



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Annette Hercules

v

Fulham Cross Academy Trust

Heard at: London Central
On: 2 - 15 July 2024

Before: EJ G Hodgson
Mr S Pearlman
Mr S Godecharle

Representation

For the claimant: Mr D Dotting
For the respondent: Ms Banton, counsel

JUDGMENT

It is the unanimous judgment of the tribunal that for both claims:

- 1. All claims of direct discrimination fail and are dismissed.**
- 2. All claims of victimisation fail and are dismissed.**
- 3. All claims of harassment fail and are dismissed.**
- 4. All claims of failure to make reasonable adjustments fail and are dismissed.**
- 5. All claims of discrimination arising from disability fail and are dismissed.**

REASONS

Introduction

- 1.1 This case concerned two claims. The first, 2208579/2022, was issued on 6 November 2022. The second, 2204019/2023, was issued on 25 March 2023. The two claims have been heard together, albeit they remain separate claims.
- 1.2 At the hearing, we noted that a number of claims brought in the second claim may predate the presentation of the first claim. This could be an abuse of process. However, as no claim has succeeded on its merits and we have not had to consider this further.
- 1.3 There has been considerable difficulty identifying the claims intended or brought by the claimant. The claims are set out in the issues as recorded below.
- 1.4 The issues were given to the parties, for consideration, after the first day. We have reproduced them below and included any amendments allowed during the course of the hearing.

The Issues

Claim one

- 2.1 There are claims of direct discrimination, victimisation, failure to make reasonable adjustments, and discrimination arising from disability.
- 2.2 There are the following allegations of direct discrimination, as identified at the case management hearing on 5 July 2023:
 - 2.2.1 allegation one: on 6 October 2020, by Ms Rachel Jones shouting at the claimant, and continuing to shout at her;
 - 2.2.2 allegation two: following the claimant raising a grievance about the incident on 6 October 2020, by the respondent failing to uphold the grievance;
 - 2.2.3 allegation three: by the respondent failing to deal with the grievance in a way in which they would have dealt with a grievance for a person of a different race;
 - 2.2.4 allegation four: in the spring of 2021, by Ms Rachel Jones shouting at the claimant when the claimant was raising concerns about the October 2020 incident;
 - 2.2.5 allegation five: in spring 2021 by Ms Rachel Jones stating that she was treating the claimant "differently" because she "found the

Christian imagery and messages" on the claimant's Facebook offensive;

2.2.6 allegation six: by Ms Diane Lawson not following up the incidents, despite email requests by Ms Hercules; and

2.2.7 allegation seven: by continued failure to resolve the grievance, it being the claimant's case it was the original grievance.

2.3 Allegations one to three are put as allegations of race discrimination allegations four to seven are put as acts of religious discrimination.

2.4 Unless the claimant says to the contrary, it is assumed that the claimant may rely on the four protected characteristics – race, religion, disability, and age for all allegations.

Disability discrimination

Disability

2.5 It is the claimant's case that she is disabled by reason of sciatica.

2.6 It is the claimant's case she is also disabled by reason of stress anxiety and depression.

Failure to make reasonable adjustments and discrimination arising from disability

2.7 The alleged claims of disability discrimination are not set out adequately or at all in the claim.

2.8 It is the claimant's case that a number of adjustments have been recommended. The claimant alleges that there was a failure to hold a meeting concerning adjustments and that this is a failure to make adjustments (allegation eight).

2.9 In the alternative, it appears she advances the failure to make adjustments as an allegation of unfavorable treatments arising in consequence of disability (section 15 Equality Act 2010), or direct disability (section 13 Equality Act 2010).

2.10 The claimant does not identify any specific adjustment she says should have been made, it is the failure to hold a meeting which is complained about.

Victimisation

2.11 For the allegations of victimisation the claimant relies on her original grievance as a protected act (as referred to in paragraph 58 of her particulars).

2.12 It is her case that as a result of raising a grievance she has been subject to the following further treatment which is said to be victimisation:

2.12.1 allegation nine : she was offered a "package to leave" in circumstances where a white 75-year-old female was not offered a package

2.12.2 allegation ten: by being subject to unwarranted management and monitoring of her day-to-day working activities.

2.12.3 allegation eleven: in October 2022 by receiving a warning from Ms Harry concerning alleged inappropriate support of a student; and

2.12.4 allegation twelve: in October 2022 by Ms Harry failing to address the claimant's concerns about her role or hold a meeting to discuss them.

Claim two

Direct discrimination/victimisation/harassment

2.13 There are general claims of discrimination being the following:

2.13.1 allegation thirteen: by rejecting the grievance against Mr Alan Jones having conducted a flawed investigation. It is alleged the flaws include the failure to obtain statements from Sally Brooks, Diane Lawson, Philip Barton and Dennis Wright;

2.13.2 allegation fourteen: by accusing the claimant in January 2023 of a data breach by emailing a link for OFSTED staff questionnaire to our own email;

2.13.3 allegation fifteen: by accusing the claimant in January 2023 of a data breach when sending her payslips to a personal email address;

2.13.4 allegation sixteen: by conducting a formal disciplinary process, to include the manner of the process undertaken by Ms Victoria Tully;

2.13.5 allegation seventeen: by the action of Ms Harry in or around March 2023 in the following respects:

2.13.6 giving a warning considering the use of a laptop for work with students

2.13.7 failing to organise a meeting between the claimant and Ms Devi, such meeting having been requested in autumn 2022, and

2.13.8 by holding an impromptu meeting (on a date not specified) with the claimant which ended when Ms Harry told the claimant to get out of the room.

- 2.13.9 allegation eighteen: by the Trust responding on around December 2022 and failing to uphold the claimant's complaints.
- 2.13.10 allegation nineteen - The allegation allowed to proceed against Mr Barton was limited to an alleged failure to deal with the grievance of 11 June 2022, and alleged failure to perform an appropriate investigation and undertake an adequate grievance procedure.
- 2.14 The allegations in claim two are pursued variously as direct discrimination, victimisation, and harassment. The claimant relies on the protected characteristics of race, religion or belief, age, and disability. The claim form fails to specify adequately or at all which allegations are put as which claims, and which protected characteristics are relied on. Each allegation will be treated as a claim of direct discrimination, victimisation, or harassment relying on each of the protected characteristics or protected acts as were appropriate.

Time

- 2.15 Are all or any of the claims out of time and if so, should time be extended

Amendment

- 2.16 A further allegation was allowed by amendment. We will refer to this as allegation 19. The allegation is against Mr Barton and is limited to an alleged failure to deal with the grievance of 11 June 2022, and alleged failure to perform an appropriate investigation and undertake an adequate grievance procedure. This is put as a claim of direct discrimination relying on age and race and as victimisation.
- 2.17 The additional alleged protected acts that may be pursued by amendment were as follows:
- 2.17.1 Protected act 2 – the claimant's grievance letter to Ms Brooks of 2 June 2021.
- 2.17.2 Protected act 6 – the claimant's grievance letter of 11 June 2022.
- 2.17.3 Protected act 9 - the claimant's grievance letter of 18 November 2022.

Evidence

- 3.1 The claimant gave evidence. In addition, Mr David Dotting also gave evidence for the claimant.
- 3.2 For the respondent we heard from Ms Rachel Jones, former assistant head teacher; Mr Alan Thomas Jones, head of school of Fulham Cross Academy; Ms Diane Lawson, HR manager; Ms Sally Brooks, executive

principal; Mr Philip Barton, chair of trustees; Ms Victoria Tully, head of school Fulham Cross Girls ; Ms Sashie Harry, assistant headteacher; and Ms Susan English, trust director.

- 3.3 Ms Beverly Beason was not called, but her statement was put in evidence and relied on.
- 3.4 The respondent filed an amended chronology on 8 July 2024.
- 3.5 Both parties gave oral and written submissions. Further submissions were filed after the hearing by the claimant.

Concessions/Applications

- 4.1 On day one, we discussed the issues in this case. There are two claims. The first claim was filed on 16 November 2022, and second on 25 March 2023. The issues in the first claim were considered at the case management hearing on 5 July 2023, but the issues in the second claim were not clarified. There was a further case management hearing on 20 October 2023, and a third hearing on 20 November 2023. At the third hearing, there was a list of issues produced, but unfortunately this included a number of matters which were not in either claim form, but no amendment was either sought or granted.
- 4.2 Following discussion, the tribunal produced a draft final list of issues which was sent to the parties on 2 July 2024. The tribunal confirmed it was the definitive list of issues: no allegation that did not appear in that list would be considered by the tribunal. The parties were asked to confirm the accuracy of the issues and to set out in writing the details of any claim which had been pleaded, but had not been included.
- 4.3 We identified the failure in either claim form to set out adequately or at all the alleged protected acts relied on for the claim of victimisation.
- 4.4 On 4 July 2024, the claimant applied for amendments. Broadly, that application asserted that a number of events amounted to protected acts. It sought to include a number of existing allegations as allegations of victimisation. In addition, further allegations, which appeared to be wholly new claims were included. The respondent was ordered to provide a reply by 09:00 on 8 July 2024, such response to be drafted over the weekend.
- 4.5 The first response to the application to amend failed to set out the respondent's position on each of the alleged protected acts. It stated that a number of additional allegations had been included, in addition to the eighteen allegations already identified by the tribunal.
- 4.6 The tribunal noted that in relation to the protected acts, the claimant had failed to particularise whether they were allegations, information, or doing something else for the purpose of the act. The factual circumstances

relied on were not set out. Further, the respondent had failed to set out its position in relation to the alleged protected acts.

