EMPLOYMENT TRIBUNALS

Claimant: Ms I Yousif

Respondent: The Good Shepherd Trust

Heard at: London South **On:** 18-22 December 2023

Before: Employment Judge Kumar
Ms L Gledhill
Mr R Singh

Representation
Claimant: in person
Respondent: Mr M. Magee, counsel

JUDGMENT

1. The claimant's application to adjourn the hearing is refused.
2. The claimant's claim of direct discrimination because of race (Equality Act 2010, s13) is not well-founded and fails.
3. The claimant's claim of harassment related to race (Equality Act 2010, s26) is not well founded and fails.
4. The claimant's claim of victimisation (Equality Act 2010, s27) is well-founded and succeeds.
5. The claimant's claim of wrongful dismissal is not well-founded and fails.

REASONS

Introduction

1. The matter came before the tribunal for final hearing. The claimant brought claims for:

    i. direct discrimination because of race (Equality Act 2010, s. 13);
    ii. harassment related to race (Equality Act 2010, s.26);
    iii. victimisation (Equality Act 2010, s. 27); and

iv. wrongful dismissal.

The issues

2. The issues were identified at a preliminary hearing before Employment Judge Jones KC on 23 December 2022. Although the claimant subsequently wrote to the tribunal seeking amendments to the list of issues she did so out of time. On 8 February 2023 the tribunal wrote to the parties informing them that Employment Judge T.R. Smith had directed that the claimant was to indicate whether she pursued her application to amend the statement of issues whereupon a preliminary hearing would be listed. The claimant did not pursue her application and therefore the issues remained as identified by Employment Judge Jones KC as follows:

Direct Race Discrimination

1. What is the Claimant's race for the purposes of Equality Act 2010, s. 9?

2. Upon whom does the Claimant rely as a comparator? Specifically, does she rely on an actual or a hypothetical comparator?

3. If she relies on an actual comparator, is that someone in respect of whom there is no material difference in circumstances within the meaning of Equality Act 2010, s. 23?

4. Was the Claimant less favourably treated by the Respondent in any of the following ways:

(1) Receiving inadequate support;
(2) Respondent failing to review the Claimant's support plan;
(3) The Claimant's mentor making a comment about a drink called Lilt on 15 June 2021; or
(4) The manner in which the Claimant's grievance was dealt with?

5. If the Claimant was less favourably treated in one or more of the ways identified above, was the reason for the less favourable treatment race?

Harassment

1. Did the Respondent engage in unwanted conduct towards the Claimant by:

(1) Failing to review her support plan; and/or
(2) By the manner in which it dealt with arrangements for the planned review meeting on 5 July 2021?

2. Was that conduct related to race?

3. Did that conduct have the purpose or effect of violating the Claimant's dignity; and/or creating an environment that was intimidating, hostile, degrading, humiliating or offensive to the Claimant?

Victimisation

1. Had the Claimant done or did the Respondent believe that the Claimant had done a protected act within the meaning of Equality Act 2010, s. 27(2)?

2. Was any such act done in bad faith?

3. If not was the Claimant subjected to any detriment either because she had

done or the Respondent believed that she had done the relevant act?

Wrongful Dismissal
1. Did the Claimant receive the notice monies to which she was contractually entitled?

The hearing

3. On 14 December 2023 two working days prior to the hearing the claimant sent an email to the tribunal indicating that she sought a postponement. On the first day of the hearing the claimant made an application to adjourn the hearing. The tribunal heard submissions on the claimant's application to adjourn and refused her application as it was not satisfied that the requirements under Rule 30A were met. Full reasons for the decision were given orally at the hearing.

4. The claimant had not finalised her witness statement. The tribunal gave the claimant until 16.30 on the first day of the hearing to file and serve her witness statement. Mr Magee on behalf of the respondent sought an unless order in the event that the claimant did not meet that deadline. The tribunal did not make an unless order but impressed upon the claimant the importance of complying with the deadline for the hearing to be effective. As it happened the claimant filed her statement after the deadline at 16.54.

