EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Bevis	**- V -**	Eaton Square Schools Ltd

Heard at: London Central (CVP) **On**: 29 January – 7 February 2024

Before: Employment Judge Baty
Mr P Lewis
Mr D Shaw

Representation:

For the Claimant: Mr J Tavernier (consultant)
For the Respondent: Mr R Stubbs (counsel)

Judgment and reasons having been given orally at the hearing; the written judgment having been sent to the parties on 12 February 2024; and written reasons having subsequently been requested by the respondent on 19 February 2024, written reasons are duly provided below.

REASONS

The complaints

1. By a claim form presented to the employment tribunal on 22 April 2021, the claimant brought various complaints of victimisation and harassment related to race. The respondent defended the complaints.

2. In summary, the claimant had been employed by the respondent from 5 January 2018 until 31 August 2019 as a mathematics teacher at the Eaton Square Senior School, Mayfair ("the School"). The respondent dismissed the claimant and the claimant brought an employment tribunal claim, alleging race discrimination. With no admission of liability, the respondent settled the claim under the terms of a COT3 agreement entered into on 6 January 2020. In the present claim, the claimant made various allegations of victimisation and

harassment related to race, said to have taken place post the termination of his employment.

3. The claimant subsequently sought to amend the claim to add further allegations. At a preliminary hearing on 5 May 2022, Employment Judge Snelson allowed two of the amendments sought but reserved the application to amend the claim to include a third allegation (now set out at paragraph 8(a) of the agreed list of issues annexed to these reasons) for determination by the tribunal at the full merits hearing.

4. The claim was originally listed to be heard at a hearing over eight days commencing on 1 February 2023 on a liability only basis. Witness statements had been exchanged and the matter was trial ready. However, that hearing was postponed at short notice on the application of the claimant. (The respondent made an application for costs in relation to that postponement, which remained outstanding as at the commencement of this hearing.)

This hearing

5. The hearing was relisted for eight days commencing on 29 January 2024. It was listed to take place in person (as was the case with the original listed hearing). However, at the end of the week prior to the commencement of the hearing, the tribunal informed the parties that the hearing would be converted to a hearing by Cloud Video Platform ("CVP") because it was unable to arrange a full tribunal which could hear the matter in person. At the start of this hearing, the judge asked the representatives whether they were content to proceed by CVP and they confirmed that they were. The hearing duly took place by CVP.

6. The judge also explained that the length of the hearing would need to be reduced from 8 to 7 days because the judge was listed to hear another case on what would have been the fifth day of the hearing (Friday, 2 February 2024). However, this did not impact on the completion of the hearing within the timeframe and, as set out below, a timetable for the hearing was agreed between the representatives and the tribunal which still allowed plenty of time for the hearing of the evidence and submissions.

Representation

7. Until relatively recently, the claimant had been represented by solicitors and counsel. However, those solicitors came off the record earlier in January 2024 and the claimant subsequently indicated that he might choose to be represented at the hearing by a consultant, Mr Jeffrey Tavernier. Mr Tavernier attended at the start of the hearing and, following discussion with the judge, the claimant and Mr Tavernier confirmed that Mr Tavernier would represent the claimant at this hearing and he duly did so. Mr Tavernier explained that he was a consultant and a friend of the claimant. He said that he had some experience of the employment tribunal system but that was not his primary area of expertise.

The issues

8. The issues had been agreed between Mr Stubbs and the claimant's previous legal representative prior to the start of the previously listed full merits hearing (hence the date of 30 January 2023 at the bottom of that list of issues). At the start of this hearing, the judge asked the representatives whether that list of issues remained the list of issues for the tribunal to determine. They both confirmed that it was. The judge made clear that the tribunal would determine the issues in the list of issues and no others.

9. A copy of the agreed list of issues is annexed to these reasons.

10. The list of issues contains jurisdictional issues both in relation to the impact of the COT3 on whether the tribunal has jurisdiction to hear the claim and in relation to time limits; in addition it contains the outstanding amendment application. It had previously been agreed between the parties' then representatives that these should be determined as part of and not in advance of the full merits hearing. The representatives at this hearing confirmed that that remained the case.

11. The judge also asked the representatives whether it remained the case that the hearing should deal with liability only. They confirmed that it was and the hearing duly dealt with liability only.

The Evidence

Witnesses

12. Witness evidence was heard from the following:

For the claimant:

The claimant himself;

Mrs Katerina Macmillan, who was employed by the respondent as a receptionist at the School from June 2019 to the end of January 2020;

Mr Len Hodge, whose son was formerly a pupil at the School and was taught mathematics by the claimant during the period from September 2018 to August 2019; and

Ms Sujata Bhattacharya, whose son was a pupil at the School from September 2018 until February 2020 and was taught mathematics by the claimant during the academic year September 2018 to June/July 2019.

For the respondent:

Ms Caroline Townshend, who was employed as Co-Head (with Mr John Wilson) and then as Head of the School from April 2018 to December 2022;

Mr Sebastian Hepher, who is and who was at the times relevant to this claim employed as Principal of a group of schools of which the School is one;

Ms Claire Little, who has since November 2019 been employed as Director of People at the Dukes Education Group (the School being one of the 66 schools and associated businesses which are part of the Dukes Education Group); and

Ms Jo Cannell, who was employed at the School as an HR and Payroll Executive between September 2019 and January 2021.

13. The witness statements in relation to the above witnesses had been exchanged prior to the hearing which was due to commence on 1 February 2023 but was postponed, as were two other witness statements.

14. The first was a witness statement from Ms Jane Ferguson (who was employed at the School at the times relevant to this claim as Head of Section (years 10 and 11) and Teacher in Charge of Drama). Ms Ferguson had been called as a witness by the respondent and was ready to give evidence at the postponed 2023 hearing. However, she has since left her employment with the School and indeed left the UK in July 2023 and will not be returning in the foreseeable future; she was, therefore, unable to attend the hearing to give evidence.

15. The second was a witness statement from Mr FM, who was a pupil at the School from September 2017 to August 2019 and who was taught mathematics by the claimant when the claimant was a teacher at the School. Initially, at the start of the hearing, Mr Tavernier said that the claimant was not intending to call Mr FM as a witness; then, following the tribunal's decision to exclude the evidence of Ms AT (see below), Mr Tavernier said that the claimant would like to call him as a witness; as he was unable to attend in the first week of the hearing, it was agreed that he should attend on the first day of the second week of the hearing (day five of the hearing); in the end, when day five came, Mr Tavernier informed the tribunal that the claimant had decided not to call him. He did not, therefore, attend the hearing to give evidence.

16. Mr Stubbs informed the tribunal that large sections of the claimant's witness statement in particular (and indeed much of the evidence of the other witnesses whom he was calling) was irrelevant to the issues which the tribunal had to determine. He noted that the claimant made a lot of allegations in his witness statement about things that happened during his employment, as opposed to the alleged actions of the respondent after the termination of his employment which formed the basis of his claim. He also noted that, whilst the claimant disputed that the COT3 agreement signed on 6 January 2020 was capable of settling future claims arising out of his employment, there was no dispute that it settled claims up to that point and that, therefore, the large numbers of allegations about what happened during his employment were not allegations which the tribunal had jurisdiction to hear anyway.

17. The judge said that, rather than spending a lot of time hearing submissions about what was relevant and irrelevant, and particularly as these witness statements had been exchanged over a year ago, the tribunal would read the statements. However, the judge reiterated that all that the tribunal would be determining were the issues of the claim, as set out in the agreed list of issues, and therefore those passages which were irrelevant would simply have no bearing on its decision.

18. In addition, the claimant produced a further witness statement from a Ms AT, a former pupil of the School, which was dated 24 January 2024, in other words less than a week before the commencement of this hearing. Mr Stubbs applied to have this evidence excluded and, having heard submissions from both representatives, we decided to exclude it. We return to the reasons for this below.

Documents

19. A bundle was produced to the hearing by the respondent. This had been agreed with the claimant's former advisers in advance of the previous postponed full merits hearing.

20. However, in advance of this hearing, the claimant had produced further documentation which he wanted to add. Whilst Mr Stubbs said that he thought that most of it was not relevant, the judge suggested that, rather than hearing a lengthy application about the documentation, it should simply be added to the bundle and, if it was indeed not relevant, it would not be something that the tribunal was likely to take into account in determining the issues. The parties agreed on that as a way forward and the respondent's solicitor agreed to add the claimant's documents to the bundle and circulate copies that day, which she duly did. This resulted in an agreed final hearing bundle numbered pages 1-1022.

21. There was also produced to the tribunal the agreed list of issues; an agreed chronology; a cast list (which was agreed by the claimant and the respondent as far as it went but to which the claimant said he would ideally like to have added a few further names); an agreed reading list; an opening note produced by Mr Stubbs; and an opening note produced by the claimant.

22. The tribunal read in advance the witness statements and any documents in the bundle to which they referred plus any further documents on the reading list, as well as the opening notes provided by the claimant and Mr Stubbs.

Timetable

23. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the start of the hearing. Although there were some changes to the witness order agreed between the parties and the tribunal during the course of the hearing, the timetable was largely adhered to.

Submissions

24. Mr Stubbs produced written submissions, which the tribunal read in advance of hearing the representatives' oral submissions.

Decision

25. The tribunal then adjourned to consider its decision. When the hearing reconvened, the judge gave the tribunal's decision and the reasons for that decision orally.

Ms AT witness statement

26. As already noted, the claimant produced a witness statement from a Ms AT, a former pupil of the School; this was dated 24 January 2024, less than a week before the start of this hearing. Mr Stubbs applied for the tribunal to exclude this evidence.

27. Both representatives made brief submissions at the start of the hearing. However, the tribunal decided to defer its decision as to whether to allow the witness statement to be adduced as evidence until it had had the opportunity to do its preliminary reading, by which stage it would have a better grasp of whether the contents of Ms AT's statement were relevant to the issues which it had to determine.

