Case No: 2302433/2021

EMPLOYMENT TRIBUNALS

Claimant: **Ms Roha Dahir**

Respondent: **Wimbledon Mosque (acting by its Trustees, Mohammed Sajid Haq, Dr Talat Malik, Saleem Ullah Shaikh and Mohammad Arshad)**

Heard at: **London South Employment Tribunal, sitting at Croydon**

On: **13 to 17 November 2023 (In Person), and 19 February 2024 (in chambers, via Video Hearing)**

Before: **Employment Judge McCann**

Members: **Ms K Turquoise**
Mr J Hutchings

Representation

Claimant: **In person (assisted by Mr Warsame, the claimant's father)**
Respondent: **Ms A Beech (Counsel)**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's claim for unfair dismissal is well-founded. The claimant was unfairly dismissed by the respondent.

2. The claimant's claim for breach of contract in respect of notice pay is wellfounded. The respondent dismissed the claimant on 27 May 2021 with only two days' notice (her employment terminating on 29 May 2021) when it should have given her three weeks' notice.

3. The claimant's claim for sex discrimination in respect of her dismissal is wellfounded and succeeds.

4. The claimant's other complaint of sex discrimination, in respect of her timetabling, is not well-founded and it is dismissed.

5. The claimant's claim for race discrimination in respect of her dismissal is wellfounded and succeeds.

6. The claimant's other complaint of race discrimination, in respect of her timetabling, is not well-founded and it is dismissed.

REASONS

BACKGROUND

1. The ET1 was presented by the claimant on 9 July 2021, the claimant having notified ACAS of her potential dispute on 12 June 2021 (and an ACAS early conciliation certificate was issued on 16 June 2021.

2. The case was listed for a five-day final hearing between 13 and 17 November 2023 and this listing was confirmed with the parties at a Preliminary Hearing for case management held on 7 December 2022, when the issues were clarified.

3. The tribunal apologises for the delay in promulgating this Judgment and Reasons. Its planned date for deliberations in chambers, on 2 January 2024, had to be vacated due to illness and so the tribunal met on the next available date, 19 February 2024.

4. The tribunal's Decision is unanimous.

The Issues

5. Having discussed the issues with the parties at the outset of the final hearing, it was apparent that some changes needed to be made to the list of issues and the final Agreed List of Issues is appended to these Written Reasons.

6. The claimant brings claims for unfair dismissal, wrongful dismissal (breach of contract in relation to notice pay), sex and race discrimination. She claims that she was dismissed on 26 or 27 May 2021 with two days' notice, with her effective date of termination being Friday 28 May 2021.

7. The claimant cites as her comparators for the direct sex discrimination claim, the two Imams (Imam Shoaib and Imam Owais) or a hypothetical comparator (being a hypothetical male part-time teacher in the Madrasah). For her direct race discrimination claim, she relies on the other four teaching staff as named comparators (the two Imams, and Ms Baqi and Ms Najeeb) or a hypothetical comparator (being a hypothetical part-time teacher in the Madrasah who is not of African/Somali origins and/or who is not black and/or who is Asian).

8. The respondent says that it dismissed the claimant by letter dated 5 June 2021, sent via a WhatsApp message (the effective date of termination being that same date); and it asserts that the reason or principal reason for the dismissal was redundancy or some other substantial reason justifying dismissal due to a reduction in the number of students attending the Madrasah in May 2021. The respondent concedes that the claimant was unfairly dismissed by reason of the lack of fair procedure adopted but contends that the claimant would have been dismissed at the same time, or fairly shortly after the date it had dismissed her. The respondent also concedes that the claimant was wrongfully dismissed and is, accordingly, entitled to three weeks' notice pay. The respondent denies that the claimant was directly discriminated against because of race and/or sex.

Documents and evidence

<u>Bundle and documents</u>

9. Ahead of the final hearing (on 10 November 2023), a bundle of documents was sent to the tribunal on behalf of the respondent, running to 226 pages.

10. A number of further documents were disclosed by the parties and provided to the tribunal during the course of the hearing:

10.1. The claimant produced:

i) Three WhatsApp messages from Mr Abdinaim Mohammed sent to Mr Warsame on Sunday 12 November 2023 (at 19:21 and 22:52) and Monday 13 November 2023 (at 05:16).

ii) Interpartes correspondence (between Mr Warsame and the respondent's solicitors) regarding exchange of witness statements, disclosure and preparation of the bundle.

iii) A WhatsApp message from Mr Aweys Abdikadir Ahmed (sent to Mr Warsame at 19:24 on 13 November 2023).

iv) A data sheet from gov.uk/coronavirus providing information about Step 3 of the Government's planned lifting of Covid-19 restrictions in England (from 17 May 2021).

10.2. The respondent produced:

i) Twelve certificates showing successful completion of "behaviour management" and "effective teaching" training dated 14 October 2018, for the six teachers who were teaching in the Madrasah at

that time (including the claimant, Imam Shoaib and Imam Owais, Faiza Najeeb and Mujahidah Ahmed Baqi and Ateeq Syed).

ii) Two emails between Imam Shoaib and the claimant

iii) WhatsApp messages and a call log of contacts between Abdinaim Mohamed and Farukh Ahmed's mobile phone on 12, 13 and 15 November 2023.

iv) A certified copy of the driving licence of Abdulahi Hussein Siyad.

v) A handwritten list of ten individuals (with signatures next to nine of the names) headed "Executive Committee Meeting 30/05/2021".

10.3. At the tribunal's request, the various WhatsApp messages and call log (referred to above) were collated by Ms Beech into a single bundle of 24 pages and provided to the tribunal.

Witness statements

11. The respondent provided a bundle of twelve witness statements.

12. The tribunal had ordered the parties to exchange witness statements with each other. Unfortunately, this had not happened.

13. The respondent's statements had been provided to the claimant but under password protection and the password was not provided to her as she had not sent her witness statement(s) to the respondent and had not indicated that she was ready to exchange witness statements.

14. Since there were twelve statements for the respondent and in order not to lose time during the hearing, on the afternoon of 10 November 2023, the tribunal directed the respondent to provide the claimant with access to the respondent's witness statements. The respondent's solicitors complied with this direction such that the claimant had copies of the respondent's statements from late afternoon/early evening on Friday 10 November 2023.

15. Just before the hearing started, the claimant provided a short witness statement (two paragraphs) from her brother, Mr Mahamad Dahir, and a hard copy of a bundle consisting of twenty-six pages and containing:

i) Statement for the claimant (twelve pages),

ii) Statement for Mr Warsame (the claimant's father) (six pages, but the sixth page of which was blank),

iii) 1-page Statement for Mr Abdulahi Siyad. (In fact, as he confirmed when he gave evidence on day 2 of the hearing, his full name and correct spelling of it is Abdullahi Adam Siyad – that is, with two "L's" in his first name),

iv) Seven pages of other evidential materials / documents, including:

- WhatsApp messages from Imam Shoaib to the teachers at the Madrassah in February and March 2021,
- A 2-page transcript of part of a meeting on 14 June 2021, and
- WhatsApp messages to Mr Warsame from two individuals for whom witness statements had apparently been served by the respondent (namely, Mr Abindaim Mohammed and Mr "HA") but who had stated they wanted their statements to be withdrawn.

Ms Beech indicated (perfectly reasonably) that she would need time to read the claimant's "bundle" and take necessary instructions, given that it had been provided by the claimant just before the start of the hearing. Since the tribunal also needed to do some reading into the case, including the witness statements, the respondent and counsel had time to read and review the contents of the claimant's bundle (including the statements contained within it). Ms Beech indicated that she would be in a position to cross-examine the claimant and her witnesses and that no postponement was requested.

Oral evidence

16. As well as the claimant, the tribunal heard oral evidence from her father (Mr Warsame), her brother (Mr Mahamad Dahir), Mr Abdulqadir Osman Ali, Mr Abullahi Adam Siyad and Mr "HA".

17. It should be noted that Mr "HA" did not wish to have his name associated with these proceedings and, indeed, had told the respondent that he wanted to withdraw the witness statement it had asked him to sign and did not wish for it to be submitted to the tribunal. When he found out that the respondent had nevertheless submitted his statement, he attended the tribunal (on Day 1 of the Hearing) to explain this background and the context in which he had been requested to and had signed the statement and he asked the tribunal to

ensure that his full name did not to appear in the Written Reasons. This was not objected to although that is not to the point. The question is whether not referring to his full name is an unjustified derogation from the principle of open justice, having regard to the interests of justice and/or Mr "HA's" right to respect for his private life under Article 8 of the European Convention on Human Rights. Since Mr "HA's" evidence is otherwise of no relevance (in that he provides no evidence about the facts of the claims), the derogation from open justice is minimal; and it is clearly proportionate not to include his full name in these Reasons which are publicly available.

18. The respondent called the following five witnesses to give evidence:

1) Dr Talat Malik – a Trustee of the respondent
2) Imam Shoaib – the lead Imam at the Mosque
3) Imam Owais – the deputy Imam at the Mosque
4) Mr Zia Khan – Joint Secretary of the respondent's Executive Committee
5) Mr Farrukh Ahmed – Joint Secretary of the respondent's Executive Committee

A second witness statement for Farukh Ahmed was served on the afternoon of the first day of the hearing to deal with an issue which arose over the identity of one of the individuals (Abdulahi Siyad) in whose name a witness statement had been served on behalf of the respondent. As things transpired, the respondent also called Abdulahi Hussein Siyad to give evidence.

<u>Seven witness statements from Somali worshipers</u>

19. In addition to the statements for the respondent's five key witnesses (listed above), it served seven other witness statements.

20. They each consisted of four identical paragraphs and were in the names of individuals who were said to be Somali worshipers at Wimbledon Mosque: Mr Aweys Abdikadir Ahmed, Mr Hussein Gaalal, Mr Abdulahi Siyad, Mr Abdinaim Mohamed, Mr "HA", Mr A Ahmed and Mr Abdi Ali Nur.

21. These seven statements asserted that Imam Shoaib had not treated the maker of the statement "differently or less favourably because I am Somalian or otherwise"; and that he had not "treated any Somalian or anyone else attending the Wimbledon Mosque less favourably because of their nationality or race". At the outset of the hearing, Ms Beech explained that the respondent did not intend to call any of these seven witnesses to give evidence.

22. Two of these seven witness statements were in the names of Mr Abdinaim Mohammed and Mr "HA".

23. These two individuals had informed Mr Warsame on Sunday 12 November 2023 in WhatsApp messages that they had told the respondent they did not want their statements provided to the tribunal as they did not agree with the full contents of those statements. Mr "HA" attended the tribunal, at the request of the claimant, to give evidence to that effect on the afternoon of day 1 of the final hearing.

24. Another one of those seven witness statements was in the name of Mr Aweys Abdikadir Ahmed. He sent a WhatsApp message to Mr Warsame on Monday 13 November 2023 (in the evening) stating that he had been rushing to prayers when he was asked to sign the witness statement in his name and that he had not read the contents of the document, having been told it was something to do with a planning permission application for a car park for the Mosque.

25. In those circumstances, the respondent withdrew the three statements which it had sought to adduce in the names of Abdinaim Mohammed, "HA" and Aweys Abidkadir Ahmed.

26. A fourth statement (amongst the seven identical statements from Somali worshipers at the Mosque) had been served by the respondent in the name of Mr Abdulahi Siyad.

27. An individual of that name was known to Mr Warsame (as being a member of the Somali community and as having sometimes worshiped at the Mosque). Having been shown the one-page witness statement apparently in his name (that is, Abdulahi Siyad), he provided a statement to the claimant (dated Sunday 12 November 2023) [page 19 of claimant's bundle of documents] asserting that this witness statement (i) had not been signed by him and (ii) was allegedly forged.

28. This was a potentially serious matter. If true, it might have constituted an attempt to interfere with the administration of justice and/or unreasonable conduct of the proceedings by or on behalf of the respondent. Accordingly, when this issue was brought to the attention of the tribunal on the first day of the hearing, it asked the parties to ensure that any relevant witnesses attended tribunal so that evidence could be heard, submissions made and any consequential rulings could be given in relation to the witness statement served in the name of Abdulahi Siyad.

29. However, it transpired that there were two Mr Siyads.

30. On the afternoon of day one, a second witness statement for Farrukh Ahmed was produced, attaching a photograph and phone number for the Abdulahi Siyad who Mr Ahmed had approached for a statement and who had signed

the witness statement then served on behalf of the respondent; and explaining Mr Ahmed's belief that the claimant and her father, Mr Warsame, may have contacted a different Mr Siyad (who also attended the Mosque).

31. Both Mr Siyads attended the tribunal to give oral evidence and to confirm their identities. One was called Abdullahi Adam Siyad (who gave evidence on day two of the hearing, on behalf of the claimant). He confirmed that his name had two "L's"; and that he was not the Abdulahi Siyad whose photo and phone number were appended to Farukh Ahmed's second witness statement. In his evidence, he accepted that there were probably two people who worshiped at the Mosque called Abdulahi (or Abdullahi) Siyad. The other Mr Siyad was called Abdulahi Hussein Siyad. He attended the tribunal on the fourth day to give evidence on behalf of the respondent. He confirmed that the witness statement served by the respondent in the name of Abdulahi Siyad was in fact his statement and he stated that its contents (all four paragraphs of the statement) were true. He showed the tribunal his driver's licence to confirm his identity and address (a copy of which was retained for the tribunal file).