5. The liability hearing proceeded on 19 December 2023. We heard evidence from the following witnesses:

   The claimant
   On behalf of the respondent:
   Mr A Clark, Chief Education Officer
   Ms L Athersuch, KS1 phase leader
   Ms A Johnston, Regional Director of Education and Designated Safeguarding Lead for the respondent at the relevant time
   Mrs J Ratcliffe, Headteacher
   Ms M Roberts, Director of Education for the Dorking area schools at the relevant time

6. All of the witnesses attended to give evidence in person save for Ms Roberts who attended by video link.

7. We were referred to pages within a bundle that ran to 623 pages as well as an addendum bundle which ran to 63 pages. Some additional documents were provided to us during the hearing.

8. We received written submissions from both parties as well as hearing oral submissions. We had regular breaks and at one stage a brief adjournment to give the claimant additional time to prepare questions for Ms Johnston.

Findings of Fact

9. The tribunal made the following findings of fact on the balance of probabilities.

10. The claimant is Iraqi, Middle Eastern.

11. The respondent is a multi-academy school trust made up of 16 church and community schools across the Diocese of Guildford. The respondent employed the claimant as a Newly Qualified Teacher ("NQT") at Ashley Church of England Primary School for part of her induction period. The claimant had

previously completed two terms of her NQT induction period at Chandlers Field School a year prior. The claimant applied for the role in September 2020 and underwent a virtual interview with Mr A Clark, who was then interim headteacher of the school, and Mr S Crinall, assistant head teacher, followed by a lesson observation and formal interview at the school which took place on 1 October 2020. We accepted the claimant's unchallenged evidence that during the interview she asked what the school's weaker areas were and Mr Clark mentioned that the school lacked diversity.

12. The claimant commenced employment on 2 October 2020. Mr Crinall was appointed as her NQT assessor and Ms Athersuch, KS1 phase leader, as her mentor. There were two other NQTs, Ms M Casey and Mr D Scurr, both of whom were white.

13. Although the claimant commenced employment on 2 October 2020 her written contract of employment was dated 17 November 2020.

14. Paragraph 6 of the employment contract read:

> "*For Newly Qualified Teachers your employment is subject to satisfactory completion of the induction period. In the event that the Employer decides that you have failed to satisfactorily complete the induction period, your employment will automatically terminate within 10 working days from the date when you gave notice that you do or do not intend to exercise your right to appeal, or from the date when the time limit of 20 days for appeal expires without an appeal*"

15. Paragraph 15 of the contract was titled 'termination'. Subparagraph 15.1 identified that this section was '*subject to successful completion of induction period (NQT)'.* Subparagraph 15.4 stated that '*the notice provisions set out in clauses 15.2 and 15.3 above shall not apply if you are an NQT and fail to satisfactorily complete your NQT induction year and thereby become ineligible for employment as a teacher at the Trust*.'

16. On 18 November 2020 the claimant was absent from school. She informed the school that she was attending a medical appointment to have an MRI scan. On the same date, 18 November 2020, the claimant appeared in court by video link at a hearing relating to a charge of dangerous driving. The claimant did not inform her employer that she was attending a court hearing but it subsequently came to light as a member of office staff informed the headteacher, Mr Clark, that the claimant's name had been seen on the court list at Kingston Crown Court, which they had been monitoring because a family member had a case in the same court. Mr Clark met with the claimant upon her return to school and presented her with the court list whereupon the claimant admitted that she had attended a court hearing and it related to a charge of dangerous driving. The claimant had been upset and Mr Clark had impressed upon her the importance of honesty. We preferred the evidence of Mr Clark to the claimant as to what occurred at that meeting not least because of the inconsistent account the claimant gave in relation to the court hearing on that date. Initially she was adamant in her oral evidence that she had not attended court on 18 November 2020 but that the hearing had gone ahead in her absence with her barrister representing her. She informed the tribunal that she had only been required to attend a hearing on one occasion whilst at Ashley School and that had been in June 2021. When confronted with a transcript of her grievance meeting where she had stated she had attended a virtual hearing in November 2020 the claimant changed her account, stating that she had forgotten her attendance.

We find it unconvincing, particularly given that the hearing and the claimant's lack of candour in relation to informing the respondent of it played a significant role in the respondent's case that the claimant would have forgotten attending the hearing.