28. Having done its preliminary reading, the tribunal heard further submissions from the representatives at the beginning of the second day of the hearing. The tribunal adjourned to consider its decision. When it returned, it informed the parties that it had decided to exclude the statement of Ms AT. It did so for the following reasons.

29. Mr Stubbs had referred us to the decision of the EAT in HSBC Asia v Gillespie [2011] ICR 192. That held (quoting from the head note) that:

"… the basic rule when an employment tribunal was considering whether to exclude evidence on the ground of relevance was that if evidence was relevant it was admissible and if it was irrelevant it was inadmissible, but relevance was not an absolute concept and evidence might be logically or theoretically relevant but too marginal or otherwise unlikely to assist the court for its admission to be justified; that it was in accordance with the overriding objective in regulation 3 of the 2004 Regulations, and their case management role, for employment tribunals to consider excluding evidence that was unnecessarily repetitive or only marginally relevant; that it did not, however, follow that such evidence should be excluded in every case or at the outset, and, in the generality of cases, the cost and trouble involved in a pre-hearing ruling would be unjustified; that whether a pre-hearing ruling should be made, where there were real advantages in terms of economy, depended on the circumstances of the case and whether it was possible at that stage to make a reliable judgment on the issue of relevance, especially in fact-sensitive discrimination cases; and that if the evidence in question would not be of material assistance in deciding the issues in the case and its admission would cause inconvenience, expense, delay or oppression, so that justice would be best served by its exclusion, a judge should be prepared to rule accordingly…"

30. The witness statement of Ms AT was not a long statement; it ran to some 10 paragraphs. However, with the exception of paragraph 8, none of them were

relevant to the issues which the tribunal had to determine. Rather, they were complaints from an individual who obviously felt aggrieved about the School in relation to matters which were not germane to the issues which the tribunal had to determine.

31. Paragraph 8 of the statement did relate to issue 8(d) in the list of issues (which was about what was said by Ms Ferguson at an assembly on 11 November 2020). However, Ms AT was not herself present at that assembly and paragraph 8 merely referenced a WhatsApp group chat between other individuals, some of whom may have been present at that assembly. That WhatsApp group chat was in the bundle already. Paragraph 8 therefore offered nothing further.

32. For these reasons, the contents of the statement were irrelevant. That in itself was sufficient reason to exclude the statement.

33. However, we also noted that the statement was produced at the last minute and in breach of the tribunal's order for exchange of witness statements. Mr Tavernier said that Ms AT had in the last week approached the claimant and offered to give a statement to help him in his case and that is how the statement came into being. That is no good reason for the statement being produced so late when the matter was trial ready a year previously. That is a further reason for excluding the statement.

34. The tribunal had made clear that, as a lot of the evidence in the other witness statements produced by the claimant was not relevant to the issues, it was not necessary for Mr Stubbs to cross-examine witnesses on those passages, even though the respondent did not accept them; we reiterated that we would be determining only the issues of the claim as set out in the list of issues. We acknowledged that, in the case of the statement of Ms AT, it was not long and we had already read it and, in the light of the tribunal's direction, Mr Stubbs was unlikely to need a lot of time to cross-examine Ms AT. Allowing the evidence to be admitted and allowing for cross-examination on it would not, therefore, unduly prolong the hearing and would certainly not be something that would lead to a risk of the evidence not being completed within the allotted hearing time.

35. However, whilst Mr Stubbs acknowledged this, he went on to submit that, notwithstanding the irrelevance, the statement included various criticisms of the respondent from an aggrieved individual and there was a sense that this approach of slinging as much mud as possible against the respondent, albeit irrelevant to the issues, to see if any of it would stick, was not acceptable. We agreed; that approach is very much within the concept of "oppression" as set out in HSBC, which is another ground for exclusion. For that reason too, we excluded the statement.

Management of the hearing

36. During his evidence, the claimant frequently did not answer the questions which he was asked and went off on a tangent. Whilst the judge let a lot of this

go initially, when it became a pattern he interjected to remind the claimant to focus on answering the questions being asked. He did this on several occasions.

37. Towards the start of the hearing, Mr Tavernier said that he would have a number of questions for the claimant. The judge explained that the evidence in chief of the witnesses was contained in the witness statements and, unless there were any properly required supplemental questions to be asked, there was not an opportunity for parties to adduce further evidence in chief through oral questions. The judge explained that this was why the tribunal ordered that witness statements should be in writing and should be exchanged well in advance of the hearing (and indeed these witness statements had been exchanged over a year ago). Mr Tavernier acknowledged this.

38. Mr Tavernier later said that he would have a number of questions for the claimant after the cross-examination of the claimant. The judge explained what re-examination was and the limited scope for asking questions; they had to be matters that arose from cross-examination (not new evidence in chief); it was not permissible to ask the same questions that had been asked in cross-examination in order to see if the claimant would give a different answer; and it was not permissible to ask leading questions.

39. When Mr Tavernier commenced his re-examination of the claimant, the judge had to intervene in relation to a number of his questions to disallow them because they were not in accordance with the limited scope of re-examination as set out in the paragraph above.

40. As noted, Mr Stubbs produced written submissions, which he forwarded by email to the claimant and the tribunal after the evidence had been completed early on the morning of the fifth day of the hearing. His written submissions were 18 pages long. It was agreed that the hearing would recommence 40 minutes later for oral submissions, to give enough time for the tribunal and Mr Tavernier to read Mr Stubbs' written submissions. The hearing duly reconvened. Mr Tavernier and the claimant asked for more time to read the written submissions. The tribunal allowed this and took an early lunch to enable this. In the end, Mr Tavernier and the claimant had just over two hours to read Mr Stubbs' written submissions.

41. Earlier that day, the claimant had emailed the tribunal and the respondent an additional single page document. This was not referred to in any of the remaining evidence which was heard that day. However, halfway through his oral submissions, Mr Tavernier started to refer to it. The judge asked Mr Stubbs if he was prepared to allow that document to be adduced at this late stage. Mr Stubbs initially objected and the judge explained that he would then need to hear brief submissions from the representatives as to whether the document should be adduced at this late stage and then make a decision on that. Mr Stubbs then said that he thought the best course of action was for him to agree that the document could be adduced but then to make some further submissions as to why it had no evidential value. This approach was agreed between the representatives and the tribunal. The extra document was adduced and Mr Stubbs duly made his

additional submissions regarding the document. Mr Tavernier then continued with his oral submissions.

42. During his oral submissions, Mr Tavernier on several occasions suggested that the evidence which we had heard was other than what it actually was. We do not find that this was intentional; however the judge did have to and did intervene on a number of occasions to remind Mr Tavernier that what he was submitting was not borne out in the evidence which the tribunal had heard. Indeed, Mr Stubbs then made similar points at the end of Mr Tavernier's oral submissions.

Findings of Fact

43. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Background

44. The respondent company, Eaton Square Schools Ltd, runs Eaton Square Schools, a co-educational, all-through collection of schools in central London, educating children from the age of 2 to 16 years old. One of those schools is the Eaton Square Senior School ("the School").

45. The respondent is part of the Dukes Education Group ("the Dukes Group") and the School is therefore one of 66 schools and associated businesses which are part of the Dukes Group.

46. The general management approach to the running of schools such as the School is that the day-to-day running of the school lies with the Headteacher of the school. At the times relevant to this claim, there were two Headteachers ("Co-Heads") at the School (Mr John Wilson and Ms Caroline Townshend), although at some point in 2020 Mr Wilson ceased to be Headteacher and Ms Townshend remained sole Headteacher. Ms Townshend was also absent from the School for certain periods when she was on maternity leave.

47. If a Headteacher needs assistance, they call on the Principals, who oversee normally two or three schools. At the times relevant to this claim, the Principal who oversaw the School was Mr Hepher.

48. Furthermore, there are specialists in other schools who can be contacted, and the Dukes Group head office team provides assistance to the school Principals, for example on legal matters.

49. The claimant was employed by the respondent at the School as a mathematics teacher from 5 January 2018 until he was dismissed with effect from 31 August 2019.

50. The claimant brought an employment tribunal claim against the School which included a large number of allegations, including allegations of race discrimination and including allegations against a large number of the claimant's

co-workers. It is accepted that that claim, for the purposes of the victimisation allegations made by the claimant in this present claim, was a protected act.

51. The parties entered into a settlement agreement by way of a COT3 on 6 January 2020. The settlement was made without admission of liability and the respondent entered into it because of the economic cost of fighting a claim which included so many allegations and would have involved them having to call around 10 witnesses to give evidence to counter the allegations.

52. Under the COT3 agreement, the respondent paid the claimant £30,000 and contributed £12,000 plus VAT to the claimant's solicitors' fees.

53. In exchange, the claimant withdrew his original claim and entered into a waiver of claims in the following terms:

"2. The Termination Payment … is in full and final settlement of:

2.1 the claim brought by the Claimant against the Respondent in the Employment Tribunal under case number 2202815/2019 (Claim); and

2.2 all and any claims which the Claimant has or may have in the future against the Respondent or any of its associated companies or its or their officers or employees whether arising from his employment with the Respondent or its termination including, but not limited to, claims under contract law, the Equality Act 2010, the Race Relations Act 1976, the Trade Union and Labour Relations (Consolidation) Act 1992, the Employment Rights Act 1996, the Working Time Regulations 1998, the National Minimum Wage Act 1998, the Transfer of Undertakings (Protection of Employment) Regulations 2006 or European Communities law, excluding any claims by the Claimant

2.2.1 to enforce the terms of this agreement;

2.2.2 any personal injury claims of which the Claimant is not aware and could not reasonably be expected to be aware at the date of this agreement unless it arises from or in connection with any of the claims referred to in paragraph 2.2; and

2.2.3 any claims in relation to the Claimant's accrued pension entitlements."