32. In those circumstances, the tribunal found that the witness statement served by the respondent in the name of Abdulahi Siyad was for Mr Abdulahi Hussein Siyad (not Abdullahi Adam Siyad) and so had not been forged.

33. However, this case of mistaken identities and the tribunal time which was expended in resolving the confusion was caused by the entirely unhelpful process adopted by the respondent of producing seven almost identical witness statements from Somali worshippers, with no intention of calling them to give evidence, with no stated addresses for the witnesses and without the full name of all the witnesses being included in the statements.

34. Furthermore, three of the seven witness statements were confirmed to be in the names of people known to Mr Warsame; two of whom informed him that they had told the respondent that they did not consent to their statements being used in the litigation and the other of which raised issues about the circumstances in which the statement had been procured.

35. These various factors had (not unreasonably in the tribunal's view) caused Mr Warsame to assume that the statement for Abdulahi Siyad had been in relation to his acquaintance (Abdullahi Adam Siyad), who denied this and assumed the statement had been forged; when, in actual fact, it was a statement for Mr Abdulahi Hussein Siyad.

36. This confusion was only cleared up by the attendance at the tribunal of both Mr Siyads, to confirm their identities.

37. Notwithstanding this confusion and the fact that three of the seven witness statements from Somali worshipers had been retracted, Ms Beech explained that the respondent wished to rely not just on the statement for Mr Abdulahi Hussein Siyad (who had attended tribunal to swear to the truth of his statement) but also on the contents of the remaining three statements (in the names of Mr Hussein Gaalal, Mr Abdi Ali Nur and Mr A. Ahmed (the first name is not included in the statement), even though these three witnesses would not be attending tribunal to give oral evidence (and so would not be made available for crossexamination or questions from the tribunal). Ms Beech acknowledged that this would affect the weight to be attached to those witness statements by the tribunal. We return to the relevance of these statements later in these Written Reasons.

38. At the end of the hearing, the claimant provided a written closing statement and a print-out of material from East London Mosque showing its two key staff (one man, the Head Imam; and one woman, the Head of Programmes and the Maryam Centre) and its Trustees, which included at least one woman).The claimant also provided a two-page "spoken concluding statement" which she read aloud. Ms Beech made oral closing submissions on behalf of the respondent and provided copies of five authorities:

   - Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 (HL)
   - Igen Ltd & Others v Wong & Others [2005] IRLR 258 (CA)
   - Madarassy v Nomura International plc [2007] IRLR 246 (CA)
   - Amnesty International v Ahmed [2009] IRLR 884 (EAT)
   - Alcedo Orange Limited v Ferridge-Gunn [2023] EAT 78

   The respondent also provided a copy of Part 1 of Schedule 9 to the Equality Act 2010 in respect of occupational requirements. The respondent, however, does not rely on any occupational requirement in its defence of the claimant's claims.

39. Having considered all the evidence set out above, the tribunal made the following findings of fact.

THE FACTS

40. The claimant is of Somali origin. She is British-born. She describes her racial group for the purposes of this claim as non-Asian and/or black and/or of Somali national origins and/or African.

41. The claimant – as are all those involved in the facts connected with these proceedings – is Muslim and she and her family worshipped at the Wimbledon Mosque.

42. On 4 September 2017, the claimant came to be employed at the Mosque's Madrasah as a Teacher of the Koran. She was 17 years old at that time. When the claimant's employment terminated in May 2021, she was 21 years old. The circumstances of her termination is the context for her claims.

Start of employment

43. The claimant's father, Mr Warsame, had spoken to the chairman of the Mosque's Executive Committee, Sajid Haq about the possibility of his daughter working as a teacher in the Madrasah.

44. Imam Shoaib's evidence is that – because it was his practice with every teacher – his recollection is that he listened to the claimant reciting passages from the Koran (which he said was from behind a curtain), and was satisfied that she was suitable for employment as a Madrasah teacher so he recommended her appointment to the Executive Committee who duly offered her the role of Madrasah Teacher of the Mosque (clause 2.1 of the contract). This evidence was not in Imam Shoaib's witness statement and it was not put to the claimant when Ms Beech cross-examined her and, during the cross-examination of Imam Shoaib by Mr Warsame, it was made clear that the claimant denied this.

45. We make no finding about whether or not Imam Shoaib listened to the claimant reciting from the Koran, as it is not necessary to do so for the determination of the claims; but we do accept that the claimant was offered employment only after the Imam had expressed his satisfaction with that proposal. The tribunal makes this finding because we consider that it is inherently plausible that Imam Shoaib, as the headteacher, would have had to state whether he wished to employ the claimant or not. This is also consistent with our findings on how the claimant's employment came to be terminated (which decision, we find, was largely that of Imam Shoaib).

46. The claimant's signed contract of employment makes clear that her employment as a teacher of the Koran at Wimbledon Mosque's Madrasah started on 4 September 2017.

47. When the claimant's employment commenced, she was one of six teachers: the two Imams, Faiza Najeeb (female), who had started teaching at the Madrasah in around 2008; Mujahida Abdul Baqi (female), who had been teaching there since around 1996; and Syed Ateeq (male). Mr Ateeq left in 2019.

48. The Madrasah was based within the Mosque building. In 2017, there were three distinct class groups:

    - Juniors – ages 5 to 7 (roughly equivalent to school years 1 and 2)
    - Intermediates – ages 8 to 10 (roughly equivalent to years 3 to 5)
    - Seniors – ages 11 to 16 (roughly equivalent to Years 6 to 11)

49. The witnesses all agreed that the classes were generally (but with exceptions) segregated by reference to sex and organised in age bands. The Imams generally taught the boys' classes (Juniors and Intermediates were taught by Imam Owais (and by Mr Ateeq before he left); and Seniors were taught by Imam Shoaib); the claimant was generally assigned to teach the Junior girls, with Ms Najeeb teaching Intermediate girls and Ms Baqi teaching Senior girls.

50. However, both the claimant and Imam Owais stated in their evidence that whilst the classes were primarily based on sex and age, they were also based on knowledge of Arabic (so that a slightly older child could be educated in a lower class if their knowledge of Arabic was at beginner level and that sometimes Junior or Intermediate boys, with little knowledge of Arabic, might be taught by the claimant with her Junior girls). When the teacher (male) who had been teaching the Junior (boys) class left the Madrasah in late 2019, many of his pupils were taught by Imam Owais; but some were assigned to the claimant's Junior (girls) class. At the point of the claimant's dismissal, two amongst her cohort of eighteen pupils were boys.

51. The claimant's case is that there is no doctrinal requirement in Islam for boys to be taught by a male teacher and girls by a female teacher. When asked by the tribunal, Dr Talat Malik (one of the Mosque's trustees) agreed that there was no prohibition in Islam but that, culturally, it was typical for male teachers to teach boys and female teachers to teach girls. There was no evidence from either of the Imams addressing this point. The tribunal, therefore, finds that it is not a tenet of the Islamic faith for teaching to be segregated by sex.

52. Imam Shoaib's evidence – which we accept – is that there had been a junior girls class until around 2014/15 when numbers dwindled but that demand picked up and that, by 2017, there was a need for an additional teacher.

53. By 2020 there were 158 students registered at the Madrasah; by the summer of 2021, this had reduced to 109 and, at the present day, there are 85 students. Job description & tasks

54. A contract of employment was drawn up and was provided to the Claimant's father for her to sign a few weeks before her employment commenced on 4 September 2017.

55. The Job Description for the claimant is in the bundle and we accept that it broadly reflects the evidence we heard about the teachers' duties. We note that neither the job description nor the contract required the claimant to teach any specific age group. We find that she worked primarily as the teacher of the Junior girls, subject to our findings above that sometimes she taught Junior or Intermediate boys, if their Arabic was at beginner level and/or there were too many Junior boys in Imam Owais' classes.

56. The tribunal has not been provided with any of the contracts of employment for the other teachers. We find that it is more likely than not that the contracts of those teachers – other than the two Imams – state that they are employed as Madrasah Teachers of the Mosque; so the same role as the claimant. We conclude from this that, whilst the teachers were assigned specific classes / age groups, they could and did teach other ages and, in the case of the female teachers, they covered for each others' absences (eg, illness and holiday).

57. The tribunal accepts the respondent's evidence that Ms Najeeb and Ms Baqi were more experienced as Madrasah teachers (by virtue of their length of service) than the Claimant. We were told (Grounds of Resistance, paragraph 10) that they were also more "qualified" (to teach the intermediate and senior classes). The only evidence is a certificate from 2011/12 in relation to Ms Najeeb in respect of achieving a Level Two Tajweed Course. We note that, by 2021, the claimant had embarked on a degree in mathematics which she has now completed. She, therefore, was in the process of obtaining a university degree. We do not conclude that the other teachers were more qualified, in any formal sense, than the Claimant.

Structure & organisation of Mosque and Madrasah

58. The Mosque, by 2017, had two Imams – Imam Shoaib (the leading Imam) and Imam Owais. Both Imams were also expected to carry out teaching duties in the Madrasah.

59. Imam Shoaib was the headteacher of the mosque. The only other employee – aside from the Madrasah teachers – was a caretaker, a man. Both of the Imams, the caretaker, Ms Najeeb and Ms Baqi were of Asian (and non-Somali) origins and were not black African.

60. The Mosque is an unincorporated association, managed by an Executive Committee with overall governance provided by Trustees (who number four at the present time). There is a Madrasah sub-committee on which there would normally be two members of the Executive Committee but, at the time of the claimant's employment coming to end, this was a sub-committee consisting of one person only – namely, Ziah Khan (who was also a member of the Executive Committee; as he is still). This was because the colleague who had been on this committee with Mr Khan had moved on and had not yet

been replaced. Farrukh Ahmed now also sits on the Madrasah sub-committee alongside Ziah Khan.

61. During his tenure on the Executive Committee (up to around 2018), Dr Talat Malik also sat on the Madrasah sub-committee. By 2018, he had taken up the position of Trustee and so he then moved off the Executive Committee (and the Madrasah sub-committee). Accordingly, by May 2021, Dr Malik was solely a Trustee. The Chair of the Executive Committee was (and still is) Mr Sajid Haq. He is also a Trustee.

62. The Executive Committee has 18 members, not all of whom attend every committee meeting. The committee meets about six times per year. The Tribunal was told by Ziah Khan that the committee would require six members in attendance to be quorate. At the time of the claimant's employment, all 18 members of the Executive Committee were men of Asian origin. The claimant's evidence, which we accept (and it was not challenged by the respondent), is
that there was a woman who was active in providing various activities for female worshipers; she organised a programme of classes and events. Notwithstanding her involvement in the Mosque, she was not a member of the Executive Committee nor a Trustee (as was accepted by Farukh Ahmed, when questioned by the claimant, stating that they had never thought to ask her).

Training

63. The Executive Committee does not have any formal or informal training programme, either by way of induction training nor regular training in order to assist members with their roles within the organisation (which is a registered charity).

64. There is no evidence of any training having been completed by any of the Committee members, nor by the Imams, other than Behaviour Management and Effective Teaching training (undertaken by all six Madrasah teachers in October 2018). Imam Shoaib referred to safeguarding training having been completed on 11 June 2021 and said that he had previously done safeguarding training in 2014 (in the Mosque) and in 2015 (in one of his other roles). We accept this evidence.

65. However, there is no evidence of any training or expertise on the part of Committee members or Trustees in relation to employment best practice / HR nor equality or diversity nor even management skills. We heard from Ziah Khan and Farrukh Ahmed that some informal HR-type advice was elicited from the Mosque's accountant and from a friend who was an HR professional. We find that this was the extent of the assistance (from professionals or training) that was available to the Committee members and Trustees.

66. Imam Shoaib and Dr Malik state in their witness statements that they have completed equality and diversity training in their other roles (Imam Shoaib as a chaplain in the NHS and Dr Malik as a research scientist). Other than their assertions, we have not seen the content of that training, nor whether it is relevant to the education setting in which the Imam operated as headteacher of the Madrasah or to Dr Malik's trustee role. Both of their work environments are, of course, different to that in which religious services and education are provided. This is even more pertinent in the context of Wimbledon Mosque which, we have heard, involved almost total sex segregation both in relation to worship and within the Madrasah education setting.

Class / teaching arrangements

67. The classes taught by the three female teachers (including the claimant) were accommodated on the upper floor of the Mosque; whilst the classes taught by the Imams (and the other male teacher, until he left in late 2019) were taught on the ground floor.

68. If Imam Shoaib, as headteacher of the Madrasah, had anything to communicate to the claimant whilst she was at the Madrasah during her working hours, he would send a child upstairs with a handwritten note. As time went on and by 2021, WhatsApp Groups had been set up. Imam Shoaib had a group for the teachers; and a group for the parents of his students. We have not seen many WhatsApp messages but, certainly, in May 2021, he was using WhatsApp to communicate with the teachers and with the parents as groups.

69. Imam Shoaib did not contact the claimant by phone and, according to the evidence provided to the tribunal, the only emails ever sent were on 7 and 8 July 2019 and on 25 March 2020, the latter of which was a group email.

70. The claimant had some, but little, contact and communications with the other female teachers. The tribunal formed the impression that there was little by way of mutually supportive working relationships in the Madrasah.

71. The tribunal has not seen any evidence (such as agendas, notes, records, follow-ups, or emails or even WhatsApp messages regarding meeting arrangements) of any supervisions or appraisals or meetings, formal or otherwise. We conclude there were no such meetings.

