EMPLOYMENT TRIBUNALS

Claimant: Ms Andrea Mairs

1st Respondent: Trafford Council
2nd Respondent: The Governing Body of Kings Road Primary School

Heard at: Liverpool (in private; by telephone) **On:** 14,15, 18,19,20,21 September 2023 and 30 October 2023 and in chambers on 21, 22 November 2023

Before: Employment Judge Aspinall
Dr Tirohl
Mrs Roscoe

REPRESENTATION:

Claimant: Mr Moretin (Counsel)

1st Respondent: Mr Bronze (Counsel)
2nd Respondent: Mr Boyd (Counsel)

Reserved Judgment

The unanimous decision of the Tribunal is that:

1. The claimant's complaint of unfair dismissal succeeds.

2. The claimant's complaint of race discrimination by victimisation succeeds.

3. The claimant's complaint of unauthorised deduction from wages and breach of contract for the pay due to her during a notice period to 31 August 2022 succeeds.

Background

1. By a Claim Form dated 13 June 2022 the claimant brought a complaint for unfair dismissal, race discrimination victimisation, breach of contract notice pay

and unlawful deduction from wages. The first respondent, The Council, defended the complaint as did the second respondent, The School, saying it had dismissed the claimant because of some other substantial reason which was the irretrievable breakdown the of the relationship between the six members of the Senior Leadership Team "SLT" at The School and the claimant.

2. There was a case management hearing before Employment Judge Aspinall on 7 November 2022 and the case came to its final hearing before this Tribunal on 14 September 2023.

The List of Issues

3. The List was agreed between the parties and presented at final hearing as follows:-

Unfair Dismissal

1. Has the Respondent established a potentially fair reason for the dismissal as set out in s.98(1) and 98(2) of the Employment **Rights Act 1996?**

    1.1 Did the Respondent act reasonably in treating that reason as sufficient reason to dismiss the Claimant bearing in mind all the circumstances, including the size and administrative resources of the Respondent, equity, and the substantial merits of the case?

    1.2 On what date did the Claimant's dismissal take effect? The Respondent asserts that notice of termination was served on 28 February 2022 and her employment, including notice, ended on 30 April 2022. The Claimant asserts that notice of dismissal took effect on the date she had a reasonable opportunity to read the letter on 1 March 2022.

2.1 What basic award is payable to the claimant, if any?

2.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

2.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

    2.3.1 What financial losses has the dismissal caused the claimant?

    2.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.3.3 If not, for what period of loss should the claimant be compensated?

2.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.3.5 If so, should the claimant's compensation be reduced? By how much?

2.3.6 If the claimant was unfairly dismissed did she cause or contribute to the dismissal by blameworthy conduct?

2.3.7 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

Victimisation

3.1 Did the Claimant do a protected act as follows:

3.1.1 Raise a grievance on 6 October 2019, alleging that members of the Senior Leadership Team discriminated against her because of her race or colour?

3.2 If so, did the Claimant give false evidence or information, or make false allegations in bad faith?

3.3 Did the Respondent do the following things:

3.3.1 carry out an investigation to consider whether the Claimant's employment should be terminated due to a breakdown of trust and confidence?

3.3.2 SLT express that they could no longer work with the Claimant if she returned to work from her sickness absence?

3.3.3 take into account the Claimant's protected act when investigating whether the Claimant's employment should be terminated?

3.3.4 Invite the Claimant to a dismissal hearing on 28 January 2022?

3.4 By doing so, did it subject the Claimant to a detriment?

3.5 Did the respondent dismiss the Claimant by letter on 28 February 2022 because she did a protected act.

3.6 If so, has the Claimant proven facts from which the Tribunal could conclude that it was because the Claimant did a protected act or because the Respondent believed the Claimant had done, or might do, a protected act?

3.7 If so, has the Respondent shown that there was not contravention of section 27 Equality Act 2010?

Remedy

4.1 Should the Tribunal make a recommendation that the Respondent should take steps to reduce any adverse effect on the Claimant? What should it recommend?

4.2 What financial losses has the discrimination caused the Claimant?

4.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4 If not, for what period of loss should the Claimant be compensated?

4.5 What injury to feelings has the victimisation caused the Claimant and how much compensation should be awarded for that?

4.6 Has the victimisation caused the Claimant personal injury and how much compensation should be awarded for that?

4.7 Should interest be awarded? How much?

Unlawful Deductions from Wages

5.1 Were the wages paid to the Claimant on 15 May 2022 for her salary less than the wages she should have been paid?

5.2 Did the Respondent make unauthorised deductions from the Claimant's wage by failing to pay her salary up to and including 31 August 2022 and if so, how much was deducted?

5.3 Was a deduction required or authorised by statute?

5.4 Was any deduction required or authorised by a written term of the contract?

5.5 Did the Claimant agree in writing to the deduction before it was made?

5.6 How much is the Claimant owed for this period?

5.7 Was the Claimant entitled to be paid?

Breach of Contract – Notice Pay

6.1 Was the Claimant entitled to receive notice to terminate her contract in accordance with the notice provisions within that contract?

6.2 What was the Claimant's notice period?

6.3 From what date did the Claimant's notice period commence?

6.4 Was the Claimant paid for that notice period?

The Hearing

Documents

4. The parties had prepared a bundle of 704 pages. The claimant had attached 28 pages of supplementary documents as an appendix to her witness statements which were admitted by agreement as additional documentary evidence.

Procedure

5. It was agreed that the respondent would go first. A timetable was agreed and adhered to.

Oral evidence

6. The Tribunal heard oral evidence from Mrs Thirkell, Mrs Hoodless and Miss Hodges from the Senior Leadership Team. The Tribunal heard from Mr Martin who chaired the panel that made the decision to dismiss the claimant and from Mr Balme who chaired the appeal hearing. Each of those panels made unanimous decisions. Those decisions are referred to as Mr Martin's decision and Mr Balme's decision below. The Tribunal found Mrs Thirkell, Mrs Hoodles and Miss Hodges gave their evidence in a helpful and straightforward way. The majority found Mr Martin and Mr Balme to be credible witnesses.

7. *Minority view of the evidence:* Dr Tirohl found Mr Martin to be a witness whose account she could not believe. She could not accept that he had made his own decision to dismiss. She found he was influenced by Mr O Keefe and had been told by Mr O Keefe and or the HR advisor to the panel, to dismiss the claimant. She concluded he was a biased decision maker on dismissal and was not wholly truthful when giving evidence about that. Dr Tirohl found Mr Balme also to have been influenced either by Mr O Keefe or HR on his behalf, so that he was also a biased decision maker at appeal and not wholly truthful when giving evidence about that.

8. *No adverse inference for not calling Mr Morgan:* The Tribunal did not hear from Mr Morgan, the Head Teacher, and was asked by the claimant to draw an adverse inference from his failure to attend and give evidence. The Tribunal drew no inference because Mr Morgan was not a decision maker on dismissal or appeal and there was no specific allegation of discrimination made against him. It was a matter for the respondent as to which witnesses they called and the absence of Mr Morgan was insufficient to amount to an inference being drawn against the respondent.

9. The Tribunal did not hear from Mr Hanif who investigated the SLT grievance and the claimant's grievance, nor from Ms Long who conducted an investigation into the breakdown of the relationship between SLT and the claimant, nor Mr Jarman who heard the claimant's appeal against Mr Hanif's outcome of her grievance. It was a matter for the respondent as to which witnesses they called and the absence of Mr Hanif, Ms Long and Mr Jarman was insufficient to amount to an inference being drawn against the respondent.

9. The claimant gave oral evidence. The majority found her to be a witness who answered carefully but would not accept (i) that she had been a difficult colleague to work with because of the manner in which she raised concerns or (ii) that the way in which she wrote to her Head Teacher on the idiom issue was unacceptable. Instead she sought to explain her own conduct throughout as a legitimate response to micro aggression racism.

10. *Minority view of the claimant's evidence.* Dr Tirohl found the claimant to be wholly credible and her conduct to be a legitimate response to years of micro-aggression racism.

Background Facts

11. The claimant was a teacher at the School from 1 September 2001. She identifies as black.

<u>Failure to appoint and Mr Morgan's comment April 2016</u>

12. In April 2016 the claimant was applying for promotion. In the course of a meeting in which Mr Morgan expressed support for her seeking promotion Mr Morgan said to her "Don't be upset with me if you don't get the job". It was the fourth time the claimant had applied and been unsuccessful.

<u>In 2017 Mrs Gallon incident</u>

13. In 2017 / 2018 the claimant had a teaching assistant supporting her in class called Mrs Gallon. The claimant perceived Mrs Gallon was not supporting her in the way she supported other teachers. The claimant raised this with Mrs Gallon and in responding Mrs Gallon was pointing her finger and jabbing the air at the claimant. The claimant lodged a grievance, her first in over sixteen years at the School, against Mrs Gallon. Mrs Gallon was moved to another class while the grievance was investigated by Mrs Hoodless.

14. During this investigation there was another incident in which the claimant said that Mrs Gallon had required the claimant to clear up some paperwork mess outdoors that she had not made, again something the claimant perceived Mrs Gallon did not require of other teachers. The claimant added that incident to her grievance and suggested potential unconscious bias by Mrs Gallon against the claimant as a black teacher. There was a history to this. Many years before Mrs Gallon had told the claimant that members of Mrs Gallon's family were uncomfortable about attending a family wedding because the couple were of different race. This comment had been repeated to the claimant by Mrs Gallon in academic year 2017 /2018. This informed the claimant's perception that Mrs Gallon was uncomfortable about the claimant's race. Mrs Gallon, on hearing that there was a racial element to the grievance, lodged a counter grievance alleging that she was being bullied by the claimant. Mrs Hoodless found there to be no racial element to the grievances and no bullying. Neither grievance was upheld. The claimant accepted the outcome, did not appeal it and the claimant worked with Mrs Gallon after that resolution. It was agreed there would be diversity training for everyone in school.

Contact whilst off sick

17. In academic year 2018 / 2019 the claimant was a Year 1 teacher and was line managed by Mrs Thirkell. There was an issue about Miss Poole and the claimant operating different practices in relation to children taking reading books home. Mrs Thirkell became involved, spoke to them both and the matter was resolved.

18. The claimant was off sick and Mrs Thirkell (who was then known as Miss Holloway) contacted her for welfare reasons. The claimant did not welcome the call and complained about it to the Head Teacher. Mrs Thirkell saw this as a serious complaint because she was new to the job and was called in to the Head Teacher to be spoken to about it. Mrs Thirkell was asked not to contact the claimant when off sick again. She was able to contact other members of staff. After this Mrs Thirkell would not contact the claimant at home and preferred to put things in writing to her rather than work face to face for fear of being accused of inappropriate contact.

19. The claimant sometimes had to cover play time if cover was needed. On one occasion when asked to cover she complained about being asked and told Mrs Thirkell that she might get her union involved.

20. The claimant was at the time of the matters in this complaint a Year 1 teacher. Everyone agreed she was a good teacher and that the children doted on her.

Mrs Thirkell aware of tensions

21. Miss Leach told Mrs Thirkell she would not work with the claimant. Mrs Thirkell did not formalise this issue, investigate, inform the claimant and seek to

resolve the issues if any between the colleagues. She did nothing about it other than seek to reassure Miss Leach.

Terms of her contract as to notice

22. The claimant's contract of employment provides:

- Notice

  The minimum periods of notice to which you are entitled are:

  Either

- Two months' notice in the Spring and Autumn Terms and three months' notice in the summer term terminating at the end of the school term. For the purpose of these arrangements the three terms shall be constituted as follows, in accordance with the Conditions of Service for School Teachers in England and Wales (the Burgundy Book)

  The summer term from 1st May to 31st August

  The autumn term from 1 September to 31 December

  The Spring term from 1 January to 30 April

  Or

  One week for each complete year of service up to 12 weeks if you have 8 years or more continuous service.

- The Burgundy Book provides at clause 4.1:

  4.1 All teachers shall be under a minimum of two months' notice and in the Summer term three months terminating at the end of a school term as defined in paragraph 1 above.

The exclusion from a Year 1 WhatsApp

23. The teaching staff in Year 1 set up a WhatsApp group to discuss school related matters but did not add the claimant to that group. The claimant found out about it in when there was a Macmillan coffee morning to which she was invited and an assumption was made that she had seen the details on the WhatsApp.

Acting up as middle leader without pay

24. The claimant acted up as a middle leader at the request of Mr Morgan. He knew she had sought promotion. When after several months she asked for the pay uplift, known as TLR, to reflect the performance of those duties, Mr Morgan told her he had asked the governors to award the TLR and the request had been refused. The claimant stopped acting up.

25. The claimant was sceptical about this response because shortly after this the middle leadership team was renamed the Excellence Committee. A former middle leader CW who had held a TLR was invited to sit on SLT. The claimant held the view that CW had been given the role without a recruitment process and whilst she, the claimant, was being denied promotion. CW already held a TLR, the claimant did not.