54. In addition, the COT3 agreement contained the following provisions:

5. The Claimant and Respondent shall keep the existence and terms of this settlement (and the circumstances leading up to termination) confidential except where disclosure is to HM Revenue and Customs, required by law or (where necessary or appropriate) to their legal or professional advisers or immediate family (provided that they agree to keep the information confidential). This clause shall not prevent the Claimant from making a protected disclosure under section 43A of the Employment Rights Act 1996, making a disclosure to a regulator regarding any malpractice, reporting a criminal offence to any law enforcement agency or assisting with a criminal investigation or prosecution.

6. The Claimant shall not and shall not encourage others to make any adverse or derogatory comment about the Respondent, or any of its associated companies or its or their officers, employees or workers and he shall not do anything which shall, or may, bring the Respondent or any of its associated companies or its or their officers, employees or workers into disrepute.

7. The Respondent shall use reasonable endeavours to ensure that its officers, employees and workers shall not make any adverse or derogatory comment about the Claimant or do anything that shall, or may, bring him into disrepute.

9. On receipt of a written request from a potential employer, the Respondent shall provide a reference in the form set out in Schedule 1 to this agreement and any oral reference provided will be on no less favourable terms. If the Respondent obtains information after the date of this agreement which would have affected its decision to provide a reference in the form in Schedule 1, it shall inform the Claimant and may decline to give a reference, or may give a reference with such modifications as the circumstances require.

55. Schedule 1 of the COT3 agreement set out the agreed form of reference, although with some areas of it in square brackets so that it could be tailored to the organisation which was requesting a reference in relation to the claimant.

56. That is the background against which the allegations of this claim are made.

Reliability of evidence

57. Before finding the facts relevant to the allegations in the list of issues, we need to make some observations on the reliability of the evidence of the respective witnesses, which is relevant to the findings of fact which we make.

The claimant

58. During his evidence, the claimant frequently did not answer the questions which he was asked and went off on a tangent. Whilst the judge let a lot of this go initially, when it became a pattern he interjected to remind the claimant to focus on answering the questions being asked. He did this on several occasions.

59. The claimant had a tendency to be evasive in answering questions, to change his evidence, to make an assertion then change it when taken to a document that indicated that it was untrue, and to attempt to explain away written contemporaneous evidence, and to give evidence that was contrary to his pleaded case. There were many examples and we set out only a few.

60. The claimant stated on a number of occasions that he did not charge for tuition and that he did not discuss charges with pupils, which was proven to be untrue by reference to his own words in the social media exchanges with them. He then stated that he stopped charging, but, as Mr Stubbs rightly submits, it is obvious that his messages in his social media exchanges with pupils were intended to lead to paid tutoring. He also suggested that he did not approach pupils regarding tutoring, which is demonstrably untrue on the face of those social media exchanges.

61. We therefore have serious concerns about the reliability of the evidence given by the claimant.

The respondent's witnesses

62. By contrast, we do not have any concerns about the reliability of the evidence given by the witnesses for the respondent. All of them sought to answer

the questions which were put to them and their evidence remained consistent in all material respects, both with their own witness statements, with the evidence of the other witnesses for the respondent, and with the contemporaneous documents.

63. Therefore, where there is a conflict of evidence between the claimant and the respondent's witnesses, we are inclined to prefer the evidence of the respondent's witnesses.

64. We now go on to make our substantive findings of fact relevant to the issues of the claim.

Reference given in November/December 2019

65. On 19 November 2019, Mr Wilson provided a written reference in relation to the claimant in response to a request from Mr Peter Broughton, the Headteacher of Westminster City School.

66. The reference given, which we have seen in the bundle, is in fact not dissimilar to the terms of the subsequently agreed reference in the COT3 agreement of 6 January 2020; however, it was of course given before that COT3 agreement reference was agreed.

67. There is nothing in the 19 November 2019 reference which could be described as negative.

68. Mr Broughton subsequently asked to have a conversation with Mr Wilson, which he agreed to and which duly took place on 21 November 2019. The claimant was, obviously, not a party to that conversation, nor was anyone else, apart from Mr Wilson and Mr Broughton. However, we have Mr Wilson's contemporaneous email (dated 21 November 2019) to Mr Hepher, which evidences that call. That email evidences that Mr Wilson was complimentary about the claimant. It also evidences that Mr Broughton had told Mr Wilson that he had received a reference from another school which was unsatisfactory and that the claimant's other referee was a parent of a pupil whom the claimant was tutoring. Mr Wilson noted that he thought that Mr Broughton had already decided not to offer the claimant a position but wanted Mr Wilson to give him further clarification anyway and his email to Mr Hepher concludes that *"I would expect that he will not be offered that position, but ironically, not for anything we have done or not done!"*. However, Mr Broughton subsequently did offer the claimant the position at Westminster City School, which the claimant duly took up.

69. Furthermore, we have also seen separate sets of notes of a meeting on 3 December 2020 between Mr Broughton and the claimant (primarily relating to the later Local Authority Designated Officer ("LADO") issue referred to below), in which it is indicated that Mr Broughton told the claimant at that meeting, in response to his question, that Mr Wilson provided a factual reference to Mr Broughton in November 2019. The handwritten notes of the meeting taken by the claimant himself indicate in their last line that Mr Broughton told him *"no reference from former employer was negative"*. One of the more tortuous

elements of the claimant's cross-examination at this hearing was when he tried, in response to Mr Stubbs' questions on these notes, to suggest that he had not intended to write *"negative"* but had intended to write *"negligible"* in these notes; which was utterly implausible and would have made no sense.

70. Furthermore, in light of the fact that Mr Wilson's impression on the call was that Mr Broughton was not going to offer the claimant a job and the fact that Mr Broughton did in fact subsequently offer the claimant a job, it is highly unlikely that anything Mr Wilson said was negative; rather it is far more likely that he said positive things which changed Mr Broughton's mind such that he did in the end offer the claimant the job.

71. For these reasons, we find that the respondent did not give a negative reference to Westminster City School in 2019, either in writing or orally.

Moo Cantina

72. The claimant has alleged that Ms Cannell breached the confidentiality provisions of the COT3 agreement at a restaurant called Moo Cantina in January 2020. This allegation essentially involves a direct contradiction between the evidence of Ms Cannell and Mrs Macmillan. There is no allegation by the claimant that he himself was present when this allegedly occurred.

73. Mrs Macmillan alleges that, at the end of January 2020, she was out with Ms Cannell and other friends and colleagues from the School at Moo Cantina in Pimlico when Ms Cannell told her and everyone else who was in attendance that the claimant had received the largest settlement package of any known previous employee, as a result of unfair dismissal from the School, equivalent to a year of his pay; and that, at the same time, Ms Cannell noted that the claimant had signed a non-disclosure agreement with the School. Mrs Macmillan alleged that, after this event, rumours about the claimant's settlement package spread rapidly around the School and outside the School.

74. Ms Cannell denies doing so; indeed, she denies that she was even aware of the terms of the settlement package with the claimant which would have enabled her to make this disclosure.

75. There are a number of reasons why we prefer the evidence of Ms Cannell and find that she did not make this disclosure.

76. Ms Cannell was employed as an HR and payroll executive at the School between September 2019 and January 2021. She was previously employed by the Dukes Group, but not in a payroll capacity and with no involvement with the School or the respondent. She joined the School after the claimant had left and so did not know him. She had never seen his personnel file.

77. Ms Little gave the following evidence, which we accept as she was in a position to know this and we have no concerns about the reliability of her evidence: Ms Cannell was employed in a relatively junior HR position and had no dealings with the claimant's settlement; the negotiations leading up to the COT3

agreement of 6 January 2020 were handled by the Dukes Group on behalf of the respondent; that is further evidenced by the fact that, when Mr Hepher later needed to supply a reference for the claimant in the agreed form in relation to Morgan Hunt, he needed to contact the Dukes Group in order to obtain the agreed wording. The settlement payment was also not made by the School; it was done by a colleague at the Dukes Group and did not appear on the claimant's payslips. Ms Cannell could not therefore have seen it.

78. Furthermore, the evidence of the respondent's witnesses, including Mr Hepher and Ms Townsend, was that, contrary to the claimant's assertion, the details of the settlement agreement were not common knowledge. Indeed, whilst Ms Townsend had been involved with the initial dismissal of the claimant, she had then gone on maternity leave and, whilst she sought on her return confirmation that the claimant's claim had been settled, she did not even herself as Headteacher know what the terms of it were. We have no reason to doubt her evidence and accept it. If even the Headteacher did not know the terms of the settlement, it is hardly likely that Ms Cannell would.

79. For these reasons, we accept that Ms Cannell did not know of the settlement agreement with the claimant or its terms and was not, therefore, in a position to disclose those terms, as alleged by Mrs Macmillan.

80. We also find that details of the claimant's settlement were not common knowledge and that, contrary to Mrs Macmillan's assertion, rumours about the claimant's settlement package did not spread rapidly around the School or outside the School from the end of January 2020 onwards.

81. In addition, as an HR professional, Ms Cannell was and is fully aware of the confidentiality of such matters and we accept her evidence that, even if she had known of the details of the COT3 agreement, she would not have disclosed them. Details of a settlement agreement are matters which any HR professional would realise were inherently sensitive and confidential. Furthermore, if Ms Cannell had indeed had knowledge of the COT3 agreement, she would also have realised that it contained a confidentiality provision (indeed part of Mrs Macmillan's assertion is that one of the aspects of the agreement which Ms Cannell disclosed was that a "non-disclosure agreement" had been signed). Furthermore, Mr Hepher, Ms Little and Ms Townsend all gave evidence that, in their dealings with Ms Cannell, they found her to be professional and would have been highly surprised if she had disclosed such information.