72. The claimant told the tribunal (Witness Statement, page 12) that, on multiple occasions, she would turn up to teach her class only to find the Madrasah was closed and she had not been told. We accept this happened from time to time – she was not challenged on this in cross-examination (although the respondent, of course, was only provided with her statement just ahead of the hearing starting on day 1).

Staff meetings

73. On the respondent's case (via oral witness evidence), there were informal staff meetings, albeit with the female teachers sitting on the other side of a drawn curtain. Both Imam Shoaib and Imam Owais gave evidence that they attended informal meetings with the other teachers in this way. This was not put to the claimant during cross-examination and, in answer to a question from the tribunal, the claimant denied having attended any meetings with Imam Shoaib, whether behind a curtain or otherwise. No calendar entries, agendas, meeting notes or attendance logs have been provided to us. On the balance of probabilities, we cannot be satisfied that there were these staff meetings.

Communications with the claimant

74. The respondent's case is that, because the claimant was hired after her father, Mr Warsame, had made an enquiry on her behalf about the possibility of employment at the Madrasah, they assumed that she preferred the Mosque to communicate with her via her father.

75. Various of the respondent's witnesses – Imam Shoaib, Dr Malik (who was then a member of the Executive Committee and on the Madrasah Committee) and Ziah Khan (who, in effect, took over Dr Malik's role on those committees in 2018) – told us that the claimant had never reached out directly to make contact with any of them and so that too had caused them to assume that she preferred communications to be via her father.

76. In the Imam's case, however, there is some evidence that the claimant and Imam Shoaib communicated via email on a couple of occasions (in 2019 and 2020). We were told that notes were passed between them (using students to deliver the notes). We have also seen some WhatsApp messages from the Imam to the Madrasah Teachers WhatsApp Group, including the claimant. We have not seen any evidence of WhatsApp messages specifically between Imam Shoaib and the claimant individually.

77. We find that there was little, if any, direct communication between the claimant and the Imam, as her line-manager and headteacher of the Mosque. There was almost no face-to-face nor verbal communications between them. We also find that neither the Imam nor members of the Madrasah Sub-Committee ever formally introduced themselves to the claimant nor inducted her into her role.

78. Ziah Khan told us that one of the other female teachers (Ms Baqi) was fully covered (in a burqa) and had, thereby, made it clear that she did not want any direct contact or communication with male members of the Mosque, including Committee members and the Imam. Mr Khan told us that the other female teacher (Ms Najeeb) had made contact with him a few times, from which he deduced she was happy to have direct communication with him and others.

79. Farrukh Ahmed's evidence was that he and his family knew Ms Najeeb well as she had taught his children over a number of years. Mr Khan, Dr Malik and Mr Ahmed all explained that, since the claimant had never tried to make contact with them or other members of the Executive Committee, they had assumed that communications should be through her father, Mr Warsame.

80. It is clear to us that the position was never checked with the claimant herself. This could have been done via email, by letter, WhatsApp or even via an enquiry made through her father if it was thought necessary for some reason to proceed in that way. Through the course of the claimant's employment, the tribunal notes that she became an adult. She was 21 years old by the time her employment terminated. She did not wear a burqa. She was British born. She attended university and worked part-time.

81. No-one within the respondent ever checked the claimant's communication preferences with her, acting on their assumptions that she would prefer to avoid direct contact. We come back to the relevance of this later in these Reasons.

Grievance / complaints policy

82. In the claimant's contract, it provides that any complaint should be raised with the Mosque Secretary, in accordance with the Mosque's grievance procedure. No grievance procedure and no staff handbook has been shown to the tribunal and we conclude from this that none exist.

83. The Claimant said she did not know who the Mosque Secretary was nor how to make a complaint, formally or informally. Whilst there was no evidence that she was told how to contact the Mosque Secretary, we find, however, that Mr Warsame knew who the Mosque Secretary was at all relevant times and the claimant could have got the information from him. The claimant told us that she would not have wished to make a complaint about Imam Shoaib because she did not want to jeopardise her employment.

Covid

84. As is well-established, by late March 2020, the entire country was in the throes of the pandemic and in a national lockdown. The Mosque and Madrasah closed. It is clear from her payslips that the claimant was put on furlough and her pay consisted of furlough pay and an additional component by which she continued to be paid her normal pay throughout. In fact, the claimant's evidence – consistent with some of the documentary evidence – is that the Madrasah moved its teaching online; so that she continued to teach throughout but via Zoom.

85. On 22 February 2021, ahead of the planned reopening of schools throughout the country (on 8 March 2021), Imam Shoaib sent a WhatsApp message to the teachers, including the claimant, to state that the Madrasah would re-open on 8 March 2021. However, on 5 March 2021, the Mosque had rowed back on that decision and this was conveyed to teachers and parents.

86. Imam Shoaib's evidence is that he was informed at around this time about various Covid guidelines for the re-opening of educational and religious settings by Ziah Khan, Talat Malik and Farrukh Ahmed. Dr Malik's evidence is that, because of his experience of working in the NHS, he had some input into the decisions relating to the closure and re-opening of the Mosque (including the Madrasah). The tribunal accepts this evidence – it is likely that, as a trustee, Dr Malik will have passed on any useful information about Covid restrictions to help inform the decision-making at this time.

87. The tribunal notes that the country was in a state of flux at this time, with the picture continually evolving in respect of covid restrictions. The Mosque was, in the main, a religious institution (rather than an educational establishment). Whilst schools were able to re-open on 8 March 2021, there were greater restrictions in respect of places of worship. This is clear from the "Covid-19 Restrictions in England (From 17 May)" information sheet taken from the gov.uk/coronavirus website by the claimant and provided to the tribunal (with agreement from the respondent). The tribunal finds that it was a time of confusion for many organisations as they tried to make sense of the different rules.

88. On 13 April 2021, Imam Shoaib sent a message via WhatsApp to teachers stating that he hoped the Madrasah would re-open on 17 May 2021. On Sunday 16 May 2021, Imam Shoaib sent a message via WhatsApp to teachers to state that the Madrasah would now be re-opening with effect from the next day, Monday 17 May 2021 (and asking them to inform the parents). The teachers were told that they would be teaching their full cohort of students between 6 to 7pm, with the exception of the claimant who would be teaching her full cohort of pupils from 5 to 6pm (so, whereas, before lockdown there would be a first shift, between 5 and 6pm; and a second shift, between 6 and 7pm, there would – as a temporary arrangement – be a merger of first and second shifts being taught during the one hour period from 6 to 7pm for all teachers except for the claimant, whose teaching would take place the hour before). The claimant was, therefore, the only teacher present at the Madrasah between 5 and 6pm. Her evidence, which the tribunal accepts, is that this made her feel a little isolated. She, however, raised no concerns about this at the time.

89. No reason was given by Imam Shoaib for this temporary arrangement either in the WhatsApp message or otherwise. We will come back to this later in these Reasons.

90. In the week commencing 17 May 2021, some of the Madrasah teachers, including the claimant, were asked by Imam Shoaib (via a WhatsApp message, the copy of which in the bundle is undated) to provide their attendance numbers for usual online attendance and for attendance during that first week back. He said that new admissions were expected from 2 June 2021. Attendance numbers were provided by the claimant, Ms Najeeb and Ms Baqi (for the week ending 22 May 2021) as follows:

- For the claimant: 18 on the register; 12 had been attending online; 5 attended that week
- For Ms Najeeb: 22 on the register; 12 had been attending online; 8 attended that week
- For Ms Baqi: 22 on the register; 5 to 11 had been attending online; 5 attended that week.

91. We note that the week of 17 May 2021 was the first week back for "in person" teaching; and that parents had only been given notice on Sunday 16 May 2021, one day ahead of the Madrasah's re-opening. All the female teachers attendance figures were down. Ms Baqi's Senior (Girls) class had the same attendance as the Claimant's Junior (Girls).

92. Neither of the Imams were apparently asked for or provided the numbers of students (i) on their register, (ii) usually attending online; and/or (iii) attending in the week commencing 17 May 2021. Imam Shoaib's evidence, which the tribunal accepts because it is inherently plausible, is that he knew his own attendance figures and that he knew Imam Owais' student numbers from verbal conversations. Imam Owais told the tribunal that his pupil numbers were very high and had been since Mr Ateeq's departure.

93. The tribunal notes that, on 31 May 2021, Imam Shoaib messaged parents to state that, from that day, the Madrasah would open "at normal times 5 – 6pm for first shift". Accordingly, the timetabling of classes reverted to what it had been previously. The altered timetabling (where each of the teachers taught all their students in one shift between 6 and 7pm, except for the claimant who taught all of her Junior classes in the early shift, between 5 and 6pm) was, therefore, only in place for two weeks from 17 to 31 May 2021.

Termination of employment

94. On Wednesday 26 May 2021, Imam Shoaib and Ziah Khan met to discuss the Madrasah's attendance figures. They discussed the fact that attendance numbers in the claimant's class were down and that there was only one child

on the waiting list for her classes. We find that there was little discussion about the fact that Ms Baqi and Ms Najeeb's class numbers were also down. We have no documentary evidence about the numbers in Imam Owais' classes, nor about the waiting list for classes at the Madrasah. We shall come back to the relevance of this in due course.

95. Both Imam Shoaib and Ziah Khan state in their evidence that they then discussed the relevance of the claimant's decreasing attendance figures and that this meant that the Madrasah no longer needed a Junior (girls) class teacher from September 2021

96. Mr Khan states in his evidence that he and Imam Shoaib had decided that the Junior class and the claimant (the "Junior teacher") were no longer needed and that he would "inform" the Executive Committee "for decision-making". Imam Shoaib says that he left it to Ziah Khan to decide with the Executive Committee whether or not to make the claimant redundant and that it was not his decision.

97. The tribunal does not accept Imam Shoaib's evidence. It is not altogether consistent with Mr Khan's (who accepts that a decision was taken – he says by him and Imam Shoaib jointly – that the claimant was no longer needed). Mr Khan also refers to a conversation with the claimant's father, Mr Warsame, the next day (27 May 2021). In his witness statement (paragraph 19), he says that he told him of the "<u>possible</u> loss of the claimant's position as a Junior Teacher – <u>subject to</u> a Mosque Committee meeting that was scheduled to occur within a few days" [our emphases added].

98. However, the claimant's case is that she learned through her father that she "was dismissed" due to low attendance in her shift (see the details of her claim, 9 July 2021, at page 19) – that is, a concluded dismissal decision was conveyed to her via her father.

99. At the meeting on 14 June 2021, Mr Warsame is recorded as having stated that Ziah Khan told him (on 27 May) that, "after this month, she's not required" and "we're going to make a decision. Sunday coming….the committee will have a meeting to decide, you know, whether we will go ahead or not….it's highly likely that they will agree with that. And he also added that her last day would be two days after today, you know the end of the month".

100. The respondent's timeline document [pages 162/163] supports the claimant's case that, on 27 May 2021, her father was "informed" by Ziah Khan, that the claimant's "position is no longer required". Furthermore, the letter dated 5 June 2021 [page 93 of respondent's bundle] refers to verbal notice of the claimant's dismissal having been given on 27 May 2021 and to that decision being "final" and "was approved by the Wimbledon Mosque committee on

Sunday 30th May 2021". The more contemporaneous evidence is, therefore, consistent with the claimant's case that a decision had already been made by 27 May 2021.

101. We find that the decision to dismiss the claimant was made in the main by Imam Shoaib, with whom Mr Khan agreed. That decision was taken on 26 May 2021 and informing the Executive Committee "for decision-making" (per Mr Khan's statement, at paragraph 18) was for reasons of governance only. The tribunal finds that this was, in reality, a rubber-stamping exercise to approve a decision that had already been made (and which the claimant was "informed" of on 27 May 2021).

102. We find that Imam Shoaib was the key decision-maker because he was in charge of the Madrasah, the teaching in it and the teachers. Our firm impression is that what the Imam says goes and that Mr Khan and the Executive Committee deferred to the decision that the Imam had made.

103. The tribunal notes, in particular, the comments made by the respondent's Chair (Mr Sajid Haq) about Imam Shoaib [page 215 of respondent's bundle] – in the transcript of an audio recording of a meeting held on 15 September 2021 – that "You should respect him. Respect your leaders. Respect who you say you salah [prayer] behind" and, more significantly, in the transcript of the recording of the meeting on 14 June 2021 [at page 181], where the Chair, Mr Haq, states, "He is the Imam of the Mosque. I have given him authority. Three years ago, there was imam I called three years or four years ago and he came and Molan Shoaib sacked him, he said 'tell him to go' I didn't say anything. I said Fair enough. That is his decision. You have to respect his decision. He is the imam. You, you, you are praying behind him". The tribunal considers that this reflects the reality – namely, that decisions (certainly as to the recruitment and dismissal of staff
in the Mosque, including the Madrasah) were typically made by the Imam, who was given full authority to make such decisions and whose decisions were approved, as a matter of course, by the Executive Committee. In the case of the claimant's recruitment in 2017 and her dismissal in 2021, the Tribunal finds that this is what happened.

104. The tribunal finds that the claimant was informed (via her father, who was told by Mr Khan) that she was dismissed on 27 May 2021 with two days notice. Her effective date of termination was, therefore, 29 May 2021.

Executive Committee Meeting (30 May 2021)

105. On 30 May 2021, there was an Executive Committee meeting. The respondent has provided "Minutes" of that meeting [page 91 of respondent bundle]. No agenda was shown to the tribunal. During the course of the tribunal hearing, a handwritten list of ten attendees was provided (signed by

nine of them). The tribunal finds that the meeting was attended by ten people (according to the handwritten register).