- 4.7 The tribunal ordered both parties to clarify their positions. Further written submissions were to be filed by 09:00, 9 July 2024.
- 4.8 In addition, on 8 July 2024, the claimant sent a further document which appeared to be an extract from a previous list of issues with further wording inserted. This was discussed. Mr Dotting said it was an application to amend. The nature of that application was unclear. He was ordered to provide an application setting out any additional claims. Such application to be made by 09:00, 9 July 2024. The tribunal confirmed it would not treat that amended list of issues as an application to amend, as it lacked any appropriate detail.
- 4.9 Further applications were made on 8 July 2024. At 20:43, the claimant filed an application to amend to include twelve protected acts (application two). At 20:51, the claimant filed a further application to amend which identified further alleged detrimental treatment (application three). At 21:59, the claimant requested the tribunal disregard page 266 of the bundle (application four). At 23:26, the claimant filed an application to include additional paragraphs in her witness statement (application five).
- 4.10 The respondent made two applications. On 8 July 2024 at 13:25 respondent applied to add to the bundle a chain of emails from 5 September 2019 (application six). In addition, the respondent sent a grievance outcome letter and a grievance appeal outcome letter of 19 April 2023 and 4 September 23 respectively, and applied for them to be included in evidence (application seven).
- 4.11 On 8 July 2022, the respondent disclosed an email chain from 5 September 2019 in which it is alleged the claimant discussed her sciatica. The emails were between the claimant and Ms Cathy Johnson. There had been discussion that morning about a version of the email chain included by the claimant in the original bundle. The respondent had doubted the claimant's version was accurate. In the respondent's application, there was indication that the emails had, in some manner, been tampered with. We brought this to the attention of Mr Dotting and we asked that he take the claimant's instructions and be ready to deal with it the next day. As there appeared to be an allegation of inappropriate conduct, we directed that Mr Dotting should have time to discuss the matter fully with the claimant before entering any questions.
- 4.12 The applications were supported by numerous documents.
- 4.13 The tribunal confirmed that the application would be dealt with after the respondent's evidence, which was due to completed on the morning of 9 July. Neither party objected.

- 4.14 Various applications were considered after the conclusion of the respondent's evidence on 9 July 2024.
- 4.15 During the discussion on 9 July 2024, the claimant withdrew application one and we consider it no further.
- 4.16 During the discussion on 9 July 2024, the claimant raised no objections to the respondent's applications. The email chain on 5 September 2019 was admitted into evidence. The grievance outcome letter and grievance appeal outcome letter, being subject to application seven, were admitted by consent.
- 4.17 On 10 July 2024, the tribunal gave its decisions in relation to the claimant's applications and reserved the reasons. Those reasons are now set out.
- 4.18 Application two – the claimant's application identified twelve alleged protected acts. The only alleged protected act which appeared in either claim form was the claimant's complaint of 6 October 2020, which she alleged was a grievance.
- 4.19 At a case management hearing on 20 November 2023, EJ Burns had set out a list of issues which included five protected acts. The first was the complaint of 6 October 2020. At paragraph 18(b) – (e) of the list she referred for other protected acts as follows:
- b. The grievance she raised in July 2021 about Rachel Jones**
 - c. The grievance she raised about Sally Brooks on 11 June 2022**
 - d. Raising concerns in a meeting in November 2022**
 - e. Raising a grievance about Alan Jones in November 2022**
- 4.20 Those alleged protected acts were not allowed by EJ Burns as amendments, and they do not appear in either claim form. Nevertheless, the respondent has sought to prepare on the basis that it accepted they could proceed.
- 4.21 Mr Dotting clarified that each of those alleged protected acts identified by EJ Burns was reflected in the specific application to amend. We refer to the numbering in the claimant's application to include further alleged protected acts. The July 2021 grievance was said to be protected act two. The grievance raised on 11 June 2022 was said to be protected act six. The raising of concerns in November 2022 and the grievance concerning Mr Alan Jones in November 2022 was said to be alleged protected act nine.
- 4.22 The respondent conceded that alleged protected acts two and six were protected acts and they had been considered in the evidence. We allowed these as there is no dispute that they were protected acts and there is no prejudice to the respondent allowing them to proceed. The respondent had known about them in advance and they were dealt with in evidence.

- 4.23 We have also allowed two alleged protected acts from amendment 9 to proceed, and to the extent we need to identify it further, we have included it in the list of issues as amended and set out above. They reflect the alleged protected acts referred to by EJ Burns, and dealing with them causes the respondent no prejudice.
- 4.24 We have considered the other alleged protected acts which the claimant sought to include. We refused to allow their inclusion by way of amendment.
- 4.25 The relevant legal principles to be applied, when considering amendment, are well known and can be stated briefly. The leading authority is **Selkent Bus Company Limited v Moore** 1996 ICR 836.
- 4.26 The tribunal must carry out a careful balancing exercise of all the relevant circumstances. It must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
- 4.27 When considering the balance of injustice and hardship, **Selkent** states that all the relevant circumstances must be taken into account, and those circumstances include the following: the nature of the amendment (is it minor or substantial); the applicability of time limits; and the timing and manner of the application.
- 4.28 **Selkent** states minor amendments include the following: the correction of clerical errors; the addition of incidental factual details to support existing allegations; and the relabelling of existing factual allegations as a different cause of action. Substantial amendments may include pleading new factual allegations, whether as a fresh cause of action or new allegations for an existing cause of action.
- 4.29 **Selkent** confirms substantial amendment will require a consideration of the applicable time limit.
- 4.30 We remind ourselves of the three points **Selkent** says should normally be considered: the nature of the amendment (is it minor or substantial); the applicability of time limits; and the timing and manner of the application.
- 4.31 It is important for a claimant to identify with clarity the amendments because, if the claimant fails to do so, the tribunal cannot determine whether the amendment is minor or substantial. Further, it is necessary for the amendment to be clear to identify whether there is any issue with time at.
- 4.32 The timing and the manner of the application must also be considered. It is necessary to consider all of the relevant circumstances. Those circumstances may include those taken into account in **Safeway**: how closely related are the new and old claims; are all the relevant facts already in issue and must be proved; was the claim omitted by mistake on

the part of the lawyers; should the respondent be surprised that the new claim has been brought; and how promptly has the application been made. These examples are merely illustrative. All the relevant circumstances must be taken into account.

- 4.33 As part of the balancing exercise, it is important to identify to what extent the amendment will lead to a different factual enquiry. In **Evershed v New Star Asset Management** EAT 0249/09, Underhill P, as he was then, found it was necessary to consider with some care the areas of factual enquiry raised by the proposed amendment and whether they were already raised in the previous pleading. In that case he concluded that the new evidence would be substantially the same as to be given in the original claim; he allowed the amendment and overturned the original tribunal decision. This approach was approved by the Court of Appeal in **Evershed V New Star Asset Management Holding Limited** [2010] EWCA Civ 870 at paragraph 50 where Rimer LJ stated:

...A comparison of the allegations in the amendment... shows that the amendment raises no materially new factual allegations... the thrust of the complaints in both is essentially the same...

- 4.34 There was no suggestion that it was necessary to determine whether it was reasonably practicable to bring the claim within the limitation period.
- 4.35 In summary, the following propositions can be distilled:
- a. First, the overarching consideration is the balance of injustice of hardship of allowing the amendment against the injustice and hardship of refusing it.
 - b. Second, it is necessary to identify whether the amendment is minor or substantial in that it involves a substantial addition of fact and a new cause of action.
 - c. Third, the timing of the application may always be relevant, but if the amendment involves a substantial alteration, it is necessary to consider whether the claim would be out of time at the date of the amendment. This is a factor to be considered in the general exercise of discretion.
 - d. Fourth, the balance of hardship is not an abstract concept. The tribunal should consider whether there is evidence of real hardship, and it must give supporting reasons having regard to all the relevant circumstances.
- 4.36 The tribunal considered the proposed alleged protected acts that were not referred to by EJ Burns. The matters said to be the protected acts were all unclear. They failed to identify adequately or at all what was said to be the information, or the thing done for the purpose of the act, or the relevant allegation. None could be understood without requiring significant further particularisation. Allowing the claimant to include the

new protected acts would be a substantial amendment. Allowing new protected acts to be pleaded would effectively create new claims. Inevitably those claims would be out of time, and there was no good reason advanced as to why they could not have been identified earlier. If they were to be dealt with adequately, the claimant would need to file further evidence, as would the respondent. There would need to be further cross-examination. Absent any further evidence, and any further cross-examination, it is unlikely that any claim could succeed. There was no proper explanation for why there had been a failure to include these in the original claim, or to make an application earlier.

- 4.37 The tribunal considered there to be real hardship to the respondent. It would be necessary to adjourn the hearing, allow the parties to adduce further evidence, and to resume cross examination. This would have led to significant delay and expense. The claims would be out of time, and it was difficult to see how time would be extended.
- 4.38 It follows that there would be significant prejudice to the respondent. However, there would be little or no prejudice to the claimant. The claimant had already brought numerous claims of discrimination and victimisation and relied on an alleged protected act. In addition, she had been allowed to rely on further protected acts which reflected those which had been broadly identified by EJ Burns. It follows that having considered the balance of hardship the application was refused.
- 4.39 The tribunal found, in relation to the four matters which had been identified by EJ Burns, the respondent was aware of them, and the parties had an opportunity to deal with the evidence.
- 4.40 Application three - this application was clarified at the hearing. Mr Dotting clarified that EJ Burns had identified at 4(i) of her list of issues following allegation
- by failing to deal with the grievance the Claimant raised against Sally Brooks (dated 11 June 2022) including the investigation, grievance and appeal stages and in particular disregarding the Claimant's statements regarding a 75 year old female, but accepting the statements Ms Brooks made about the same person (Claim 1) (race, religion or belief, age and disability);**
- 4.41 It is said this was included in the original claim one between paragraphs 47 and 56. The relevant grievance was dealt with by Mr Philip Barton and he had been cross-examined on the circumstances which appear to be envisaged in the allegations recorded by EJ Burns.
- 4.42 The application to amend, lacked clarity. Whilst there is reference to the surrounding circumstances in the claim form, there is no clear allegation which is said to be a specific act of discrimination. Whilst the tribunal must read a claim form purposefully, the concept has limits. What is required is an identification of an allegation of detrimental treatment and some words which demonstrate the alleged causal link to the specific type of

discrimination.¹ It is far from clear that exists within the claim form. In our view, this is a substantial amendment, and time must be considered. Ultimately, when considering whether to allow the amendment, there is no need to reach a final decision on whether time should be extended. That can be left to determination of the final hearing.

