the "erection" allegation before escalating the matter</u> (R1-3)

The respondents did check the credibility of the allegation, by way of an initial consideration, as the policy required.

Forwarding a "false" allegation with regard to the claimant being alone in a classroom with a female student with the door closed without checking it (R1-2) to fit a narrative (sex only)
The Tribunal found that this did not happen.

Fabricating an allegation that the claimant opted to do girls' PE to fit a narrative (R2) (sex only)
The Tribunal found that this did not happen.

"Fishing" for allegations to fit a grooming narrative (R1) (sex only)
The Tribunal found that this did not happen.

32. As the Tribunal did not find that the claimant had been harassed in the ways alleged, or at all, it was not necessary to go on and consider whether it was because of the protected characteristic of sex or race. Had it done so, the Tribunal records that it would have concluded that there was no evidence whatsoever upon which it could conclude that either of these grounds were related to the treatment of the claimant by any of the three respondents.

33. Turning to the allegations of direct discrimination, the Tribunal found as follows:

Adopting the agency's findings and retaining a record of the "false" allegations (R1,3)
The agency's findings were not "adopted". The only record kept by the respondent was in the Head Teacher's confidential file and the safeguarding log, both of which were kept in relation to all staff and were wholly unrelated to race or sex.

Biased and/or inadequate investigation including failing to speak to relevant witnesses including the claimant (R1-2)/ R1 not independent
The first respondent did not investigate – she carried out an initial consideration in accordance with the policy. The initial consideration was not biased – on the contrary, in the Tribunal's judgment the first respondent kept a very open mind. She interviewed all relevant witnesses apart from the claimant, in relation to whom the reason for not speaking to him was wholly unrelated to his race or sex but in compliance with the LADO recommendation that the agency as employer should do so, and the third respondent's policy.

Failure to refer to the DSL (R1-2)
There was no basis for referring the matter to the DSL. The Head Teacher must deal with complaints against teachers according to the policy. In any event, the Tribunal could find no detriment in this treatment.

Referral of "baseless" / inadequately checked allegations to the LADO/ DBA/SLT(R1)
The allegations were not required to be proven before referral to the LADO or

others. On the contrary, as long as they passed the initial consideration of credibility (ie. could they have happened?), which they did, they were bound to be so referred.

Instigating the investigation as a result of the PE lesson (R2) (sex only)
The second respondent did not instigate any investigation.

Suggesting that the claimant needed further training (R1) (sex only)
The first respondent made no suggestion of further training. That suggestion, which was no more than a reminder of policy for the claimant's own protection, came from the LADO.

Any of the treatment not found to have been harassment – the harassment allegations were not direct discrimination either for the reasons already set out.

The claims of sex and race discrimination and harassment therefore failed and were dismissed.

34. In so concluding, the Tribunal acknowledged that this course of events has been something of an ordeal for the claimant and that it has unfortunately taken its toll on his health. It was clear to the Tribunal that the claimant remains adamant that his treatment has been wrong and unjust despite the fact that, as with other teachers against whom unsubstantiated allegations are found to have been made, he is and remains fit to continue his career in teaching should he wish to do so.

Employment Judge J Jones
7 December 2022