106. The tribunal finds that the Minutes are very poor, they do not capture the full discussion and there is not much the tribunal can properly draw from them. They do not provide a sound basis for making findings of fact about exactly what was discussed. Mr Khan's evidence (in his witness statement, paragraph 22) lacks detail, merely stating that the Committee "agreed" that the position of Junior teacher was no longer required due to student numbers but that the accountant would be contacted about furlough. Mr Ahmed's evidence (witness statement, paragraph 7) is to similar effect, with the addition that "if we could not place the claimant on furlough, we would need to make her redundant".

107. Of course, at this point in time (Sunday 30 May 2021), on the tribunal's findings, the claimant had already been told she was dismissed.

108. The tribunal's findings in respect of the 30 May 2021 Committee meeting – having regard in particular to the Minutes of the meeting, the letters from the respondent of 5 and 27 June 2021, the transcribed recording of the meeting of 14 June 2021 and the witness evidence of Messrs. Khan and Ahmed, both their witness statements and especially their oral evidence – are that Mr Khan told the attendees that the Junior teacher was no longer required and so would be dismissed. We find that it is more likely than not that this was presented as a concluded view, because the decision had already been made. We further find that one of the attendees then enquired about the possibility of furlough. We find that neither Imam Shoaib nor Ziah Khan had considered this possibility before the decision had been taken to dismiss the claimant. The tribunal finds that a proposal was then put to the vote – namely, "could we put her on furlough and, if not, she will remain dismissed?". We find that everyone voted in favour.

Events in June 2021

109. The day after the Committee meeting, Ziah Khan spoke to the claimant's father to state that he was checking whether the claimant might be furloughed. Mr Khan then spoke to the accountant who informed him that furlough was not possible. Mr Khan conveyed this back to the claimant's father on 3 June 2021.

110. On 4 June 2021, the claimant and her father sent a letter of grievance to the respondent, via WhatsApp [pages 92 and 104 of bundle]. The letter referred to the claimant's "unfair dismissal" and complained about the way that "Management" had treated the claimant, "the only non-Asian employee in the organisation". The claimant and her father pointed to the fact that new students had joined the Madrasah in the last few days. The tribunal notes, of course, that on 16 May 2021, in his WhatsApp message, Imam Shoaib had

referred to new pupils joining on 2 June 2021. The claimant and her father referred to a breach of trust and to seeking legal advice if the respondent failed to respond to their letter within a reasonable time.

111. Mr Khan responded to the letter from the claimant and Mr Warsame at 12:21pm, via WhatsApp, stating that he would talk to the committee and that it was "very sad" that they were treating this as racially motivated which he could "assure" them, it was not.

112. At 12:21pm on 4 June 2021, Mr Warsame messaged Mr Khan stating that he was free from the main criticism in the letter and stated, "whatever difference I had with Sheekh Shoeb, it shouldn't have impacted on Roha's career". The tribunal finds that this was a reference to Mr Warsame and Imam Shoaib having had a disagreement over the allocation of Rakaats for Tarawih to Mahamad Dahir (the claimant's brother) in Ramadan in April/May 2021. We address this point later in these Reasons. Mr Warsame sent a further message asking for at least one week's notice of any meeting and referred to "a colleague of mine will join us in the meeting". He made the same point in a message on 7 June 2021; and on 8 June 2021, Mr Khan asked who this colleague was and "what is his interest in this matter". Mr Warsame replied referring to two colleagues, stating they are "our union reps. One is our employment contract rep and the other one is Equality and diversity rep". Neither Mr Warsame nor Mr Khan made any reference in their messages to the claimant attending any meeting to discuss her concerns.

113. On 5 June 2021, the respondent (Mr Ahmed, with some help from a friend who works in HR) drafted a letter confirming the claimant's dismissal, verbal notice of which had already been given on 27 May 2021. However, that letter was only received by the claimant (via WhatsApp) on 9 June 2021.

114. On that day, Mr Warsame sent a message to Mr Khan referring to Imam Shoaib being unwell. Mr Khan replied to state that the Imam saw no reason to be present at the meeting; so it would be attended by the Committee, Mr Warsame and his friend. Later that same day (9 June 2021), Mr Warsame messaged Mr
Khan [pages 94, 104 and 226] raising concerns about the fact that Imam Shoaib was not planning to attend the meeting to discuss the complaints which had been raised by him and the claimant. A further letter of complaint (about Imam Shoaib) was sent on 10 June 2021 [page 95]. In this letter, Mr Warsame made the point that the fact that the Committee and Trustees could not get Imam Shoaib to attend the meeting "shows that he, not the rest of the management or committee, is running the mosque. This is exactly what I wrote in my letter last week, one man rule!".

Meeting of 14 June 2021

115. The meeting to discuss the complaints raised by the claimant and her father took place on 14 June 2021. It was attended by Sajid Haq, Talat Malik, Ziah Khan, Farrukh Ahmed, Mr Warsame (referred to as Abdur Rashid in the meeting notes) and his friend, Farrukh Husain (referred to as an employment solicitor). The tribunal has had full regard to the respondent's summary meeting notes and to various transcribed audio recordings from different parts of that meeting.

116. Mr Warsame did not ask permission to record the meeting on 14 June 2021 nor did he inform the attendees that he was recording the meeting. The claimant's evidence, which the tribunal accepts because it is eminently plausible, was that she asked her father to record the meeting because she had not been invited to attend.

117. The tribunal finds that, at the meeting on 14 June 2021, there was a wideranging discussion.

118. At the beginning of the meeting, Mr Warsame raised concerns about the way in which Imam Shoaib had allocated the leading of Tarawih prayers (during Ramadan) to members of the congregation who were Hafiz (that is, fluent in the recitation of the Koran). This involved allocating a number of Rakaats (the single units of prayer in Tarawih). Mr Warsame's son (Mahamad Dahir, the claimant's brother) was Hafiz and Mr Warsame was concerned that Imam Shoaib showed preferential treatment towards Hafiz from outside the Mosque's congregation (and who were not of Somali origin) by allocating them disproportionately more Rakaats (and more money for leading the prayers).

119. Dr Malik responded to this topic of discussion, initially showing some frustration [page 174]. His response was that the meeting was meant to be about the claimant and he was not going to discuss the prayer allocation issue further. However, the discussion continued during which Dr Malik asked "Can you show me a Somali mosque where I even seen an Asian person leading the prayer?" [@ 180]. He also accused Mr Warsame of being "fixated" on the issue of race discrimination (as between those of Somali origin and those of Asian origin). Talat Malat also stated, "the way you're behaving, he's never going to lead in this masjid".

120. Sajid Haq is recorded (in the respondent's notes of the meeting) as responding to the complaint of race discrimination in relation to the allocation of Rakaats for Tarawih prayers as follows: "he would ask the executive committee at the next meeting to consider bringing Mahamad (Abdur Rashid's son and Roha's brother) as a junior teacher on the boys side". The tribunal will come back to this in due course.

121. The discussion then moved onto the topic of the termination of the claimant's employment. Mr Warsame and Mr Husain raised concerns about the lack of consultation with the claimant about her possible redundancy, about how the claimant's role was singled out and about how all the communication had been carried out directly with Mr Warsame, rather than the claimant. They also raised concerns about the claimant's belief that she had been discriminated against based on her race. In response, Sajid Haq stated that the claimant had been "fed by her father" and that Mr Warsame had told her that she had been sacked because of discrimination. The response from Mr Warsame was to deny that he had done so and he commented "that's totally out of order". Farrukh Ahmed's response to the allegation of race discrimination was a bare denial ("there's no discrimination").

122. Talat Malat is recorded at the meeting as saying that the respondent only selected one teacher out of three; which was "all to do with which children they teach". Mr Warsame pointed out that the claimant was herself Hafiz (that is, she could recite the Koran by heart) and that she was able to teach other classes. Mr Warsame also pointed out that the claimant had been asked to carry out a survey of her pupils and they had all expressed a wish to continue with online teaching.

123. Mr Husein (Mr Warsame's solicitor friend) then discussed possible outcomes if the claimant took her case to court and there was reference to likely compensation. Farrukh Ahmed stated that he would speak to an HR professional and the meeting concluded.

Letter of 27 June 2021

124. Mr Ahmed did then speak to a friend who worked in HR. That individual advised that, in fact, it would have been possible to place the claimant on furlough, rather than dismiss her.

125. On 24 June 2021, Ziah Khan messaged the claimant's father to ask for her full name, address or email "so we can send her the furlough offer". Mr Warsame replied to state that the claimant had told him that she was seeking legal advice on unfair dismissal and racial discrimination and that "the trust is broken".

126. Mr Ahmed (with assistance from his HR friend) drafted a letter dated 27 June 2021. This stated that the previous advice (given by the accountant) about furlough had been incorrect and that, as per government guidelines, the claimant could be placed on furlough (with 80% salary paid for June, 70% for July and 60% for August). The claimant was made an offer to agree to change her employment status to that of "furloughed worker". If she did not accept the offer, she was told that "the alternative may be compulsory redundancy or unpaid leave." The letter ended by stating that if the respondent did not hear

back from the claimant by 5 July 2021, it would assume she did not wish to go on furlough. At this time, of course, as the tribunal has found, the claimant was already dismissed.

127. The letter of 27 June 2021 was sent by WhatsApp (from Ziah Khan) directly to the claimant on 28 June 2021. This was the first occasion on which the respondent had directly communicated with the claimant.

128. The claimant did not reply and, on 16 July 2021, Ziah Khan messaged her with a further letter. It stated that "as you have not accepted our Furlough offer, and you have requested the P45, we assume that you have voluntarily resigned….Based upon this we will pay you one month's notice as per our rules". The reference to voluntary resignation made no sense since the respondent had dismissed the claimant on 27 May 2021 (and confirmed this on 5 June 2021).

129. On 9 July 2021, the claimant had presented her ET1/Claim Form (having complied with the requirements for early conciliation via ACAS).

SECONDARY FINDINGS OF FACT

130. The claimant relies on a number of separate background matters from which she contends the tribunal should draw the inference that (i) the timetabling change (from 17 May 2021 until her dismissal) and (ii) the decision to dismiss her were acts of race and/or sex discrimination

Pupil expulsion

131. Mr Abdulqadir Osmar Ali attended the tribunal to give evidence in support of the claimant's case. He had also provided a witness statement. He stated that in 2019, he had attended the Mosque one evening and heard a commotion involving Imam Shoaib and two children (one of Somali origin and the other of Asian origin). His evidence is that the Imam was shouting at the child of Somali origin stating "you never come to this Madrasah" and was dragging the boy by his shirt collar; with the boy sobbing uncontrollably. Imam Shoaib was telling off the boy for making a prank call to the police using the telephone box in the hallway outside the prayer room.

132. Mr Ali's evidence is that he intervened and he and the Iman were then joined by Farrukh Ahmed, that they watched the CCTV footage and this showed that, in fact, it was the other boy (i.e. of Asian origin) who had gone into the phone box and made the prank call. He stated that Imam Shoaib was not interested in hearing this but that this other boy then admitted it had been him. Mr Ali stated that Imam Shoaib then walked off with this boy, talking to him softly in Urdu. He does not speak Urdu so he could not understand what was being said. Mr Ali stated that the Somali boy did not come back to the Mosque the

next day, whilst the Asian boy did. In cross-examination, Mr Ali accepted that he did not know whether the Somali boy ever attended again and that he could not know what was or was not said to the boys' parents. Imam Shoaib was not cross-examined about this issue by the claimant or her father.

133. The tribunal finds that it is more likely than not that there was some altercation but that the specifics are not sufficiently clear for us to make any detailed findings about what happened on the balance of probabilities, nor about the Imam's mental processes in connection with the events (and, specifically, whether any part of his conduct in respect of the two boys was racially discriminatory). This incident happened in 2019, at least eighteen months before the claimant's dismissal and is inconclusive such that it would not provide a proper basis from which to consider drawing inferences of race discrimination in respect of the claimant's dismissal in May 2021.

Discrimination / "stupidity"

134. The claimant seeks to rely on an observation made by Dr Malik that this incident (referred to above) was not discrimination but "stupidity". This was said in the context of a meeting on 15 September 2021 (so more than three months after the claimant's dismissal). The meeting was convened to discuss, in an open forum, letters of concern submitted by a group of worshippers of Somali origin on 22 July and 12 September 2021. The incident of the prank phone call was raised. Dr Malik commented that, if the boy of Somali origin was "expelled" from the Mosque, that should not have happened but "I don't think that's discrimination. That's stupidity".

135. The tribunal finds that this was neither a helpful nor conciliatory comment to make when there had been no proper investigation into the incident and Dr Malik did not have all the facts. It perhaps shows a closed mind on the part of Dr Malik and a frustration in response to complaints of discrimination (the tribunal recalls Dr Malik's response to Mr Warsame's complaint regarding his son (Mahamad Dahir) having been allocated fewer Rakaats in Tarawih prayers, which was to threaten that complaining in that way would mean that Mr Dahir would never lead prayers again in the Mosque). However, the tribunal notes that Dr Malik was not a decision-maker in respect of either of the factual incidents relied upon in the claimant's discrimination claims (the timetabling of her classes by Imam Shoaib from 17 May 2021 and the decision to dismiss) and nor was he a member of the Executive Committee. Consequently, whilst it has some concerns about Dr Malik's mindset and approach, it considers that this matter does not particularly assist with the reason(s) for the treatment complained of by the claimant in her claims.