- 4.43 We are satisfied that the respondent undertook preparation to deal with the allegation set out by EJ Burns, as clarified by this tribunal above.
- 4.44 There is little prejudice to the respondent in allowing this allegation to proceed, provided the allegation is clear, and limited: the evidence has been produced, the matter has been dealt with in cross-examination.
- 4.45 The actual incident as described in the application to amend of eight July is so diffuse that it is not possible to understand it without seeking further clarification.
- 4.46 If it were necessary to clarify it further, there would be significant prejudice to the respondent. Equally, there would be little prejudice to the claimant in not allowing it, as it is one allegation amongst many, she may proceed with the others.
- 4.47 We allowed the allegation to proceed in a limited way. The allegation against Mr Barton was limited to an alleged failure to deal with the grievance of 11 June 2022, and the alleged failure to perform an appropriate investigation and undertake an adequate grievance procedure. This is put as a claim of direct discrimination relying on all four protected characteristics.
- 4.48 Application four - this was an application to withdraw documentation from the bundle. On 8 July, during cross-examination, Mr Dotting referred to page 266 of the bundle. He alleged that certain wording had been a response, from Cathy Johnson, to the claimant's email. This was challenged by the respondent. The respondent subsequently submitted the email chain.
- 4.49 By email of 8 July 2024, the claimant conceded that the wording that had been attributed to Ms Cathy Johnson was not written by Ms Johnson and instead was some form of note made by the claimant. The tribunal noted the position. However, that was no good reason to remove the document. To the extent that the claimant applied to withdraw the document in the bundle, that was refused.
- 4.50 Application five - the claimant seeks to add to her witness statement.
- 4.51 EJ Burns ordered that witness statements be exchanged by 25 March 2023. No party was permitted to rely on further statements without permission. It follows that permission must be sought.

¹ See *Housing Corporation v Bryant* 1999 ICR 123

- 4.52 There is a significant dispute as to what was sent to the respondent and when. We do not need to give the detail of that. It is for the claimant to bring to the tribunal's attention any further statement, or additions to the statement, which were not exchanged in accordance with the tribunal's orders, and on which she wished to rely.
- 4.53 No earlier than 20 June 2024, the claimant identified the further evidence she wished to rely on. It was for the claimant to apply for permission. She could have done so prior to the hearing. She could have done so at the hearing, including at the point when she adopted her statement.
- 4.54 Prior to the hearing, the claimant sent an email which appeared to contain further paragraphs which could be attached to her statement. When the claimant gave evidence, she elected not to include those additional paragraphs as part of her statement that was her litigation choice. During the hearing she made reference to the evidence and it was confirmed that she had not obtained permission to rely upon it.
- 4.55 The claimant was aware when she adopted her evidence that she had filed further evidence and she chose not to apply for permission to rely on it. That was her choice. It appears that she changed her mind. Allowing that evidence to be included, would lead to further cross-examination by the respondent. Moreover, it may be necessary to recall a number of the respondent's witnesses so they could give further evidence. There must be finality. The claimant had an opportunity to produce the evidence. She elected not to seek permission to rely on it. The effect of allowing it in would be to lead to the hearing being prolonged, with a real risk of the hearing being adjourned.
- 4.56 If there were any reasonable argument that the evidence was vital, it may be appropriate to allow it to be introduced, even given the choice by the claimant. However, the application fell short of establishing why the evidence would assist with any matter in dispute. In the circumstances, we did not give permission for the further evidence to be produced.
- 4.57 The tribunal noted that it would be helpful to have a chronology detailing when the claimant was off work and the reasons for absences. The respondent agreed to do this, and documents supplied on 8 July 2024. The respondent filed an amended chronology on 8 July 2024.

Submissions

- 4.58 During the early part of the hearing, the tribunal indicated it would be likely to require written submissions. Advance notice was given to allow the parties time to prepare.
- 4.59 On day five the hearing, we indicated we would consider the various applications and give a decision the following morning and thereafter the parties would give the submissions. Time would be allowed to make any

amendments to the final written submissions. On day six, 10 July 2024, having confirmed decision on various applications, the claimant requested time to finalise her written submissions. The time was granted and we proceeded at 13:00. At the end of his oral submissions, Mr Dotting indicated that his written submissions were in draft, and he had understood that they should be. That alleged understanding did not reflect the conversations or the instructions given. We confirmed that if he wished to file further submissions he should do so with an explanation.

- 4.60 Day seven of the hearing was the start of Chambers.
- 4.61 On 11 July 2024 at 00:46, the claimant filed a request for amendment to include hypothetical comparators. The tribunal at no stage had limited the claimant to either hypothetical or actual comparators. Relying on a comparator, whether hypothetical or actual, does not require an amendment. The construction of a hypothetical comparator may assist. However, there is no absolute rule that it is necessary and there are occasions when constructing a comparator may be unhelpful. The submissions state the hypothetical comparator was as follows: "This hypothetical comparator would be an employee with similar qualifications, experience, and position but who does not share the protected characteristics that have subjected me to discriminatory treatment."
- 4.62 On 11 July 2024 at 07:22, the claimant sent a further "amendment" request. This referred to an amendment "as outlined above" (presumably in the email or attachment).
- 4.63 Attached to the document where further closing submissions which appear to incorporate the initial submissions which had been submitted as numerous separate documents, and also appears to contain further submissions. What, if anything, was said to be an amendment to the claim is not identified, and it appeared that the application to amend may be a misconception. What was intended, if anything, as amendment to the claim was unclear; we considered that allowing any such amendment would be severely prejudicial. It would be necessary to recall the parties in order to try and clarify the amendment. If any substantial amendment were allowed, it would likely require further evidence and a resumption of the hearing. We saw no prejudice to the claimant in not allowing a further amendment of the claim. There would be significant prejudice to the respondent in terms of delay and expense. In any event, it appeared that the application was misconceived as it appeared to be simple application to consider further submissions. We considered those submissions in any event.
- 4.64 On 11 July 2024, at 09:02, the claimant filed a further application to amend. The claim was identified as follows:

The Respondent's recruitment policy includes provisions, criteria, or practices (PCPs) that indirectly discriminate against individuals with protected characteristics, in particular [specify the protected characteristic, e.g., race, gender, age, disability, etc.]. This policy places individuals with

these protected characteristics at a significant disadvantage compared to others, contrary to Section 19 of the Equality Act 2010. This discriminatory recruitment policy establishes the motive for the discrimination I have faced in my employment.

- 4.65 This appears to be a claim of indirect discrimination. It failed to set out what was the relevant provision, criterion, or practice. It failed to set out the relevant protected characteristic. It failed to set out what was the group disadvantage. It failed to set out what was the disadvantage suffered by the claimant. It may be possible that the claimant was affected, at some point, by the recruitment policy. However, there was a failure to set out when the claimant was subject to the recruitment policy, and therefore to identify when any disadvantage may have occurred.
- 4.66 We have set out above the relevant law. This is a substantial amendment including an entirely new cause of action. It amounts to no more than an assertion of indirect discrimination. As noted above, it gives none of the relevant details. This application is made late, and it has no precision at all.
- 4.67 There is no adequate explanation for why it is late. If it were granted, it would be necessary to seek further particularisation which inevitably would lead to an amendment of the amendment. Further evidence would be needed as this is a completely new claim. There would be significant expense and significant delay.
- 4.68 There would be severe prejudice to the respondent. The respondent would not know the case it was to answer. The claim would be delayed significantly. There would be further significant expense.
- 4.69 There is no prejudice to claimant in refusing to allow an amendment when the claim, as pleaded, inevitably fails for lack of particularisation. To the extent there may be a potential claim, any prejudice to the claimant arises from her failure to identify or will deal with it earlier.
- 4.70 We refused the application.
- 4.71 There was a further application to amend on 11 July 2024 at 10:32. The application was as follows:

Application to Amend Claim

I am the Claimant's representative and I am writing to respectfully request the Tribunal's permission to amend my claim to include a new claim based on the Respondent's recruitment policy, which I believe to be discriminatory. The new claim is crucial to supporting evidence of the discriminatory practices I have faced, particularly as it relates to the motive for the discrimination.

During the cross-examination of Mr. Alan Jones, a witness for the Respondent, it was stated that the recruitment policy was a "thought-provoking piece." However, upon reviewing the document on page 165 of the bundle, it is clear that the statement made by Mr. Jones does not align with the contents of the document.

The document reads: "The interviewing and vetting process need to be dramatically improved so that we can all (school/candidate) answer the questions below." This statement suggests an intention to develop a discriminatory recruitment policy, contrary to the assertion that it was merely thought-provoking.

Grounds for Amendment:

1. Evidence of Discriminatory Recruitment Policy:

- The contents of the document on page 165 demonstrate a clear intention to develop and implement a discriminatory recruitment policy.
- As the Respondent is a public body, such a policy would be in breach of the public sector equality duty.
- This information significantly impacts the nature of the original claim and supports evidence of discriminatory recruitment practices, which were the pretext for the discrimination faced by the Claimant.

2. Relevance to Original Claim:

- The evidence is directly relevant to the original claim of discrimination.
- Including this new claim will ensure a comprehensive and fair examination of all discriminatory practices employed by the Respondent.