17. Although the claimant informed the tribunal it had been her choice not to complete her induction period at Chandlers Field School we found that concerns were raised about the claimant's professional conduct during her time there. The claimant's evidence was that one incident of lateness had been raised at a formal NQT meeting at Chandlers Field and that after that incident the claimant ensured that she was not late again. The grievance investigation report dated 30 July 2021 stated that:

    - the claimant's first NQT assessment form from Chandlers Field (03/01/2019 -05/04/2019) stated that she had not met the required standards that term and concerns were raised by the school over professional conduct including potentially putting the children at risk and persistent lateness.
    - the claimant's second NQT assessment form from Chandlers Field (23/04/2019-19/07/2019) stated that the claimant had met expectations for required standards that term but that concerns around the claimant's professional conduct continued to be noted by school leaders, namely a failure to attend a school event, receiving a warning for lack of punctuality and breaching confidentiality.

18. The report then referred to "Appendix 8" suggesting the reports from Chandlers Field were appended to the grievance report although were not included in the court bundle. The claimant appeared to dispute the contents of the NQT reports from Chandlers Field when put to her in cross-examination. She said "*I'd need to look at the NQT report. I only remember one incident of lateness" and "I may need to go back and look at the NQT".* However when over the course of the hearing the respondent sought to produce the Chandlers Field NQT reports the claimant objected to them being admitted into evidence. The tribunal was satisfied that the reports contained the details referred to in the grievance reports and drew adverse inferences from the claimant's vociferous opposition to them being considered by the tribunal. Our finding is that the claimant did not want the tribunal to read the reports as they confirmed the summary in the grievance report and that there had been ongoing concerns about the claimant at Chandlers Field contrary to her case.

19. In respect of the claimant's progress at Ashely School Mr Crinall had concerns about the claimant's progress and a support plan was therefore put in place for her in January 2021. On 20 January 2021 the respondent sent the claimant a letter informing her that her probationary period had been extended. Between January 2021 and March 2021 Covid-19 lockdown provisions were in place and classes were taught remotely. Over this period the claimant had regular virtual support meetings with her mentor, Ms Athersuch. The claimant was happy with the level of support she was receiving from Ms Athersuch at that time.

20. Lockdown ended in March 2021 and there was a return to classroom teaching. It was common ground that from March 2021 the claimant did not receive as much formal support as she had during lockdown. Ms Athersuch put this down to additional work pressures that arose for her. The claimant disputed that Ms Athersuch had additional work pressures but it was self-evident to the tribunal that a physical return to the classroom and ongoing Covid related protocols would have led to increased workloads for more senior staff. Informal support

remained in place for the claimant although it is common ground that the support the claimant received from March onwards could have been greater. The tribunal found that the claimant was fully supported as an NQT until March and although subsequent to that she received some informal support from Ms Athersuch and from other experienced teachers the support she received was inadequate and she did not have formal weekly mentor meetings. We further found that the respondent failed to review the claimant's support plan. Ms Athersuch's evidence was that the support plan was reviewed but this was not supported by any contemporaneous documentary evidence.

21. In April 2021 Mr Clark left Ashley school and Ms Ratcliff took over the role of headteacher. On 3 May 2021 Ms Ratcliff sent an email to Mr Clark asking if they could discuss the claimant's NQT assessment. Mr Clark responded stating the claimant "*is mentored by [Ms Athersuch] and [Mr Crinall] is in charge of her NQT assessments, observations, etc. He is really the one to talk to about her. She is working towards her targets on her support plan and the last I heard was that he was making good progress and was likely to pass. I made it clear to both [Ms Athersuch] and [Mr Crinall] that we can't pass her and say she's not good enough for Ashley. She either fails and goes or stays!*".

22. In May 2021 Ms Ratcliff met with the claimant, as she had met with all members of staff since starting as head teacher. We found that at that meeting the claimant raised concerns about the lack of feedback she was receiving about her progress and that Ms Ratcliff had reassured the claimant that she was on course to pass her NQT year. We note that this accords with the account given by the claimant in her email to Ms Ratcliff sent on 5 July 2021. We do not find that the claimant raised the lack of support or any issues about her mentor at that meeting.

23. On 15 June 2021 the claimant was speaking to Ms Athersuch when Ms Athersuch was asked by another member of staff said she was going to the shop and asked Ms Athersuch whether she wanted anything. Ms Athersuch said that she wanted some Lilt and then imitated the 1980s/90s advert, putting on a Caribbean accent and saying '*totally tropical taste'*. This incident was referred to during the hearing as the "Lilt Incident". The claimant's recollection was that Ms Athersuch had said '*it's totally great'* in a foreign accent and had then said '*I'm not being racist by the way*'. In the respondent's grounds of resistance it was denied that such an event had occurred but in Ms Athersuch's witness statement and oral evidence she accepted that there had been an occasion along the lines described by the claimant. We find it more likely than not that Ms Athersuch said '*totally tropical taste'* as being the wording of the advert rather than 'it's totally great' as claimed by the claimant. Ms Athersuch accepted that she had said this is a faux Caribbean accent. Ms Athersuch in her oral evidence accepted that she may have made a comment along the lines of '*is that appropriate now?'* after she did this.