Banana/rice comment (Imam Shoaib)

136. In his evidence, Mr Ali also referred to Imam Shoaib joking with his students about Somali children eating bananas and rice and how this embarrassed those in his class who were of Somali origin, particularly when the Imam and other pupils laughed.

137. Imam Shoaib was asked about this incident and stated that he probably did refer to Somalis eating rice and bananas but this was not in a dismissive or jokey way. He stated that he would talk to his pupils about different national dishes and, in that context, he may have mentioned something about Somalis eating bananas and rice.

138. The tribunal did not find Imam Shoaib's evidence credible on this point. His evidence sounded contrived and implausible. We find that he did make a jokey comment about Somalis eating rice and bananas in a dismissive way. We shall come back to the relevance of this in due course as we consider it is a matter to which it is appropriate to have regard when considering the operation of the burden of proof provisions in s.136 of the Equality Act 2010 in respect of the claimant's race discrimination claim.

Imam Shoaib's children allowed in the Mosque

139. Mr Ali also gave evidence about an occasion when his children were told by Imam Shoaib to leave the Mosque as children were not permitted to be there at that particular time; however, he then noticed that the Imam's children were allowed to remain within the Mosque. They are of Asian origin whilst Mr Ali's are of Somali origin.

140. The tribunal accepts Mr Ali's evidence, as far as it goes. However, we find that it is inconclusive as the key point is that the children who were allowed to remain in the Mosque were the Imam's. We find that it is significantly more likely that the reason they were permitted to stay in the Mosque is that their father was the Imam, not because they were of Asian origin. We, therefore, consider that this point does not take the claimant's case further in any material way.

Allocation of Rakaats in Tarawih (and allocation of money)

141. The tribunal has made findings (above) in respect of the discussion about this matter which took place at the meeting on 14 June 2021. The complaint by Mr Warsame was that a Hafiz (of Asian origin) was brought from outside the Mosque (from Dewsbury) by Imam Shoaib during Ramadan in 2021 and that he was allocated more of the Rakaats in Tarawih prayers than the two local Hafiz (one of whom was Mahamad Dahir, Mr Warsame's son; and the other of whom was also of Somali origin). The concern was also that the external Hafiz was given more money (£1000) for his role than the two others (who were given £500 each). Mahamad Dahir's evidence was that he and another

Somali Hafiz were assigned 4 Rakaats each whilst the external Hafiz led 12 out of the 20

Rakaats. The three Hafiz discussed this and agreed on a fairer 6/6/8 split. However, Imam Shoaib then overruled their agreement. At the end of Ramadan, Mr Dahir and the other Somali Hafiz were paid £500 each, whilst the external Hafiz received £1000. Mr Dahir stated that he felt this was an unfair distribution despite equal capabilities.

142. The tribunal accepts Mr Dahir's evidence about how the Rakaats and money were split; but we do not consider that the allocation of Rakaats and money for reciting them was racially discriminatory. We note that, in fact, for reciting four Rakaats out of 20 (that is, one-fifth of the total Rakaats), Mr Dahir and the other Hafiz of Somali origins each received one-quarter of the money (i.e. £500 each out of the total of £2000 paid over to the three Hafiz). In this way, they were treated preferentially as regards the allocation of money (although they were treated less preferentially in relation to the number of Rakaats allocated to them).

143. Mr Dahir asserted, in cross-examination, that the external Hafiz was not more experienced than him so it was not equitable to assign him more Rakaats. However, Imam Shoaib's evidence (in his witness statement, paragraph 29) is that Mr Dahir was the least experienced of the three Hafiz. The Imam was not challenged about this during cross-examination (despite the claimant having had Imam Shoaib's witness statement a few days ahead of the hearing). The tribunal accepts Imam Shoaib's evidence that the external Hafiz was more experienced than the two Hafiz from the Mosque. It was an honour to be asked to lead Tarawih prayers and that honour was conferred on Somali and nonSomali Hafiz alike. On the relatively scant evidence adduced by the claimant (who has the burden of proving these background facts), the tribunal finds that Mr Dahir was given less money because he was allocated fewer Rakaats and that this allocation was due to his lesser experience rather than his Somali origins. The tribunal does not consider that this matter is of much assistance in shedding light on the reason(s) for the treatment of the claimant which she complains about in her claims.

144. During cross-examination of Mr Dahir, he agreed that, when Imam Shoaib assigned him to lead Tarawih, the Imam spoke to Mr Dahir's father about this. Mr Dahir pointed out that when he was first allowed to lead Tarawih, this was in 2017 when he was only 14 or 15 years old so, as a child, it would be normal for the Imam to approach his father about this. The tribunal notes, however, that by 2021, Mr Dahir was 18 or 19 years old, so no longer a child. Mr Dahir agreed that in 2021, the arrangements for Tarawih were also discussed directly with Mr Warsame, rather than with Mr Dahir. The tribunal addresses the relevance of this to the claimant's claims below.

The seven Somali witnesses' statements

145. As recorded above, significant time was spent during the hearing on the seven witness statements from Somali worshippers. The tribunal understands that many, if not all, of these seven individuals were from a community of Somali taxi drivers who worship or worshipped at that time at the Mosque. We have also heard how this community would provide donations each year to the Mosque.

146. The seven statements are all identical in content – stating that the maker of the statement considers that Imam Shoaib did not treat Somali worshipers less favourably because of nationality or race, including their Somali origins.

147. The tribunal expresses its unease and surprise at the way that these statements were procured. Farrukh Ahmed was given the template statement by the respondent's solicitor and approached various worshipers of Somali origin, asking them if they would be willing to sign. This is not the proper way to ask a witness to give evidence in a court or tribunal case. It risks leading or influencing the individual to give certain evidence – it is likely to put words in the mouth of the witness.

148. Furthermore, for three of them (Mr "HA", Mr Abdinaim Mohamed and Mr Aweys Abdikadir Ahmed), the information before the tribunal tends to suggest that Mr Ahmed was not sufficiently clear with them about what they were signing nor what use the statement would be put to. All three individuals resiled from the statements which were submitted in their names and they were withdrawn.

149. The only witness who testified to the truth of the statement was Mr Abdulahi Hussein Siyad. Nevertheless, the respondent asked the tribunal to have regard to the other three witness statements (which had not been withdrawn). The purpose of the statements is said to be to demonstrate that a number of Somalis have had no experience of any discriminatory treatment by Imam Shoaib, nor witnessed that sort of treatment against others.

150. The tribunal attaches no weight to the six statements in relation to which the individual witnesses did not attend tribunal to attest to the truth of their statement. As for Mr Siyad's view of Imam Shoaib, that is one person's view to the effect that he had not been subjected to discrimination by the Imam and, in his experience, nor had others. The tribunal is really not assisted by Mr Siyad's own experience in considering whether the Imam's treatment of the claimant (regarding timetabling and her dismissal) was racially discriminatory.

151. On the contrary, the way in which Mr Ahmed, on behalf of the respondent, treated the Somali taxi drivers, as a group to be tapped into and even, on the accounts of Mr "HA", Mr Abdikadir Ahmed and Mr Abdinaim Mohamed,

somewhat manipulated into providing supposedly supporting witness evidence is troubling and is a factor which we conclude it is appropriate to have regard to in considering the application of the burden of proof provisions in s.136 of the Equality Act 2010 in respect of the claimant's claims of race discrimination, and to which we return below.

Composition of the Executive Committee

152. As stated above, the Committee has never had a single female member; and only two members who are not of Asian origin (one member is of Somali origin and one of Albanian origin but both of those have joined the Committee since 2021). The tribunal agrees with the claimant that these are factors to which we can properly have regard when considering the application of the burden of proof in respect of the claimant's claims of sex and race discrimination.

Employment Reference

153. Farukh Ahmed gave evidence about a request that the respondent received after the claimant's dismissal for an employment reference. The tribunal reminds itself that Mr Ahmed is Joint Secretary of the Executive Committee (along with Ziah Khan) and attended the Executive Committee on 30 May 2021. Mr Ahmed stated that he was not able to provide the reference which was requested because he could not create an outgoing email account and so would have needed to use a Hotmail email account to send the reference from, which the potential employer would not accept.

154. The tribunal expressed some surprise at Mr Ahmed's evidence as, in his own employment, he is an IT specialist. The tribunal also asked Mr Ahmed why he did not phone the person who had requested the reference or send a letter of reference by post. He had no good answer to this, saying only that he did not think of it. The tribunal does not make any determination on whether it amounted to victimisation by the respondent not to provide the reference as there is no such claim advanced by the claimant. However, it does consider it proper to conclude that Mr Ahmed's approach to the reference request showed a lack of consideration for the claimant by Mr Ahmed, on behalf of the respondent. Whilst Mr Ahmed was not a decision-maker in respect of the claimant's discrimination complaints, he was part of the respondent's management/leadership and we find that his attitude reflects the general approach adopted towards the claimant, including by Imam Shoaib and Ziah Khan. Accordingly, this is a matter to which the tribunal can properly have regard in considering the application of the burden of proof provisions when determining the claimant's claims of both sex and race discrimination.

Dena's letter

155. The claimant relies on an anonymous letter that was distributed around the Mosque (with copies left in the entrance) in the summer of 2021. Her evidence

is that this is from a woman called Dena. That is not challenged by the respondent. The letter was attached by the claimant to her written response to the Grounds of Resistance (sent on 19 January 2023). The claimant's case is that, having seen the letter, Imam Shoaib said (during Friday prayers) that "this is not how a woman should behave". This was put to him (by Ms Beech, for the respondent) at the beginning of his evidence for him to comment on. He denied saying this, telling the tribunal that he has always tried to encourage men to "look after their wives and the women in their household". The tribunal finds that

this answer was perhaps a little evasive and defensive but, on balance, we cannot conclude that it is more likely than not that Imam Shoaib said "this is not how a woman should behave". The tribunal notes in this regard that, in the claimant's written response to the Grounds of Resistance, she did not make this allegation (one would expect to see this referred to in paragraph 19 of that document).

156. In her letter, Dena raised various concerns, referring to a number of particular incidents which, in the tribunal's view, called for some sort of investigation by Imam Shoaib and the Mosque's leadership. The tribunal has received no evidence that this letter was investigated. The tribunal considers that this shows a lack of due regard; and a somewhat dismissive attitude by the Imam and management which calls for explanation. The tribunal will return to this when considering the application of the burden of proof provisions to the claimant's allegations of sex discrimination.

Meeting on 15 September 2021

157. As the tribunal has noted, letters of concern were submitted by a group of male worshippers of Somali origin in July and September 2021 and a meeting was convened on 15 September 2021 for an open discussion about the grievances. We have been provided with a transcribed audio recording of that meeting. The tribunal finds that some Somali worshippers did have concerns regarding the current and future direction of the Mosque. However, these were only raised after the claimant's dismissal and do not really shed light on what happened to the claimant. The tribunal notes that, unlike Dena's letter, the Mosque did at least respond to the letter from the Somali worshipers and seek to address their concerns. That some Somali worshipers raised concerns by letter after the claimant's dismissal and that these concerns were discussed at a meeting does not, in the tribunal's view, advance the claimant's claims and these are not matters which we consider it would be proper to have regard to when determining the claimant's claim of race discrimination. Moreover, the fact that the concerns raised by male worshippers were responded to, unlike the letter from Dena (a female worshipper) is a relevant factor when considering the operation of the burden of proof in respect of the claimant's sex discrimination claim.

THE LAW

Direct race and sex discrimination

158. Under s.13(1) of the Equality Act 2010, read with s.9 (race) and s.11 (sex) and s.23 (comparison by reference to circumstances), direct discrimination takes place where a person (here, the respondent) treats another (here, the claimant) less favourably because of race and/or sex than that person treats or would treat others.

159. 'Race' includes ethnic and national origins, nationality and colour and can include not being of a particular ethnic or national origin or not being of a particular colour.

160. Paragraphs 3.4 and 3.5 of the Equality and Human Rights Commission's Code of Practice on Employment states:

   If the employer's treatment of the worker puts the worker at a clear disadvantage compared to other workers, then it is more likely that the treatment will be less favourable….

   The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

161. Under s.23(1), when a comparison is made when considering whether there has been less favourable treatment of one person compared to another, there must be no material difference between the circumstances relating to each case.

162. In a case in which reliance is placed on more than one protected characteristic, the comparison may necessitate that the comparator has neither of the claimant's protected characteristics (so, to test both the race and the sex discrimination complaints, the comparator may properly need to be both male and Asian / non-Somali / non-black / non-African) (see Ministry of Defence v Debique [2010] IRLR 471, albeit this concerned a claim of indirect sex and race discrimination, but where the question of the appropriate comparator was under consideration).

163. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant was less favourably treated than another person was or would have been treated and then, secondly, whether that treatment was because of race or sex. However, in some cases (for example where there is only a hypothetical comparator), these questions may be better answered by standing back and considering the 'reason why' the claimant was

treated as she was (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 [2003] IRLR 285). This is likely to depend on whether the tribunal is able to make positive findings, one way or another, about the reason for the treatment.

164. In D'Silva v NATFHE [2008] IRLR 412, the claimant had sought to argue that the tribunal had failed to construct the hypothetical comparator correctly before considering how such a hypothetical comparator would have been treated. Underhill J (as he then was) commented (paragraph 30) as follows:

"It might reasonably have been hoped that the Frankenstein figure of the badlyconstructed hypothetical comparator would have been clumping his way rather less often into discrimination caseds since the observations of Lord Nicholls in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 (see in particular paragraph 11 at p.289) and the decision of this tribunal, chaired by Elias J, in Law Society v Bhal [2003] IRLR 630, at paragraphs 103115 (pp.652-654)."