New Claim: Discriminatory Recruitment Policy

The Claimant wishes to add a new claim regarding the Respondent's discriminatory recruitment policy, which breaches the Equality Act 2010 and the public sector equality duty. This policy directly contributed to the discrimination faced by the Claimant. The specific grounds for this new claim are as follows:

3. Breach of the Equality Act 2010:

- The recruitment policy, as evidenced by the document on page 165, indicates a practice that discriminates against candidates based on protected characteristics.
- **Case Law:** In *James v. Eastleigh Borough Council* [1990] 2 AC 751, it was held that treating someone less favorably based on a protected characteristic is unlawful discrimination.

4. Breach of Public Sector Equality Duty:

- The Respondent, as a public body, has a duty under Section 149 of the Equality Act 2010 to eliminate discrimination and advance equality of opportunity.
- **Case Law:** In *R (on the application of Elias) v. Secretary of State for Defence* [2006] EWCA Civ 1293, the importance of the public sector equality duty and the need for public bodies to consider equality implications in their policies were emphasized.

Points in Law:

5. Equality Act 2010:

- It is unlawful for an employer to discriminate against a job applicant or employee based on protected characteristics such as race, gender, age, disability, religion, or sexual orientation (Equality Act 2010, Sections 39-41).
- **Case Law:** In *James v. Eastleigh Borough Council* [1990] 2 AC 751, the House of Lords held that treating someone less

favorably based on a protected characteristic is unlawful discrimination.

6. Public Sector Equality Duty:

- The Respondent, as a public body, is subject to the public sector equality duty under Section 149 of the Equality Act 2010.
- This duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between people who share a protected characteristic and those who do not.
- **Case Law:** In *R (on the application of Elias) v. Secretary of State for Defence* [2006] EWCA Civ 1293, the Court of Appeal emphasized the importance of the public sector equality duty and the need for public bodies to consider equality implications in their policies.

7. Employment Tribunals Rules of Procedure:

- Rule 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 allows for the amendment of claims where it is just and equitable to do so.
- Given the recent discovery of the relevant document and its significant impact on the claim, it is just and equitable to permit this amendment.
- **Case Law:** In *Selkent Bus Co Ltd v. Moore* [1996] ICR 836, the Employment Appeal Tribunal outlined the factors to consider when deciding whether to allow an amendment, including the nature of the amendment, the applicability of time limits, and the interests of justice.

8. Limitation Periods:

- Although the standard limitation period for discrimination claims is three months from the date of the act, the Tribunal has the discretion to extend this period where it is just and equitable (Equality Act 2010, Section 123).
- Whilst the Claimant had the evidence approximately four months ago and I have only recently started to represent the Claimant and I have acted promptly in seeking this amendment. It is in the interest of justice to extend the time limit in this case.
- **Case Law:** In *British Coal Corporation v. Keeble* [1997] IRLR 336, the Employment Appeal Tribunal held that the Tribunal has a broad discretion to extend time limits if it is just and equitable to do so.

Claimant as a Litigant in Person:

The Claimant has been representing themselves as a litigant in person up to the end of their cross-examination. This has posed significant challenges in navigating the complexities of employment law and tribunal procedures. The Claimant recognised these challenges and have asked me to represent them so that I can diligently pursued their claims and I have promptly sought to amend the claim upon discovering new evidence. The Tribunal is respectfully asked to take into consideration the Claimant's status as a litigant in person and myself and a layperson, which may have impacted the timing and presentation of this application.

**Request for New Time Limits Consideration:
Time Limit Consideration**

Given the importance of this document in substantiating my claim of discrimination, I respectfully request that the Tribunal exercise its discretion to allow this amendment in the interest of justice.

Relevant Case Law:

- **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640:** This case discusses the Tribunal's discretion to extend time limits where it is just and equitable to do so.
- **Selkent Bus Co Ltd v Moore [1996] ICR 836:** This case provides guidance on when a Tribunal should allow an amendment to a claim, considering factors such as the nature of the amendment, the applicability of time limits, and potential prejudice to the other party.
- **DCA v Jones [2005] EWCA Civ 220:** This case supports the principle that amendments to claims should be permitted if they are necessary to allow the real issues between the parties to be determined, provided there is no undue prejudice to the respondent.

Conclusion:

In light of the above, I respectfully request the Employment Tribunal to:

9. Allow the amendment of my claim to include the new claim based on the discriminatory recruitment policy.
10. Consider new time limits for this claim, given the recent discovery of the relevant document.
11. Ensure that all evidence of discriminatory recruitment practices by the Respondent is thoroughly examined.

4.72 What is intended to be the new claim or claims is unclear. It is clear that there are new claims. They appear to be advanced as claims of direct discrimination.

4.73 It is not the tribunal's role to undertake a general review of policies. Tribunal proceedings are not a public enquiry. In the case of direct discrimination, for there to be a claim, there must be detrimental treatment. In the case of indirect discrimination the provision, criterion, or practice must be set out and it must cause substantial disadvantage to persons sharing the same protected characteristic as the claimant, and the claimant must be subject to that disadvantage.

4.74 To the extent the allegation is set out at all in the application to amend, it appears to be as follows:

The Claimant wishes to add a new claim regarding the Respondent's discriminatory recruitment policy, which breaches the Equality Act 2010 and the public sector equality duty. This policy directly contributed to the discrimination faced by the Claimant.

4.75 This falls short of establishing a specific detriment alleged by the claimant. If the claimant has been affected by the recruitment policy, she must say when, how, and why. She fails to do so. This in our view is a wholly unparticularised claim. If that amendment were allowed, it would

inevitably lead to further questions and the need for a further amendment. The hearing could not be concluded. The hearing would have to be reconvened. The claim would need to be clarified. There may be a process of discovery and the filing of further evidence which would, effectively, be an entirely new claim.

- 4.76 There is a suggestion that this claim has been delayed and could not be brought earlier. We reject that suggestion.
- 4.77 There is reference to a “recruitment policy” at page 164/165 of the bundle. It is said that, in some manner, some evidence was produced which was inconsistent with it which, and in some manner, has led to the application. The rationale underpinning this is unclear to the tribunal. The document at page 164 was raised by Mr Dotting during cross examination and he sought, through his questioning of Mr Jones, to introduce evidence of Mr Dotting’s own experience. It was clear Mr Dotting knew about this policy. It is clear that he takes exception to it and believes that it demonstrates discrimination. It was clear from what he said that was a matter that he raised at the time while he was an employee.
- 4.78 We will consider this policy further below when we consider the question of what evidence may turn the burden in a discrimination claim.
- 4.79 We should note that Mr Jones indicated it was a discussion document and was not policy.
- 4.80 The application fails to identify the detrimental treatment that affected the claimant. At best this appears to be advanced as some form of allegation of discriminatory conduct in general. It appears we are invited to find that the policy itself was discriminatory and therefore that is a matter from which we can draw an inference. This approach would introduce inappropriate satellite litigation and that is not the function of the tribunal.
- 4.81 There is no prejudice the claimant in refusing to allow the amendments, as no detrimental treatment is claimed. There is significant prejudice to the respondent in terms of delay and expense. Moreover, the respondent should not have to deal claim which is on its face is misconceived. The application is refused.
- 4.82 On 15 July 2024, the claimant made a further application. She sought “additions to the bundle.” One document concerned a meeting with the respondent’s managers in which it was alleged they “approved the rationale for a discriminatory recruitment policy.” There was reference to a “discrimination questionnaire” and the respondent’s management structure. It was said that only white people had held the four highest positions. There is also reference to a document which was said to demonstrate to staff to teaching assistant ratio. The respondent objected to the inclusion of further evidence. It alleged the evidence was irrelevant. It noted the hearing had concluded.

- 4.83 We do not accept that the evidence could not have been submitted earlier. Nevertheless, we have taken it into account where appropriate albeit we found the documents of little or no assistance.

The Facts

- 5.1 The respondent is a multi-Academy trust comprising two partner academies – Fulham Cross Academy (the Academy) and Fulham Cross Girls School and language College (the College).
- 5.2 The claimant is a teaching assistant.² She was employed from 1 November 2010 at Henry Compton, Fulham Cross Boys School, which has now become the Academy. She joined the trust on 1 November 2020.
- 5.3 On 26 September 2018, the claimant fell whilst working at the Academy and landed on her right side. She received hospital treatment. The following month she had intermittent pain.
- 5.4 On 5 September 2019, the claimant wrote to Ms Cathy Johnson stating that she had pain in her bottom and her leg which was unbearable. She stated wearing trainers helped her. She stated the doctor had diagnosed sciatica. She asked for permission to wear trainers.
- 5.5 Ms Johnson responded to confirm that her request was acceptable.
- 5.6 In her disclosure to the respondent, which became a document in the bundle, and is supported by paragraph 22 of the claimant's statement, the claimant appeared to attribute the following written comment to Ms Johnson – "I'm sorry to hear that your sciatica has flared up again. I was not aware of this. When she had a letter addressed to her from OHU." When this was questioned by the respondent during the hearing, the claimant clarified, by an email after the hearing stopped for the day, that this was some form of note that she had included in this email chain.
- 5.7 From 27 September 2018 to 26 October 2018, the claimant was absent from work. She submitted two medical certificates which referred to pain in her knees and neck, and unresolved grief. They do not refer to sciatica.
- 5.8 From 25 April 22 to 22 June 22, the claimant was absent from work the reason given was sciatica.
- 5.9 Between October 2018, of April 2022, the claimant had twelve periods of absence with a total time taken as sickness of 75 days. All periods were short, being one or two days, and related to infections or minor ailments, save for one absence of two days starting 25 November 2020 which

² At the hearing it was asserted the employment has now ended. That was not relevant to the matters before this tribunal and we sought no clarification.

related to hip pain. Two periods of absence were lengthy, the first in September 2021 lasting for 12 days, and the second starting in November 2021 and lasting 49 days. The reasons for the longer absences were anxiety depression, and stress-related mood disorder respectively.