82. Ms Cannell and Mrs Macmillan were, for a period of a few months, work colleagues and regarded each other as friends during that limited period, although Ms Cannell emphasised, and we accept this, that they were not close friends. However, they did socialise with each other and other work colleagues outside work and Ms Cannell visited Ms Macmillan's home on at least one occasion in late December 2019. However, although Mr Tavernier made much of this, we do not accept that that level of acquaintance and friendship would mean that an HR professional would be likely to disclose to one employee sensitive confidential information relating to another employee. It is even less likely that

such a professional would, as alleged by Mrs Macmillan, disclose such information to the entire gathering in a restaurant.

83. There were two occasions when employees of the respondent, including Ms Cannell and Mrs Macmillan, visited the restaurant Moo Cantina outside work. However, Ms Cannell's evidence, which we accept, is that one of these took place in October/November 2019 and the other in December 2019. Those occasions both predated the date which the COT3 agreement was entered into (6 January 2020); Ms Cannell could not therefore have disclosed details of that agreement on either of those two occasions.

84. As noted, we had no reason to doubt the reliability of Ms Cannell's evidence. She is an ex-employee of the respondent and therefore has no obvious incentive to insist the respondent (albeit we accept that she has her professional reputation to defend in the light of Mrs Macmillan's accusation).

85. However, we do have reasons to doubt the evidence of Mrs Macmillan. Whilst she stuck to her evidence in cross-examination and did not depart from it, we note that she is an individual who was dismissed by the respondent at the end of January 2020 and disagreed with the reasons for her dismissal. In her witness statement she sets out a number of grievances which she has with the School (which are irrelevant to the issues of this claim), culminating in her complaining about her own dismissal by the respondent; she then goes on to say *"I am therefore happy to be a witness for [the claimant] in the forthcoming hearing at the Employment Tribunal"*. She is therefore someone with an axe to grind.

86. Furthermore, complaints had been made about her while she was employed by the School by Ms Bhattacharya, who was another of the witnesses called by the claimant in this claim; Ms Bhattacharya had complained to the School about Mrs Macmillan being, amongst other things, antisocial and intimidating. Mrs Macmillan denied in her evidence before the tribunal that she was antisocial and intimidating. When Ms Bhattacharya was asked in her evidence, she insisted that the evidence of Mrs Macmillan that she was not antisocial and unintimidating was not accurate. Therefore, in addition to Ms Cannell, there is a further witness, called by the claimant himself, who gave evidence that Mrs Macmillan's evidence to the tribunal was not accurate.

87. Finally, the claimant gave evidence that he had met Mrs Macmillan at her house in September 2020 and they had discussed matters to do with the settlement of his claim against the respondent. However, his case is also that he did not learn about Mrs Macmillan's alleged January 2020 conversation with Ms Cannell until February 2022 (and subsequently sought to amend his claim in April 2022). It is, however, inconceivable that, if he had met Mrs Macmillan in September 2020 and they had discussed the settlement, she would not have mentioned what she has since alleged Ms Cannell told her in January 2020, if Ms Cannell had indeed said that to her.

88. For all these reasons, we prefer the evidence of Ms Cannell and find that she did not disclose any details of the claimant's settlement agreement, in late January 2020 or otherwise.

89. It follows that, and we further find that, there was no breach of clause 5 of the COT3 settlement agreement (which required the claimant and the respondent to keep the existence and terms of the settlement confidential).

The claimant's contact with his former pupils on social media

90. After the claimant left the respondent's employment, he engaged with various of his former pupils on social media. They were still pupils at the School at the time, some of them aged 14 or 15. The respondent's policies (in common with those of other schools) prohibit teachers from engaging with their students on social media, for obvious safeguarding reasons.

91. We have seen the social media exchanges between the claimant and three of these pupils. On any objective level, they are inappropriate exchanges between a former teacher whose relationship with the children arose only because he had taught them and who had been in a position of trust in relation to them. There are two issues of particular concern.

92. First of all, the claimant was using this social media contact to try and offer his tutoring services in maths directly to the children, and in the process he made derogatory comments about the teaching of their then current maths teacher at the School and, in the case of one pupil, made derogatory comments about the private tutor whom that pupil already had at that time. He was clearly doing this in order to persuade them to use his services.

93. The second is the language which he used and the level of familiarity with the pupils. There are a number of concerning examples but the worst is his response to one of his former pupils (a 14 year old girl) who sent a picture of herself on the beach in what appears to be a bikini top and to which the claimant replies: *"Hhhhhheeeeellllloooooo"*.

94. The claimant spent a lot of time trying to deflect from this obviously inappropriate behaviour by suggesting, variously, that it was not illegal for him to offer tutoring services after he had left the School and that the respondent's social media policies did not apply to him now that he had left the School. However, this missed the obvious point that his behaviour was entirely inappropriate, that the School had a safeguarding duty to its own pupils, and that it had no real choice but to act in the way it subsequently did if it was not to be in dereliction of that duty.

95. It is not entirely clear whether the claimant, even to this day, does not realise that his behaviour was entirely inappropriate or whether he does realise it but was dissembling for the purposes of pursuing this claim (and there is evidence in the bundle and from cross-examination which indicates that it may be the latter). However, we do not need to make a finding on that for the purposes of

determining the liability issues of this claim. Suffice it to say, in the context of working with children, it is deeply concerning, whichever is the case.

11 November 2020 assembly

96. On 11 November 2020, two of the year 11 pupils whom the claimant had been messaging complained about this to their then current maths teacher at the School. She, quite properly, immediately informed Ms Townsend about this.

97. Ms Townsend immediately contacted Ms Ferguson, who was Head of Section for years 10 and 11. She told her what had happened. She asked her to lead an informal assembly to students in year 11 which focused on social media settings and allowing people to contact her and what to do if they felt uncomfortable. She instructed her to ask if anyone else had been contacted so that they could come forward and let her know, so that she could check that they were okay and talk to them about social media settings. She specifically asked Ms Ferguson to keep the assembly discussion broad and not to mention the claimant personally.

98. Ms Ferguson's evidence is that this is what she did. Furthermore, Ms Townsend's office was opposite the room where the assembly took place and she kept the doors open during the assembly so that she could hear what was happening. Ms Townsend's evidence, which we accept, is that Ms Ferguson did not mention the claimant and that the assembly was very short (only a couple of minutes); and that Ms Ferguson was an experienced teacher and she simply would not have used the terminology which the claimant now alleges she used, such as *"the School will be forced to take this matter to court"*. Indeed, leaving Ms Ferguson's professionalism aside for one moment, she was not even in a position to know what action the School would or would not take in the circumstances.

99. Although Ms Ferguson was not present at this tribunal to give evidence, her absence was for good reasons; furthermore, her witness statement was prepared and signed before the last hearing (which was postponed only at the claimant's request) and she was ready to give evidence at that hearing. Furthermore, what she has said about this issue in her witness statement was corroborated by Ms Townsend. We therefore accept her evidence in this respect.

100. The claimant was of course not present at the assembly himself. The only evidence which he has provided in relation to this issue is a message which we have seen at page 454 of the bundle between a group of students (some former students of the School, some then present students of the School and some with no involvement with the School). The claimant himself described this as a message between students on a gaming chat which included pupils who were not at the School. It is the contents of this single message which have clearly gone into the claimant's allegation about what was said at this assembly as set out at paragraph 8(d) of the list of issues.

101. However, we accept, as Mr Stubbs' submitted and as the claimant himself ought to have been aware, that young teenagers on a gaming chat are

likely to be prone to exaggeration and to sensationalise. It is also readily apparent, and the claimant accepted this in cross-examination, that the students at the School would all know the reason for the assembly in view of the fact that two of them had come forward earlier that same day to state that they had received messages from the claimant which made them uncomfortable; it is highly likely that they all would have known that it was the claimant's messages which prompted the assembly. It is much more likely, therefore, that without Ms Ferguson mentioning the claimant by name or making any of the comments alleged at paragraph 8(d) of the list of issues, the pupils assumed (rightly) that it was the claimant's messages which triggered the assembly and then speculated as they did on the gaming chat message.

102. Given the experience of Ms Ferguson and the instructions that she was given by Ms Townshend immediately preceding it, it is implausible that this assembly was conducted in an unprofessional way. It is far more likely that the assembly covered social media and internet safety settings, with any students who wanted to raise any messages from anyone that had made them feel uncomfortable being told they could speak to Ms Ferguson at the end of the assembly. At that time they may well have mentioned the claimant, given that it was his messages that had made them feel uncomfortable and given that further students beyond the two who originally complained also came forward.

103. We therefore find that Ms Ferguson did not tell the pupils at the assembly that the claimant had been contacting pupils offering paid tuition, that this was not allowed, that people should not answer him and the School would be taking this matter to court.

<u>Report to Westminster Local Authority Designated Officer ("LADO") regarding the claimant</u>

104. When the claimant's social media exchanges with his former pupils were brought to its attention, the respondent quite rightly took the matter seriously and involved not only the Principal Mr Hepher, but also advisers at the Dukes Group. The advice was to seek advice from the LADO. The LADO advised them that they should make a report. The School duly made that report. Although those at the respondent were well aware that the claimant, with his history of litigation, might well *"go legal"* if they did so, they decided, quite rightly, to treat the matter as they would with any other teacher and to make the report.

105. The claimant accepted in cross-examination that the referral was because, having asked the LADO for advice, the advice was that the respondent should refer, that the referral was due to safeguarding concerns, and that the referral was *"fine"*.

106. The referral made reflects the information which the children provided and what they had said, which was noted down and provided to the LADO.

107. Both the LADO and the police (whom the LADO informed) considered that the issues raised valid safeguarding concerns (although the police did not

consider that the matter was above the criminal threshold, they considered it was a conduct matter).

108. The respondent did not therefore, as the claimant has alleged, make a *"malicious"* report or one which *"was intended to bring him into disrepute and damage or destroy his professional reputation and career"*.