165. The passages quoted by Underhill J from Shamoon and Bahl emphasise that it not necessary to construct a hypothetical comparator in order to test whether there is less favourable treatment. It is not possible to state whether the chosen comparator would have been differently treated independently of knowing why the alleged victim was treated in the way in which he or she was. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was.

166. Decisions are frequently reached for more than one reason. Provided that the protected characteristic (so, race and/or sex) had a significant influence on the outcome (in that race and/or sex were an effective cause of the impugned treatment), then discrimination is made out (Nagarajan v London Regional Transport [1999] IRLR 572 (HL)). "Significant" means more than trivial.

167. Case law recognises that very little discriminatory treatment is overt or even deliberate. People can even be unconsciously prejudiced or biased.

168. The tribunal has had full regard to the case of Amnesty International v Ahmed [2009[IRLR 884, relied on by the respondent. In particular, it notes that, in some cases, the reason for the treatment may be inherent in the treatment itself so no further enquiry is necessary and the employer cannot escape liability because he had a benign motive (for example, James v Eastleigh). In other cases, the act complained of is not in and of itself inherently discriminatory, but is rendered so by a discriminatory motivation – that is, by the mental processes (conscious or unconscious) which led the discriminator

to carry out the impugned conduct. Establishing those mental processes is not always an easy inquiry.

169. The tribunal notes, from Ahmed (in particular, paragraph 37), that the fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the reason for that treatment. In that sense, the tribunal should be cautious about approaching the exercise by focusing on a 'but for' analysis.

170. In determining the mental processes of an alleged discriminator, the tribunal may need to draw appropriate inferences from the conduct of that individual and from surrounding circumstances, with the assistance (where necessary) of the burden of proof provisions. Even in such cases, Ahmed reminds us that the subject of the inquiry is the reason for the alleged discriminator's action, not his motive.

171. The tribunal must make a clear determination about who took the decision to dismiss the claimant and whether that person, or persons, made the decision because of race and/or sex. The tribunal has reminded itself that, if a decisionmaker's reason for his treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439, [2015] ICR 1010 (per Underhill LJ, at paragraphs 33 to 36). What matters is what was in the mind of the individual taking the decision. The tribunal has also had regard to Alcedo Orange Limited v Ferridge-Gunn [2023] EAT 78 (one of the cases relied on by the respondent), to similar effect (see paragraphs 35 to 38).

172. Section 136 of the Equality Act 2010 sets out the provisions on the burden of proof. They are likely to require careful attention whenever there is room for doubt as to the facts necessary to establish discrimination, but may have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or another, about the reason(s) for the treatment complained of (Hewage v Grampian Health Board [2012] IRLR 879 (SC), per Lord Hope, at paragraph 32).

173. The burden of proof is initially on the claimant under s.136(1) EA 2010 to establish facts from which the tribunal could decide – in the absence of any other explanation – that the respondent has acted unlawfully (so, here, in a way that directly discriminates because of race and/or sex). This requires the claimant to prove more than the difference in treatment and a difference in protected characteristic(s) (Madarassy v Nomura International plc [2007] EWCA Civ 33 [2007] ICR 867, at paragraph 56). There must be something

more – namely, evidence from which it could be concluded that the protected characteristic was part of the reason(s) for the treatment. At this first stage, when considering what inferences can be drawn from the primary facts, the tribunal must assume that there is no explanation for them. It can, however, take into account evidence adduced by the respondent insofar as it is relevant in deciding whether the burden of proof has moved to the respondent.

174. Accordingly, a false explanation for the treatment added to a difference in treatment and a difference in race and/or sex, can constitute the 'something more' required to shift the burden of proof (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12).

175. The burden then passes to the respondent under s136(3) to prove that the treatment was not discriminatory (Igen Ltd v Wong [2005] EWCA Civ 142 [2005] ICR 931. In order to discharge the burden of proof (i.e. to prove that the treatment was not discriminatory under this second stage, if the claimant succeeds at the first stage), the respondent must prove, on the balance of probabilities, that the protected characteristic(s) played no part whatsoever in the treatment complained of (Wong). Since the facts necessary to prove an explanation are normally in the possession of the respondent, a tribunal would usually expect cogent evidence to discharge that burden of proof.

176. If the tribunal accepts that the reason given by the respondent for the treatment is genuine, then unless there is evidence to warrant a finding of unconscious discrimination, such that the tribunal is really finding that the alleged discriminator has concealed the true reason even from himself, there will be no basis to infer unlawful discrimination at all.

177. The tribunal reminds itself that there may be cases where the discrimination is unconscious because, although the reasons for the actions are genuinely the ones which the putative discriminator identifies, they do not appreciate that these reasons are in and of themselves discriminatory. This will be the case where assumptions are made based on stereotypical views of people who have the relevant protected characteristic. But it is well-established that, in this type of case, there must be clear evidence to support the inferences that stereotypical assumptions were made. In Stockton on Tees Borough Council v Aylott [2010] ICR 1278, at paragraph 49, Mummery LJ stated:

"Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that

person's characteristics and that those assumptions were operative in the detrimental treatment."

178. Furthermore, the case of Commerzbank AG v Rajput [2019] ICR 1613 demonstrates how careful a tribunal must be before proceeding to determine a case based on allegedly stereotypical views. Such an allegation (i.e. that a person was motivated by stereotypes) must have been clearly advanced, with proper notice to a respondent (see paragraphs 81 to 84). It is also vital that a tribunal only proceeds on the basis of proper evidence as regards the alleged stereotype and/or, potentially, on the basis of 'judicial notice' but only where this has been properly canvassed with the parties in advance.

179. The above principles in respect of the burden of proof provisions do not mean that there is any need for a tribunal to apply those provisions formulaically.

180. As already stated, the tribunal has reminded itself that if it is able to step back and make positive findings about the reason(s) for the treatment, one way or another, then it is permissible for it to move straight to the question of the reason for the treatment. In all cases, it is important to consider each individual complaint of discrimination separately and not take a blanket approach (Essex County Council v Jarrett UKEAT/0045/15/MC, at paragraph 32). It must also treat each protected characteristic separately (Bahl v The Law Society [2004] IRLR 799 (CA)).

181. Equally, however, the tribunal has reminded itself that it is important to stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: Quereshi v Victoria University of Manchester [2001] ICR 863, at 874C-H and 875C-H, per Mummery J (as he then was).

182. The tribunal notes that the fact that someone is treated unreasonably does not mean they have been discriminated against (Glasgow City Council v Zafar [1998] ICR 120). However, we also bear in mind that where the evidence shows that the complainant is the only employee who has been subject to unreasonable treatment, the tribunal must "consider carefully and with particular scrutiny" whether discrimination has played a part in the treatment: Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust UKEAT/0269/15/JOJ, per Langstaff J (paragraph 48).

183. If the tribunal concludes that a dismissal was unlawful by reason of discrimination but is satisfied that, if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been lawfully dismissed at some point, the tribunal must determine when that lawful dismissal would have taken place or, alternatively, what was the percentage chance of a fair

dismissal taking place at that point (this is the application of the Polkey principle, referred to below, to discrimination claims): Chagger v Abbey National plc [2009] EWCA Civ 1202 [2010] ICR 397; and Contract Bottling Ltd v Cave [2015] ICR 46.

Unfair dismissal

184. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is a potentially fair reason falling within subsection (2) – i.e. in this case, redundancy or some other substantial reason ("SOSR") of a kind such as to justify the dismissal of an employee holding the position which the employee held (here, the respondent relies on an alleged reorganisation of teaching provision in the Madrasah).

185. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which causes them to make the decision to dismiss the employee (see Abernethy v Mott Hay and Anderson [1974] ICR 323, 3309, cited with approval by the Supreme Court in Jhuti v Royal Mail [2019] UKSC 55, [2020] ICR 731, at paragraph 44. There are exceptions to this approach (as discussed in Jhuti) to which we have had regard. However, the tribunal has made a clear finding that the decision to dismiss the claimant was taken jointly by Imam Shoaib and Ziah Khan, with the Imam being the main decision-maker. The Executive Committee rubber-stamped or approved a decision that had already been made (and communicated) to the claimant. Therefore, the issues discussed in Jhuti do not arise on the facts of this case.

186. If the claimant fails in her primary argument that her sex and/or race were the reason(s) for the dismissal, then the tribunal has to consider, first, whether the respondent has proved that the definition of 'redundancy' in s.139(1)(b)i) ERA 1996 is satisfied – namely, whether the requirements of the Mosque "for employees to carry out work of a particular kind…have ceased or diminished or are expected to cease or diminish" and whether the dismissal is "wholly or mainly attributable" to that state of affairs. The House of Lords in Murray and ors v Foyle Meats Ltd [2000] 1 AC 51 made clear that these are questions of fact for the tribunal and that the language of the statute was simple and should be applied without gloss. It was emphasised that the statute does not refer to "employees of a particular kind" nor to "work specified in their contracts of employment" but to "the requirements of the business for employees to carry out work of a particular kind" (emphasis added).

187. In deciding what the requirements of the business are for the purposes of s.139 ERA 1996, the tribunal is not to investigate the reasons behind the employer's actions (James w Cook and Co (Wivenhoe) Ltd v Tipper [1990]

ICR 716). However, in a case such as this, the investigation of the employer's reasons is relevant to what the sole or principal reason for the dismissal was.

188. If dismissal is for a potentially fair reason (here, redundancy or SOSR), then the tribunal must consider whether, in all the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s.98(4)(a) ERA 1996). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s.98(4)(b)). At this stage, neither party bears the burden of proof – it is neutral (Boys and Girls Welfare Society v McDonald [1997] ICR 693). The tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were in all respects, including as to the procedure and the decision to dismiss, within the range of reasonable responses open to the employer (Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111.

189. In redundancy cases, in deciding whether the dismissal is fair in all the circumstances within s.98(4), the principles in William v Compair Maxam [1982] ICR 156 apply, as adjusted to dismissal where (as here) there is not union involvement – so:

(1) The employer must give as much warning as possible of impending redundancies so as to enable alternative solutions to be considered.

(2) The employer must consult as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible.

(3) The employer must establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience or length of service.

(4) The employer must seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

(5) The employer must see whether, instead of dismissing an employee, he could offer him alternative employment.

190. Not every procedural error renders a dismissal unfair – the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a

sufficient reason for dismissing the employee (Taylor v OCS Group Ltd [2006] ICR 1602, at paragraph 48). A failure to afford the employee a right of appeal may render the dismissal unfair (West Midlands Cooperative Society v Tipton [1986] AC 536); and a fair appeal may cure earlier defects in procedure (per Taylor v OCS Group); but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily – it is a matter for assessment by the tribunal on the facts of each case (Mirab v Mentor Graphics (UK) Limited UKEAT/0172/17, paragraph 54, per HHJ Eady QC (as she then was)).

191. Where the dismissal is found to be unfair on procedural grounds, the tribunal must also consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503 (HL), there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

CONCLUSIONS

Timetabling (direct race and direct sex discrimination)

192. The tribunal has found that the claimant was the only teacher to have been placed on shift 1 (that is, 5 – 6pm) with effect from 17 May 2021. We do not see that this would objectively cause clear disadvantage and the claimant did not raise any concerns about this at the time. However, the tribunal notes that there is no need for the claimant to prove "actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently" (per EHRC Code, as above). Given that there was no reason given by Imam Shoaib at the time for scheduling the claimant's classes separately to the other teachers and given the claimant's evidence that it made her feel rather isolated, we are prepared to accept that she can reasonably assert that she would have preferred not to be treated differently to the other teachers.

193. The claimant's case is that Imam Shoaib did this in order to orchestrate a redundancy situation (and her dismissal) because this would cause a reduced number of students to turn up for her class. She considered that this would (or should) have been obvious to Imam Shoaib because there was nowhere for parents (and other children) to wait (due to social distancing requirements). The claimant stated that families quite often had children who would be taught in both the first shift (5 to 6pm) and the second shift (6 to 7pm). Timetabling all the groups, other than Juniors (girls) at 6 to 7pm would inevitably mean that parents would choose only to attend in time for 6pm classes, rather than bring a child to an earlier class, and then have to wait outside (or in the car) with the other child until the 6pm lesson. The claimant says that this would

adversely impact the number of children attending her 5 to 6pm classes and that Imam Shoaib knew this.

194. The tribunal finds this to be rather far-fetched. Indeed, as the respondent has pointed out (including Imam Shoaib in his evidence), looking at the claimant's attendance register, more of her usual "shift two" pupils (i.e. those who would normally expect to attend classes between 6 and 7pm) actually turned up for her 5 – 6pm class than her normal "shift one" pupils. This shows that what the claimant says was obviously foreseeable was not what, in fact, transpired.

195. Furthermore, looking at the attendance figures for the claimant and Ms Baqi (the latter of whom was teaching her shift one and two classes only during "shift two" for that first week back of 'in person' teaching, from 17 May 2021), they both had around 4 or 5 pupils attending each day in the week commencing 17 May 2021. Moreover, Ms Baqi's normal "shift one" pupils (that is, those who would normally expect to attend classes between 5 and 6pm) turned up in equal numbers for the 6 to 7pm class in the revised timetable as the normal "shift two" pupils. When considering the register and attendance figures for Ms Najeeb,
her normal "shift one" pupils turned up in greater numbers for the 6 to 7pm class in the revised timetable than her normal "shift two" pupils.