Black history month

26. Every year the school celebrates black history month. The school has a history coordinator. The work is supported by a black teaching assistant. The claimant was asked by the Head Teacher to work on black history month. The claimant felt that giving black people black related content is a micro aggression. She worked with colleagues to deliver content for black history month.

Being asked to deal with black parent

27. There was an occasion when a parent alleged racism and threatened to move the child from the school. The parent wanted to talk to Mr Morgan but Mr Morgan directed that the claimant should talk to the parent. The claimant felt this was a micro-aggression, giving her the task of speaking to a black parent because she was black. She spoke with the parent to allay concerns. She did not make a complaint about what she perceived to be a micro aggression.

The sanction for a pupil and black children feeling the cold

28. The claimant raised concerns at children being left to stand outside against the wall as a sanction for bad behaviour in cold weather. She felt this was inappropriate for any child and added that black children feel the cold more than white children.

Year 1 teaching team meetings excluding the claimant

29. The Year 1 teaching team met to discuss delivery of learning without the claimant. The meetings happened in school at a time when the claimant was not present. She was not informed of nor invited to those meetings.

The “blackcurrant” label photograph

30. The claimant saw a photograph in a school art display of a child wearing a label which said “blackcurrant”. The claimant knew this was part of a World Word Day initiative. The claimant raised that it was inappropriate for a black child to be wearing a sticky label that said blackcurrant as this could be misconstrued and she asked that staff be sensitive about labels.

31. Following this issue the claimant raised with Mr Morgan that the training recommended following the Gallon grievance had not been commissioned. The claimant got involved in sourcing and setting up the training.

The Training

32. The training in diversity, part of the outcome of the Gallon grievance, took place in January 2019 . The trainer used an example of a ginger haired person and a single mother to seek to establish empathy with what black people might feel. Some staff took offence at the language used by the trained *all gingers should be burnt at the stake and also single mothers* and *stand up if you want to be treated as if you are your black colleagues* and complained. Some staff felt that the claimant was responsible for this training and the offence it caused. SLT were disappointed that the training focused on what black people might feel and was not a broader training on all aspects of diversity, they felt this focus was driven by the claimant.

Stephen the magician February 2019

33. In February 2019 a magician came into school to give a series of repeat presentations to different groups of children throughout the day. During his first presentation the claimant heard him refer to the children, about 80% of whom were black or brown children, as "little monkeys" and to one black child as a "cheeky monkey". After the presentation the claimant raised a concern about the use of the word monkey in relation to black and brown children. She did this so as to seek to not have it repeated in later presentations. The head teacher Mr Morgan reacted to this, subsequently, by giving an instruction to all staff that any reference to a monkey must be removed from the school. This led to library books having to be removed, art displays taken down and for nursery and reception classes to stop singing a song called Five Little Monkeys. This caused tension amongst staff who saw this as the claimant's fault.

The Ugandan family idiom

34. A photograph was displayed to help children understand the phrase "making ends meet". It was chosen by speech and language therapist Ms Patel. It showed a Ugandan family, apparently in poverty. A teaching assistant Nina raised with the claimant that this was stereotyping of black people. The claimant raised this with the Head Teacher. Her email to him and deputy head teacher Leah Grimsley at 7.21 am said:

> *"A member of staff came to me yesterday about this week's idiom. The image that has been used does not match the words and being honest is very insulting….that image shows a very happy family having a meal together. Culturally, that's what happens at meal time. Just because they are doing things differently doesn't indicate "poverty" or that they are trying to make ends meet. It's a shame that media likes to interpret Africa in this way especially the predominantly black areas of Africa. I hope our staff have been too busy to get to this idiom this week, it's not one I will be showing or using."*

It concluded with a sad face emoji. At around 2.00pm that day Mr Morgan thanked the claimant for her email but did not give a substantive response. The claimant replied to his acknowledgment within minutes saying:

> *"You and Leah will meet…I have put my point across and no one cared to respond until I asked for a response…Please email me your responses to the idiom and the picture that has been used. I'm interested to know if you think it is appropriate. If I decide I want to meet with you to discuss your responses we can arrange…. I am surprised you haven't asked our staff not to use it as a resource as it paints a huge negative picture and is clearly cultural insensitivity."*

35. At around 2.00pm Ms Grimsley replied saying that she and Mr Morgan would meet with the claimant to discuss her concerns. The claimant copied the concern to Ms Hoodless saying:

> *"…you should have been made aware that last weeks idiom was culturally insensitive and bordering racism. I have raised this with Nina, Darren and Leah and am surprised staff were not asked not to use it."*

36. The claimant's tone with the Head Teacher Mr Morgan in emails on other issues was also harsh and inappropriate. She said:

> "*Although wanting our school to be fully inclusive for all unfortunately for me being black that will never happen. There is no escape from racist thoughts or behaviours.*
>
> *There are some really horrible people in this school who think they can do as they please…may they continue to tell lies to hide their non inclusiveness…actions will always speak louder than words."*

The claimant replied to Ms Grimsley's email about the idiom saying:

> *"I am hoping for your responses via email as it would help me to prepare some questions for you both. However, if we meet for responses then I will prepare some questions for you after the first meeting."*

37. On 20 June 2019 there was a meeting with the claimant and her workplace colleague AE, Mr Morgan and Ms Grimsley to discuss the idiom and the email exchange. There was agreement reached about moving forward together on diversity.

<u>Accused of hypocrisy in liking the Facebook post</u>

38. The claimant saw a Facebook post in which a colleague, on father's day on 16 June 2019, referred to her white children as cheeky little monkeys. The claimant posted a like to that post. Colleagues said that this was hypocritical of her after she, as they perceived, had caused the removal of any reference to monkeys at school.

39. SLT felt that the claimant was a difficult colleague to work with because she complained often in a formal way about matters that could be resolved amicably and locally. Those concerns related to a range of matters such as safeguarding,

teaching practices and issues that had a racist concern too. She escalated concerns above the person she had first gone to before giving that person time to respond. Some staff felt worried about engaging with her in case she accused them of racism. Some staff went to SLT members saying it was difficult to work with the claimant because of their fear of her complaining generally and, specifically, of her accusing them of being racist. Staff said they were afraid to use the word black in any context for fear of being accused of racism.

40. SLT felt a disproportionate amount of time was being used up in responding to emails from the claimant and in dealing with concerns of other staff about the claimant and her propensity to send emails of complaint and accuse people of racism. No one spoke to the claimant about her behaviours, about either her propensity to complain, or the manner or content of her complaints face to face. Six members of SLT decided to lodge a collective grievance. Miss Thirkell, Mrs Hoodless and Miss Hodges were each afraid that if they complained individually about the frequency and manner of the claimant's complaints they would be accused of racism and this could affect their own careers.

June 2019

41. The claimant was observed in her teaching by Mr Morgan and Ms Grimsley as part of a normal peer review process and was found to be performing well.

The SLT grievance 1 July 2019

42. On 1 July 2019 the claimant was away from work. There was a meeting of SLT that day to compose the grievance. Ms Hoodless drafted it with input from her SLT colleagues. Six colleagues; Ms Hodges, Ms Thirkell, Ms Hoodless, Ms Meenagh, Ms Walls and Ms Warburton together alleged that the claimant is intimidating and unreasonable and her behaviour in persistently complaining amounted to harassment.

43. There were six heads of allegation as follows:

1. The claimant regularly threatens staff with formal action. This causes anxiety and distress. The fact that The claimant has carried out a number of threats shows that her intention is real. The grievance gave four examples: the Gallon grievance, going to her union about colleagues, report to STA re maladministration, safeguarding breach report escalated to the governors.

2. When the claimant makes a complaint about another member of staff in most cases she does so directly to the Head Teacher, bypassing the opportunity for constructive/ amicable resolution. Five examples were given.

3. The claimant makes complaints and criticises members of staff (across the school) on an alarmingly frequent basis. The grievance said these could be verified from email history but did not cite the

examples relied on.

4. The claimant makes complaints about numerous individuals across the entire organisation. The grievance listed 9 individuals or categories of people about whom the claimant had complained.

5. The nature of the claimant's complaints are wide ranging. The grievance categorised them as; racism, unprofessionalism, dissatisfaction with monitoring feedback, unacceptable quality of colleague's planning work, being excluded from chats online.

6. The claimant's complaints and criticisms have a negative impact on the whole school, team and individual morale. Five examples were given including the "cheeky monkeys" issue and the use of the word black issue and the Father's Day post issue.

44. The SLT said that they wanted to address the intensity regularity and intimidating nature of the complaints, the negative views of the claimant about the school shared in the staff room and on social media. They said a considerable number of staff shared their concerns and summarised the concerns as follows:

a. Uncomfortable entering into conversation with the claimant for fear of subsequent complaint;

b. Reluctant to be alone with the claimant for fear of conversations being misrepresented;

c. Concern about being labelled racist by the claimant;

d. Concerned about tremendous time and resource implications in responding to her emails and investigating points raised.

45. They said:

"Our primary goal is to achieve a positive outcome whereby the claimant ceases the unreasonable, negative intimidating behaviour outlined above. Our wish is that the claimant continues working within our organisation, but in a positive and reasonable way…..all staff should feel comfortable…without fear of being labelled racist or unprofessional by The claimant…."

It went on to say that if the positive outcome could not be achieved then:

"We would like the claimant to seek alternative employment"

and as a last resort for the Head Teacher to pursue appropriate disciplinary measures. It did not ask for mediation.

5 July meeting with Head Teacher Darren Morgan

46. The claimant was told of the existence of the grievance brought by SLT by Mr Morgan at a meeting but told that its content will only be shared with her when HR can be present. The claimant was very anxious that week. Her previous experience of grievance was not so formal. She was immediately concerned by the fact that it was six members of the SLT that brought the grievance and the fact that she did not know its content and that Mr Morgan needed HR present, that something different was happening, that a process was beginning.

Meeting with HR present takes place on 11 July

47. On 11 July 2019 the content of the grievance was shared with the claimant by Mr Morgan with HR present.

48. There was no disciplinary investigation, nor performance management issue raised by Mr Morgan or HR at that time. HR raised mediation as a possible way forward.

C's reaction to grievance

49. The claimant was shocked by what she read in the grievance and too unwell to come to school. She was off sick for three weeks and returned only briefly at the end of the summer term. The claimant took time over the summer to think about how she could move forward. She was scared by the outcomes the SLT called for and daunted by the weight of it. There were six of her managers against her. She felt personally wounded as she had had little if any dealing with 4 of them. It was only Ms Thrikell and Ms Hoodles with whom she had had any real contact.

50. During the summer the claimant went into school and passed Ms Thirkell on the corridor. Ms Thirkell did not greet her or speak to her at all that day.

51. The claimant thought about mediation but was concerned at the fairness of that because it was a collective grievance against her. It was the power imbalance that made her frightened to engage. The claimant discussed the grievance with her union representative.

C attends inset day

52. In early September 2023 the claimant attended an INSET day and was not greeted nor spoken to by any of SLT. There was a group event and she had to sit at a table with some of the SLT. Ms Hodges sat in the empty chair beside the claimant but angled her chair away and made it clear from body language that she did not wish to speak to the claimant. Mr Morgan sat on the other side of Ms Hodges but did not speak to the claimant. Ms Meenagh did not greet the claimant or acknowledge the difficult situation. She was at that time the claimant's performance line manager.

53. During the INSET day the claimant went to her classroom and asked other colleagues for support perhaps in the form of character references. She became

distressed, had a panic attack and went off sick. The claimant went over and over the content of the grievance and could not see how mediation could work. She wanted formal investigation of the SLT grievance. She wanted someone to look at whether or not she had done all the things she was alleged to have done. The claimant was very upset at having been described as intimidating.

54. Neither Mrs Hoodless, Miss Hodges nor Miss Thirkell have ever known the claimant
to raise her voice, or shout. The claimant was doted on by the children and had good relationships with parents.

October 2019

55. Whilst off sick the claimant met her union representative and had a long discussion about her history at the school. The claimant told the representative of the history of micro-aggressions as she saw them, against herself, but which she had not raised at the time. On advice the claimant lodged a grievance and asked for it to be investigated alongside the SLT grievance.

7 October 2019 grievance lodged

56. The claimant's grievance took the form of a letter and attachments. The first attachment cited examples of occasions when she had demonstrated leadership. The second was entitled "events related to racial discrimination". It provided details of the following incidents:

- In 2017 Ms Gallon, TA telling the claimant that she had family members who had been reluctant to attend a family inter racial wedding back in 2001.

- The claimant having four times applied for Assistant Head Teacher roles and been unsuccessful.

- A middle leadership course not being appropriate for her but having been recommended.

- April 2016 Mr Morgan telling the claimant when she was applying for an AHT role don't be upset with me if you don't get it.