24. On 16 June 2021 the claimant attended a medical appointment when she was away from school for 'planning time at home'. She did not inform the respondent that she attended the medical appointment. Later on the same day, 16 June 2021 Ms Athersuch observed the claimant teaching a class. The class was a focused reading class which was a new method of guided reading teaching which the school was trying out. The lesson was not a good one and Ms Athersuch told the claimant that another class would be observed instead. The claimant was not provided with Ms Athersuch's write up of the observation at the time and we preferred the claimant's evidence that the observation was effectively discounted on the basis that there would be another observation of a more traditional class. We note that subsequently the write up of the observation was relied upon by the respondent as evidence of a failed

observation.

25. On 17 June 2021 at around 17.21 the claimant was notified by her criminal solicitor that she was required to attend court on the afternoon of 18 June 2021. The claimant had already informed the respondent that she would not be in school on the morning of 18 June 2021 as she was attending a medical appointment. However the claimant did not notify the respondent that she was unable to attend school in the afternoon. At 10.51 on 18 June 2021 the claimant emailed Mr Clark, who had been interim head teacher but was no longer at the school, informing him that she had a court attendance. Mr Clark in his response sent at 11.02 told the claimant to ring Ms Ratcliff and explain stating "*We talked about being honest, and perhaps you need to explain to [Ms Ratcliff]*". The claimant subsequently contacted Ms Ratcliff and informed her of the absence and the need to attend court.

26. On 21 June 2021 the claimant sent a WhatsApp message to Ms Athersuch informing her that she hoped to complete her report writing by the end of the day. Ms Athersuch responded saying she 'was wondering where they were'. The respondent's case was that the claimant missed the report writing deadline. The claimant asserted that the deadline for the reports was in fact 5 July 2021. We preferred the respondent's evidence on this point as it was evident 5 July 2021 was the hard deadline for the reports to be sent out and the claimant did not challenge that her reports needed to be reviewed before they were sent out or that the deadline for submitting the draft reports of 21 June 2021 was contained within the Phase Agenda or the weekly staff briefing as asserted by Ms Athersuch in her oral evidence. The WhatsApp exchange that records Ms Athersuch 'wondering where they were' supports Ms Athersuch's account that the draft reports were due on that date

27. On 22 June 2021 and subsequent to the court appearance the claimant was interviewed by Ms Ratcliff and Ms J Cambra, director of HR at the Trust on account of concerns that the claimant had misrepresented the reason for her taking time off on more than one occasion. A note of that meeting was contained within the bundle. The claimant explained that the court attendance related to dangerous driving and that she had left her wing mirror at home and had not seen the police signalling her to stop having observed her allegedly driving through two sets of red lights. The claimant was asked to forward a copy of her indictment to the respondent. The claimant had shown the indictment to Ms Ratcliff and Ms Cambra on her phone but did not subsequently send them a copy as she said she would.

28. On 24 June 2021 Ms Ratcliff sent an email to the claimant stating:

    "*I am writing to confirm that you will be teaching in Year 4 next academic year. The year leaders are now finalising the classes, LSA support and classrooms. As soon as the details are confirmed, they will be shared with you.*

    If you have any questions, please do ask."

29. The respondent's case was that Ms Athersuch raised concerns about the claimant to Ms Ratcliff on 29 June 2021 and Ms Ratcliff sought HR advice on 30 June 2021 and 1 July 2021 and advice from the local awarding body about extending rather than failing the claimant. We were not taken to any documentary evidence that supports these discussions that were said to have taken place and we are unable to make any findings in relation to advice sought or the conversations had.