196. From all of this evidence, the tribunal accepts that it would not have been obvious to Imam Shoaib whether some, all or no pupils would turn up for classes at all or at particular times and certainly not so obvious as to raise a credible suggestion that the revised scheduling was deliberately engineered to ensure that fewer pupils would turn up to the claimant's classes than other teachers.

197. In his evidence, Imam Shoaib said that he decided to change the claimant's timetable so that both her classes were taught together in the 5 – 6pm slot because of wanting to separate the younger children from older primary children to reduce the spread of Covid. He said that he had based his decision on research he had done on the internet (although he could not now identify, when asked by the claimant, what it was he had read nor on which website). The tribunal accepts that, in this regard, Imam Shoaib was trying to do the best he could in May 2021. We find that he was not well-equipped to undertake a properly informed risk-based approach and that his approach was amateur. However, the picture at the time was not clear and the guidance was not always easy to understand. There was news coverage about how children, especially younger ones, did not seem to get such bad symptoms from Covid infection but might be a bigger cause of the virus spreading.

198. Dr Malik's evidence was that he, as a Trustee with a medical and scientific background and working in the NHS with Covid patients, was tasked by the

Mosque with advising on how and when the Mosque and Madrasah should reopen. He said that he told the Executive Committee and Imam Shoaib that they could reopen from 17 May 2021 in line with schools and that the government guidelines for education settings should be applied to the Madrasah. It is entirely plausible (indeed, the tribunal finds, it is likely) that Imam Shoab did do some research, and sought to re-open the Madrasah whilst trying to adhere to guidelines. We note that everything was up in the air and there was a lot of confusion. People were trying to do the right thing.

199. From all of this, the tribunal is able to make positive findings on the evidence about the mental processes of Imam Shoaib in respect of the timetabling complaint. We have, therefore, determined these complaints of direct race and sex discrimination by adopting the 'reason why' approach and have not been assisted by constructing a hypothetical comparator (a Junior class teacher who was both male and Asian (or not black/African/Somali origin). The other teachers are not suitable as actual comparators because their circumstances are not sufficiently similar (since the Asian male teachers were/are primarily employed in religious, rather than teaching, roles; and the female teachers are Asian, and the most apt comparison would be with an Asian male teacher, who was not also an Imam).

200. We conclude that Imam Shoaib's reason for timetabling the claimant from 5 to 6pm was to facilitate some social distancing and ensure that not all students would be in the Madrasah at the same time. We reject as implausible the orchestration point. We cannot see that it would have been at all obvious that fewer children would arrive at 5pm. We conclude that Imam Shoaib did not and could not have known the impact of the timetabling decisions on class numbers. Accordingly, he did not revise the timetabling in order to subject the claimant to a detriment or reduce her class numbers to engineer her dismissal and neither race nor sex played any part in his decision-making.

201. Inevitably, therefore, the claimant's claims of direct race and sex discrimination in respect of the timetabling allegation fail.

<u>Unfair & discriminatory dismissal</u>

202. There are four claims advanced by the claimant in respect of her dismissal – direct race discrimination; direct sex discrimination; as well as unfair and wrongful dismissal.

203. It is not in dispute that the claimant was dismissed whilst the other teachers were not and that this is a clear disadvantage which could properly give rise to a complaint of less favourable treatment. The key issue, then, for the

discrimination claims is whether race and/or sex were effective causes of the dismissal.

204. The respondent has conceded that the dismissal was unfair by reference to the complete lack of any fair procedure adopted. However, the respondent maintains that the reason for dismissal was redundancy or SOSR and that the claimant's race and sex played no part whatsoever in the decision to dismiss her; and had a fair procedure been implemented, the claimant would certainly have been dismissed in any event.

205. At the start of the hearing, the respondent's case was that the fair dismissal would certainly have happened on or around 5 June 2021. In closing, the respondent stated that it would have taken three weeks to effect a fair dismissal, such that the claimant's dismissal would have taken effect on or around 16 June 2021.

206. The tribunal must identify the factor or factors operating on the minds of the decision-makers which caused them to make the decision to dismiss the claimant. On the tribunal's findings, the decision-makers were Imam Shoaib (the key individual who determined that the claimant should be dismissed) and Ziah Khan (the supporting decision-maker). We have found that the Executive Committee was not a decision-maker at all in any real or operative sense (since
the claimant had been dismissed on 27 May 2021, with two days' notice, which was before the meeting of the Executive Committee). Accordingly, it is the states of mind of Imam Shoaib and Ziah Khan with which the tribunal is concerned.

207. It is convenient and appropriate for the tribunal to start by determining their reason or reasons for dismissing the claimant as this is at the heart of all the claims predicated on her dismissal.

208. Looking at the mental processes of Imam Shoaib, the tribunal concludes that he did genuinely note the reducing numbers of pupils attending the Madrasah for 'in person' classes from 17 May 2021. From this general picture, he decided, overly hastily and without any proper thought, consultation or examination of alternatives, that the Madrasah could manage without the claimant such that she was no longer required and should be dismissed. He gave no thought whatsoever to whether any of the other teachers should be dismissed instead of the claimant, nor to any other options to avoid dismissal.

209. Looking at the mental processes of Ziah Khan, the tribunal concludes that he did not disagree with Imam Shoaib's analysis of the attendance figures and, when Imam Shoaib told him that this meant that the claimant was no longer required, he agreed, again without any real consideration of the context

(including alternatives) and with no consultation. He too gave no thought at all to whether any of the other teachers should be dismissed instead of the claimant nor to any other options to avoid dismissal.

210. The tribunal has decided that it is convenient first to reach conclusions on the claimant's claims that her race and sex were the reasons or at least part of the reasons for her dismissal. This will also assist with the determination of whether the claimant was dismissed wholly or mainly because of the declining pupil numbers in the period from 17 to 25 May 2021.

211. Whilst the tribunal accepts that the backdrop of falling pupil numbers is what led Imam Shoaib (with no dissent from Ziah Kkan) to decide that the Madrasah could manage with fewer teachers, the claimant was the only employee who was considered for dismissal. In those circumstances, particular care and scrutiny is required of the evidence (per Kowaleska-Zietek). The tribunal feels constrained to ask: why did the axe fall so quickly on the claimant and was her race and/or her sex any part of the reasons for the decision to dismiss her?

212. Here, the tribunal is not particularly assisted by constructing a hypothetical comparator and nor is it able to make positive findings on the evidence about the full reasons operating on the minds of Imam Shoaib and Ziah Khan for the claimant's dismissal. The tribunal is, therefore, assisted by the burden of proof provisions in s.136 of the Equality Act 2010.

213. Accordingly, the claimant has the initial burden of proving facts from which the tribunal could conclude that the decision to dismiss (taken by Imam Shoaib, with whom Ziah Khan agreed) was unlawful because of race and/or sex.

214. We have concluded that such facts have been proved.

215. First, this was an incredibly hasty decision; based on insufficient information collected over too short a period of time (one week, from 17 to 25 May 2021).

216. Second, there were no efforts at all to see if the situation could be resolved or improved. The tribunal notes that the respondent could (and ought to) have considered the situation much more carefully, including consideration of the following: creating a proper pool of its Madrasah teachers (not including the Imams whose main duties were religious and whose duties could not be carried out by the claimant, Ms Baqi or Ms Najeeb); moving to online teaching, or a transition period where some classes were taught online and others in person; spreading the remaining classes amongst all the teachers etc. The fact that no consideration was given to any options other than dismissal of the claimant is striking.

217. Third, the claimant was able to (and did) cover for the other two teachers and taught some boys. There was no good reason to single her out.

218. These <u>three</u> key aspects cry out for explanation but unreasonable treatment, without more, is not sufficient from which a tribunal could conclude that the treatment was discriminatory – something more is required.

219. Fourth, that something more is to be found from the background or secondary facts found by the tribunal. Although the tribunal finds that these are not conclusive on their own of sex or race discrimination in respect of the dismissal decision by Imam Shoaib and Ziah Khan, they are matters from which the tribunal could conclude – absent any other explanation – that the decision to dismiss the claimant was consciously or unconsciously on grounds of sex and race:

(1) Ziah Khan communicated the dismissal decision on 27 May 2021 to the claimant via her father; Ziah Khan did not invite the claimant to the meeting on 14 June 2021 to consider the letter of concern she had written jointly with her father; and Sajid Haq observed that the claimant's view that she had been discriminated against must have been because she was "fed by her father". Mr Haq was the Chair of the Mosque and Mr Khan one of its Joint Secretaries as well as a decision-maker in the dismissal decision (albeit playing a minor role in that decision). Imam Shoaib never interacted with the claimant face-to-face (sending handwritten notes via pupils and/or WhatsApp messages). That the Imam (and headteacher) and Mr Khan (one of the leading figures in the Mosque) should assume that the claimant would not wish to be communicated with directly nor attend the meeting at which her concerns would be discussed; and that another of its leading figures (the Chair, Mr Haq) assumed that she was not capable of reaching her own view (i.e. about discrimination) betrays, in the concluded view of the tribunal, a profoundly paternalistic, patriarchal and sexist stance within the respondent organisation. This makes it more likely that the claimant's sex had a significant (i.e. more than trivial) influence on the decision by Imam Shoaib and Ziah Khan to dismiss her.

   i. The tribunal concludes that Ziah Khan and others (including Imam Shoaib, Imam Owais and Farrukh Khan) had presumed – based on a stereotypical assumption about Muslim women as a group and the claimant as a member of that group – that the claimant would not wish to have direct communications with any of the men who were accountable for the management of the Mosque and the Madrasah, unless she made it explicitly clear that direct communication was welcomed.

ii. We asked the parties to address the tribunal, in their closing submissions, on the relevance, if any, of the fact that the claimant's employment was in a religious (namely, Islamic) context, at the Madrasah.

iii. The evidence from both parties, which we accept, is that there was significant sex-segregation within Mosque and the Madrasah: female and male worshipers would use separate entrances, and different floors in the Mosque's building for worship and prayer, for education and meetings; and activities were organised for men and women separately.

iv. The respondent asserted, in closing submissions, that whilst it was not relying on the occupational requirement in Schedule 9 to the Equality Act 2010, the tribunal should nevertheless be cognisant of the provisions and that they could provide an exemption from what might otherwise constitute unlawful sex discrimination in respect of not offering employment to a person in order to comply with the doctrine of a given religion or to avoid conflicting with views of a significant number of followers.

v. However, the tribunal notes that (1) the respondent did not seek to rely on this exemption for not employing or dismissing the claimant; (2) the exemption would be strictly applied; and (3) there was no evidence which could sustain either the compliance principle or the non-conflict principle within the meaning of paragraph 2 of Schedule 9 to the Act. On the contrary, the respondent's witnesses appeared to agree that there was nothing in Islamic doctrine which
would require a female teacher to teach girls and a male teacher to teach boys (particularly junior boys and junior girls); and, indeed, the claimant did teach some boys. The tribunal, therefore, derives no real assistance from the existence of the occupational requirement exemption in Schedule 9.

vi. The respondent also asserted that it was not really possible or likely that stereotyping could have taken place in respect of the assumption that the claimant would not welcome direct communication with men. The respondent's reasoning was that Imam Shoaib, Ziah Khan and others in the Mosque's management were all making decisions within the same mosque in respect of people sharing the same tenets of faith and so, in that context, it was not a question of stereotyping but rather reasonable assumptions being made about what other people, including the claimant, may believe and therefore want (or not want). The

tribunal does not accept that stereotyping can only take place by an outsider rather than insider, which is really what the respondent was suggesting. The tribunal concludes that it is entirely possible for people of the same faith to make stereotypical assumptions about others within their faith, for example based on sex. That is still making an assumption about an individual just because of their membership of a group (here, the claimant, as an individual woman, was assumed not to welcome direct communication with men who were not her direct family because she was a member of female Muslims as a group).

vii. The respondent also asserts that, in any event, the reason for not communicating the dismissal decision to her directly nor inviting her to the meeting on 14 June 2021 (or the reason for assuming that her father had "fed her" the idea that she had been discriminated against) was nothing to do with stereotyping by reference to sex but was because her employment was first arranged via her father and he did not ask for her to be invited to the meeting. The tribunal concludes that this misses the point. The claimant was only 17 when she was first employed by the Mosque. Her dismissal was four years later, when she had reached adulthood, left school and gone to university and had been continuously employed throughout.

viii. The tribunal does note that, when arranging for Mahamad Dahir to assist with leading Tarawih during Ramadan, Imam Shoaib did this via his father. The respondent says that this shows there was no stereotyping based on sex because son and daughter were treated alike. However, Mahamad Dahir was not an employee of the Mosque so the context is not comparable. Furthermore, the tribunal
notes that, when Mr Warsame complained (at the meeting on 14 June 2021) about the allocation of Rakaats (and the allocation of money in respect of this), Sajid Haq stated that he would see whether Mahamad Dahir could be offered teaching work in the Madrasah. In this way, the son was preferentially treated over the daughter (i.e. the claimant) which tends to reveal, at least in part, an unconscious bias on grounds of sex. That there was the potential for teaching work for Mahamad Dahir also undermines the respondent's case that the only reason for the claimant's dismissal was that there was a reduced need for Madrasah teachers.

ix. The tribunal concludes that Imam Shoaib and Ziah Khan, as did others in the Mosque's management, simply assumed things

about the claimant (i.e. that she would not welcome direct communication or wish to attend the meeting on 14 June 2021) without ever making the effort to check with her; and we conclude that this assumption was, at least in part, down to stereotypical assumptions they made (as Muslim men) about Muslim women.

x. The claimant, of course, was not dismissed because of assumptions made about how (or how not) to communicate with her. The relevance of this stereotyping of the claimant is that it reveals an unconscious sex-based bias on the part of the Mosque's male leadership, including Imam Shoaib and Ziah Khan, the two men who decided to dismiss the claimant. This is, therefore, a factor which – along with others – goes into the balance to shift the burden of proof to the respondent to prove that sex played no part whatsoever in their decision to dismiss her.