- 2016 being asked by Mr Morgan to take on a middle leadership role despite not being successful in interview. The claimant performed this role then asked for the TLR payment to go with it and the role was withdrawn from her. The middle leadership roles changed so were no longer available to her. A white teacher, former MLT with TLR was asked to join SLT without recruitment process.

- 15 September 2017 the claimant lodged a grievance against Ms Gallon, and then when behaviours continued a second grievance relating to unconscious bias. Ms Gallon was moved. Gill Hoodless was the

complaints officer. Ms Hoodless said Mr Morgan had a file of complaints against the claimant as at 22 May 2018. Mr Morgan later denied the existence of any such file.

- The outcome of the Gallon grievance was racism training. This was not implemented until the claimant raised it again after objecting to a child's photograph being displayed with him labelled "blackcurrant". The training then took place with Ms Sweeney at which Vicky Hodges and JW argued about being able to call black children monkeys.

- Exclusion from planning, year one teachers purposely excluding the claimant.

- Exclusion from Year 1 WhatsApp group

- Unfairness in TA support allocations

- 5.7.2019 grievance from SLT : race discrimination (raising black and monkeys again)

57. The next attachment was headed events that have taken place in school.

58. The SLT did not want the grievances considered together but the respondent decided that the same investigator Mr Hanif would investigate each of them.

14 November 2019

59. On 14 November the claimant met with investigatory officer Mr Hanif. She confirmed that her grievance, in so far as she had given examples of Mr Morgan's failing to address her concerns, also related to Mr Morgan. Mr Hanif questioned her about, amongst other things, the frequency with which she said that things were race related or racism.

Addendum

60. On 18 November 2019 the claimant sent supplementary information to her grievance to Mr Hanif. It was in this letter that the claimant raised "blackophobia". She said:

> *"The SLT complained about not being able to use the word black. This can only be discrimination about the colour of my skin. They are unable to use the word black, which indicates how uncomfortable they are around their black colleague. this again is racial discrimination and more commonly known as blackophobia."*

21 November 2019

61. The SLT wrote to Mr Hanif saying that the claimant's grievance was

"retaliatory action", that it was vengeful and amounted to harassment, and described it as "slanderous and malicious". The letter expressed concern for the impact of the investigation on the witnesses who SLT said "have not yet even been approached in support of our grievance against The claimant' behaviour".

> *"We were relying on their extreme courage to speak out about what they have suffered relentlessly over years."*

62. The SLT letter said,

> "*we are edging closer to a position of irreconcilable differences where each member of SLT and teaching staff fears being subjected to unfounded and malicious grievances by The claimant…..fears ongoing and permanent damage that could be done to our professional reputations…..by such vicious allegations.*

63. They said having received the "counter grievance" they were each seeking independent union advice and considering seeking legal advice as a group. The claimant remained off sick and sending in her fit notes from September 2019.

March 2020

64. In March 2019 the claimant's union representative chased up the Council regarding delay in outcomes to the grievances. Mr Hanif was still investigating and had not yet reported. In August 2020 Mr Hanif published his outcome to the SLT grievance. The report itself was undated. It was 41 pages long, had looked at each of the six heads of allegation the SLT made and each of the examples cited. It reached a conclusion on each of the allegations and examples and an overarching conclusion and made a set of recommendations.

Grievance investigation outcomes

65. Mr Hanif found *the claimant was difficult to manage, he found a breakdown of trust and working relationships …as a consequence of her actions over a long period of time….SLT should have managed her conduct in a more forthright manner but were hesitant to do so for fear of her construing this as being racially motivated and allegations affecting their careers and reputations.*

66. He concluded that the claimant's grievance was submitted as a counter grievance as all acts complained of in it took place prior to the SLT grievance he considered it:

> *"A malicious grievance aimed at deflecting and steering away issues raised by the SLT."*

67. He made 8 recommendations:

1. an investigation into the breakdown of the working relationships;

2. formal conduct investigation into the claimant's conduct as found by him in the outcome report; and

3. diversity training; and

4. an SLT review of the school's communication policy on equality and diversity matters; and

5. a staff survey to encourage staff to share thoughts, feedback and ideas about school and SLT; and

6. SLT training in handling conflict and staff management; and

7. external guided coaching for the claimant *to develop her skills in understanding other people's perspectives', the impact of her behaviour, restorative practice and to improve her communication skills;* and

8. formal mediation between the claimant and SLT.

6 September 2020 C appeals the grievance outcome

68. On 6 September 2020 the claimant replied to Mr Hanif's report and stated that his report is part of systemic racism. She was particularly aggrieved at his finding that her grievance was malicious. The claimant appealed the outcome of his finding on her grievance.

25 September 2020 grievance appeal outcome – David Jarman

69. Her grievance appeal was heard on 25 September 2020. The claimant was represented and the panel, chaired by Mr Jarman, upheld Mr Hanif's decision at investigation stage that her grievance had been submitted in bad faith.

29 September 2020 referral to OH

70. Mr Jarman wrote to the claimant with the outcome of her appeal on 2 October 2020. In relation to her ground of appeal that the grievance had been found to be malicious the appeal panel upheld that finding because:

- It would not have been submitted if SLT had not lodged their grievance.

- There had been opportunities to resolve issues or lodge a grievance in relation to them before the SLT grievance and they were not taken.

- The points had been resolved previously so the decision to raise things that had been resolved previously was a reaction to SLT grievance and done in bad faith.

- In relation to the mediation point the appeal panel upheld the

> recommendation that there be a formal investigation into the breakdown of the relationship.

71. The appeal panel upheld the recommendation to investigate the claimant's conduct. It acknowledged that the Head Teacher Mr Morgan had not dealt with the conduct issues but taking the email exchange between the claimant and her head teacher in the round, the panel upheld the recommendation for a conduct investigation under the behaviour policy.

72. No such investigation was instigated. The claimant remained off sick. Her classes were covered and SLT continued working. The claimant had no contact from her line manager, head teacher or any of her SLT colleagues during her long sickness absence.

Contact with Mrs Grady and HR

73. During her sickness absence the claimant had sent fit notes to School. In January 2020 she had asked about keeping in touch and School had allocated business manager Mrs Grady to be her keep in touch person. The claimant sent fit notes to Mrs Grady and from time to time Mrs Grady rang the claimant to ask how she was. The claimant had medication, counselling and adopted a holistic approach to her own recovery.

74. In September 2020, when she had been off sick almost a year, the claimant told Mrs Grady that she was ready to come back to school. They met to discuss the process for a return to work. Mrs Grady said the first step would be an OH referral and with the claimant's consent that was actioned.

OH report 4 November 2020 recommends return to work

75. The claimant attended her occupational health assessment and said that she wanted to return to work and hoped for a phased return and for the recommendations from Mr Hanif's report to be actioned, in particular external coaching for her, training for SLT and mediation.

School consult SLT about a return to work

76. School consulted the SLT about a return to work for the claimant. The Tribunal did not see the communication, if written, that came from School to each of the SLT members that had lodged the grievance against the claimant. On 11 November 2020 at 19.04 Ms Hoodless wrote:

> *"I cannot manage or work with this individual...impossible for anyone to manage because*
>
> *…does not respond to requests or directions from SLT*
>
> *…refused to engage with SLT throughout this entire process*
>
> *…escalated her malicious behaviour during this process*

…accused members of SLT of racism and blackophobia and has not retracted or apologised for this.

77. Her letter went on to say that the claimant has instilled fear in colleagues, made staff feel unsafe at work, undermined the running of the school through relentless complaining and escalation of complaints, refused to cooperate and accept requests and direction from line management, negatively impacted teaching and learning and placed strain on the budget due to sickness absence.

78. At 19.17 Ms Hodges sent an email to Mr Morgan and Ms Grimsley in which she said:

"I would be unable to work with the employee should she return to school ….. formally accused me of behaving in a discriminatory, racist, blackophobic manner towards her. All of which has been formally unfounded but still no apology or retraction has been made."

79. At 21.05 that same evening Ms Holloway wrote:

"I wish to give formal notice that should this employee return to work at Kings Road I would be completely unable to enter the building and continue with the job I love so dearly……I cannot and will not work in an establishment where I do not feel safe……..malicious treatment by one individual….viciously pursued hateful and unfounded claims against our staff…can we genuinely be offered any assurance that this behaviour will cease?"

80. At 21.20 that same evening Ms Walls wrote:

"If the employee were to return….I would have no alternative but to leave…I would not enter the same building as the employee…….professional and emotional turmoil….immeasurable negative impact on the children in both my class and my key stage…. I am deeply disturbed and utterly offended by the abhorrent nature of the allegations made by the employee……caused irreparable damage on a personal and professional level…

81. At 21.45 that same evening Ms Meenagh wrote:

"If the employee were to return I would have significant concerns and anxieties …. I feel deeply upset and aggrieved at being labelled blackophobic…I feel intimidated by her, her actions and her unpredicatability….any relationship of trust…is not damaged beyond repair, …constant fear of the next accusation…

82. Ms Grimsely's response came the next morning, 12 November 2020 at 07.57. She said:

"I cannot and will not work with the employee if they return to work."

Ms Grimsley set out 18 bullet points detailing the impact of a return which included all senior leaders walking out and the health and safety of every member of staff and every pupil being compromised, the local authority being unable to manage risk with no SLT and irreparable damage to the school.

13 November 2020 suspension by Mr O'Keefe

83. The next day, 13 November 2020 the claimant was suspended from her role by Chair of Governors Mr O Keefe. His letter suggested they had spoken and gave the reason for suspension as the irretrievable breakdown of the working relationship with SLT. The letter said that suspension did not constitute disciplinary action and that an investigation into irretrievable breakdown would take place.

84. The claimant asked that the governors look at alternates to suspension, alternate work for her or to allow her to work from home. There was no response to that request from School. School then appointed external HR Consultant Ms Lauren Long, acting on Mr Hanif's recommendation, made in August 2020, that there be an investigation into the irretrievable breakdown of the relationship.

School interviews SLT

85. The investigation into irretrievable breakdown included interviews with Ms Hodges, Ms Thirkell, Mrs Meenagh, Mrs Hoodless and Mrs Grimsely and Head Teacher Darren Morgan. Now the 6 who had lodged a grievance were joined by the Head Teacher and Deputy Head Teacher. Each member of SLT stated why they would be unable to work with the claimant. Mr Morgan told Ms Long that there were 37 instances in total of the claimant complaining, 21 of those were complaints about staff. He alluded in his interview to a file he had kept detailing those complaints. Each member of SLT in those interviews referred to the offence caused to them by the claimant's grievance and her accusation of blackophobia.

86. The claimant remained suspended.

Letter 23 February 2021 inviting C to investigatory interview

87. The letter set out the reasons given by the now eight SLT members as to the breakdown in relationships. The claimant's interview was supposed to be on 26 February 2023 but the claimant was too unwell to attend. It was rearranged and she saw OH Professional Dr Mike Orton on 19 March 2021. His report letter dated 19 March 2021 said she was well enough to engage in the investigation and processes including outcomes. It recommended that if any meetings were to be face to face they could be on neutral ground and confirmed that she did not require any other adjustments.

Invitation to investigation meeting on 31 March 2021 for meeting on 9 April 2021

88. The claimant was then invited by Lauren Long to attend an investigation meeting into the irretrievable breakdown of working relationships with the SLT. An

initial arrangement was postponed due to the claimant's internet issues, to 13 April 2021.

Lauren Long interviews the claimant on 13 April 2021

89. At the investigation meeting the claimant set out her position. She did not want mediation with a group. She was afraid that with eight senior leaders against her it could not be a fair process. She did offer though to seek to mediate by meeting with each of the members of SLT individually to resolve matters. The claimant told Ms Long that she felt she could carry on working professionally. SLT members when asked about mediation each said it was not a viable option, Messrs Hodges, Hoodless, Grimsley, Walls and Meenagh refused to engage in mediation. Ms Thirkell did not believe it would work and Mr Morgan said it would not work as no one else would work with the claimant.

Outcome of investigation 21 April 2021

90. Ms Long concluded there was an irretrievable breakdown in the relationship, that the claimant was unmanageable and affecting the Head Teacher's mental health. She noted that 4 of the 7 SLT members (she did not count Mr Morgan) had day to day contact with the claimant. She recorded in her findings that staff were fearful of working with the claimant and that one SLT member had said:

> *"The relationship had broken down since the submission of the grievance (by the claimant) and is now damaged."*

91. The Head Teacher Mr Morgan and Deputy Ms Grimsley described how they would feel that the school would be unsafe if the claimant returned and Ms Hodges, Hoodless, Walls and Meenagh all said that they felt the claimant would be "untouchable / invincible" if she were allowed to return.