30. On the morning of 2 July 2021 the claimant met with her new class for the next academic year.

31. On the same day, 2 July 2021 the claimant was observed teaching by Ms Athersuch and Ms Ratcliff jointly. On the evening of Sunday 4 July 2021 Ms Ratcliff sent an email to Ms Cambra, Director of HR stating,

    "*I wonder if I can speak with you in the morning about [the claimant]?*
    She taught a lesson on Friday as part of her final assessment - it was not brilliant. There have been a few issues with planning and having resources ready for her team etc. The final NQT report needs to be submitted on Tuesday however it could be extended for another term. She failed to pass part 2 last term and has not demonstrated her understanding of the importance of part 2 this term. Sorry to press you but Tuesday is the deadline.
    What a muddle!"

32. The claimant claimed that this email had been doctored and the word 'not' had been added before the word 'brilliant'. We reject this and find that the email was genuine. Ms Ratcliff stating the lesson was 'brilliant' does not make sense in the context of the rest of the email and the response that was received from Ms Cambra later that evening which read,

    "*Yes I can, call when it suits, I have no meetings tomorrow. Is there a tutor who can support, if she has previously failed, and continues to show a lack of comprehension and learning, in addition to failing to support other colleagues, I think you need an honest approach? If she does an additional term, I assume to moves onto the ECF which is 2 years.*

    I certainly witnessed a lack of comprehension when we met with her. Do you have the authority to just fail her, backed up with evidence? or is this an NQT assessor judgement? and if you fail her, are you committed to offer her another term?

    Give me a call in the morning."

33. On 5 July 2021, the date the claimant was due to meet with Ms Athersuch and Ms Ratcliff for feedback on her less, at 8.55am the claimant sent a lengthy email to her copied to Mr Clark, HR and the local awarding body. Within the email she stated '*I feel it is highly discriminative because I have seen peers and colleagues at the same level, contributing similar levels of effort and capability pass their NQT, the only discrepancy between them and I is purely my ethnicity."*

34. The claimant met with Ms Athersuch and Ms Ratcliff for feedback on the lesson.

35. On the same day, 5 July 2021, a staffing update went out to parents which stated that the claimant would be teaching Heron class in year 4 in September 2021.

36. The claimant was asked to meet with Ms Ratcliff, Mr Crinall and Ms Athersuch at 8am the following morning, 6 July 2021, to review her NQT evidence. The claimant was held up on the way to that meeting on the bus and sent an email stating that she would be a few minutes late. The respondent rescheduled the meeting to 12.15 the same day. The claimant was a few minutes late for this meeting having left the school briefly to get something to eat and drink after

her class and she was told that it was unacceptable that she was late. A further meeting took place at 4pm between the claimant and Ms Ratcliff, Mr Crinall and Ms H Gregory from the awarding body. The claimant was informed that she had not been successful in completing her NQT year and that she would be subject to a further extension but this would not be accommodated at Ashley School. The claimant subsequently chased her completed NQT report and was informed it had been delayed on account of her attending the morning meeting late. It was submitted and at 6.33pm the claimant was sent an email and was asked to meet to discuss it but by this time the claimant had left the school.

37. The claimant did not return to school on 7 July 2021.

38. On 12 July 2021 a letter was sent to the claimant by the respondent terminating her employment as of 23 July 2021 and starting that her probation period had been unsuccessful and that while an extension was being sought this would not be completed at Ashley school or a school within the Trust.

39. On 15 July 2021 the claimant sent a formal grievance letter to the respondent.

40. The grievance was investigated by Ms M Roberts, Director of Education who invited the claimant to a grievance meeting. Ms Roberts interviewed the claimant and staff from the school. Some transcripts of interview contained within the bundle were incomplete and Ms Roberts explained in her oral evidence that she had difficulties with her recording device. She told us that the interviews had been re-recorded and transcribed again. It was unclear why the transcripts within the bundle were not the transcriptions of the re-recorded interviews but the claimant did not challenge that additional transcripts existed or that Ms Roberts' accounts of the interviews were not accurate and we accepted Ms Roberts' evidence on this. Ms Roberts gave in our view balanced evidence. She was able to identify the weaknesses in the support that was provided to the claimant and that she had perhaps not had enough time to evidence that she had met the NQT standards.