Claimant's alleged comparator

109. The claimant subsequently, in 2022, alleged that another member of the School's teaching staff, who is white, had been following pupils on social media. However, by the time he made the School aware of this allegation, that member of staff had left the School. No one at the School had been made aware of any such allegations previously. In May 2022, just after the claimant raised this allegation, Ms Townsend did ask staff if they were aware that this individual had been following students on social media; however, none of the individuals she asked were aware of anything. No student complained about this individual. We accept Ms Townsend's evidence that, if a student now complained about him messaging on social media, she would investigate and respond in exactly the same way as she did with the claimant.

110. The circumstances in relation to this individual and the claimant were not, therefore, comparable (because the respondent was not aware of any allegation about him, there was no complaint made about him, the individual had left by the time the claimant made this bare allegation about him; and, having made enquiries, Ms Townshend had no evidence which would form the basis for a report to the LADO – in stark contrast to the extensive evidence in relation to the claimant's social media contact with the pupils, both from those pupils and from the social media messages themselves).

1 December 2020 meeting with the LADO

111. As part of the process undertaken by the LADO, Mr Hepher and Mr Broughton (the Headteacher of Westminster City School, at which by that stage the claimant was a teacher) were required to attend a meeting with the LADO. This took place on 1 December 2020.

112. Mr Hepher informed those at the meeting, including Mr Broughton, that the claimant had entered into a settlement agreement with the respondent. However, all he did was to state that fact and that an agreed reference was part of the settlement. He did this because he was asked about it by the LADO, as is clear from the notes of the meeting. The claimant accepted in cross-examination that the respondent was obliged to inform the LADO of the way in which his employment ended and of the settlement agreement at the meeting of 1 December 2020 and that this was because of the statutory obligation to assist the LADO. Mr Hepher was indeed under a statutory obligation to assist the LADO.

113. We further find that Mr Hepher disclosing this information did not amount to a breach of clause 5 of the COT3 agreement. This is because, carved out from

the confidentiality provisions in clause 5 are disclosures required by law. As the respondent had a statutory duty to assist the LADO, the disclosures made by Mr Hepher were ones required by law. There was, therefore, no breach of clause 5 of the COT3 agreement.

Claimant's allegation regarding respondent's instruction to parents

114. The claimant has alleged as part of his claim that, in or around February 2021, the respondent instructed parents of pupils at the School not to contact the claimant for tutoring services.

115. We accept Mr Stubbs' submission that this allegation is so unclear that it cannot stand as a coherent allegation for the respondent to face. It was also not put to the respondent's witnesses by the claimant or Mr Tavernier; in fact, it was only put to them at all because, in the absence of any questions from Mr Tavernier, the judge decided to put it to them.

116. The claimant's witness statement is very vague about this allegation. The extent of what he says about it is, for example, at paragraph 64, where he says that *"in February 2021, the school contacted the parents of year 9 students by phone and asked them not to follow me on Instagram. The school has instructed parents not use my tutoring services"*. He then goes on to say that he learned this from two parents of his former students. However, there is no detail at all as to who at the respondent is supposed to have instructed parents not to contact the claimant for tutoring services. Nor has the claimant called any evidence from those whom he says told him about these alleged instructions.

117. Ms Townsend was clear in her evidence that the respondent did and does tell pupils and parents that current teachers should not tutor them (not that former teachers should not tutor them). It is, therefore, highly likely that, even if the claimant did speak to parents about these matters as he alleges, there has been a misunderstanding about the message. Those who could comment on the allegation (Ms Townsend and Ms Little) were clear (when asked by the judge) that they did not give any such instruction and they did not tell anyone else to do so.

118. For these reasons we find that the facts of this allegation have not been proven.

Morgan Hunt reference

119. The claimant has alleged that the respondent deliberately omitted, refused or failed to provide a reference in response to a reference request submitted by Morgan Hunt on 14 March 2022.

120. However, there was no omission, refusal, or failure to provide a reference in response to Morgan Hunt's reference request on 14 March 2022. The respondent did provide a reference, in the agreed form set out in the COT3 agreement. The claimant admitted in evidence that the respondent did provide a

reference; and indeed, we have seen the correspondence in the bundle which evidences this.

121. There was a delay in providing the reference. Mr Hepher needed to obtain the form of reference from the Dukes Group and there was a slight delay in providing it. When that was done, it had slipped off his radar at a busy time of the School's year and was not actioned. When a chaser email from Morgan Hunt arrived, Mr Hepher provided the reference soon after that. These were the reasons for the delay.

122. Furthermore, around this time a different reference request in relation to the claimant came in from another organisation, which Mr Hepher responded to promptly.

The Law

Harassment related to race

123. Under section 26(1) of the Equality Act 2010 ("the Act"), a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

124. In deciding whether conduct has the effect referred to above (but not the purpose referred to above), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

125. Race is a relevant protected characteristic in relation to harassment.

126. In Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT Mr Justice Underhill, then President of the EAT, said: *'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'*. The EAT affirmed this view in Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13. The EAT observed that 'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'. Indeed, the Court of Appeal in HM Land Registry v Grant (Equality and Human Rights Commission intervening) 2011 ICR 1390 further stated in this context that *'tribunals must not cheapen the significance of these words since they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment'*.

127. Under section 40(1) of the Act, an employer must not harass an employee of his.

Victimisation

128. Section 27 of the Act provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act.

129. Protected acts include the bringing of proceedings under the Act; giving evidence of information in connection with proceedings under the Act; doing any other thing for the purposes of or in connection with the Act; or making an allegation (whether or not express) that A or another person has contravened the Act. However, 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.

130. Under section 39(4) of the Act, an employer (A) must not victimise an employee of A's (B) on various grounds, including subjecting him to a detriment. Detriment can be anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. However, an unjustified sense of grievance alone would not be enough to establish detriment.

Post employment harassment and victimisation

131. It is agreed that the tribunal is not prevented from having jurisdiction to hear these complaints of harassment and victimisation simply because the alleged detriments to which they relate are all said to have taken place after the termination of the claimant's employment with the respondent (section 108 of the Act and, in relation to victimisation, Jessemey v Rowstock Ltd and another [2014] EWCA Civ 185).

Burden of Proof

132. In respect of the above provisions, the burden of proof rests initially on the claimant to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the respondent did contravene one of these provisions. To do so the claimant must show more than merely that, for example, he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be "something more" to indicate a connection between the two (Madarassy v Nomura International plc [2007] IRLR 246). If the claimant can establish this, the burden of proof shifts to the respondent to show that on the balance of probabilities it did not contravene that provision and the respondent must prove that the treatment was "in no sense whatsoever" related to the relevant characteristic or the protected act. If the respondent is unable to do so, we must hold that the provision was contravened and that harassment or victimisation, as applicable, did occur.

133. However, if the tribunal can make clear positive findings as to the respondent's motivation, then it need not revert to the burden of proof (Martin v Devonshires Solicitors [2001] ICR 352 (EAT)).

Time Limits

134. Section 123(1) of the Act provides that proceedings may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the tribunal thinks just and equitable. (The primary time limit is adjusted as a result of time spent in ACAS early conciliation.)

135. Section 123(3) provides that, for these purposes, conduct extending over a period is to be treated as done at the end of the period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the Court of Appeal held that the burden is on the claimant to prove, either by direct evidence or by inference from the primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

136. The tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, it is for the claimant to persuade the tribunal that it is just and equitable. There is no automatic presumption that it will be extended. The exercise of discretion is thus the exception rather than the rule (Robertson v Bexley Community Centre [2003] IRLR 434 CA).

Jurisdiction and COT3 agreements

137. Section 144 of the Act provides that claims under the Act can be validly settled under an agreement *"made with the assistance of a conciliation officer"* (in other words a COT3 agreement). Such agreements are not subject to the additional requirements in section 147 of the Act which apply to *"settlement agreements"*.

138. Consequently, the case law in relation to whether settlement agreements and COT3 agreements can respectively settle future claims varies slightly. However, the case law is clear that a COT3 agreement can settle future claims. Mr Stubbs took us to a number of authorities in this respect, which we summarise below.

139. In Arvunescu v Quick Release (Automotive) Limited [2022] EWCA Civ 1600, (a case in which the decision that an earlier COT3 prevented the presentation of new proceedings was upheld), it was clear that the parties intended a clean break and the meaning of the wording *"claims… in the future"* was unarguable.

140. In Arvunescu the Court of Appeal considered the earlier case of Royal National Orthopaedic Hospital Trust v Howard [2002] IRLR 849, EAT in which it was held (at [9]) that:

"If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for. We can see no reason why as a matter of public policy a party should not contract out of some future cause of action. But we take the view that it would require extremely clear words for such an intention to be found."

The Court of Appeal, in obiter comments, did not raise any issue with the concept that future (unknown) claims could be settled.

141. In McLean v TLC Marketing PLC UKEAT/0429/09/LA, a case concerning the application of a COT3, the dicta in Howard was applied, having considered the applicable limitations on settlement under, at that time, the SDA 1975.

142. In overturning the decision of Lord Summer that a settlement agreement (not a COT3) could not settle future claims, in its recent decision in Bathgate v Technip Ltd [2023] CSIH 48, the Inner House of the Court of Session (persuasive only but entirely consistent with the above authorities) held that a settlement agreement did meet the requirements of section 147 of the Act for a "qualifying settlement agreement" and so future claims could be validly compromised by a settlement agreement, as they can through a COT3.

143. The case law is therefore clear that a COT3 (and indeed a settlement agreement) can settle future claims, provided that clear language is used.

144. For a COT3, the question is one of construction and whether the COT3 settles the claim through clear language.

Amendments

145. The leading case on amendments is Selkent Bus Co Ltd -v- Moore [1996] ICR 836. In determining whether to grant an application to amend, an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing the amendments. In Selkent, the then President of the EAT, Mr Justice Mummery, explained that relevant factors may include: the nature of the amendment; the applicability of time limits; and the timing and manner of the application. However, the exercise is essentially one of balancing the prejudice to one party of granting the amendment against the prejudice to the other party of refusing it.