92. Ms Long gave her reasons for concluding that there was an irretrievable breakdown. She said it was because (i) SLT found Ms Mairs conduct unsatisfactory and (ii) because each member of SLT had said that the submission of the counter-grievance where *AM alleges racism and blackophobia has significantly worsened the pre-existing relational issues.* Ms Long concluded that *the submission of a counter-grievance of such gravitas as contributed to the SLT's perception that there is a breakdown in mutual trust and confidence.* She concluded that it was the counter-grievance and SLT response to it that would mean that mediation would not work.

93. Ms Long concluded that issues with the claimant's behaviours should have been managed through Schools formal processes but that the impact of the frequency of issues on the Head Teacher had led him to feel he could not manage the claimant. Ms Long mentioned the similarity in language used by SLT members in their interviews and in the notes they submitted to her. Ms Long concluded that there was an irretrievable breakdown and her recommendation was a dismissal meeting.

Dismissal meeting invitation letter dated 22 June 2021

94. Mr O Keefe as chair of the governing body resolved to follow the recommendation and convene a dismissal hearing. A letter was sent convening a dismissal meeting, initially for September 2021, the claimant now having been out of school for two years. The School used an agency to acquire an independent decision maker for the dismissal meeting, Mr Martin.

Claimant's evidence for the dismissal meeting

95. The claimant provided her evidence against dismissal to the panel on 20 September 2021 by her union representative.

Mr Martin's preparation for the dismissal meeting

96. On 18 November 2021 Mr Martin was asked to chair a meeting at the School. Mr O Keefe called to Mr Martin's home and passed to him Ms Long's investigation report, the addendum to it by Mr Mallon, the claimant's evidence bundle and enclosures, SLT responses to the claimant's submission and the claimant's additional evidence bundle. He also received and shared the recording of the investigation meeting between the claimant and Ms Long. Mr O Keefe and Mr Martin had nothing more than a cursory discussion about timings of any hearing and the documents that were included. They did not discuss the decision that Mr Martin had to make.

97. In late November 2021 the claimant was out shopping and was drawn into conversation by a parent, Mrs S, at the school, seeking information about her absence. The claimant discussed the reason for her absence and there was discussion between them about racism and speculation as to whether or not Mr Morgan was racist. The conversation lasted for about an hour. Mrs S knew Mr Hanif's wife and told her the fact of this conversation and its broad content. Speculation about racism in the leadership at Kings Road was fed back to school. Mrs Hanif told her husband who reported the conversation with Mrs S to Mr Morgan. Mr Morgan lodged a grievance against the claimant arising out of this incident on 30 November 2021. He alleged she had made false allegations, told lies to a parent about him and was deliberately bringing his name into disrepute. Ms Whiting was instructed to investigate the Morgan grievance.

2 December 2021

98. On 2 December 2021 the claimant received documents from lawyers for the SLT. On 6 December her representative sent her responses to those documents. The claimant received an invitation from Ms Whiting to attend an investigation meeting in Mr Morgan's grievance to take place on the same day as her dismissal meeting before Mr Martin's panel was due to take place. The claimant's representative wrote to say that she would not attend an investigatory meeting prior to the dismissal meeting, it being too much to face both in one day. The claimant's representative then said she would be happy to attend an investigatory

interview at a date to be arranged regarding the Morgan grievance.

99. HR advisor to the dismissal panel, Ms Merron, checked that her panel members had all the documents they needed and informed them she had been in touch with Mr O Keefe and she was available to meet with them before the dismissal meeting.

16 December 2021 dismissal meeting postponed

100. The dismissal meeting convened on 16 December 2021 with the claimant represented and Ms Merron present to support the panel. One panel member, Mrs Ahmed, had a conflict and so the hearing was postponed to find another member. On 17 December 2021 Mr O Keefe wrote to Ms Merron to say he had heard from Mrs Ahmed about the hearing and the need to find another panel member. He said he had called a special governors' meeting to discuss finding another member. He said:

> *"I will make it clear to governor colleagues that the future of Kings Road hinges on this hearing. We must have a strong presence on the panel."*

101. On 20 December he wrote again to Ms Merron. Mr O Keefe said:

> *"Confidentially, she (Mrs Ahmed) shared an uncertainty with me about Peter Martin as her impression was he was leaning towards management blame for the situation rather than Mrs Mairs' conduct……reinstatement of Andrea Mairs cannot be an option in the light of all the outcomes …. I'm going to stress to governor colleagues…putting it bluntly… they have to stand up and be counted……next steps have to be carefully calculated…no room for error."*

102. On 22 December 2021 Mr O Keefe then confirmed to Ms Merron that the governors had chosen Mrs Rosie Harris to replace Mrs Ayeesha Ahmed. In that letter he asked

> *"When she (the claimant) submits her grounds for appeal and presumably this has to be a factual error or procedural error, who decides whether she has made a case? ..this SOSR route is unusual….I thought it might be the chair of governors with advice from HR and solicitors…perhaps you could advise."*

5 January 2022 invitation to investigation

103. The claimant was invited to attend a meeting on 10 January 2022. At that meeting Sarah Whiting read out Mr Morgan's grievance and the claimant set out her account of the conversation with Mrs S. Ms Whiting concluded that she was unable to say what had been said in the conversation and by whom. She concluded that the claimant had engaged in a conversation in which the strong implication was that she was being restricted from working at the school and that this could be due to racism. Ms Whiting made a written report and recommended that the

panel should take the matter into account in reaching its decision on irretrievable breakdown at the dismissal hearing.

Dismissal Hearing 28 January 2022

104. The claimant was represented at the hearing by Ms Morton a Regional Officer of NEU. The panel was chaired by Mr Martin. His panel comprised himself and Mrs Trotter, a governor and Ms Dukali, a governor. Ms Merron attended as HR advisor to the panel and Ms Lawson attended as clerk and note taker.

105. The procedure was that the claimant began, presenting her case against her own dismissal, reading from a written statement. She said she could return and mediate with each SLT member individually and work with them professionally but that SLT were refusing to mediate. Mr Martin questioned the claimant about why she would not mediate earlier in the process and had not gone back to School during her long absence to seek to mediate, suggesting it was disingenuous of her not to have done so or offered to mediate, even though off sick, until the dismissal hearing.

106. There was no one to present a management position. The panel had Ms Long's report but no member of SLT nor the Head Teacher attended to present the management case for dismissal based on irretrievable breakdown.

107. The panel heard from Ms Whiting that she had been unable to reach a definitive conclusion as to who had said what in the conversation between the claimant and Mrs S but, she argued, that the fact of a one hour conversation plus a strong implication that the content was around the claimant being restricted from working possibly due to racism at the top, was relevant to the irretrievable breakdown.

108. The claimant then gave a closing statement. She emphasised that none of the content of the SLT grievance had been put to her before that grievance was lodged. She pointed out that the recommendations from Mr Hanif's report had not been actioned and that moving to a dismissal hearing without having provided the coaching that was recommended would be unfair. The claimant set out her long service and dedication to her role and unblemished teaching record. Her representative pointed to character references she had provided and reiterated that the claimant could go back to work and work professionally.

109. Ms Merron said that panel would aim to have a decision quickly but that there was no relevant time frame in a policy document as this was a Some Other Substantial Reason dismissal and not within policies. The panel adjourned to consider its decision. It was advised by Ms Merron. The panel made a unanimous decision that the relationship between the claimant and the six leaders of SLT and Ms Grimsley and Mr Morgan had irretrievably broken down and it went on to conclude that the claimant be dismissed.

Reasons of Mr Martin's panel

110. The panel found no evidence that the claimant would change her behaviours, those set out in Lauren Long's report. It recorded that the claimant had failed to recognise the impact of her going over the head of the head teacher to the governors and that this amounted to a lack of respect. It concluded there was a breakdown and it was irretrievable because SLT were refusing to work with the claimant.

111. Mr Martin, supported by HR, wrote a long dismissal letter dated 28 February 2022 setting out his reasons in full. His panel agreed with Lauren Long's findings and Mr Hanif's finding that her allegation of "blackophobia" in the counter grievance was made in bad faith. Mr Martin said:

> *"We agree with Ms Long's conclusion that your counter grievance…..racism and blackophobia….was raised by you in bad faith…..and without any substance ,….led to the exacerbation of a pre-existing relationship breakdown beyond repair…….the panel does not consider that your counter-grievance caused the irretrievable breakdown ….and instead finds…the relationship was already damaged beyond repair…..you demonstrated no intention to repair this relationship…refused to engage in mediation when SLT were so willing……and raised a counter-grievance……..the relationship has irretrievably broken down as a result of your actions over a prolonged period of time…. As evidenced in the upholding of the SLT's original grievance against you…."*

112. The letter went on to say that the panel had taken into account Ms Whiting's findings that the claimant made inappropriate comments to a parent from which it would be reasonable to infer that the claimant was absent from work due to racism in the School. Mr Martin concluded this was further evidence of breakdown of relationship. The panel took into account character references from parents and colleagues but discounted them as they did not speak to the relationship with the SLT. The letter said:

> *"The panel have also considered whether there are any alternative options to dismissal in the circumstances and have concluded there are none…."*

113. The letter set out alternates all based at Kings Road School and said why they would not be viable; because of the need to work with SLT. It concluded that there was no way that the claimant could return to School and work positively and professionally with SLT. The letter said:

> *"It is evident …that SLT…no longer wish to engage in mediation on account of your initial refusal and the impact that your handling of matters in response to their grievance has had on them and their wellbeing."*

114. He was saying, the reason you can't come back and mediate with them individually is because your counter grievance in which you allege racism and blackophobia made them ill and caused them never to want to work with you again, that is why you have to be dismissed.

115. On 28 February 2022, after 5.00pm, the School emailed its outcome to the claimant. It said, *"You are entitled to 12 weeks' notice …your employment will end on 30 April 2022".* It gave notice and time limits for appeal. The claimant read the letter on 1 March 2022. The claimant was dismissed. The reason given was irretrievable breakdown in relationship.

17 March 2022 the claimant appeals against her dismissal

116. The claimant appealed her dismissal in writing in March 2022. She remained off sick and did not return to School. In May 2022 the claimant received a salary payment. After that she received no further pay. The claimant was invited to attend an appeal hearing to take place on 2 September 2022. Her grounds of appeal were summarised in writing by Mr O Keefe when inviting her to an appeal hearing, as follows:

a. As at the date of the dismissal hearing one panel member had not heard the recordings of the interview between the claimant and Lauren Long

b. By the date of the deadline for appeal the claimant had not received minutes of the December and January dismissal hearings.

c. The decision to dismiss is flawed because the claimant indicated a willingness to work with former colleagues constructively and professionally

d. The School should have implemented the Hanif recommendations before taking a decision to dismiss

e. The decision to dismiss was discriminatory

f. Claims of structural racism within the School were ignored by the disciplinary (Mr O Keefe's word) panel

g. The decision to dismiss was victimisation

117. The matter went to an appeal hearing before a panel chaired by Mr Balme. His panel members were Ms Smith, governor and Mr Wilson, governor and HR support was provided to that panel by Ms Whiting, who had investigated the grievance against the claimant and recommended it contributed to irretrievable breakdown. The claimant was represented again by Ms Morton of NEU and there was a note taker clerk Mr Britton. Ms Morton had written to the appeal panel before the hearing saying:

> *"We believe that the panel failed ….in choosing to dismiss without first ascertaining whether enacting the recommendations (Hanif) may repair the professional relationships. This decision is of serious detriment to Andrea and we therefore ask the governors on this panel to …overturn…that decision and reinstate Andrea.."*

Ms Morton said:

> *"Andrea has repeatedly accepted the recommendations ….the suspension and subsequent dismissal have been triggered by SLT's threat to engage in a wild cat strike…."*

118. Mr Martin did not attend the appeal hearing to present his panel's case for dismissal. The claimant set out that but for her dismissal she would have had 21 years of service with a clear performance record and no disciplinary issues. She was willing to return and had set out that she would mediate with each SLT member individually and work professionally. She said her dismissal was victimisation for having brought her grievance. She said that the decision was hasty as the recommendations from the Hanif investigation had not been put in place. The claimant said alternatives to dismissal were available and to move straight to dismissal was unfair. She asked what alternatives to dismissal the dismissing panel had considered. She accused the dismissal panel of structural racism in failing to even consider that she may experience racism and in dismissing her.

Appeal outcome letter 18 October 2022

119. On 18 October 2022 Mr Balme sent his letter setting out his reasons for upholding the decision to dismiss. He addressed some procedural points that had been made about recordings and transcripts not being accurate and delay in the provision of notes and found they made no material difference to any outcomes. Mr Balme found the dismissal panel was reasonable in concluding that the claimant had not wanted to mediate. The letter said her sickness absence was why the recommendations from the Hanif report had not been actioned and criticised her for not having sought to mediate during her sickness absence. It said the decision was not over hasty as she had had a long time off sick during which she could have engaged in mediation.