(2) There was an almost complete absence of any proper training, policies and procedures, particularly in respect of equality and diversity and governance, and a total failure to seek any professional advice (until it was too late). This makes it much more likely that Imam Shoaib (as headteacher) and Ziah Khan, as a member of management and the Madrasah sub-committee, may have allowed unconscious biases in respect of both race and sex to creep into their decision-making without any awareness of this danger.

(3) During the claimant's employment and at the time of her dismissal, the Executive Committee had no women and no non-Asian members (and had never had female or non-Asian members). The respondent had never even thought about inviting the woman who organised activities for female worshipers to join the Executive Committee. The tribunal finds that the homogeneity of the management/leadership of the Mosque may well have allowed unconscious biases in respect of both race and sex to creep into
the decision-making by those in leadership roles (including Imam Shoaib and Ziah Khan).

(4) The respondent (through the efforts, or lack thereof, of Farrukh Ahmed) failed to ensure that the request for a reference was properly actioned and his explanation for this was inadequate. That no proper and reasonable efforts to ensure a reference was sent in relation to the claimant shows a lack of consideration which the tribunal could conclude was, at least in part, due to her race and sex. Whilst Mr Ahmed was not one of the decision-makers, his attitude towards the claimant reflected that of the Mosque's leadership, including Imam Shoaib and Ziah Khan.

(5) Imam Shoaib showed a disdain towards his Somali students by making jokey and dismissive comments about them eating bananas and rice. The tribunal finds that this is a matter from which it could infer a conscious or unconscious racial bias against Somalis on the part of Imam Shoaib which is clearly relevant to the dismissal decision given that he was the main decision-maker.

(6) Neither Imam Shoaib nor Ziah Khan (as one of the Joint Secretaries) nor anyone else within the respondent apparently took any steps to investigate the allegations of sexism raised by "Dena" in her letter, whilst they did respond to concerns raised by male Somali worshippers. This reveals a lack of consideration for the concerns of women which is another matter from which the tribunal could conclude that singling out the claimant for dismissal was, at least in part, because of her sex.

(7) The respondent considered it was appropriate to tap into the community of Somali taxi drivers in order to secure evidence that the Imam was not racist towards Somalis. That the respondent viewed this cohort as a group by reference to race and as people who could be manoeuvred into providing identical witness statements is a matter from which the tribunal could conclude that the Mosque's leaders (including Imam Shoaib and Ziah Khan) had a disdainful or dismissive attitude to those of Somali origin.

220. The tribunal has considered the relevance of the claimant's failure to complain about discrimination until after her employment had been terminated. The respondent suggests that this is because she did not genuinely believe she was being subjected to discrimination. The tribunal finds, in accordance with the claimant's explanation for her lack of complaint, that she did not raise concerns prior to her dismissal because she did not want to 'rock the boat'. To her mind, the only significant discrimination prior to her dismissal was the timetabling change which was only nine days before her dismissal in any event. We accept that, at the point her timetable was changed, she did not want to risk her job by raising a complaint.

221. The matters set out above are all factors from which the tribunal could conclude that race and/or sex were effective causes of the decision by Imam Shoaib and Ziah Khan to dismiss the claimant (even if they were not the main or sole reasons).

222. Consequently, the tribunal then looks to the respondent to prove that neither race nor sex played any part whatsoever in the decision by Imam Shoaib and Ziah Khan to dismiss the claimant.

223. The tribunal concludes that the respondent is not able to discharge that burden of proof. The tribunal is entitled to expect cogent evidence in the hands of the respondent to demonstrate that the reason for dismissal had nothing to do with sex or race:

i. There is no compelling evidence that the snapshot, in the week of 17 to 24 May 2021, of declining pupil numbers was of such immediate importance and concern that it required the immediate dismissal of a teacher and, in particular, the claimant.

ii. It must have been obvious that the situation at that time was in flux and that confining the review to the first week to ten days back after the move from online to 'in person' teaching was unlikely to reflect the true position.

iii. The claimant was the only employee who was singled out for possible dismissal. It did not occur to Imam Shoaib or Ziah Khan to consider whether one of the Asian female teachers should be dismissed instead of the claimant. The claimant's attendance figures were not that dissimilar to Ms Najeeb's or Ms Baqi's. The respondent says that there were fewer young (i.e. Junior) pupils on the waiting list but no documentary evidence was adduced to corroborate this assertion.

iv. At around the same time, the Chairman (Sajid Haq) was of the view (as at 14 June 2021) that there might be teaching work available for the claimant's brother Mahamad Dahir (a man) – this completely undermines the respondent's case that the declining student numbers in late May 2021 compelled the claimant's immediate dismissal.

v. No thought was given to the obvious and numerous ways in which the dismissal of the claimant could be avoided – namely, pooling the three part-time teachers and selecting one from that pool on the basis of fair and objective criteria; as well as options which may well have meant that no dismissal was required at all, such as writing to parents to encourage better attendance; drumming up new pupils; sharing the existing classes amongst the teachers to see if numbers could be increased; offering a mixture of online and 'in person' classes; moving classes back to an
'online' platform only; transferring some of the younger boys taught by Imam Owais (whose evidence was that he had too many pupils) to the claimant to create a mixed Junior class; or indeed putting her on furlough for a few months to see if numbers picked up (this was not considered or offered to the claimant before she was dismissed on 27 May 2021).

vi. The tribunal also notes that the respondent has provided no good explanation for the secondary/background factors detailed at paragraph 219 above (which we consider are matters from which we could infer that race and sex were both operative factors in the decision to dismiss the claimant).

224. The tribunal concludes that the respondent has failed to discharge the burden of proving, on the balance of probabilities, that neither race nor sex were any part of the reason for dismissal.

225. Consequently, the reasons for dismissal were:

i. Pupil numbers which were apparently declining; ii) The claimant's race; iii) The claimant's sex

226. The tribunal does, however, accept that the main (i.e. principal) reason for the claimant's dismissal was the declining pupil numbers and that her dismissal was mainly attributable to that situation. It reaches this conclusion because the evidence it has seen and heard shows that Imam Shoaib was sufficiently concerned about attendance that he discussed this and his decision that the Madrasah could manage without the claimant with Ziah Khan on 26 May 2021. We have not accepted the claimant's case that this was all deliberately engineered to get rid of her. There was no overt hostility to the claimant on the part of Imam Shoaib (nor Ziah Khan or other members of the Executive Committee), let alone on grounds of sex and race. Rather, the tribunal's conclusion is that her race and sex meant that she was viewed as expendable in a way that would not have been the case had she been male and of Asian origin.

227. Consequently, there was a potentially fair dismissal by reason of redundancy and the claimant's dismissal was principally for that reason.

228. The respondent admits that it did not act reasonably in treating the apparently declining pupil numbers as a sufficient reason to dismiss the claimant in all the circumstances but that this was only because of the lack of any procedure.

229. The tribunal concludes that this was not just a failure of all due process. The claimant's dismissal was well outside the band of reasonableness, both procedurally and substantively for the following reasons:

(1) The tribunal has full regard to the fact that the Mosque is a small employer. It had six employees at the time of the claimant's dismissal. The tribunal also takes into account that the Mosque had little by way of administrative resources and no formal access to professional HR advice.

(2) However, it had an active Executive Committee which included professional people who were business savvy. Imam Shoaib and Dr Malik were keen for the tribunal to note their access to guidance and policy resources from their jobs in the NHS and prison service. Furthermore, we have heard evidence that Ziah Khan and Farrukh Ahmed were able to access advice from an accountant and an HR professional, albeit after the claimant's dismissal. With proper thought, this advice could and should have been sought sooner.

(3) The tribunal finds that, whilst the Mosque's size and administrative resources meant that it was an unsophisticated operation, this does not mean that the complete failure to follow any due process in relation to the claimant's dismissal could possibly be viewed as meaning that her dismissal was within the range of reasonable responses. Indeed, the respondent realistically conceded that the dismissal was unfair for this reason. However, it says that she would have been dismissed fairly on or around 16 June 2021 had a proper procedure been followed.

(4) The tribunal does not agree. We find that the unfairness went further than the total lack of due process. Not only did the claimant's race and sex both play a part in her being uniquely and so quickly selected for dismissal (in contrast to Ms Baqi and Ms Najeeb, who were doing the same job as her), but the respondent failed to consider any of the numerous reasonable alternative options which may well have saved her job (and which we have referred to above). By the time that the offer of furlough was conveyed to the claimant on 27 June 2021, the horse had bolted as the claimant had already been dismissed a full month earlier, with just two days' notice (on 27 May 2021).

230. Accordingly, the claimant's dismissal was unfair, as well as amounting to direct race discrimination and direct sex discrimination. These claims all succeed.

231. The parties agreed that the tribunal should determine liability and make findings relevant to the application of the principle in Polkey and Chagger. On the basis of the tribunal's findings (set out in detail above), the tribunal concludes that if the respondent had followed a fair procedure and had considered reasonable alternatives to avoid dismissal and absent any race and sex discrimination, there is a very good chance that the claimant would have remained in her employment with the respondent. The tribunal will consider the precise percentage chance at the Remedy Hearing on 15 April 2024.

Wrongful dismissal

232. The respondent accepted that the claimant was entitled to three weeks' notice of dismissal which she was not given and so conceded the claim for wrongful dismissal. The claim is, therefore, well-founded.

233. Given that the claimant has succeeded on all of her four dismissal claims, the case will now proceed to a remedy hearing which is listed for 15 April 2024; and case management orders will be made to enable the parties to prepare for that hearing.

Employment Judge McCann
11th March 2024

Case No: 2302433/2021

EMPLOYMENT TRIBUNALS

Heard at:	**London South (at Croydon)**
Before:	**Employment Judge McCann**
On:	**13 November 2023 (day 1 of 5)**
Claimant:	**Ms R Dahir**
Respondent:	**Wimbledon Mosque (by its Trustees)**

Appearances

For the Claimant: **Mr Warsame (Claimant's father)**

For the Respondent: **Ms Beech (Counsel)**

REVISED LIST OF ISSUES

(at the end of Day 1 of the Hearing, on 13th November 2023)

After discussions on the first day of the hearing, the issues which had been identified at the preliminary hearing for case management were revised, following certain concessions on behalf of the Respondent. The Revised List of Issues is set out below.

Unfair dismissal

1. The parties agree that the Claimant was dismissed by the Respondent.

2. On what date was the Claimant dismissed by the Respondent?

   The Respondent asserts that the Claimant was dismissed on 5th June 2021 (when a letter of that date was sent by the Respondent to the Claimant). The Claimant asserts that she was dismissed on 28th May 2021.

3. Was there a potentially fair reason for dismissal? (The Respondent will rely on redundancy and/or some other substantial reason (business reorganisation)).

   The Claimant asserts that she was selected for dismissal because of race and/or sex and so there was no potentially fair reason for dismissal.

4. Did the Respondent act reasonably in treating any potentially fair reason for dismissal as a sufficient reason in all the circumstances? In particular:

   4.1. Was there a fair process adopted?

   4.2. Did the decision to dismiss fall within a reasonable band of responses?

   The Respondent has today conceded that the Claimant's dismissal was unfair by reference to the unfair procedure adopted.

5. Should any compensation be reduced following Polkey v A.E. Dayton Services Limited and, if so, by how much?

   The Respondent asserts that the Claimant would have been dismissed by the same date (5th June 2021) in any event (that is, even if a fair procedure had been adopted) and that the compensation to be awarded should be limited to the statutory redundancy payment to which she is entitled.

6. Should the basic and compensatory awards be reduced to reflect any culpable or blameworthy conduct by the Claimant which contributed to her dismissal?

   The Respondent no longer relies on this issue.

Wrongful dismissal

7. Was the Claimant dismissed in breach of contract, in that she was given no notice (and no payment in lieu of notice)?

   The Respondent has today conceded that the Claimant is entitled to three weeks' notice pay.

Direct race and/or sex discrimination

8. Was the Claimant subjected to the less favourable treatment alleged below because of her race and/or sex?

   8.1. Placed on the 5pm – 6pm shift on around 16th May 2021 and following
   8.2. Her employment was terminated in early June 2021

9. The Claimant relies on a hypothetical comparator.

10. Was the Claimant subjected to less favourable treatment?

11. If so, was this because of her race and/or sex?

    Either:

    a) what was the reason for the Claimant's treatment (the 'reason why')?

    Or:

    b) the two-stage test:

       i. Has the Claimant proved facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has discriminated against the Claimant because of race and/or sex (i.e. a 'prima facie case')?

       ii. If so, what is the Respondent's explanation? Does it prove a nondiscriminatory reason for any proven treatment?

Remedy

12. What financial losses have arisen from the Claimant's dismissal?

13. Has the Claimant taken all steps as were reasonable to mitigate her losses?

14. Should there be any award for injury to feelings and, if so, how much??

15. What other remedy, if any, is the Claimant entitled to?