- 5.10 There is no recorded absence for sciatica or musculoskeletal related problems between October 2018 and April 2022.
- 5.11 On 6 October 2020 there was an incident involving the claimant and Ms Rachel Jones, assistant head teacher. Ms Jones believed the claimant behaved inappropriately towards a student by snatching from the student drumsticks. This led to an altercation and Ms Jones displayed anger. We will consider the detail further when considering the allegation relating to this.
- 5.12 The claimant filed an incident report, which she subsequently alleged was a grievance; we consider this further in due course.
- 5.13 There was a subsequent investigation.
- 5.14 Mr Alan Jones, head of school, dealt with the subsequent disciplinary proceedings. He concluded that Ms Jones had behaved inappropriately and issued Ms Jones with a first written warning. He also recommended external coaching and referred Ms Jones for an occupational health report, as he was concerned she remained emotional about the incident. In addition he recommended mediation.
- 5.15 On 4 March 2021, a mediation meeting proceeded involving the claimant and Ms Jones. It was overseen by Ms Diane Lawson, HR manager. Ms Jones apologised to the claimant. However, when the claimant began to speak, Miss Jones interrupted; she accepts her tone was strong.
- 5.16 On 2 July 2021, the claimant filed a formal grievance concerning the incident of 6 October 2020 with Ms Jones and the subsequent mediation of 4 March 2021. She alleged Miss Jones had “continued to behave in a discriminatory manner towards black members of staff.” She referred to the Equality Act 2010 and her protected characteristics of religious beliefs and race.
- 5.17 Ms Brooks exchanged emails with the claimant at the start of September 2021.
- 5.18 On 16 September 2021, there was a further mediation meeting undertaken by Ms Sally Brooks, executive principal. Ms Brooks understood the meeting was generally positive, and brought to an end the incident of 6 October 2020. At the mediation meeting, there was some discussion about Facebook pages. We will consider that further below.
- 5.19 Following this meeting, the claimant took a period of absence and ultimately returned on 6 October 2021.

- 5.20 On 27 September 2021, Ms Brooks sent a letter of advice to Ms Jones concerning potential inappropriate social media posts on Ms Jones' Facebook profile. The post in question was not related to the claimant, her religion, or any anything that concerned the claimant, albeit the claimant had made the complaint. The claimant had produced a screen shot of a page from Ms Jones' Facebook.
- 5.21 On 10 November 2021, the respondent received an occupational health report about the claimant. This referred to the claimant feeling anxious and upset, and having panic attacks. It suggested she could not return to work and needed time to recover. It made no reference to sciatica or musculoskeletal issues.
- 5.22 The claimant had a further period of absence for mood disorder from 11 November 2021 to 2 February 2022.
- 5.23 Further occupational health reports were obtained on 21 January 2022 and 26 January 2022. The reports record the claimant's concerns about the events involving Ms Jones and the subsequent mediation. They recorded her continuing distress, anxiety, and mental health issues. It recorded that the final mediation meeting had been viewed as constructive by all parties. As for her return to work, it was suggested there should be regular meetings. In addition there was reference to discussion about flexible retirement. The second report indicated she would be fit to return to work from 7 February 2022 and suggested a phased return; the phased return was put in place by the respondent. The second report again referred to flexible retirement. Neither report considered any difficulty relating to sciatica, and that does not appear to be a matter raised.
- 5.24 On 25 April 2022, the claimant commenced absence because of sciatica.
- 5.25 There was a referral for an occupational health report on 17 May 2022.
- 5.26 The report referred to the claimant's concerns about not having a designated workspace or desk. There is reference to the need for a "suitably supportive office chair" as the claimant was "experiencing backache." The claimant had seen an osteopath. The osteopath and the GP supported a diagnosis of sciatica. The report states, "It is difficult to give examples of the effect of Annette's health problem on work performance and attendance as this is the first time Annette has been absent due to this health issue." No specific adjustments are recommended, other than the provision of a chair.
- 5.27 There was a further occupational health report on 25 May 2022. This states that the claimant had been absent for a month due to sciatica. It states "Her symptoms started suddenly with no apparent trigger." It suggests that if her symptoms improved within 2 to 4 weeks there could

be a phased return to work. It states “sciatica usually gets better in a few weeks.” It goes on to say “the risk of recurrence... is relatively low.”

- 5.28 On 8 June 2022, there was a meeting involving the claimant, Ms Brooks, and Ms Lawson. At that meeting, there was discussion about the occupational health report. In addition, there was a without prejudice discussion about the claimant leaving, and the potential for future work.
- 5.29 On 10 June 2022, Ms Brooks wrote to the claimant concerning the “without prejudice” meeting of 8 June 2022. She confirmed the without prejudice offer as follows:
- Instead of returning to work on 1st September 2022 under the flexible retirement scheme on a working pattern of two days a week, you would retire officially wef 31st August 2022 and a lump sum settlement payment of three months (1st Sept to 30th Nov 2022) at your current full time salary would be made to you for payment in September.**
- 5.30 On 11 June 2022, the claimant raised a grievance against Ms Sally Brooks, particularly with regard to the without prejudice discussion.. The claimant alleged there had been no discussion about her return to work, but that she had been offered a package to leave. She stated the letter of 10 July (presumably June) “is merely a façade to disguise Sally Brooks blatant discrimination due to my age and victimisation due to raising grievances about discrimination.”
- 5.31 On 16 September 2022, Shahzad Ahmed, trust director, sent an investigation report on the claimant’s grievance.
- 5.32 The claimant was absent for two days from 20 September 2022 with chest pains and she attended hospital.
- 5.33 The claimant had raised issues concerning the “professional conduct” of another TA, Ms Devi. She appeared to object to this difficulty being seen as a “personality issue.” This led to an exchange of emails with Ms Harry on 3 October 2022. This reflected an ongoing situation which concerned the working relationship between the two members of staff.
- 5.34 From 4 October 2022 until 6 October 2022, the claimant was absent with sciatica.
- 5.35 On 13 October 2022, there was a grievance hearing which concerned the complaint against Ms Brooks.
- 5.36 On 20 October 2022, Mr Dennis Wright, trust director, sent a letter of outcome. He accepted that the meeting on 8 June 2022 should have been confined to a discussion about the claimant’s sickness absence and the occupational health report. He concluded that the offer had been

made with “the best of intentions.” He rejected any suggestion that the claimant had been required to accept retirement.

- 5.37 On 8 November 2022, the claimant appealed Mr Wright’s decision. In part, she stated Mr Wright had failed to address concerns about the claimant’s “protected characteristics” and had failed to consider the potentially discriminatory conduct. It is unclear whether the claimant was rejecting any findings of fact.
- 5.38 On 18 November 2022, the claimant filed a grievance against Mr Alan Jones. This referred to her subject access request of 30 September 2022. She alleged that Alan Jones had, in some manner, falsely stated or implied that she had been given a letter of thanks for her contribution to the investigation. Broadly, it appears to be concerned with alleged inaccurate statements made by Mr Jones.
- 5.39 Mr Jones had, on 13 October 2020 sent a letter to the claimant thanking her for speaking with him, and thanking her in advance for her cooperation. We accept that he viewed this as a letter of thanks.
- 5.40 On 28 November 2022 the claimant sent an appeal submission regarding the outcome of the grievance concerning Ms Brooks arising out of the meeting on a June 2022. This again referred to the failure to consider the claimant’s protected characteristics and the allegation of discrimination.
- 5.41 On 28 November 2022, Mr Philip Martin, chair of directors for the trust heard the claimant’s appeal.
- 5.42 The claimant was absent from 5 December to 16 December 2022 with mental health issues and sciatica.
- 5.43 On 7 December 2022, Mr Barton issued his outcome to the grievance appeal. At the appeal hearing, the claimant referred to a 75-year-old white female who she alleged had been absent for some time, but on her return to work had been supported, not presented with a package to leave the school. That person has not been named. It appears that the description as a 75-year-old white female is an anonymization adopted by the parties rather than a reflection of the language used at the time. All parties knew who they were talking about. Mr Barton rejected the assertion of age discrimination. He found the claimant presented no evidence to demonstrate that any difference in treatment was because of age. He refused to uphold the allegation of age discrimination. In relation to the allegation of discrimination “on the grounds of gender” he found the claimant had presented no evidence and did not uphold that allegation. He also found no evidence of disability discrimination. He noted that a phased return to work had taken effect in June 2022, as recommended by occupational health. He found no evidence the claimant had been treated differently to another member of staff because of disability. He considered the complaint concerning Mr Wright. The claimant read from a prepared statement. He noted the claimant wished to discuss why Ms Brooks had made the offer in the first place. It does not appear he made a specific

findings regarding any complaint against Mr Wright, as he did not believe one was proceeding. He accepted that Ms Brooks, on 8 June 2022, had put forward a possibility of retirement as an alternative to flexible retirement. He rejected any suggestion that pressure was put on the claimant. He concluded that the allegation Ms Brooks had behaved in a discriminatory manner could not be upheld. He believed Ms Brooks intention was good and the claimant had been provided with options. He confirmed that was the end of the appeal procedure.