120. Mr Balme said:

> *"You were dismissed on the grounds of there being an irretrievable breakdown between you and SLT. We do not accept this was caused by you raising a grievance…..we accept the Dismissal Panel's findings that there was clear evidence of such a breakdown which preceded your grievance."*

121. Both the dismissal and appeal panels found the relationship was irretrievably broken down before the counter-grievance and yet criticised the claimant for failing to mediate after the counter-grievance when she was off sick.

122. The claimant applied for work and a reference request went to Mr Morgan. Mr Morgan answered YES to a question were there any disciplinary proceedings. He says Ms Mairs was dismissed in May 2022 under some other substantial reason.

123. The claimant went to ACAS and brought her Tribunal complaints.

Relevant Law

124. Section 98 Employment Rights Act 1996 provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) The reason (or, if more than one, the principal reason) for the dismissal; and**
>
> **(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it –**
>
> **a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;**
>
> **b) Relates to the conduct of the employee;**
>
> **c) Is that the employee was redundant; or**
>
> **d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

125. The burden of proof lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2). According to Cairns LJ in Abernethy v Mott, Hay & Anderson [1974] ICR 323:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

126. This requires the Tribunal to consider the mental processes of the person who made the decision to dismiss.

127. In Linfood Cash and Carry v Thomson

> **"The Tribunal must not substitute their own view for the view of the employer, and thus they should be putting to themselves the question -could this employer, acting reasonably and fairly in these circumstances properly accept the facts and opinions which it did? The evidence is that given during the disciplinary procedures and not that which is given before the Tribunal"**

128. Whether the reason was a substantial one is for the tribunal to answer, using its common sense and experience, and this can only be attacked on appeal if the tribunal's decision is so obviously wrong that it must have misdirected itself.

129. Where the employer does show a potentially fair reason for dismissing the claimant the question of fairness is determined by section 98(4).

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> a. **depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and**
>
> b. **shall be determined in accordance with equity and the substantial merits of the case."**

130. In Iceland Frozen Foods Limited v Jones [1982] IRLR 439**,** Browne-Wilkinson J formulated the correct test in the following terms:

> **"…the correct approach for the Industrial Tribunal to adopt in answering the question posed by Section 98(4) Employment Rights Act 1996 is as follows:**
>
> **(1) The starting point should always be the words of Section 98 (4) themselves;**
>
> **(2) In applying the section the Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;**
>
> **(3) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;**
>
> **(4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take the one view, another quite reasonably take another;**
>
> **(5) The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."**

131. The Tribunal must determine whether dismissal was a response that no reasonable employer could have adopted in the circumstances. It is not for the tribunal to substitute its own opinion as to what was reasonable for that of the employer Alidair Ltd v Taylor, [1978] IRLR 82**.** The Court of Appeal later held that the range of reasonable responses test applies not just to the substantive fairness of the decision to dismiss but also to the fairness of the procedure Whitbread plc v Hall [2001]EWCA Civ 268. In Tayeh v Barchester Healthcare Limited 2013 EWCA Civ 29, the Court of Appeal affirmed the "band of reasonable responses" test.

132. In London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220 Mummery LJ reminded tribunals that it is all too easy to slip into a substitution mindset. A tribunal must avoid conducting its own fact-finding forensic analysis. The real question is whether the employer acts fairly and reasonably in all the circumstances at the time of the dismissal.

133. In some other substantial reason cases the reasonableness will itself be linked to the nature of the reason for dismissal. Although doubt has been cast on the application of The ACAS Code on Disciplinary and Grievance Procedures to some other substantial reason dismissals commentary in Harvey on Industrial Relations considers it is likely to apply so that the Tribunal will have regard in assessing reasonableness to whether or not consultation took place, warnings were issued, alternates considered and whether there was consistency in the employer's decision making. The Tribunal will also have regard to whether or not the employee was given the opportunity to appeal.

134. The ACAS Code on Disciplinary and Grievance Procedures provides at paragraph 4:

- **Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.**
- **Employers and employees should act consistently.**
- **Employers should carry out any necessary investigations, to establish the facts of the case.**
- **Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.**
- **Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.**
- **Employers should allow an employee to appeal against any formal decision made.'**

135. In some other substantial reason cases the Tribunal should consider the reasonableness at the time of dismissal St John of God Care Services Limited v Brooks 1992 IRLR 546 and all the way to expiry of the notice to terminate Alboni v Inde Coope Retail Limited.

136. Polkey v AE Dayton Services Limited [1987] IRLR 50 HL established that where a claimant is successful a reduction may be made to an award on the basis that if the employer had acted fairly the claimant would have been dismissed in any event at or around the same time. This may take the form of a percentage reduction, or it may take the form of a tribunal making a finding that the individual would have been dismissed fairly after a further period of employment (for example a period in which a fair procedure would have been completed). The question for the tribunal is whether the *particular employer* (as opposed to a hypothetical reasonable employer) would have dismissed the claimant in any event had the unfairness not occurred.

137. The Employment Rights Act 1996 at section 122(2) provides for a reduction in the basic award because of any conduct by the claimant before the dismissal

> **(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**

Section 123(6) provides for deduction from compensatory award:

> **(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**
>
> **(2) The loss referred to in subsection (1) shall be taken to include —**
>
> **(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and**
>
> **(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.**
>
> **(3) ….**
>
> **(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.**
>
> **(5) ….**
>
> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.**

138. Section 97 Employment Rights Act 1996 defines the effective date of termination.

> **(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—**
>
> **(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,**
>
> **(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and**
>
> **[(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect].**
>
> **(2) Where —**
>
> **(a) the contract of employment is terminated by the employer, and**
>
> **(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),**
>
> **for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.**
>
> **(3) In subsection (2)(b) "the material date" means —**
>
> **(a) the date when notice of termination was given by the employer, or**

> **(b) where no notice was given, the date when the contract of employment was terminated by the employer.**

139. In Gisda Cyf v Barratt 2010 IRLR 1073 the Supreme Court determined that the effective date of termination was the date on which the employee actually read the letter terminating the employment or had a reasonable opportunity to do so.

140. Section 27 Equality Act 2010 defines victimisation

> **1. "A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act."**
>
> **2. Each of the following is a protected act –**
>
> **(i) bringing proceedings under this Act;**
>
> **(ii) giving evidence or information in connection with proceedings under this Act;**
>
> **(iii) doing any other thing for the purposes of or in connection with this Act;**
>
> **(iv) making an allegation (whether or not express) that A or another person has contravened this Act.**

141. 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. This provision does not require any form of comparison. In Saad v Southampton University Hospitals NHS Trust [2018] IRLR 1007 the test was held to be whether or not someone acted honestly. This interpretation was followed by HHJ Auerbach in Kalu v University Hospitals Sussex NHS Foundation Trust [2022] EAT where he suggested that for an allegation not to be made in bad faith the claimant must believe in the truth of the allegation he is making. The commentators in Harvey suggest that this is going too far and in effect imposes a test of honest, good faith, which is not what the statute says. An allegation made dishonestly will be made in bad faith but as the commentators suggest:

> ***"Surely if the claimant, for example, was unsure as to the truth of an allegation but felt the matter was important and should be reported to others so that it could be investigated, that would be a good faith allegation."***

142. If it is shown that a protected act has taken place then the Tribunal will consider what detriments have occurred. Detriment is not defined in the Equality Act 2010 but is considered akin to unfavourable treatment, disadvantage or a "bad thing" happening to the claimant and is to be given the ordinary meaning of the word in the sense that the act complained of is detrimental to the claimant.

In Warburton v Chief Constable of Northhamptonshire [2022] ICR 925 Griffiths J in the EAT restated the test on detriment:

> **The key test is: "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" Shamoon v Chief Constable of**

the Royal Ulster Constabulary [2003] ICR 337 HL applied. Detriment is to be interpreted widely in this context."

143. If detriment is established then the question arises as to the relationship between the protected act and the detriment. Use of the term causation is to be deprecated. In Warburton the EAT at paragraphs 61 – 75 set out the relevant case law and restate the correct test. It is one of "significant influence". **"The question was whether the protected act had a significant influence on the outcome**. Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL, Nagarajan v London Regional Transport [2000] 1 AC 502, Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 and Page v Lord Chancellor [2021] ICR 912 CA were considered and applied.

144. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

145. The reversal of burden of proof applies to a claim for victimisation: If the claimant has established sufficient facts, which in the absence of any other explanation, point to a breach having occurred, in the absence of any other explanation, the burden shifts onto the respondent to show that he or she did not breach the provisions of the Act. This was applied to victimisation law by the Court of Appeal in Greater Manchester Police v Bailey:

> **"The burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act: see *Madarassy*, per Mummery LJ at paras. 54–56 (pp. 878–9)."**

146. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

147. Section 13 Employment Rights Act 1996 provides

> **(1) An employer shall not make a deduction from wages of a worker employed by him unless —**
>
> **(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
>
> **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**
>
> **(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised —**

> **(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
>
> **(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.**
>
> **(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.**
>
> **(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.**
>
> **(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.**

Submissions

148. Mr Moretin submitted for the claimant:

a. That her counter grievance was not made in bad faith. She believed in the allegations she was making. Her moment of realisation was when speaking to her union representative and that explains why she had not complained sooner. The things she complained about did happen, the respondent does not dispute them.

b. That the counter grievance was the root cause of the refusal of the senior leadership team to work with the claimant. The counter grievance leads to the chain of events that is the effective cause of each of the detriments, the counter grievance is a significant influencing factor on each detriment and dismissal.

c. That the chronology speaks of the causal relationship; the Long investigation comes after the SLT say they wont work with her. The Hanif investigation finds the grievance was made maliciously and recommends a SOSR dismissal process. Her suspension and the Long investigation are because of her allegation of racism in the counter grievance, the chronology shows that and the invitation to dismissal hearing flows from the Lauren Long investigation into the breakdown. Mr Martin accepted in cross examination that the counter grievance was part of the reason for the irretrievable breakdown, and not a trivial part. That is enough to shift first stage burden of proof in section 136 and it is then for the respondent to show a non discriminatory reason for the breakdown.

d. That the unfair dismissal process was fundamentally flawed because there was only ever going to be one outcome and that was dismissal. Mr Martin said he needed an act of contrition in order not to dismiss and that shows that the outcome was predetermined.

e. Mr Martin failed to consider lesser sanctions than dismissal, failed to take into account: her health, her ability and willingness to engage in mediation, he did not check the timing of offers of mediation or their restatement, he attached weight to the passage of time and held that against her but she was off sick.

f. That the decision to dismiss was outside range of reasonable responses.

g. That there was no communication to The Council, no redeployment efforts or request and this something that no reasonable employer would have done.

h. That it is fundamental to fairness that a person must not be dismissed for raising race discrimination and that the claimant was dismissed because of her grievance. That the counter grievance was the reason for dismissal and that cannot be a fair reason justifying dismissal.

i. That there should be no Polkey v AE Dayton Services Ltd [1987] UKHL 8 reduction.

j. That the Tribunal must accept that apart from this process there was no other evidence of the claimant being dismissed except evidence of the respondent that the SLT wanted to mediate and only decided it wouldn't work with her after her counter grievance.

k. That the Hanif investigation report is lacking and does not substantiate the allegations against the claimant

l. That the Tribunal should draw an adverse inference from Mr Morgan's absence at Tribunal. That Mr Morgan's own grievance and the timing of it shows an agenda to remove the claimant .

m. That senior colleagues did not address concerns she had about racism and were afraid that they would be accused of being racist …..her race, her black skin, affected the way they reacted to her…. This fear came to fruition in their response to her grievance and they then refused to work with her again, which led to her dismissal.

The Second Respondent's submissions

149. Mr Boyd referred to the following authorities

Gallacher v Abellio Scotrail Limited 2020 where it was held that a SOSR dismissal could be fair even in the absence of any fair procedure.

Abdi v TC Facilities Management [2022] Employment Tribunal 1600217-21 which shows that context can matter as to whether or not a phrase is racist and amounts to harassment, where it was found at first instance at paragraph 172

With regard to the comment 'cheeky monkey', whilst we accepted that in some domestic circumstances such a comment would not necessarily be inherently related to race, e.g. where a young child might affectionately be referred to as such by an older relative, we considered that in this work context, where there was a disagreement between two workers and the recipient of a comment made by a white employee is black, that such a comment is potentially inherently related to the recipients race, widely being regarded as a racial slur.

CLFIS v Reynolds 2015 EWCA Civ 439 para 36 on the separability principle so that any discriminatory motive of anyone other than the decision makers must not, in a victimisation dismissal, be attributed to the decision makers.

Warburton 2022 ICR 925 on the correct test of "significant influence" in a victimisation detriment complaint including a victimisation dismissal.