41. Ms Roberts' grievance report was completed on 22 July 2021 and the report submitted on 30 July 2021. The report did not uphold the claimant's grievance but recommended her salary was paid until 31 August 2021. It identified that the termination letter referred to the claimant's probation period as being 'unsuccessful' which Ms Roberts considered to be at odds with the NQT assessment form which recommended the claimant required more time to meet standards on account of Covid-19 closures. Ms Roberts gave evidence which we accepted in respect of the process by which she carried out her grievance investigation. She was asked by Ms Cambra, HR director to undertake the investigation. She was given an outline of the situation and the relevant documents were provided to her. She interviewed the relevant members of staff. Ms Roberts confirmed that she had carried out investigations in the past but had not previously dealt with complaints of race discrimination. The claimant did not when questioning Ms Roberts suggest that her approach to the grievance process had been motivated by race but rather her complaint appeared to be that she did not agree with the outcome.

42. On 7 September 2021 the claimant sent an appeal letter to the respondent. Within the letter the claimant for the first time raised the "Lilt incident".

43. Ms A Johnston dealt with grievance appeal and a hearing took place on 21 September 2021. She considered her role was to review the original investigation and not to undertake further investigation and she did not look into new points raised in the appeal letter, including the "Lilt incident". On 1 November 2021 the claimant was informed by letter that the appeal had not

been upheld. Again it was not suggested to Ms Johnston by the claimant that her approach to the grievance appeal was motivated by the claimant's race. Again the claimant's criticism was that she disagreed with the outcome.

The Law

Direct Discrimination

44. Section 13 of the Equality Act 2010 prohibits direct discrimination: "A discriminates against B if, because of the protected characteristic, A treats B less favourably than A treats or would treat others." There may be an actual comparator or a hypothetical comparator, someone A would treat better. Section 23 of the Equality Act provides that there must be no material difference between the circumstances of the claimant and the comparator other than the protected characteristic. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison (**Hewage v Grampian Health Board (2012) UKSC 37**).

45. Direct discrimination also includes unconscious discrimination. Section 136 provides that:

"(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."

46. Lord Nicholls of Birkenhead observed in **Nagarajan v London Regional Transport (1999) IRLR 572** that:

"*All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated" concluding that "Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination*."

47. **Igen v Wong (2005) ICR 931** addressed how the requirements of section 136 operate. The burden of proof is on the claimant. However evidence of discrimination is unusual and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that they did not discriminate, including that the treatment was '*in no sense whatsoever*' because of the protected characteristics. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

48. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is

no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic, and less favourable treatment, is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent committed an act of unlawful discrimination". There must be "something more".

49. There are factors from which we can draw inferences, such as, statistical material, which may "put the tribunal on enquiry" – **Rihal v London Borough of Ealing (2004) ILRLR 642**, where a "sharp ethnic imbalance" should have prompted the tribunal to consider whether there was a non-racial reason for this. **McCorry v McKeith (2017) IRLR 253** noted too that "reluctant, piecemeal and incomplete nature of discovery" could be a factor indicating discrimination, as can omissions and inaccuracies -**Country Style Foods Ltd v Bouzir (2011) EWCA Civ 1519**.

50. **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases of hypothetical comparators, a tribunal may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120**, and **Efobji v Royal Mail Ltd 2017 IRLR 956**, remind tribunals that the respondent's explanation must be "adequate", but that may not be the same thing as "reasonable and sensible".

Harassment

51. Section 26 of the Equality Act provides: (1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

52. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

Victimisation

53. Section 27 of the EqA provides that:
(1) A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act
(2) Each of the following is a protected act –
(a) Bringing proceedings under this Act;
(b) Giving evidence or information in connection with proceedings under this Act;
(c) Doing any other thing for the purposes of or in connection with this Act;
(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

54. Therefore, to establish victimisation a claimant must prove two things:
a. That they were subjected to a detriment, and
b. That it was because of a protected act.

55. A three stage test for establishing victimisation was set out in **Derbyshire and ors v St Helens Metropolitan Borough Council and ors 2007 ICR 1065, HL** by Baroness Hale and Lord Nicholls. Adapting their guidance to the phrasing of the EqA, the test is:

• Did the alleged victimisation arise in any of the prohibited circumstances covered by the EqA?
• If so, did the employer subject the claimant to a detriment? and
• If so, was the claimant subjected to that detriment because of having done a protected act, or because the employer believed that the claimant had done, or might do, a protected act? 36.The prohibited circumstances are set out in S39(3) and (4) EqA. S39(4) is set out above and is the relevant provision in this case.