- 5.44 There was a further occupational health report in December 2022.
- 5.45 The claimant had a further period of absence from 3 January to 27 January 2023.
- 5.46 The claimant had requested some payslips. On or around 25 November 2022, the claimant was sent some payslips, but inadvertently she received the payslips of approximately 30 other non-qualified teaching staff.
- 5.47 The claimant printed all payslips, it appears on at least two occasions. She forwarded the email and attachment to a legal advisor and two others. The initial breach was the respondent's. The respondent was concerned that the claimant's actions constituted a breach of data protection
- 5.48 On 10 January 2023, following an investigation into the data breach, Ms Sally Brooks issued Ms Lawson a written warning for allowing the data breach to take place.
- 5.49 By letter of 12 January 2023 Ms Beverley Beason, finance and operations manager, raised concerns about the claimant's actions after she had received the payslips of others and sought clarification.
- 5.50 On 25 January 2023, there was an investigation meeting between the claimant and Susan English regarding the claimant's grievance against Mr Jones.
- 5.51 On 6 February 2023, the claimant forwarded to her own email address, a work emails which contained a link to an OFSTED questionnaire. The link was for feedback concerning the OFSTED inspection. After the link it stated: "This link must not be shared to anyone outside the school."
- 5.52 On 10 February 2023, Ms Lawson invited the claimant to a disciplinary hearing for breach of IT policy with respect to the OFSTED link.
- 5.53 On 21 February 2023, the investigation report concerning the grievance against Mr Jones was completed. The report records the claimant's reluctance to meet, albeit the meeting eventually went ahead. The report did not support the claimant's grievance.
- 5.54 On 14 March 2023, Ms Victoria Tully, co-head of school, conducted a disciplinary hearing regarding a breach of IT policy. This led to a

disciplinary outcome letter on 21 March 2023. She concluded that the claimant had sent two emails contrary to the respondent's policies. The claimant was issued a first written warning effective for 12 months.

- 5.55 On 21 March 2023, the claimant met with Ms Shashie Harry, assistant head teacher and the respondent's special educational needs coordinator (SENCo). She was the claimant's line manager. One issue discussed was the claimant's use of a business laptop. Ms Harry understood the claimant had made a request for a laptop to the IT department, which had not been approved. Ms Harry did not believe the claimant needed a work laptop to perform her duties; she confirmed that the laptop was not required.
- 5.56 The claimant had raised a complaint to The Teacher Regulation Agency (TRA) concerning Mr Jones. We do not need to record the details. These were serious complaints alleging professional misconduct against Mr Jones. The complaint accused him of racial discrimination. These complaints, if upheld, would lead to serious professional consequences. On 21 March 2023, Nehal Kanji, caseworker for TRA completed an investigation into the claimant's complaints against Mr Alan Jones. The decision maker did not find substantive evidence in support of any of the claimant's allegations.
- 5.57 On 19 April 2023, Ms Sally Brooks dismissed the grievance against Mr Jones
- 5.58 On 4 September 2023, Mr Barton dismissed the grievance appeal outcome regarding Mr Jones.

The law

- 6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

- 6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

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. (para 10)

- 6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually

occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept the there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

Section 26 - Harassment

- (1) A person (A) harasses another (B) if-
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (3) ...
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are-

age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

6.5 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation at the second stage.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.

- 6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
- 6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.
- 6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.
- 6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.
- 6.12 Victimisation is defined in section 27 of the Equality Act 2010.

Section 27 - Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

6.13 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.14 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question, as posed in Derbyshire below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.

6.15 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

“37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental... Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'. ”

40. The second question focuses upon how the employer treats other people...

41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a

'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan's* case [2001] IRLR 830, 833, paragraph 29, this

'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'

- 6.16 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.
- 6.17 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in *Khan*' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances. The stress and worry induced by the employer's honest and reasonable conduct in the course of his defence cannot, except in the most unusual circumstances, constitute a detriment. The focus should be on the question of detriment.

Reasons for unfavourable treatment.

- 6.18 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.
- 6.19 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail.

The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

- 6.20 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.
- 6.21 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

Subconscious motivation

- 6.22 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.
- 6.23 Section 23 refers to comparators in the case of direct discrimination.

Section 23 Equality Act 2010 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

- 6.24 The time limits are set out in Section 123 Equality Act 2010.

(1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of-

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section--

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--

- (a) when P does an act inconsistent with doing it, or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

6.25 Section 136 Equality Act 2010 refers to the reverse burden of proof.

Section 136 - Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

- (a) an employment tribunal;
- (b) ...

6.26 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258**. We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246**. The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

6.27 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

Section 20 - Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) ...
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
- (9) ...

6.28 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif 2007 IRLR 579** we note the following:

... the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made.

6.29 Section 15 Equality Act 2010 defined discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

- 6.30 In **Pnaiser v NHS England** [2016] IRLR 170, EAT, Simler P, as she was, at [31] gave extensive guidance on the general approach to be taken by a tribunal under s 15. In summary the tribunal should have in mind the following:
- Was there unfavourable treatment and by whom?
 - What was the reason for the treatment (Motive is irrelevant)?
 - Was the cause/reason 'something' arising in consequence of the claimant's disability?
 - The more links in the chain of causation, the harder it will be to establish the necessary connection.
 - the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
 - The knowledge requirement is as to the disability itself.
- 6.31 Causation must not be too loose. Section 15 requires the tribunal to isolate the 'something' in question and to establish whether the 'something' was caused by the disability and if that 'something' caused the unfavourable treatment³ (a two-stage test) see In **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305, Langstaff, P said this at paragraph 26.

26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B.

- 6.32 There is available an employer defence of justification, i.e., 'the treatment is a proportionate means of achieving a legitimate aim. This liability does not apply if the employer did not know, and could not reasonably have been expected to know, that the employee had the disability.
- 6.33 The ET must consider the balance between the reasonable needs of the employer and the discriminatory effect. The tribunal can consider whether lesser measures could have been adopted. The test is objective.

Conclusions

- 7.1 In these conclusions, we will first consider whether the claimant was disabled. Thereafter, we will consider the alleged protected acts. After that we will consider each of the individual allegations.
- 7.2 In considering all allegations of discrimination, we have regard to the totality of the evidence when we consider each of the allegations.

³ It must be a material cause.

Disability

- 7.3 The respondent concedes the claimant was disabled by reason of sciatica. It is respondent's case that the date of knowledge was 25 May 2022, when it received the occupational health report.
- 7.4 We received limited evidence about the effect of sciatica on the claimant's day-to-day activity. The claimant's oral evidence on the point contradicts the written evidence. In particular, it contradicts the occupational health report of 25 May 2022. The report states that the claimant had been absent for a month due to sciatica. It records "Her symptoms started suddenly with no apparent trigger." This contradicts the claimant's oral evidence to the effect that she had continued with symptoms of sciatica, since sciatica she was first affected her in 2018. That oral evidence is not supported by any contemporaneous documents, any GP records, or any other evidence to which we have been directed. The occupational health report is unequivocal, and we find the claimant is mistaken in her recollection. We prefer the contemporaneous documentary evidence which appears to set out her position at the time. The occupational health report says that it is likely to last a short time and is unlikely to recur. We find this was the second episode of sciatica, and this was a recurrence.
- 7.5 Our assessment must be made on the basis of the evidence as it would have been at the time. It is for the claimant to prove when she became disabled, and in deciding that, we must have regard to the definition set out in schedule one of the Equality Act 2010. The impairment is long-term if it has lasted at least 12 months, it is likely to last at least 12 months, or is likely to last for the rest of the person's life. However, where the impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities it is to be treated as continuing if that effect is likely to recur. We find that after the initial difficulties in 2018 the impairment ceased to have a substantial adverse effect. However, the symptoms of sciatica returned around April 2022.
- 7.6 We take the view as the symptoms did recur. Having recurred once, it was likely that they would recur again, at that point the claimant became disabled. When the claimant became absent because of sciatica, the respondent obtained an occupational health report. When the report was obtained, the respondent accepted the claimant was disabled by reason of sciatica. We find that she was disabled from the point that the sciatica recurred towards the end of April 2022.
- 7.7 For the purpose of the reasonable adjustment claim, we must consider when the respondent had knowledge or could reasonably be expected to have had knowledge of the disability. We find the first point the respondent could have understood the claimant had a disability was when the disability occurred. That did not occur until the claimant became absent with sciatica in April 2022. The claimant's absence resulted in the occupational health report. The occupational health report identified the

sciatica. It was on receipt of the report of 25 May 2022 that the respondent had knowledge.

Protected acts

- 7.8 The first alleged protected act is her alleged original grievance of 6 October 2020.
- 7.9 The claimant's email of 6 October 2020 refers to this as a statement. It is not said to be a grievance. The narrative explains the incident. She describes Ms Jones as being rude and aggressive in accusing the claimant of snatching the drumsticks from the student. The claimant states Ms Jones was angry and aggressive when she confronted the claimant in the corridor.
- 7.10 This statement makes no reference to any protected characteristic, discrimination generally, or the Equality Act 2010. It is a complaint about alleged rude and aggressive behaviour. This may be contrasted with her grievance of 2 July 2021 which specifically refers to the Equality Act 2010 and protected characteristics.
- 7.11 It is clear that the claimant is complaining about Ms Jones' behaviour. However, she is not doing anything by reference to, or for the purposes, of the Equality Act 2010. She is not alleging any form of discrimination. We accept that the allegation does not have to be an express allegation of discrimination, but there must be some wording from which it could be understood that the allegation involve a contravention of the Act. We find the complaint of 6 October 2020 is not a protected act for the purposes of section 27.
- 7.12 The second protected act relied on is the grievance of 2 July 2021. This expressly refers to discrimination and to the Equality Act 2010. It is a protected act. We find that this is the first protected act undertaken by the claimant.
- 7.13 The third protected act alleged is the claimant's grievance of 11 June 2022. This is said to be a formal grievance against Ms Sally Brooks. The grievance says, expressly, that Ms Brooks was seeking to disguise "blatant discrimination due to my age and victimisation due to raising grievances about discrimination." This grievance was a protected act.
- 7.14 The remaining protected acts are set out in the alleged protected act nine of the application to amend, as referred to above. The claimant relies on two sets of wording from the grievance letter of 18 November 2022. We have considered the letter of 18 November 2022. It is a formal grievance against Mr Jones. It refers to Mr Jones, as lead investigator, disregarding his "duty of care. At issue was the investigation of the events on 6 October 2020, and Mr Jones subsequent involvement. The grievance asserts that the complaints were of misconduct, and therefore there was no timeframe for the grievance submission. The original grievance of 6

October 2020 was not a protected act for the reasons given. The complaints against Mr Jones do not reference, in any manner, discrimination. They are not expressly advanced by reference to the equality act. They do not concern his involvement in matters otherwise advanced as discrimination. We do not consider the claimant was doing anything for the purposes of or in connection with the act. She was not making allegations whether express or otherwise that any person had contravened the act. The grievance of 18 November 2022 was not a protected act.