Conclusions on the issues

146. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

147. It is again worth reminding the parties that the only issues which we are determining are those in the agreed list of issues. We are not therefore, determining matters which, whilst they may be of interest to one party or another, are not relevant to those issues.

148. It is also worth stating that this case is not about whether the claimant was a good teacher or a bad teacher, or whether he was a popular teacher with some of his pupils. It is about whether the respondent did the various things alleged at paragraph 8 of the list of issues and whether, if it did, it did so either because the claimant brought his original claim or as an act of harassment related to the claimant's race.

149. We now address the issues set out in the list of issues. We deal first with the seven substantive issues set out in paragraph 8, then the issue of the amendment, then the issue of time limits, and finally the issue of whether the tribunal has jurisdiction to hear the claim because of the provisions of the COT3 agreement of 6 January 2020.

Substantive issues

a. Breaching the confidentiality provisions of the Settlement Agreement by Ms Cannell of the R in January 2020.

150. As set out in our findings of fact above, Ms Cannell did not disclose any details of the claimant's settlement agreement, in late January 2020 or otherwise; nor was there a breach of clause 5 of the COT3 settlement agreement (which required the claimant and the respondent to keep the existence and terms of the settlement confidential). This allegation is, therefore, not made out on the facts and therefore fails.

151. We would add, in this respect, that, even if Ms Cannell had made the disclosures in late January 2020 as alleged by Mrs Macmillan, they were not authorised by the respondent and they were made outside the course of her employment, albeit to work colleagues at a social gathering. Furthermore, as the claimant accepted in cross-examination, whatever Ms Cannell's actions were, they were not authorised by the respondent. We therefore, find, that, even if Ms Cannell had made those disclosures, they were not in the course of employment and were not therefore actions of the respondent. The allegation would have failed for that reason too.

152. Finally, for completeness, if Ms Cannell had made those disclosures, there is no prima facie case that she did so either because the claimant had brought his previous claim or as an act of harassment of him related to his race. The allegation would fail for that reason too. The most likely explanation for such a disclosure would have been simply inappropriate gossip.

b. Providing a negative reference or oral reference to WCS on terms inconsistent with Schedule 1 of the Settlement Agreement in or around November and December 2019.

153. First of all, this allegation is nonsensical insofar as it alleges that the written reference was on terms inconsistent with the agreed reference in the COT3 agreement. This is because that reference was given in November 2019,

whereas the COT3, with its agreed form reference, was not entered into until 6 January 2020.

154. Furthermore, as we have found, the respondent did not give a negative reference to Westminster City School in 2019, either in writing or orally. This allegation is not, therefore made out on the facts and it fails.

c. Making a malicious report about C to Westminster LADO in or around November 2020 which was intended to bring him into disrepute and damage or destroy his professional reputation and career

155. As we have found, the respondent did not make a *"malicious"* report or one which *"was intended to bring him into disrepute and damage or destroy his professional reputation and career"* and for those reasons the allegation is not made out on its facts and therefore fails.

156. However, if the allegation had been merely that the respondent made a report to the LADO, which it did, it is absolutely obvious that the report was made for valid safeguarding reasons; the School had good reason to be concerned for its pupils and it referred due to the genuine safeguarding concerns that it had.

157. We can make that finding clearly on the evidence without reverting to the burden of proof. However, even if we applied the burden of proof, there is no evidence from which we could conclude that the decision to report was anything whatsoever to do with the fact that the claimant had brought a claim previously or an act of harassment related to his race. The burden of proof would not therefore shift and the allegations would fail for that reason as well.

d. On or around 11 November 2020, during assembly at Eaton Square Upper School, Mayfair, pupils were told by a member of the R's staff that C had been contacting pupils offering them paid tuition, that this was not allowed, pupils should not answer him and the school would be taking this matter to court.

158. As we have found, Ms Ferguson did not tell the pupils at the assembly that the claimant had been contacting pupils offering paid tuition, that this was not allowed, that people should not answer him or that the School would be taking this matter to court. As the allegation has not been proven on the facts, it fails.

e. Informing C's employer, WCS, that he had entered into the Settlement Agreement with R in or about December 2020.

159. As we have found, Mr Hepher did inform those at the 1 December 2020 meeting with the LADO, including Mr Broughton, the Headteacher of Westminster City School, that the claimant had entered into a settlement agreement with the respondent. However, all he did was to state that fact and that an agreed reference was part of the settlement. Furthermore, he did this because he was asked about it by the LADO, as is clear from the notes of the meeting. The claimant accepted in cross-examination that the respondent was obliged to inform the LADO of the way in which his employment ended and of the

settlement agreement at the meeting of 1 December 2020 and that this was because of the statutory obligation to assist the LADO. Mr Hepher was indeed under a statutory obligation to assist the LADO.

160. We can therefore make a clear finding, without needing to revert to the burden of proof, that Mr Hepher did this because he was asked by the LADO and because he was obliged to reveal this information when asked. These allegations therefore fail.

161. However, even if we did employ the burden of proof, there is no evidence to suggest that Mr Hepher did this because of the fact that the claimant had previously brought a claim or that it was in any way related to the claimant's race. The burden of proof would not therefore shift and the allegations would fail.

162. As we have also found, Mr Hepher's disclosing this information did not amount to a breach of clause 5 of the COT3 agreement. This is because, carved out from the confidentiality provisions in clause 5 are disclosures required by law. As the respondent had a statutory duty to assist the LADO, the disclosures made by Mr Hepher were ones required by law. There was, therefore, no breach of clause 5 of the COT3 agreement.

f. In or around February 2021, R instructing parents of pupils at Eaton Square Upper School not to contact the Claimant for tutoring services.

163. As we have found, this allegation has not been proven. As it has not been established on the facts, it fails.

g. R's deliberate omission, refusal or failure to provide a reference in response to the reference request submitted by Morgan Hunt on 14 March 2022.

164. As we have found, there was no omission, refusal, or failure to provide a reference in response to Morgan Hunt's reference request on 14 March 2022. The respondent did provide a reference, in the agreed form set out in the COT3 agreement. This allegation has not therefore been made out on the facts and it therefore fails.

165. Mr Tavernier even acknowledged this in his submissions. However, he went on to suggest that the delay in giving this reference was too long and that was an act of victimisation/harassment. To be clear, that is not the allegation before us, so it is an entirely improper way to deal with matters.

166. However, even if that was the allegation before us, there were reasons for the delay which were nothing whatsoever to do with the fact that the claimant had brought a previous claim or related to his race. Mr Hepher needed to obtain the form of reference from the Dukes Group and there was a slight delay in providing it. When that was done, it had slipped off his radar at a busy time of the School's year and was not actioned. When the chaser email from Morgan Hunt arrived, Mr Hepher provided the reference soon after that. These were the reasons for the delay and we can make a clear finding of fact to that effect.

167. Furthermore, around this time a reference request came in from another organisation, which Mr Hepher responded to promptly. If Mr Hepher were discriminating against the claimant by delaying the provision of references, why would he delay in the one case and not in the other; it makes no sense. The reasons were therefore in no sense whatsoever because of the fact that the claimant had brought his previous claim or related to the claimant's race. The complaints would, therefore, even if brought on this basis (delay), also fail.

Summary of substantive issues

168. In summary, all of the claimant's complaints fail on their substantive merits.

Amendment application in relation to issue 8(a) (Moo Cantina)

169. This complaint relates to what was or wasn't said on a social night out allegedly in January 2020. It is a freestanding, separate complaint to the remainder of the complaints which make up this claim. It is not a relabelling of existing facts. It is a major amendment to the claim, as is evident from the amount of time which has needed to be devoted to it in terms of witness evidence and cross-examination (neither Mrs Macmillan nor Ms Cannell would have needed to have given evidence if it were not for this allegation) and our assessment of it on its merits.

170. The complaint relies on oral evidence and that evidence was first set down in writing only in in July 2022.

171. The (unamended) claim was lodged on 22 April 2021. Even at that time, any complaint dating from January 2020 was well out of time.

172. As noted, the claimant's evidence was that he had had a discussion with Mrs Macmillan in September 2020 that included discussion of his settlement with the School. As we found, it is not credible that Mrs Macmillan would not have raised matters pertaining to January 2020 and the alleged conversation at Moo Cantina at that time (if it had indeed taken place). However, no amendment was sought in or around September 2020.

173. The claimant maintained (implausibly in the light of the paragraph above) that he was told of the allegation in February 2022. No application was made at that time, but as he accepted, at that time he was represented by solicitors and counsel and, with the help from his girlfriend, he was able to provide instructions to apply to postpone a preliminary hearing.

174. The amendment was only sought on 29 April 2022. There is no good explanation for the delay. The claimant sought to suggest, without any medical evidence, that he was not well at the time. However, he was well enough to deal with other matters relating to the claim.

175. The delay in bringing this complaint means that there were two witnesses being asked to recall what was said or not said on a social night out

four years ago. This is in the context of the short three month time limit in relation to discrimination claims, for which there are good reasons. It was evident during Ms Cannell's cross-examination that, as a result of the passage of time, there were things about which she was asked that she simply could not recall (for example, the WhatsApp messages with Mrs Macmillan which she was taken to by Mr Tavernier; whilst they were not of relevance to the issues of the claim, it was evident that Ms Cannell struggled, understandably given the time gap, to remember them or the context of them). We accept, therefore, that notwithstanding that the complaint fails on its substantive merits, there was prejudice to the respondent because of this long delay.

176. The allegation is one that, following the claimant's evidence in cross-examination, cannot constitute a breach of the COT3 or an act of the respondent in any event; this is because the claimant accepted that, whatever Ms Cannell said, she would have done this outside the course of her employment with the respondent.

177. As we have found above, the claim fails on its facts. Therefore, granting the amendment is worthless to the claimant.

178. For these reasons, we find that there is no prejudice to the claimant in not granting the amendment whereas there is some prejudice to the respondent in granting it. For these reasons we refuse the application to amend the claim to include the allegations at paragraph 8(a).