Wrongful dismissal

56. A wrongful dismissal concerns a dismissal by an employer in breach of the employee's contract of employment. This can, and often does, focus on whether an employment contract has been terminated without the necessary notice period. Required notice periods are provided for through agreement in the employment contract, or through the statutory scheme contained at section 86 of the Employment Rights Act 1996 ("ERA"). Section 86 ERA provides a statutory minimum notice entitlement, which cannot be reduced by contractual agreement. This provides that after one month of continuous employment, an employee would be entitled to at least one week's notice, with increases in entitlement based on years of service. Section 86 ERA does not provide any entitlement to notice period for employment that has not yet reached one month in length.

Discussion and conclusion

Direct Race Discrimination

57. The claimant's race for the purposes of the Equality Act 2010 is Iraqi, Middle Eastern

58. The claimant relied upon the comparators of Ms Casey and Mr Scurr. Ms Casey and Mr Scurr were an NQTs like the claimant. Ms Casey and Mr Scurr were white.

59. The claimant alleges that she was less favourably treated by the respondent in four ways.

Receiving inadequate support

60. We are satisfied that the claimant received inadequate support. We have found that until March 2021 the claimant was adequately supported as an NQT and had regular formal meetings with her mentor. From March 2021 onwards we found that the claimant did not receive formal support. We accepted that some informal support was available to her but we do not consider it was adequate to meet her

support needs, particularly in light of the fact that she had been placed on a support plan in January 2021.

Failing to review the claimant's support plan

61. We have set out in our findings that we have found that there was a failure to review the claimant's support plan and the reasons that we made this finding.

The claimant's mentor making a comment about a drink called Lilt on 15 June 2021

62. We have found that Ms Athersuch said 'totally tropical taste' whilst imitating a Caribbean accent in the claimant's presence on 15 June 2021. We have further found that she subsequently made a comment suggesting she realised that the historical Lilt advertising campaign was racially inappropriate.

The manner in which the claimant's grievance was dealt with

63. We have found that the claimant's grievance was investigated thoroughly and properly.

Harassment

Failing to review the support plan

64. We have found that the respondent failed to review the claimant's support plan.

Arrangements for the planned review meeting on 5 July 2021

65. We have found that issues arose in arranging the claimant's review meeting on account of the claimant being late for the meeting. The claimant raised an issue about the meeting being scheduled before the start of the school day but we do not think this was unreasonable or unusual in the context of a school. The claimant also felt she was unfairly criticised for being late to the 12.15 meeting when she had not had an opportunity to eat or drink. We consider it would have been expected by any employer for the claimant to inform them that she was going to go and get something to eat before the meeting rather than simply turning up late. We do not consider that there was any aspect in the arrangements for the planned that supports the claimant's claim.

Stage 1 test

66. It is evident to us that the claimant has proved facts in respect of some of her allegations from which we *could* conclude, in the absence of an explanation, that the reason or a material part of the reason, for the difference in treatment between the comparator and the respondent was race. We say that for the following reasons:

66.1 The starting point is that there was a difference of treatment and difference of racial status. The comparator Ms Casey who also had a period of inadequate support was provided with a new mentor when the claimant was not.
66.2 The school at the time itself identified its weakness as being its lack of diversity.
66.3 Notwithstanding the nature of the claim, Ms Ratcliff, the head teacher was not able to confirm if there were any other staff from an ethnic minority background at the time of the claimant's employment.
66.4 The respondent initially denied that the "Lilt incident" had occurred. When it was admitted that the incident occurred only when specifically asked by the tribunal did Ms Athersuch admit that she had imitated a Caribbean accent or made a comment about the appropriateness of doing so.

Stage 2 test

67. It therefore turns on the respondent's explanation for each of the proved facts.

68. We accepted the evidence of Ms Athersuch as to the additional pressures that she was under from March 2021 when lockdown and remote classes came to an end. We accepted her explanation that it was her workload rather that meant that formal mentor meetings no longer took place. Whilst Ms Casey like the claimant had a period when she lacked mentor support, unlike the claimant Ms Casey raised concerns about the lack of support and requested a change of mentor which was then implemented by the respondent. The claimant did not raise any issues with the respondent about the lack of support she felt she was receiving until July 2021. We find that this was the reason that the claimant was treated differently in these circumstances. If she had sought to change mentor it is likely that the respondent would have taken action to change the claimant's mentor. We concluded that the lack of support the claimant received was not on account of her race.