- 7.15 It follows for the purposes of victimisation there are two protected acts we may take into account. The first was on 2 July 2021 the second 11 June 2022.

General evidence

- 7.16 The claimant has advanced some general evidence from which it appears she alleges inferences of discrimination can be drawn, and we consider that now.
- 7.17 It is alleged that the respondent's recruitment policy was discriminatory. This allegation was introduced by Mr Dotting during his cross-examination of Mr Jones. Evidence of the effect of any recruitment policy was not introduced by the respondent. It was the claimant who introduced it through cross-examination of Mr Jones. We were referred to an alleged recruitment policy at page 164. We find that was not a recruitment policy; it was a discussion document. It posed a number of questions and appeared designed to encourage discussion. It specifically noted the need for caution to prevent subconscious bias when recruiting. It emphasised the need for diversity. The document does refer to the need to improve questioning and the vetting process. It refers to a number of questions that could be answered. There were twelve questions. Question 11 stated "Could we have a coffee together?" Question 12 said "Could we have a glass of wine/beer together?"
- 7.18 Mr Dotting was critical of these questions; he says, they may exclude individuals, including those who do not drink alcohol. Mr Jones acknowledged that was a valid point. He confirmed that the document had not formed a policy, it was not a procedure, and the questions were treated as metaphorical. We find that Mr Jones was aware of the difficulties that such questions could pose, and the potential for discrimination. In the circumstances, we do not find that this document indicates some form of underlying discrimination in the recruitment policy. Instead, it illustrates that the senior management were aware of the potential for discrimination, and actively addressed it.
- 7.19 There was significant cross-examination on the grievance policies. There were a number grievance policies. It is alleged there was a failure to use the correct grievance policy at the correct time. The applicable grievance policy was available on the internet. We do not accept the claimant was

caused significant confusion, or that any confusion caused any disadvantage. We do not accept that any confusion relation to the correct grievance procedure is a factor in which we could draw an inference of discrimination.

The allegations of discrimination

7.20 As necessary, we have set out further key findings of fact in relation to each of the allegations. We also considered in relation to each allegation all evidence which is relevant to the burden of proof. We have maintained an overview of all relevant evidence and its probative effect. The breadth and the detail of the allegations in this case is considerable. The tribunal is not required to set out the minute detail of every point of evidence it has considered, or explain every matter that it is taken into account. We have set out the most important points so the parties can understand the basis on which we have reached our decision.

Discrimination

7.21 We next turned to the specific allegations

Allegation one: on 6 October 2020, by Ms Rachel Jones shouting at the claimant, and continuing to shout at her.

7.22 Ms Rachel Jones gave frank, candid evidence to the tribunal. She accepted that she behaved inappropriately towards the claimant on 6 October 2020 and thereafter at the first mediation meeting. She regrets her behaviour.

7.23 We are satisfied that she cooperated with the investigation following the incident on 6 October 2020. She accepted that she had fallen below the standards of conduct expected and she accepted the warning given and thereafter embraced the coaching and retraining offered. She was at the time, and remains, embarrassed by her own behaviour. She expressed regret at the time and continues to do so.

7.24 There is dispute as to what happened on 6 October 2020. The claimant's evidence would suggest that the claimant did nothing inappropriate and that her behaviour was beyond reproach. The claimant suggests that the contemporaneous evidence supports her. We were referred to various student interviews. Much of the discussion before us revolved around whether the claimant touched or held a student, and whether the claimant snatched the student's drumsticks.

7.25 The claimant's statement says she asked the student to hand her the drumstick, which he did. The claimant states that she was surprised by Ms Jones' reaction, but she fails to set out in evidence what Ms Jones' reaction was, or to what she reacted. The claimant alleges that she left the class simply saying "What you should have said is 'Sorry I am late for my lesson.'" This is consistent with there being a tetchy exchange

between the two individuals. The claimant's reported statement, contained a degree of sarcasm and was confrontational; it was unlikely to calm a difficult situation.

- 7.26 Ms Jones accepts she followed the claimant out of the classroom and the claimant alleges she was shouted at. Ms Jones concedes that her action was inappropriate.
- 7.27 We have found the claimant's evidence to be inconsistent with at least one contemporaneous accounts and with Ms Jones' account. One witness refers to the claimant pulling the drumsticks out of the student's hand.
- 7.28 It may be possible for the claimant and Ms Jones to have different perceptions of the claimant's behaviour.
- 7.29 There is no evidence that the claimant's behaviour towards the student was such that any safeguarding issue was raised, even if she snatched the drum sticks, and this is consistent with Ms Jones' evidence.
- 7.30 Unfortunately, there was a history of some negativity affecting the relationship between Ms Jones and the claimant.
- 7.31 Ms Jones is a gay woman who is open about her sexuality. Both Ms Jones and the claimant are practising Christians. Ms Jones acknowledges that some Christians hold negative views of same-sex relationships and do so for doctrinal reasons. She accepts there is a debate amongst those who practice Christianity. She accepts that some Christians, for doctrinal reasons, do not accept same-sex relationships and may hold negative views. With some of those individuals Ms Jones is, nevertheless, friendly.
- 7.32 Ms Jones acknowledges that some people may make assumptions about the views held by Christians who are also black people. Both parties agree that there exists a perception of a stereotype. Ms Jones accepts that there is a stereotype about black people who are Christians which would suggests that they are more negative about same sex relationships. She states, that it is a stereotype of which she is aware, but not one that affects her either consciously or subconsciously. The acceptance by Christians of same sex relationships is a debate that she actively engages with. She states that many of the individuals who are negative about same-sex relationships are white people. She alleges that she does not make the assumption, implied by the stereotype, which she acknowledges exists.
- 7.33 However, Ms Jones had formed a view that the claimant was hostile to same-sex relations. She formed that view based on actual evidence. In particular, she says this at paragraph 19 and 20 of her statement.

19. In and around school I had experienced the Claimant seeming to mutter prayers when in my vicinity, possibly when approaching me from behind on the stairs or in a corridor, using words such as "salvation" and

“damnation” which I perceived to have been directed towards me on account of my sexuality and the potential for that to have been at odds with the Claimant’s beliefs. I had also known the Claimant to burst into religious song in and around school and when she did this in my presence, I felt it was directed at me in the same way as the Claimant’s muttered prayers.

20. In addition, the Claimant would often refer to me as “Sir” in front of pupils as if she had mistakenly referred to me as being male. Given the regularity of the Claimant calling me “Sir” I felt the Claimant did this deliberately and often in order to provoke a reaction from pupils.

- 7.34 The claimant fervently denies those allegations. The claimant’s evidence is silent on her view same-sex relations.
- 7.35 We have considered if the claimant behaved in the manner described by Ms Jones.
- 7.36 Deliberately referring to a woman as Sir, and using words such as “salvation” and “damnation” particularly when connected to vocal prayers which appear to directed at an individual could be seen as unwanted conduct related to the protected characteristic of sexual orientation. Such behaviour could be upsetting, and it is difficult to see how it would be acceptable in a workplace.
- 7.37 Ms Jones evidence suggested that hostility towards same-sex relationships was something she tolerated within the context of her faith, but something she found unacceptable in the workplace.
- 7.38 There is a direct conflict of evidence. The claimant’s alleged treatment of Miss Jones was raised at the mediation meeting. The claimant took exception.
- 7.39 There is no independent evidence to establish whether Ms Jones’s description of the claimant’s general conduct towards Ms Jones was accurate. The finding of fact on this depends on resolving the conflict of oral evidence, and ultimately on whose evidence we prefer.
- 7.40 We find Ms Jones gave frank evidence, even when her account of her own behaviour showed it to have been embarrassing and demonstrated her own poor conduct. She accepted she fell short of the standards which should be required of her as a professional.
- 7.41 We have concerns about the claimant’s evidence. The claimant’s statement, at paragraph 22, referred to a reply from Ms Cathy Johnson said to be set out at page 266. When the respondent challenged that evidence, the respondent stated that the document included in the bundle, which had been supplied by the claimant, was not an email from Ms Johnson. This was later conceded by the claimant who stated the words which appear to be attributed to Ms Johnson in the email chain were in fact some form of note the claimant had included. Whilst it is possible that there could have been an inadvertent error by the claimant, the way in which the alleged error occurred is difficult to understand. The claimant

admits to altering an email chain. She says the reason was to make some form of note for herself. However, this does not explain why, in her own statement, she then went on to describe her own note as being an email from Ms Johnson. The explanation for her error is inherently unlikely. On the balance of probability, we find that the claimant deliberately sought to mislead.