Jurisdiction (time limits)

179. We now consider the jurisdictional issues in relation to time limits in relation to the remaining allegations (paragraph 8 (b-g)).

180. ACAS early conciliation commenced on 8 February 2021 and ended on 22 March 2021, with the claim being presented on 22 April 2021. That means, and Mr Stubbs agreed with this assessment when the judge suggested it, that any complaints where the allegation is said to have taken place earlier than 9 November 2020 are prima facie out of time.

181. Allegation 8(b), which is said to have taken place in early November 2019, is therefore prima facie out of time. The remaining allegations (paragraphs 8(c-g) are in time.

182. There are no successful in time complaints such that the complaint at 8(b) could be deemed to be in time as being part of conduct extending over a period with successful in time complaints. Paragraph 8(b) was therefore presented out of time.

183. We have heard no arguments as to why it would be just and equitable to extend time in relation to this allegation and, having looked at all the evidence before us, we can see no reason why that complaint could not have been brought earlier and we can see no reason why it would be just and equitable to

extend time. The tribunal does not therefore have jurisdiction to hear the complaints at allegation 8(b) and they are therefore struck out.

Jurisdiction (COT3 agreement)

184. The claimant's original claim was settled through a COT3 agreement and not through a "settlement agreement" governed by the provisions of section 147 of the Act. The relevant section for us to consider is therefore section 144 of the Act. Without repeating all of the case law which Mr Stubbs took us through, that case law is clear that there is no prohibition in principle from such an agreement settling future claims and the test calls for a construction exercise in order to determine whether the COT3 in question excludes the claim through clear language and words.

185. The wording of the COT3 of 6 January 2000 is clear. It states that it settles "*all and any claims which the claimant has or may have in the future against the respondent… including but not limited to, claims under… the Equality Act 2010"*. As the claimant accepted in cross-examination, his current claims are claims under the Equality Act 2010. The claims are also clearly ones which are "in the future" (as at the time of the COT3 being entered into).

186. The judge specifically asked Mr Stubbs as to whether he considered that there was any significance to the fact that the COT3 in Arvunescu referred to claims *"arising out of or in connection with"* employment or its termination, as opposed to the present COT3 wording which refers only to claims *"arising out of"* employment or its termination. Mr Stubbs submitted that, as a matter of construction, although these claims of victimisation and harassment were one stage further removed than, for example, the complaints of race discrimination during the claimant's employment in his original claim, they nonetheless arose out of the claimant's employment and/or its termination and that it was not necessary to add the words *"in connection with"* in order to cover these complaints. We agree and we find that it was clearly the intention of the parties that the COT3 should cover future complaints such as these.

187. We therefore consider that the complaints brought under the claimant's claim are all covered by the waiver in the COT3 agreement.

188. The claimant has employed a secondary argument, which is emphasised greatly in his original claim form, drafted by solicitors, and which is indicative of the concern which they (and he) must have had about the effect of the COT3 on the claimant's ability to bring these complaints. He has alleged that the respondent breached the COT3 in carrying out certain of the allegations made in his claim, in particular the confidentiality and derogatory statements provisions of the COT3. Proving a breach of the COT3 is not necessary for the purposes of establishing whether the respondent's alleged actions were acts of victimisation or harassment. However the claimant's argument goes on that, because the COT3 was (allegedly) breached, it can be rescinded and the respondent cannot rely on the provisions of the waiver which it contains. That, we consider, is why the claimant has from the start placed so much emphasis on the respondent allegedly breaching the COT3.

189. However, we have found that the respondent did not breach any of the provisions of the COT3. (As an aside, the reason why this jurisdictional issue was not determined at a preliminary hearing before the substantive issues were heard is because it appeared necessary to determine whether the respondent had breached the COT3 in order to determine whether the COT3 prevented the claimant from bringing these complaints; which meant that it was necessary to hear the evidence on the substantive issues first.)

190. However, as there was no breach, the waiver remains valid. The tribunal does not therefore have jurisdiction to hear any of the complaints which the claimant has brought and they are all struck out.

191. For completeness' sake, we should add that, even if there had been a breach, the claimant has not in fact rescinded the COT3 agreement. To do so, he would have had to have repaid to the respondent the £30,000 settlement payment which he was paid; he has not done so. Therefore, even if the respondent had breached the terms of the COT3 agreement as alleged by the claimant, this would not have rendered the waiver of claims ineffective and the tribunal would, therefore, still not have had jurisdiction to hear the claimant's complaints.

Written reasons

192. After the judge had delivered the reasons for the tribunal's decision on liability orally, he explained that he would, in a moment, ask the parties whether they wanted the written reasons for the decision and that they would be able to request them either now at the hearing or within 14 days of the judgment being sent to the parties.

193. Before doing so, the judge explained, principally for the claimant's benefit, two things. First, he said that, if a party wished to appeal the tribunal's decision, that party would need the written reasons in order to do so, although he stated that an appeal could only be founded if there was an error of law by the tribunal or if its decision on the facts was perverse; there were no grounds for appeal if a party simply disagreed with the factual findings that the tribunal had made. Secondly, he explained that, if written reasons were produced, they would be published online on the tribunal's website and that the tribunal had no discretion as to whether or not to do this. He added that the reasons were searchable by name and that the tribunal was aware that potential future employers might carry out such a search. He noted that the tribunal's reasons had included various findings about the claimant's reliability of evidence, honesty and character. The judge made these remarks because he wanted the claimant to be aware of the implications of written reasons being produced before making a decision as to whether or not to request them.

194. The judge then asked the representatives if they wanted the written reasons for the decision. Mr Tavernier took instructions and said no. Mr Stubbs said that the respondent had no present intention to seek written reasons, but would consider it in the coming days.

195. (Subsequently, by an email of 19 February 2024, the respondent's solicitor requested written reasons.)

Costs application

196. Mr Stubbs then withdrew the respondent's outstanding application for costs in relation to the postponement of the original full merits hearing and, instead, made a separate application for costs.

Law

197. The tribunal's powers to make an award of costs are set out in the Employment Tribunal Rules 2013 at rules 74-84. The test as to whether to award costs comes in two stages.

198. First, has a party (or a party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or response have no reasonable prospect of success? If that is the case, the tribunal must consider making a costs order against that party.

199. Secondly, should the tribunal exercise its discretion to award costs against that party? In this respect the tribunal may, but is not obliged to, have regard to that party's ability to pay.

200. Before Mr Stubbs made his application, the judge took time to explain for the claimant's and Mr Tavernier's benefit what the law in relation to costs in the tribunal was, as summarised above.

Application

201. Mr Stubbs' application was both on the grounds that the claim had no reasonable prospect of success and on the grounds that the claimant had behaved unreasonably and vexatiously in the bringing of and the conducting of the proceedings.

202. Both parties then made their submissions on the application. During the course of Mr Tavernier's submissions, the judge asked Mr Tavernier a number of questions about the claimant's financial means, which he answered having taken instructions from the claimant. The tribunal then adjourned to consider its decision.

203. When it returned, it gave the parties its decision on the application and its reasons for that decision.

First stage of the test

No reasonable prospect/unreasonable conduct

204. In the case of most of the seven assertions of fact in the list of issues (including the one which we did not allow by way of amendment), the claimant was unable even to establish the facts of those allegations, let alone that they were acts of victimisation or harassment related to race. It should have been clear from the start that these complaints were weak; however, after the disclosure process, which was completed on 13 January 2023, when the claimant had all the documents, it was manifestly apparent that he could not succeed even in establishing the facts of several of the allegations. Furthermore, it was similarly manifestly apparent that there was nothing whatsoever to suggest that, even where the facts were established, the actions of the respondent were acts of victimisation or of harassment related to his race. At that point it was clear that all of these complaints had no reasonable prospect of success on the substantive merits.

205. The complaints brought by the claimant therefore had no reasonable prospect of success and that was clear by the time disclosure had been done.

206. Furthermore, in the light of that, we consider that it was unreasonable conduct by the claimant to continue with the proceedings from the point at which disclosure had been done in January 2023.

Vexatious

207. Both the bringing of these proceedings and the conducting of them was vexatious.

208. In our earlier decision, we left open the question of whether the claimant even at this stage did not realise that his conduct in relation to his communications with his former pupils was inappropriate or whether he did realise that but dissembled for the purposes of bringing this claim. We now make a finding that it was the latter. The claimant is an intelligent individual and one who was familiar with the safeguarding policies at both the respondent and other schools. There are numerous pieces of evidence which suggest that he knew that what he was doing was inappropriate, for example the fact that, when he produced copies of the social media conversations in question, he removed some of the more inappropriate passages. We therefore find that the claimant knew that his behaviour was inappropriate but nonetheless brought and continued these proceedings, knowing that they were of no merit.

209. He did this for two reasons: primarily, it was to try and obtain a financial settlement from the respondent; he had managed to do this on a previous occasion and sought to chance his arm again. The fact that money has been at the forefront of his mind is evidenced by the fact that, even in the weeks coming up to this hearing, he was seeking wholly disproportionate offers of settlement from the respondent, including for respectively three years' salary, two years' salary and one year's salary. The only other potential motivation was a

misguided attempt to “clear his name” although, given the weakness of the case, that is likely to have been very much secondary in comparison to his primary motivation to obtain money from the respondent.

210. However, both of these motivations are improper reasons for bringing an employment tribunal claim. We therefore have no hesitation in concluding that the claimant’s bringing and conducting of these proceedings was vexatious.

Unreasonable

211. We have already found that the continuing of these proceedings after the disclosure stage was unreasonable.

212. However, the claimant’s conduct of these proceedings was also unreasonable for a number of other reasons. Examples include: his late disclosure and the attempted introduction of the new witness statement in relation to Ms AT, all at the last moment; lying in his evidence, for example knowingly suggesting that he was not charging for tuition when the documents themselves demonstrated that he was; and the unreasonable settlement demands in January 2024 which we have referred to, which were wholly unreasonable given the merits of the case which he must have been aware of.