69. We moreover concluded that the failure to review the claimant's support plan was borne of the same pressures that were upon Ms Athersuch and general oversight on the part of the respondent caused by the unique circumstances of the Covid-19 pandemic and the measures that were in place following the relaxation of lockdown. We do not conclude that the respondent's failure to review the claimant's support plan was on account of her race.

70. We do not conclude that the Lilt incident was connected to the claimant's race. Whilst an ill-judged comment on Ms Athersuch's part generally and in the context of a work place we accepted as genuine Ms Athersuch's explanation that it was a comment that she would make to others in relation to the drink Lilt, copying the advertisement that had previously appeared on TV. We note that the branding and advertising referenced the Caribbean whereas the claimant is Iraqi Middle Eastern. The claimant informed us that her partner had Caribbean heritage and that Ms Athersuch would have known this, but

this did not form part of the claimant's grievance or appeal and was mentioned for the first time in her witness statement. This seemed very much an afterthought from the claimant given that she had neither raised it in her grievance, grievance appeal or ET1. Ms Athersuch said that she was not aware that the claimant's partner had Caribbean heritage and we accepted her evidence. We do not find that the faux Caribbean accent, however ill-judged, was directed at the claimant or that it was intended to be malicious either to the claimant or to anyone else.

71. Ultimately we accept the explanations given by the respondent for the inadequate support, failure to review the claimant's support plan and the Lilt incident. In reaching this conclusion it is of relevance that at no time did the claimant suggest to any of the respondent's witnesses in cross examination that they had racially discriminated against her.

Victimisation

72. The claimant raised a complaint that she had been discriminated against because of her ethnicity by email on 5 July 2021. It was not in dispute that the claimant raising this complaint was a protected act within the meaning of the Equality Act section 27(2) and we find that the claimant had done a protected act in alleging that the respondent had contravened a provision of the Act. Neither was it argued on behalf of the respondent that the allegation had been made in bad faith and we do not find that it was. The respondent argued that the claimant's dismissal was a result of a cumulation of concerns in respect of her the claimant's performance and integrity. On the evidence we do find that chronology shows an accumulation of concerns arising from 16 June 2021 including the claimant not following absence procedure, not promptly informing the respondent that she would not be able to attend school in the afternoon of 18 June 2021 on account of a court appearance, not meeting the deadline for providing her draft reports, concerns about the claimant misrepresenting the reason for her absence from school and her final assessment. Mr Magee drew the tribunal's attention to the exchange that occurred between Ms Ratcliff and Ms Cambra on the evening of 4 July 2021 as evidence that the decision making in respect of the claimant failing the NQT year as predating her complaint of 5 July 2021. Our reading of that exchange however is that no decision had been taken that the claimant was to be dismissed and at that stage all options were still on the table. Our conclusion in respect of the claimant's claim for victimisation is that the respondent settled upon a decision to dismiss on account of the respondent raising her complaint and that the claimant was subjected to a detriment because of her protected act. We form that conclusion based upon the following:
    - The timing of the decision to dismiss her;
    - The fact that the respondent's decision to introduce the claimant to the children she would be teaching from September 2021 on 2 July 2021 did not suggest that a decision to dismiss her had been made.

- The fact that the respondent sent out a letter on 5 July 2021 to parents which stated that the claimant would be teaching a specific class from September 2021.
- The fact that the respondent had at no stage prior to 5 July 2021 given the claimant any indication that she might not be able to continue at Ashley School.

Wrongful Dismissal

73. The claimant's case was essentially that her employment contract had to be read in conjunction with documents from the Teaching Regulation Agency and that accordingly she by virtue of the fact that her NQT was being extended it could not be said that her probationary period had not been successful. We reject this. The employment contract is a stand alone document and does it is clear that the respondent did not consider that the claimant had satisfactorily completed her NQT period.

Remedy

74. A remedy hearing is listed to take place on 4 -5 April 2024.

75. By 26 February 2024, the claimant is to send to the respondent (1) a revised schedule of loss, a witness statement addressing remedy and copies of any documentary evidence upon which she relies.

76. By 11 March 2024, the respondent will send to the claimant any counter schedule and/or witness statements and/or documents for the hearing to determine remedy.

77. By 18 March 2024 the respondent will send to the claimant the bundle of documents for the remedy hearing.

Employment Judge **Kumar**

Date: 05/02/2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
6th March 2024

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/