150. Mr Boyd made the following submissions:

a) That the test as to the reason for dismissal in victimisation law is not a "but for" test, not *but for the counter grievance she would not have been dismissed*. The *reason why* is the correct test. Mr Boyd says the Tribunal must ask what was the reason for each detriment.

b) That Mr Martin was free from any discriminatory taint. The Tribunal was directed to para 36 in CLFIS and Mr Boyd submits that The Equality Act can only attach where the individual did the act motivated by protected characteristic themselves.

c) That there should be no adverse inference drawn from the respondents not calling Mr Morgan as Mr Morgan was not the dismissal decision maker nor appeal manager and was not a party to the SLT grievance.

d) That there should be no adverse inference drawn of any failure to disclose (Mr Morgan's alleged file containing 37 instances of the claimant complaining) as there has been no specific disclosure request.

e) That the Tribunal must be careful not to engage in substitution of its view for that of Mr Martin.

f) That in relation to Polkey v AE Dayton Services Ltd [1987] UKHL, should the claimant succeed in unfair dismissal then the very idea that relationship could have continued is ludicrous and the deep impact of allegation of blackophobia must be that the relationship could not have continued and there is a 100% likelihood it would have broken down and

the claimant dismissed for a lawful reason.

g) That the protected act in the victimisation complaint, being The claimant grievance and addendum was done in bad faith, that the claimant did not believe in the truth of what she alleged.

h) That characterisation of the grievance as "change or go" by the Tribunal is unfair, that the SLT at the point of their grievance wanted mediation to take place and to work.

The first respondent's submissions

151. Mr Bronze's submissions for the first respondent were that the relationship had clearly broken down and this was the reason for the dismissal. He referred the Tribunal to Perkin v St George's Healthcare NHS Trust [2005] EWCA 1174.

152. On the notice point he submitted that the claimant, having more than 8 years' service, was entitled to statutory notice of 12 weeks on termination. On Polkey v AE Dayton Services Ltd [1987] UKHL 8 he submitted that a fair dismissal was inevitable within weeks.

153. On the victimisation complaints Mr Bronze said that *the protected act must be more than simply causative of the treatment in the but for sense, it must be the real reason* (his emphasis*).* He argued the separability point referring to Martin v Devonshires Solicitors UK EAT/0086/10 to argue that the claimant was dismissed because of the number of complaints she had made and the manner in which she had made them which itself had caused a breakdown in relationship. These were the reasons for dismissal, he argued, and were "properly severable" he said from the protected acts. Mr Bronze also referred the Tribunal to CLFIS v Reynolds citing that the focus must be on the motivation of the actual decision maker.

Applying the Law to the Facts

154. The subheadings below use the numbering from the List of Issues to show where each issue has been addressed.

Unfair dismissal

Was there a dismissal? Who was the dismissing officer ?

155. The Tribunal has reached a unanimous decision on unfair dismissal but for different reasons. The Tribunal agreed that the claimant was dismissed by a letter dated 28 February 2022, seen by her on 1 March 2022. The majority decision is that Mr Martin who had chaired the disciplinary hearing panel was the decision maker. Applying Abernethy it is the factors operating on his mind as to reason for dismissal that are relevant to the Tribunal's reasoning on unfair dismissal.

Minority view on identity of decision maker

156. Dr Tirohl took the view that Mr Martin did not make his own decision. He was influenced by manipulators Mr O Keefe, Ms Long and HR Advisor Ms Merron. Her grounds for this view, which was not advanced by the claimant, were that

a. Mr O Keefe had delivered papers in the case to Mr Martin and must have had conversation with him about the context at that time and must have given Mr Martin the clear instruction that Ms Mairs was to be dismissed because this was a view that Mr O Keefe had expressed in correspondence.

b. Mr Martin saw Ms Long's report and it recommended dismissal. The letter convening the hearing referred to a "dismissal meeting" suggesting dismissal was the predetermined outcome.

c. Ms Merron, who had seen Mr O Keefe's letter advised the panel at the dismissal hearing and carried, or attempted to carry, Mr O Keefe's agenda to dismiss the claimant to that hearing and influenced the decision.

d. Mr Morgan's grievance and Mrs Whiting appearing at the hearing show Mr Morgan exerting influence over Mr Martin to dismiss.

e. Mr Balme on appeal was also influenced by Jayne Merrron whether consciously or unconcsiously because Ms Merron is present to further the exit agenda of Mr Morgan and Mr O Keefe

Majority view on identity of decision makers

157. The majority reject this view because (i) it found Mr Martin to be a credible witness on this point who said he was not influenced or manipulated by anyone and answered questions about the papers having been delivered to him by Mr O Keefe. The majority accepted his evidence that there had been no conversation about the content but just a brief conversation about arrangements and timings for the hearing and (ii) Mr O Keefe's letter, the correspondence which Dr Tirohl relied on as evidence of Mr O Keefe exerting influence over decision makers, was sent on 20 December 2021, it *postdated* the delivery of the papers. There was supposed to have been a hearing on 16 December 2021, the papers were delivered before that and it had to be reconvened because of a conflict for one panel member. It was *after* that adjournment that Mr O Keefe wrote his letter. The majority could not infer from a letter sent *after* what was to have been the dismissal hearing to the HR professional and not to Mr Martin, that Mr O Keefe was instructing Mr Martin to dismiss. The majority accepted Mr Martin's oral evidence under cross-examination that the first time he saw those correspondences from Mr O Keefe was in the bundle in preparation for this final hearing.

158. On the minority point at 156b) above the majority found it was appropriate that Ms Long's report on irretrievable breakdown in the relationship was before the decision making panel chaired by Mr Martin. The Tribunal accepted his evidence that he was free to accept or reject its recommendation. Mr Martin saw the letters from the six senior leaders and reached his own view on irretrievable breakdown

based on the content of those letters.

159. On the point at 156c) there was no evidence from Ms Merron and the majority saw nothing from which they could infer that Ms Merron, an HR Professional, had or would seek to influence a panel's decision. There was direct evidence from Mr Martin and Mr Balme which the majority accepted that they had not been influenced by Ms Merron or anyone else to make any decision other than their own.

160. On the point at 156d) the majority find that the presence of Mrs Whiting at the dismissal hearing and the Morgan grievance made no material difference to the outcome. The claimant would have been dismissed by Mr Martin in the absence of the Morgan grievance because Mr Martin based his decision on the breakdown in relationship with SLT.

161. On the point at 156e) that Ms Merron was present at the appeal hearing to further the exit agenda of Mr Morgan and Mr O Keefe and to influence Mr Balme, the majority found no evidence whatsoever to substantiate that view. The Tribunal did not hear from Ms Merron so this point could not be put to her. The Tribunal heard from Mr Balme and accepted his evidence that he had made his own decision.

LOI1 *Has the Respondent established a potentially fair reason for the dismissal as set out in s.98(1) and 98(2) of the Employment Rights Act 1996?*

The majority decision

162. Employment Judge Aspinall and Mrs Roscoe accept Mr Martin's evidence, **the reason for dismissal was that the relationship had irretrievably broken down.** The content of the letters was so strong that it was clear that the senior leadership would not work with the claimant.

The minority view on reason for dismissal

163. Dr Tirohl believed that the real reason for dismissal was that the SLT and Head Teacher and Mr O Keefe, Lauren Long and Ms Merron were motivated to remove the claimant because she complained about racist behaviours towards herself and others and that this reason was the real reason for dismissal.

164. Dr Tirohl believed Mr Martin to be a less than credible witness when he said he had not spoken to Mr O Keefe about the decision to dismiss. Dr Tirohl believed that Mr Martin was instructed by Mr O Keefe to dismiss the claimant. She rejects Mr Martin's evidence given in cross-examination that he did not discuss the case with Mr O Keefe other than to check he had the right documents and to set dates for meetings and that he made his own decision. Dr Tirohl bases her belief that Mr Martin was manipulated to make the decision to dismiss in Mr O Keefe's email to Ms Merron dated 17 December 2021 at 16.05 in which he states:

> *"The future of Kings Road hinges on this hearing. We must have a strong*

presence on the panel."

And a further email to her dated 20 December 2021 in which he states:

> *"Confidentially, she (Ayshea former panel member) shared an uncertainty with me about Peter Martin as her impression was he was leaning towards management blame for the situation, rather than Ms Mairs conduct. As you appreciate successful management of Kings Road in the future depends on the outcome of these procedures, reinstatement of Andrea Mairs cannot be an option…."*

165. Dr Tirohl concluded that Mr Martin had discussed the case with Mr O Keefe. The majority view is that is not something that that can be concluded from the email as:

(i) This is only half of an email exchange and is not inconsistent with the evidence given by Mr Martin;

(ii) the email says Ayshea told Mr O Keefe that Mr Martin was leaning towards management blame.

(iii) The email exchange comes *after* the date that had been set, 16 December 2020, for the dismissal meeting.

166. The majority view was that it was enough in unfair dismissal reasoning, for Mr Martin to conclude, as he did from the SLT letters, that the situation had irretrievably broken down. The minority view was that the reason for breakdown was relevant and was that the claimant complained about racism and that complaining about racism cannot be a potentially fair or substantial reason for dismissal.

Substantiality of the reason

167. **The majority find that Mr Martin had a substantial reason for dismissal** in the irretrievable breakdown refusal to work with the claimant, it was real and evidenced in writing. Although whimsical or capricious reasons cannot be 'substantial', if the employer has a fair reason which he genuinely believes to be substantial the case will fall within this category: Harper v National Coal Board [1980] IRLR 260*, EAT*. Mr Martin genuinely believed the relationship had irretrievably broken down.

168. The majority decision of the Tribunal finds that Mr Martin was persuaded of the refusal of six senior leaders to work with the claimant. This was a substantial reason as without the SLT coming to school it could not function. The letter of dismissal sets out significant disruption to operational efficiency that would ensue from six members of SLT refusing to work with the claimant. The reason for dismissal amounted to some other substantial reason such as to justify the dismissal of an employee holding the position the claimant held, within section 98 (1)(b).

169. Dr Tirohl's minority view is that a decision to dismiss that flows from SLT refusing to work with the claimant that flows from the claimant alleging racism, cannot be substantial or a potentially fair reason as that would sanction racist dismissals. The majority do not seek to apply a "flows from" approach. An irretrievable breakdown in working relationships, however caused, can be substantial in law and sufficient within section 98 to dismiss. The majority had regard to the existence of, and different provisions and relevant case law in, unfair dismissal law and discrimination law so that a sanction for a racist dismissal exists alongside unfair dismissal law. **For those reasons the majority decision is that there was a potentially fair reason for dismissal.**

LOI1.1 *Did the Respondent act reasonably in treating that reason as sufficient reason to dismiss the Claimant bearing in mind all the circumstances, including the size and administrative resources of the Respondent, equity, and the substantial merits of the case?*

170. The first respondent is the Local Authority, the Council, with significant resource including HR advice. The second respondent is the School with access to HR advice and to its governing body and the provision of external investigators and governors to assist in the conduct of employment processes. It had access to Occupational Health professionals. The Tribunal had regard to the ACAS Code. The Tribunal was satisfied that the claimant knew the case against her, that the position was set out in the invitation to hearing letter and she was warned about the possible outcome of dismissal. She was entitled to make written representations and to bring her representative and was also permitted to bring a friend to the dismissal hearing. She had adequate notice of that hearing, it having been put back.

171. Mr Martin did not see or ask for the OH report despite the claimant saying she had been off sick and not able to mediate. In applying ACAS guidance the Tribunal is concerned that he formed a view that the claimant was disingenuous about mediation based on her not having offered to engage in mediation. Mr Martin accepted in cross examination that the emphasis was on School to check if the claimant had been well enough to mediate or not before forming a negative view about her failure to mediate and that he did not check if that had been done. He did not check to see if any mediation had been offered between August 2020 and April 2021 yet conceded in cross-examination that he had concluded that her failure to mediate was part of the irretrievable breakdown. Failing to check gave the Tribunal cause for concern about the rigour of the decision making process and the extent to which any attention was being paid to what the claimant was saying at the dismissal hearing.

171. The format of the hearing was a cause for concern. The initial invitation to hearing letter had indicated that Lauren Long would attend to present the management statement of case. The hearing was postponed and Ms Long did not attend nor did anyone else to present the management case so that the hearing became very one sided. The panel appear to have predetermined that the relationship had broken down and the claimant should be dismissed from the and

expected the claimant to argue against that. Mr Martin when asked what the claimant could have said to have saved her job said, in cross-examination, *nothing,* that there was *no sign of her backing down*. The Tribunal finds that he had reached a decision that the claimant had to be dismissed because of irretrievable breakdown, itself caused by her counter grievance, and that unless she "backed down" from those allegations in the counter grievance (which he believed had been made maliciously) she could not come back to work. Mr Martin did not ask the SLT letter writers to attend. Mr Martin did not consult each of them individually to check that they would not mediate and the relationship really had broken down.

172. Mr Martin had seen the Hanif recommendations and was referred to them by the claimant who said they had not been acted upon. It was open to him to have maintained the claimant's employment and called for them to be implemented including the recommendation for a disciplinary process. He did not do that.