213. The claimant’s conduct of these proceedings was therefore unreasonable.

214. We are, therefore, obliged to consider our discretion as to whether to make an award of costs and if so in what amount.

Discretion

215. The total amount of the respondent’s costs of defending the case was £58,668 (excluding VAT).

216. However, Mr Stubbs said that the respondent was only seeking its costs from December 2023 onwards. These amounted in total to £22,421 (which comprised counsel’s fees of £14,625 and solicitors fees of around £8000). These sums were excluding VAT, but the respondent was not claiming that.

217. Furthermore, Mr Stubbs said that the amount of these costs which they were seeking should be capped at £20,000, which was the maximum which a tribunal could award without a detailed assessment.

218. The reason why Mr Stubbs said the respondent limited the costs to those which were incurred from December 2023 onwards is because the final decision of the LADO was produced in December 2023 (which made clear that the claimant’s conduct was inappropriate). As is evident form our earlier findings, we do not in fact consider that it was necessary for the claimant to have seen this document in order to have realised that his claims had no reasonable prospect of success; it was enough for him to have seen the documents which came out of the disclosure exercise which completed in January 2023. In our view, the

respondent could quite reasonably have sought its costs from that point onwards. However, it chose not to do so and has limited its application to £20,000.

219. In the context of the number of issues of this litigation and the length of the hearing, we do not consider that the costs incurred by the respondent were excessive; we rather suspected that they might have been more than that. The costs sought by the respondent are not, therefore, in themselves unreasonable. As noted, the respondent could quite reasonably have sought the recovery of costs well in excess of £20,000.

220. Furthermore, the claimant was represented by solicitors until January 2024, when those solicitors came off the record. At times during that period he was also represented by counsel. He therefore had the benefit of professional legal advice until less than a month before this hearing. He has only been a litigant in person for a few weeks prior to this hearing. It would not therefore be appropriate to treat the claimant, who is also an intelligent man, as a naïve litigant in person who did not know any better.

221. The claimant was also warned by the respondent in a number of letters of the weaknesses of his claim. In a letter of 11 October 2022, the respondent set out the weaknesses of the claimant's claim and offered not to pursue costs if he withdrew, but confirmed that, if he did not, it would pursue costs on the basis that the complaints had no reasonable prospect of success and that the claimant acted unreasonably in bringing the complaints. A further letter was sent on 6 September 2023. On 8 January 2024, noting that the claimant was now representing himself, the respondent offered to withdraw any costs application if the claim was withdrawn. However, as noted, the claimant simply engaged in unrealistic negotiations, for example his email of 22 January 2024 (only a week before this hearing) where he said that he would withdraw his claim if he got three years' salary from the respondent, together with all of his costs and a reference. The claimant was, therefore, warned of the consequences on many occasions and nevertheless continued to pursue his claim all the way through to this hearing.

222. Mr Tavernier made much of the fact that the original full merits hearing was postponed, arguing that the costs which the respondent was seeking under this application would never have been incurred if the original hearing had not been postponed. However, firstly, that hearing was postponed on the claimant's application anyway. Secondly, and more pertinently, this submission misses the point: the claimant should have discontinued this litigation even before the original hearing; the decision to continue the litigation to the original hearing and beyond it up to and including this hearing was his decision; that is the reason why the respondent has unnecessarily had to incur the costs which it is seeking. Mr Tavernier's argument is therefore a red herring: it does not amount to a reason not to award the costs which the respondent seeks.

223. We have decided not to take into account the claimant's financial means, for two reasons. First, this is because of the particularly extreme nature of the claimant's conduct in terms of his unreasonable behaviour and his vexatious motivation for bringing this claim. His decision, as an intelligent individual, to do

so has been a complete waste of the time and resources for both the respondent and the employment tribunal. Secondly, in the light of his dishonesty, we do not feel that we can take at face value anything which the claimant has told us about his financial means.

224. We therefore make an award of costs in the full amount sought of £20,000.

225. Even if we did take into account the claimant's financial means, we would still have awarded costs in the sum of £20,000. The claimant told us that he had spent the £30,000 settlement sum which he had received from the respondent four years ago; that he had no assets, including no property of his own and no car; and that he was renting his accommodation at £1,700 per month. First, we reiterate our scepticism about anything the claimant tells us. Secondly, in his own schedule of loss for these proceedings, the claimant set out that he had earned £15,000 for tutoring services and that he anticipated that he would earn £69,000 for future work. The claimant sought to row back from that in his submissions on the costs application when it was pointed out to him. However, we accept that, even if he has not earned those sums already, he does have significant earning potential and that, whilst paying £20,000 of costs would be difficult and a hardship to him, it is something which would be possible.

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Employment Judge Baty

Dated: 1 March 2024

Judgment and Reasons sent to the parties on:

……12 March 2024.....

…….....
For the Tribunal Office

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

Annex

Agreed List of Issues

Introduction and Summary

1. By a Claim Form presented to the Employment Tribunal ("ET") on 24 April 2021, C claimed:

    a. Victimisation under s.27(1) of the Equality Act 2010 ("EqA 2010") read with s.108(1) EqA and

    b. Harassment related to the protected characteristic of race under s.26 EqA 2010 read with s. 39(2) EqA.

2. C was employed by R from 5 January 2018 until 31 August 2019 as a mathematics teacher at Eaton Square Upper School, Mayfair.

3. The following issues fall to be determined by the ET.

PRELIMINARY ISSUES (agreed by the parties that these should be determined as part of and not in advance of the full hearing)

Jurisdiction

4. Is C precluded from bringing claims under the EqA for post-employment victimisation and/or harassment by the Acas COT3 Agreement?

Amendment

5. Whether C should be allowed to amend his claim to include a claim in relation to an alleged breach of the confidentiality provisions of a Settlement Agreement in January 2020 (see 8. a. below)

SUBSTANTIVE ISSUES

Factual Issue

6. C admits that he was in contact with some of his former pupils via social media but denies that the contact was initiated by him or inappropriate.

Victimisation under s.27 EqA 2010

7. It is accepted that the bringing of the first set of Employment Tribunal proceedings (First Claim) which were settled by COT3 was a protected act and that these proceedings (Second Claim) also constitute a protected act.

8. Did the following alleged acts or omissions identified in paragraph 27 of C's Amended Particulars of Claim dated 29 April 2022 take place:

    a. Breaching the confidentiality provisions of the Settlement Agreement by Ms Cannell of the R in January 2020 [27.1];[1]

    b. Providing a negative reference or oral reference to WCS on terms inconsistent with Schedule 1 of the Settlement Agreement in or around November and December 2019 [27.2];

    c. Making a malicious report about C to Westminster LADO in or around November 2020 which was intended to bring him into disrepute and damage or destroy his professional reputation and career (For the avoidance of doubt, C relies upon facts and matters in paragraph 25 in his Amended Particulars of Claim dated 29 April 2022 as background evidence in support of his contention) [27.3];[2]

    d. On or around 11 November 2020, during assembly at Eaton Square Upper School, Mayfair, pupils were told by a member of the R's staff that C had been contacting pupils offering them paid tuition, that this was not

[1] In the Case Management Order on the preliminary hearing on 5 May 2022, Employment Judge Snelson reserved the application to amend the Particulars of Claim (PoC) to include the allegation at paragraph 6(a) of the List of Issues (Amendment 1) for determination by the Tribunal at the liability-only hearing. Amendment 1 is referred to at paragraphs27.1, 28.1.1 and 30.1 of the amended PoC dated 29 April 2022 and further amended 27 May 2022 (Amended PoC). The Respondent opposes the application to amend the PoC to include Amendment 1 by way of letter to the Tribunal dated 27 May 2022 and the amended Response dated 15 June 2022.

[2] Amendment 3 granted by EJ Snelson in Case Management Order on the preliminary hearing on 5 May 2022 provides additional background evidence in respect of this allegation. Amendment 3 is referred to at paragraphs 25, 27.3, 28.1.3 and 30.3 of the Amended PoC.

allowed, pupils should not answer him and the school would be taking this matter to court [27.4];

e. Informing C's employer, WCS, that he had entered into the Settlement Agreement with R in or about December 2020 [27.5];

f. In or around February 2021, R instructing parents of pupils at Eaton Square Upper School not to contact the Claimant for tutoring services [27.6] and

g. R's deliberate omission, refusal or failure to provide a reference in response to the reference request submitted by Morgan Hunt on 14 March 2022 [27.7].[3]

9. Did R subject C to any of the above acts of omissions because it believed he had done or may do a protected act?

10. If so, do those acts or omissions constitute detriments?

Harassment related to race under s.26 EqA 2010

11. Did R engage in unwanted conduct as alleged in paragraph 8 above?

12. Did said conduct have the purpose of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

If not, did said conduct have the effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C? In considering whether the conduct had that effect, the ET will take into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect?

[3] Amendment 2 granted by EJ Snelson in Case Management Order on the preliminary hearing on 5 May 2022. Amendment 2 is referred to at paragraphs 24, 26.1, 27.7, 28.1.7 and 30.2 of the Amended PoC.

13. Are there facts from which the ET could properly conclude that the conduct related to C's race?

14. If so, has R shown that it was not so related?

Jurisdiction

15. Does the ET have jurisdiction to hear C's complaints? R asserts that they are time barred.

16. Has C proved there was conduct that extends over a period of time, which is to be treated as done at the end of that period? Is such conduct accordingly in time?

17. If not, would it be just and equitable to extend time?

Remedy

18. In so far as C was subjected to any unlawful treatment attributable to R:

    a. Should the ET make a declaration?
    b. Should the ET make any recommendations?
    c. What if any loss has C been caused by reason of such treatment?
    d. To what, if any, compensation is C entitled to in relation to injury to feelings?
    e. To what if any compensation is C entitled in relation to aggravated damages?

30 January 2023