173. Each of the above taken together render the dismissal unfair. Further, Mr Martin failed to consider a possible alternative of the claimant remaining employed as a teacher in the region, within the LEA but not at The School (where the irretrievable breakdown had taken place). This failing, on its own, renders the dismissal unfair.

174. The claimant was a teacher of over 19 years' service, with an unblemished performance record. No one had taken any steps to address any conduct or performance issues and she was doted on by the children and their parents. The Tribunal accepts the claimant's representative's submission that the School was not reasonable when it moved to dismissal without having referred its proposed course of action to the LEA and without having enquired of the LEA as to its view on dismissal and possible alternatives to dismissal.

175. Mr Moretin took the Tribunal to the claimant's contract of employment which provides that she was employed in the service of the LEA, in effect the first respondent Council, and employed to work at the School. The School Staffing (England) Regulations 2009 SI2009/2680, to which we were referred by the claimant's representative, provide at Regulation 20,

> **(1) …where the governing body determines that any person employed or engaged by the authority to work at the school should cease to work there, it must notify the authority in writing of its determination and the reasons for it.**
>
> **(2) If the person concerned is employed or engaged to work solely at the school (and does not resign), the authority must, before the end of the period of fourteen days beginning with the date of the notification under paragraph (1), either —**
>
> **(a) terminate the person's contract with the authority, giving such notice as is required under that contract; or**
>
> **(b) terminate such contract without notice if the circumstances are such that it is entitled to do so by reason of the person's conduct.**
>
> **(3) If the person concerned is not employed or engaged by the authority to work solely at the school, the authority must require the person to cease to work at the school.**

176. The Tribunal finds, the witnesses having accepted, that the School failed to notify the LEA. If the LEA, in effect the first respondent, had been notified in writing then enquiry could have been made as to the possibility of deployment outside of The School. Whether or not that would have been fruitful remains to be seen but in failing to consider it the second respondent unfairly dismissed the claimant.

177. During the course of the hearing it was accepted that the Tribunal did not have in front of it, and nor had Mr Martin nor Mr Balme at the dismissal and appeal hearings, the witness statements that had been given by members of staff to Mr Hanif in the course of his investigations into the SLT and claimant's grievances nor the witness statements given to Ms Long in her investigation into the breakdown of the relationship between SLT and the claimant. It did not have Head Teacher Mr Morgan's file, which was alleged to exist, of 37 alleged instances of complaints against the claimant or instances of her alleged inappropriate conduct. The Tribunal accepts the oral evidence of Mr Martin and Mr Balme that they each relied on the finding in the Lauren Long report that the relationship had irretrievably broken down. The presence of the above documents would not have undermined their reliance on that finding. The Tribunal finds that the absence of those documents at dismissal hearing and appeal hearing made no material difference to the outcomes. The Tribunal was invited to draw adverse inferences from the absence of those documents and for the reasons above declines to do so.

178. The Tribunal found unanimously that Mr Martin at dismissal acted in a way that no reasonable employer would act, so that the decision to dismiss fell outside the range of responses of a reasonable employer. The fairness of the decision to dismiss must be looked at all the way to appeal. The claimant said that she had not been given the notes of the December and January dismissal meetings and the investigation meeting with Ms Whiting into Mr Morgan's grievance prior to the appeal. This was a failing but made no material difference to the outcome because the claimant and her representative had been present at the dismissal meetings and knew the content of them. The claimant prepared written submissions to the appeal hearing and was heard at it. There were defects as set out above in the dismissal hearing. At appeal Mr Balme could have remedied the defects in the dismissal hearing by looking at redeployment both within the School and within the LEA second respondent. He failed to do so. When asked why he had not done that he replied "*it was not part of our remit to consider giving her her job back".* The following failures also, taken together with each other, meant that the conduct of the appeal was unfair.

(i) Mr Balme did not interrogate the decision making at dismissal. Mr Balme accepted in cross-examination that he did not know whether or not Mr Martin had taken the Morgan grievance findings (Ms Whiting's submission to the dismissal panel) into account in deciding to dismiss. Whilst the Tribunal has found the Morgan grievance position would have made no material difference, the failure of Mr Balme to consider the point showed the Tribunal that his handling of the appeal was cursory.

(ii) The appeal did not look at whether or not the dismissal panel had considered asking each of the SLT members individually whether the relationship was really irretrievably broken and whether or not they would mediate individually. Again, this led the Tribunal to conclude that the appeal lacked rigour.

(iii) The appeal did not look at the dismissal panel's reasoning in criticising the claimant for having failed to mediate whilst off sick. Mr Balme said he had no idea which documents Mr Martin had seen and whether or not Mr Martin had seen an OH report. Mr Balme repeated the criticism of the claimant and attached weight in his decision on appeal to the claimant not having contacted school to ask for mediation whilst off sick.

(iv) The appeal did not consider if the dismissal panel had looked at why the other Mr Hanif recommendations had not been acted on.

(v) The appeal panel did not challenge why no one had attended the dismissal hearing to present a management statement of case so that in effect, the hearing became an argument against dismissal by the claimant.

(vi) Mr Balme did not consider whether Mr Martin had informed the first respondent of School's intention to dismiss and enquired as to whether there might be alternatives short of dismissal within the LEA if not within the School.

(vii) Mr Balme said that the cause of the breakdown was not taken into account either by him or Mr Martin's panel, only the fact of the breakdown. His evidence on this point is rejected. The letter of dismissal shows that the counter-grievance was referred to and taken into account at dismissal.

179. It was Mr Balme's view that the relationship had broken down and that *" the counter claim by Mrs Mairs seemed to make it irretrievable*" Mr Balme said it was not within his remit to consider alternatives to dismissal and when asked did you consider what else the dismissal panel could have done other than dismiss he said no *because the process clearly wasn't going that way.*

180. The Tribunal finds that the appeal fell short of a fair appeal hearing and was a rubber stamping exercise. The appeal outcome fell outside the range of reasonable responses in the above taken together and, separately, in its failure to consider alternatives short of dismissal with the LEA .

Remedy points to assist the parties

181. The parties asked that if the claimant succeeded the Tribunal give a provisional view on Polkey v AE Dayton Services Ltd [1987] UKHL 8 and just and equitable and contributory fault deductions. The following provisional findings are

a majority decision. Dr Tirohl would have made no deductions or reductions whatsoever.

LOI 2.2 *Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

182. The Tribunal would reduce the claimant's basic award to reflect her conduct prior to dismissal. Her letter writing to her Head Teacher was inappropriate, her propensity to escalate matters over her manager's heads and colleagues' heads without giving them adequate time to respond was inappropriate. The Tribunal would reduce the basic award by 33% to reflect the fact that the claimant was a difficult colleague for the reasons set out in the factual findings.

LOI 2.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

183. Applying Polkey v AE Dayton Services Ltd [1987] UKHL 8 the Tribunal finds That Mr Hanif's second recommendation, that there be a conduct investigation, would have been actioned and disciplinary proceedings ensued. The Tribunal then had to speculate as to what was the prospect of dismissal from those proceedings. There was good evidence in the documents before the Tribunal of inappropriate communications. The tone and manner of the claimant's writing to her Head Teacher may have resulted in a disciplinary sanction being imposed. The matters in Mr Hanif's investigation, if substantiated, may also have resulted in a disciplinary sanction being imposed. They were capable, if all taken together, of amounting to gross misconduct but mitigation would be relevant.

184. The claimant was a long serving teacher with no performance issues prior to these proceedings, a good performance in July 2019 despite issues predating that teaching observation and no previous disciplinary issues. The Head Teacher had not addressed her conduct earlier and even when a collective grievance was lodged and investigated and conduct proceedings recommended he did not instigate them. The reality was that there was no appetite to address the claimant's behaviours for fear of being accused of racism. That is not a good reason for a Head Teacher not to address the conduct of staff. It is often said that Judges must have broad backs, so too must Head Teachers. If Mr Morgan or Mr O Keefe had instigated disciplinary proceedings the Tribunal speculated that the process would be likely to have taken 3 months. It could have run concurrently with the other investigations. That is to say that if Mr Martin's hearing had not dismissed the claimant but recommended action on the Hanif conduct proceedings recommendation then it would have taken 3 months from the dismissal hearing outcome letter to get to a conduct hearing. There would likely have been further delays, possibly sickness absence, or delay in convening a panel so that the hearing may not have happened for a further month.

185. The Tribunal finds that within 4 months there would have been a 1 : 3 chance of dismissal. The Tribunal finds that given the mitigation of 19 + years service and no previous disciplinary issue, a final written warning and some training for the claimant would have been the most likely outcome. The Tribunal

would reduce compensation by 33% from 4 months after the date of the letter of dismissal to reflect the fact that the claimant had 1: 3 chance of being dismissed. The contractual provisions for notice will need to be considered, specifically if they apply to summary dismissals, and if so then adjustments made.

2.3.6 If the claimant was unfairly dismissed did she cause or contribute to the dismissal by blameworthy conduct?

186. For the compensatory award the claimant's conduct must be "culpable or blameworthy" and have caused or contributed to the dismissal. The Tribunal makes no deduction or reduction for the compensatory award as it finds that the claimant's conduct did not cause or contribute to the irretrievable breakdown in the relationship. It was caused by the excessive reaction of SLT to the counter grievance. They could have reacted reasonably (even to the allegations of racism and blackophobia) and remained focused on the claimant's behaviours and pressed for disciplinary proceedings on the claimant's behaviours on her return to work. On the evidence before the Tribunal they did not do that. Instead they reacted, as the claimant's representative suggested, by way of threat of a "wild cat" strike.

Unauthorised deduction from wages and breach of contract, notice pay

LOI 1.2, 5.1, 6.1 *On what date did the Claimant's dismissal take effect? The Respondent asserts that notice of termination was served on 28 February 2022 and her employment, including notice, ended on 30 April 2022. The Claimant asserts that notice of dismissal took effect on the date she had a reasonable opportunity to read the letter on 1 March 2022.*

187. The claimant saw and read the letter on 1 March 2022 That was her first reasonable opportunity to see the letter it having been sent by email during out of office hours the preceding evening. Applying Gisda Cyf, notice is given when it is read. Notice took effect on 1 March 2022. The claimant did not deliberately avoid opening the email on 28 February. Even if she had read it on 28 February that would not have been determinative of a notice point.

188. As an employee of almost twenty years standing she was entitled to twelve weeks' notice *expiring at the end of a term*. Whether given on 28 February or 1 March 2022 the notice given was not 12 weeks' notice expiring at the end of a term. 1 March 2022 fell during the Spring Term which ran from 1 January to 30 April. The date to have given notice would have been twelve weeks before the 30 April.

189. The notice given was not given in accordance with the contractual provisions and Burgundy Book. After 1 March 2022 the next opportunity on which to give notice would be twelve weeks from the end of the summer term, 31 May 2022, so that employment would terminate on 31 August 2022. Ms Mairs was therefore entitled to be paid until 31 August 2022. Those were wages properly payable to her within section 13 Employment Rights Act 1996. In so far as she received less pay than she would have had if she had remained employed to 31

August 2022 then **she has suffered a breach of contract and an unauthorised deduction from her wages.** Amounts will need to be clarified at remedy stage.

VICTIMISATION

LOI 3.1, 3.1.1 *Did the Claimant do a protected act as follows: Raise a grievance on 6 October 2019, alleging that members of the Senior Leadership Team discriminated against her because of her race or colour?*

190. Section 27 (2)(c) defines a protected act as doing any other thing for the purpose of or in connection with the Equality Act 2010. The claimant's counter grievance which she lodged by a letter sent by her Trade Union Regional officer on 7 October 2019 together with attachments amounts to a protected act. The letter said " I am concerned she is a victim of racial discrimination" and the attachments labelled (1) examples of racial discrimination (2) leadership examples and (3) pre interview notes for meeting on 10 October 2019, each cited examples of racial discrimination. **The Tribunal finds that taken together the letter and attachments amount to a protected act**.

191. The claimant added to her grievance in a letter dated 18 November 2019. It is in this letter that she speculates as to the motivation of the SLT in lodging a collective grievance. She uses the word "blackophobia". **The Tribunal finds the 18 November 2019 addendum is a protected act.**

LOI 3.2, 3.7 *If so, did the Claimant give false evidence or information, or make false allegations in bad faith?*

192. Giving false evidence or information, or making a false allegation will not qualify under Section 27 as a protected act if it is made or given in bad faith. The respondent submitted that the claimant's grievance and attachments and letter of 18 November 2019 were made in bad faith. The Tribunal rejects that submission. Applying Saad v Southampton Hospitals NHS Trust UKEAT/0267/16 and Kalu v University Hospitals Sussex NHS Foundation Trust [2022] EAT 168 the Tribunal looked at *the state of mind of the claimant and in particular whether they were dishonest in the sense that they did not believe in the truth of the allegation they were making.* The case law requires that a claimant be cross-examined on this point and she was. The claimant gave clear oral evidence that she believed the truth of her allegations in her protected act. The Tribunal looked at each of them.

193. The allegations in her grievance and addendum are set out at paragraphs 56 -60 above. The Tribunal finds that the claimant honestly believed that SLT motivation was because they were afraid that if they raised a concern with her she would accuse them of racism. This is what she meant by use of the term "blackophobic". She honestly believed that SLT would not have lodged a collective grievance about matters in their grievance without having previously raised them with the individual teacher on a one to one basis, if that teacher had not been black. She believed and believes to this day that was true.

194. The Tribunal accepts Ms Mairs' evidence on this point because (i) she was a credible witness; she spoke calmly and was measured, not overstating what amounted to her supposition as to their possible motivation for what she perceived

to be a heavy-handed act, (ii) her evidence was corroborated by what she wrote at the time in the grievance and addendum and (iii) her evidence was corroborated by the respondent's witnesses Ms Thirkell and Ms Hoodless who accepted that they had not put the concerns in their grievance to Ms Mairs prior to lodging the grievance and that this was both because she was "difficult" and because they were worried she would accuse them of racism and (iv) the collective grievance itself recited that:

> *"a large number of staff have commented that they are afraid to use the word black in any context in front of the claimant for fear of her misinterpretation of the term."*

and in the outcomes section stated:

> *"Our wish is that the claimant continue working within our organisation but in a positive and reasonable way……all staff should feel comfortable to discuss views….without fear of being labelled racist or unprofessional by The claimant."*

195. The SLT fear of being accused of being racist was there in the grievance. It corroborates the claimant's honestly held view in her counter grievance and addendum that her colour played a part in the decisions SLT made as to how they addressed what they perceived to be her "intimidating and unreasonable behaviour". The claimant believed in the truth of the matters she raised.

196. The respondent referred to the claimant' grievance as "the counter-grievance", to advance its argument that the claimant' grievance was in bad faith because it was retaliatory and that because she had not raised them before the SLT grievance, she had not previously thought the allegations were racist. The Tribunal accepts the submission that the claimant accepted in cross-examination that she thought she had had a good working relationship with each member of the SLT who later signed the grievance against her, as late as June 2019. The claimant had a good performance review in June 2019. The Tribunal accepts her evidence that choosing not to act on something at the time does not mean that it was not perceived at the time to be racist.

197. The Tribunal accepts the claimant's evidence that she had raised concerns (some of them about race) prior to July 2019, had sometimes escalated matters over the decision makers' head, but had thought those matters, including delicate areas such as the "cheeky monkey" incident and the external training event had been addressed. She had not been spoken to about being difficult or intimidating or unreasonable by any member of SLT prior to their grievance. The Tribunal finds it was not disingenuous of her to think she had a good working relationship with each member of SLT prior to the grievance and it rejects any submission by the respondent that her acceptance of having a good working relationship and believing matters she had raised concerns about to have been concluded meant that she had a purpose (whether retaliatory or otherwise) or motive in lodging her grievance that could in any way amount to bad faith.

<u>The detriments</u>

LOI 3.3, 3.4, 3.6, 3.7 Did the Respondent do the following things and were they done because the claimant had done a protected act :

LOI 3.3.1 Carry out an investigation to consider whether the Claimant's employment should be terminated due to a breakdown of trust and confidence?

198. The respondent commissioned the Lauren Long investigation, acting on Mr Hanif's recommendation on 13 November 2020. An investigation will often be a neutral act, the proper execution of processes so that it could be argued that a claimant would have an unjustified sense of grievance, applying Shamoon, in claiming it amounted to a detriment. However, in this case the Tribunal paid close attention to the chronology of events. An investigation was pre-empted in the SLT grievance itself. The SLT wanted her behaviour investigating. In its outcome section it reads:

> *"Our primary goal is to achieve a positive outcome, whereby the claimant ceases the unreasonable, negative, intimidating behaviour outlined above. Our wish is that the claimant continues working within our organisation, but in a positive and reasonable way."*
>
> *"If this cannot be achieved, then we would like The claimant to seek alternate employment as a last resort if positive changes cannot be made, we would like the Head Teacher / Governing Body to pursue appropriate disciplinary measures …..in order to safeguard the wellbeing of all our staff."*

199. Mr Hanif had recommended an investigation into the breakdown of working relationships when he published his report into the grievances in August 2020. (the relevant facts are at 65 above). No action had been taken on that recommendation at the time. Then an occupational health report on 4 November 2020 said that the claimant could return to work. On 11 November 2020, within minutes of each other (which led the Tribunal to conclude that there was undoubtedly collusion in their preparation), the SLT sent their letters saying that they could not work with the claimant. By 13 November 2020 the claimant was suspended and Mr Hanif's first recommendation, though not his others, was acted upon and Lauren Long was commissioned to investigate the breakdown in working relationships.

200. The Tribunal had regard to the detrimental effect on the claimant. The Lauren Long investigation had a detrimental effect on the claimant because it put in place the process that would prevent the return to work that had been indicated and lead to termination of employment. The Tribunal finds that the decision to investigate, at this time, in the face of a proposed return to work, and startlingly similar letters provided within minutes of each other by SLT, and not having acted on the recommendation before, amounts to a detriment that was done because of the protected act.

LOI3.3.2 The senior leadership team express that they could no longer work with the Claimant if she returned to work from her sickness absence?

201. Ms Hoodless, Ms Hodges, Ms Thirkell, Ms Walls and Ms Meenagh each sent a letter on the evening of 11 November 2020. Ms Grimsley, who had not been part of the SLT grievance, added her letter on 12 November 2020. The Tribunal paid close attention to the content of those letters. They were strongly worded. The Tribunal heard evidence that some of the writers had had little contact with the claimant in the workplace so the highly emotive language used in them would appear to be excessive and overclaiming in impact particularly when referring to health and safety. The striking similarity of content, vocabulary and the timing of the letters as set out above, showed the Tribunal that the writers had colluded to put their letters together. The witnesses who denied this to be the case were not credible on this point. Each of the letters from recipients in this paragraph amounted to a detriment to the claimant.

202. The Tribunal finds that it was those letters that led to the claimant's suspension, the next day, and ultimately dismissal. Mr Martin's panel relied on them, they are referred to in the letter of dismissal as "statements from SLT" and the letters from Ms Meenagh and Ms Walls are quoted in the dismissal letter in some detail at numbered paragraph 2. Mr Martin said in the letter of dismissal "SLT are justified in being fearful of you". The letters were clearly a significant factor in the decision to dismiss.

203. The letters were sent because of the protected act. They referred to it the content of the counter grievance and addendum explicitly :Miss Hodges' letter said *accused me of behaving in a discriminatory, racist, blackophobic manner.* Ms Thirkell's letter said *I would feel at risk of receiving further unfounded complaints.* Ms Walls' letter said *On a personal level, I am deeply disturbed and utterly offended by the abhorrent nature of the allegations made by the employee.* Ms Meenagh's letter said *I am deeply upset and aggrieved at being labelled a "Blackophobe".* Ms Hoodless' letter said *escalated her malicious behaviour, accused members of SLT of racism and blackophobia.*

204. There is a time delay in the chronology here in that the protected acts were in October and November 2019 and the letters sent on 11 and 12 November 2020 but they are sent within a week of the OH report indicating the claimant's imminent return to work. The Tribunal finds that the protected acts were the reason for each of the writers' refusal to work with the claimant, that that view persisted from the dates (unspecified) when each of them became aware of the protected act and was only committed to writing when the prospect of a return to work became a reality.

<u>LOI 3.3.3 Take into account the Claimant's protected act when investigating whether the Claimant's employment should be terminated?</u>

205. The protected act had a significant influence on the findings of Lauren Long, the investigator. The Tribunal did not hear from Ms Long but had her report. She records in her report that the reason she concluded that there had been an irretrievable breakdown was because each member of SLT had said that the submission of the counter-grievance where *AM alleges racism and blackophobia has significantly worsened the pre-existing relational issues*. She concluded that it

was the counter-grievance and SLT response to it that would mean that mediation would not work. The influence of the protected act on Ms Long's recommendation to dismiss is clearly set out in her own report. The respondent took the protected act into account. This was detrimental to the claimant. The recommendation to terminate employment was done because of the protected act and the SLT response to it.

LOI 3.3.4 Invite the Claimant to a dismissal hearing on 28 January 2022?

206. The Tribunal finds that the invitation to a dismissal hearing was detrimental to the claimant. It put her in fear of the loss of her employment. The letter invited her to a hearing to take place off site and to be conducted by a panel of three governors, one an external governor. The letter said,

If it is determined, and without pre-empting the outcome in any way, that the relationship between you and the SLT has broken down irretrievably, you may be dismissed with notice. Any such dismissal would be on the basis of "some other substantial reason".

207. The claimant knew that the Lauren Long report found that there had been an irretrievable breakdown and that it recommended dismissal. The invitation to dismissal hearing was done because of the Lauren Long report, in turn because of the recommendation in that report to terminate employment, because of the SLT response to the protected act. There is a continuous causative link between the dismissal, invitation to hearing, recommendation to terminate, investigation and suspension, SLT response to protected act, imminent return to work, and protected act. The invitation to dismissal hearing is a detriment.

LOI 3.5 , 3.6 Did the respondent dismiss the Claimant by letter on 28 February 2022 because she did a protected act.

208. Applying Warburton the protected act was a significant influence on Mr Martin's panel's reasoning. Mr Martin in cross-examination said:

> *"The accumulation of evidence before us was that there was an irretrievable breakdown and yes Lauren Long's report says the counter-grievance worsened that relationship and led to the breakdown so yes one of the reasons the hearing was set up was because of that counter-grievance and we took it into account"*

209. Mr Martin confirmed he had seen the SLT letters, citing the blackophobia allegation from the counter-grievance, and had taken them into account. He was less credible as a witness on the point as to when he had thought (at the time of the dismissal), the relationship had irretrievably broken down. He suggested that the relationship had irretrievably broken down prior to SLT grievance but when challenged about that, as to how that could be right when he had criticised the claimant for not having engaged in mediation after that, he said that it was a year and a half ago and he wasn't sure when he thought the relationship had irretrievably broken down. When it was suggested to him that the relationship had irretrievably broken down as a result of the SLT letters citing the counter-grievance,

his reply was that that sounded a reasonable argument. He accepted in cross-examination that the irretrievable breakdown came as a result of the SLT letters which were themselves a response to the counter-grievance and the prospect of the claimant returning to work.

210. The letter of dismissal he sent says:

> *"The counter grievance which was raised by you in bad faith and without any substance led to the exacerbation of pre-existing relationship breakdown beyond repair."*

and

> *"SLT are justified in being fearful of you and of how things said by them in the future may be misconstrued…."*

211. The Tribunal finds that the letter of dismissal, in addition to the oral evidence of Mr Martin, makes a clear link between protected act and dismissal.

Mr Martin's reliability

212. Mr Martin was not familiar with the documents or his own witness statement. He was formulating his position under cross-examination and wanting to say the right thing to exonerate himself, his panel and the respondent. He said in cross examination *HR did not suggest redeployment was an option so we did not consider it, that redeployment was not part of our panel discussion*. The Tribunal notes that his witness statement said "we considered whether there were any alternative options to dismissing the claimant but concluded there were none". The letter of dismissal states "the panel have also considered whether there are any alternative options to dismissal in the circumstances and have concluded there are none".

213. The Tribunal accepts Mr Boyd's submissions based on CLFIS v Reynolds, echoed by Mr Bronze and Mr Moretin, as to the correct test for discriminatory dismissal and the separability principle and has looked at the motivation of Mr Martin and his panel separately from that of the SLT or Ms Long. The Tribunal finds, for the reasons set out above, that the protected act had a significant influence on Mr Martin and the decision to dismiss. This is not a tainted information case.

Conclusion

214. The claimant was unfairly dismissed. She was not given the notice due to her under her contract and the failure to pay her to what would have been the termination date of 31 August 2022 if notice had been given correctly, amounted to unlawful deductions from wages.

215. The claimant's complaint of victimisation succeeds. The claimant was investigated, the SLT said they would not work with her, there was a

recommendation that she be dismissed which took into account her protected act and she was invited to a dismissal hearing and then dismissed for having done the protected act of raising a counter grievance.

216. There will need to be a remedy hearing. The following issues on the List of Issues remain to be determined: 2.1, 2.3, 2.3.1, 2.3.2, 2.3.3, 2.3.5, 2.3.7(this falls away), 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7 and 5.2 (as to how much) 5.3, 5.4, 5.5, 5.6 and 5.7. The parties are invited to agree directions for that remedy hearing and send those directions together with their non-available dates for a hearing between March 2024 and September 2024 to the Tribunal for the attention of Employment Judge Aspinall.

Employment Judge Aspinall

Date: 20 December 2023

REASONS SENT TO THE PARTIES ON

3 January 2024

FOR THE TRIBUNAL OFFICE