- 7.42 Whilst an attempt to mislead does not necessarily mean that all elements of a witness statement are untrue, it is a matter we can take into account when deciding whose evidence we prefer.
- 7.43 In this case, we prefer Ms Jones' evidence where it is in conflict with the claimant's evidence. We accept that the conduct Ms Jones alleges, as set out at paragraphs 19 and 20 of her statement, is a true reflection of the conduct of the claimant and did, in fact, occur.
- 7.44 When considering the allegations of discrimination, we are concerned with the motivation of Ms Jones. We are satisfied that Ms Jones did not form a negative view of the claimant because of any conscious or subconscious bias against the claimant, whether based on race, religion, or otherwise. Ms Jones' view reflected her honest recollection of the claimant's conduct.
- 7.45 Not all inappropriate or unwelcome behaviour will be because of a protected characteristic. An individual who is subjected to behaviour perceived as harassment, whether that is related to a protected characteristic or not, may well form a negative view of the individual perceived to have behaved inappropriately. In any specific situation, this may lead to a negative reaction. We find that is what happened here. Ms Jones had a negative opinion of the claimant based on the claimant's behaviour. That led to Ms Jones reacting negatively to the claimant. Ms Jones' response was inappropriately angry. However, on 6 October 2020, Ms Jones reacted negatively to the claimant because of the claimant's behaviour to a student. The extent of that reaction is explained by Ms Jones' dislike of the claimant. She disliked the claimant because of the way the claimant behaved towards her and because she had good grounds to believe the claimant had showed negative behaviour to Ms Jones because of Miss Jones' sexuality.
- 7.46 The claimant does not admit that she had a negative attitude towards Ms Jones, or towards Ms Jones because of her sexuality. It follows that she does not seek to justify any view held or action undertaken on the basis of her own religious belief. However, holding a strong religious belief would not excuse behaviour which could be harassment related to sexual orientation.
- 7.47 Ms Jones explanation is an answer to, and defeats, all claims of direct discrimination based on all the protected characteristics relied on.
- 7.48 We do not consider it necessary to construct a hypothetical comparator given the reason for Mr Jones behaviour is clear and it is established. The

comparator would be someone who was in the same material circumstances. Those material circumstances would, crucially, include showing negativity to Ms Jones because of her sexuality.

Allegation two: following the claimant raising a grievance about the incident on 6 October 2020, by the respondent failing to uphold the grievance.

- 7.49 The claimant's report of the incident from 6 October 2020 (page 268) does not refer to itself as a grievance. However, it was treated as a grievance and we find the nature of the report is implicitly a complaint; it was treated as a grievance, albeit the outcome refers to it as an incident. Whatever distinction is envisaged by the respondent, there was a full investigation guided by the trust's disciplinary policy and procedure. Perhaps the most important feature of a grievance is that an outcome is given to the person who complained. That communication is not necessary if an individual simply identifies an incident which subsequently leads to another member of staff being disciplined. In those circumstances, it may be quite improper to communicate to the person who made the original report the outcome of the investigation.
- 7.50 On 16 November 2019, Mr Jones reported the outcome of the investigation to the claimant. No action was taken against the claimant. Action was taken against Ms Jones. To move matters forward, the claimant was offered mediation with Ms Jones, which was something that she embraced and welcomed.
- 7.51 It is unclear what the claimant means by the grievance not being upheld. Stating that the claimant's grievance was not upheld is unsustainable. The claimant made a complaint about Ms Jones' inappropriate behaviour. That was acknowledged and the respondent took action about which the claimant approved.
- 7.52 Mr Jones believed, and had grounds to believe, that the claimant would be happy with an apology and with mediation. He believed this was a reasonable resolution which was approved of by the claimant. He believed that the matter was resolved.
- 7.53 As an allegation of direct discrimination, it fails. First, there is no reasonable basis to find the detriment complained of occurred, or the treatment itself was detrimental. Second, we have accepted the respondent's explanation. In no sense whatsoever were any of Mr Jones' actions because of any other protected characteristics relied on.

Allegation three: by the respondent failing to deal with the grievance in a way in which they would have dealt with a grievance for a person of a different race.

- 7.54 This allegation is an extension of allegation two. At the hearing, it was agreed it concerned the alleged behaviour of Mr Jones. This allegation raises no new matters. We reject it for the same reasons set out in allegation two.

Allegation four: in the spring of 2021, by Ms Rachel Jones shouting at the claimant when the claimant was raising concerns about the October 2020 incident.

- 7.55 This refers to the events at the first mediation meeting which occurred on 4 March 2021. Ms Jones conceded in cross examination that Ms Lawson described her as shouting, and whilst it was not her perception, she accepts she must have raised her voice.
- 7.56 We find, therefore, that Ms Jones did shout at the claimant at the mediation meeting. This was a mediation meeting to improve the relations between the claimant and Ms Jones. Ms Jones shouting at the claimant was inappropriate; she accepts the claimant showed significant distress. It was detrimental treatment.
- 7.57 The allegation is put as a claim of discrimination. To succeed, any one of the protected characteristics relied on must be a material reason for the behaviour. To be a material reason, it doesn't have to be the sole or principal reason; it must be a factor which is more than trivial. The influence of the protected act does not have to be conscious; subconscious motivation will suffice.
- 7.58 The claimant relies on a hypothetical comparator as follows:
- This hypothetical comparator would be an employee with similar qualifications, experience, and position but who does not share the protected characteristics that have subjected me to discriminatory treatment.**
- 7.59 Section 23 Equality Act 2010 specifies that there must be no material differences between the circumstances relating to each case when there is a comparison of cases. Circumstances are material if they are an influence on the decision, in the sense that they are more than trivial.
- 7.60 Here the circumstances include Ms Jones' perception of the claimant, and the influence it had on her reaction to the claimant. Ms Jones felt uncomfortable with the claimant because of her belief that the claimant had acted negatively in relation to her sexuality. It is accepted Ms Jones interrupted the claimant and raised her voice, to the point of shouting.
- 7.61 Ms Jones was the first person who spoke. She apologised for her behaviour on 6 October 2020. She did refer to the claimant's behaviour which caused her to feel uncomfortable. Neither Ms Jones nor the claimant give full details of this. However, having regard to the cross examination, we find that Ms Jones raised with the claimant her allegation the claimant referred to Ms Jones negatively, to include the claimant's inappropriate muttering of prayers and using words such as damnation and salvation. In general, Ms Jones communicated to the claimant that the claimant's behaviour towards her as a gay woman was negative and that her action in muttering prayers was inappropriate. Ms Jones was concerned by the

behaviour in the work place. She was not concerned about the view held by the claimant, or the claimant's reasons for holding the view.

- 7.62 In addition, Ms Jones' referred to the claimant's Facebook page (they had been friends on Facebook for a short time). Ms Jones had watched a video of the claimant giving a Sermon at her church. The sermon spoke about the roles of men and women.
- 7.63 The claimant's evidence states that Ms Jones was allowed "a platform to air her personal (discriminatory) grievances." It is said that her comments had no bearing on the incident at hand.
- 7.64 We reject the claimant's assertion that Ms Jones reference was inappropriate, Ms Jones' unhappiness with the claimant's behaviour at work formed the basis of the explanation. The fact the claimant had made a complaint did not preclude Ms Jones referencing the claimant's conduct. We have no doubt that the claimant found it difficult to hear. These issues are likely to elicit strong feelings. It is difficult to see how these matters could have been dealt with in a mediation in a positive way, and perhaps mediation was ambitious. It is clear that the claimant took offence and she states she felt attacked. The claimant states that Ms Jones was allowed to detail the "various personal gripes she had about me and my religious belief." The claimant gives no details as to what Ms Jones said about her religious beliefs. On the balance of probability we find that Ms Jones raised matters with the claimant such as set out in paragraph 19 and 20 of a statement. The claimant interpreted those as comments on her religious belief. However, we are satisfied that Ms Jones talked only about the claimant's behaviour at work rather than commenting more generally about her perception of the claimant's religious belief.
- 7.65 We heard from Ms Lawson who oversaw the mediation. Her evidence does not set out the detail what was said by Ms Jones and doesn't assist.
- 7.66 The claimant filed a grievance on 2 July 2021, but that gives no details of the contents of Ms Jones' statements at the mediation.
- 7.67 We have also considered the documentation immediately after the mediation meeting. This included the claimant's account. The claimant does not refer to Ms Jones as being negative about her religion. The claimant's account is consistent with Ms Jones account. Both are consistent with Ms Jones raising the claimant's specific behaviour, rather than a more general point about the motivation for her behaviour based on her religion.
- 7.68 We accept the respondent has established a reason which, in no sense whatsoever, is because of any protected characteristic, the claimant particularly relies on race and religion. She does not appear to advance this is a claim of disability or age discrimination. But the explanation would be an answer to those as well.

- 7.69 Ms Jones genuinely believed that the claimant had behaved towards her negatively and that the behaviour related to her sexual orientation. Part of the claimant's negativity took the form of inappropriate praying and inappropriate use of words such as damnation and salvation. Ms Jones objected to the claimant referring to her as "Sir." Ms Jones' evidence is the claimant at no time has sought to express any positive or accepting views about same-sex relationships, and the claimant's evidence before us has remained silent on her view of same-sex relationships.
- 7.70 Ms Jones reacted to the treatment of Ms Jones by the claimant. It is clear that by the time of the mediation, her annoyance had not resolved. This led to Ms Jones behaving negatively to the claimant by interrupting her, talking over her, and shouting. Whilst this was inappropriate behaviour and detrimental, we find it was not because of a protected characteristic.

Allegation five: in spring 2021 by Ms Rachel Jones stating that she was treating the claimant "differently" because she "found the Christian imagery and messages" on the claimant's Facebook offensive.

- 7.71 The allegation fails to set out the detailed circumstances. It is unclear what Ms Jones is alleged to have said in relation to the treatment of the claimant or in relation to the claimant's Facebook.
- 7.72
- 7.73 The claimant's contemporaneous documentation does not contain any specific detail of the alleged comments. The claimant's statement says she was attacked because the content of her Facebook page was offensive. However, no detail is given. The content of the Facebook page has not been disclosed.
- 7.74 Ms Jones accepts that she referred to the claimant's conduct. Her statement refers to a video on the claimant's Facebook of a sermon the claimant delivered in her church in which spoke about the natural roles of men and women.
- 7.75 It appears Ms Jones made reference to this when explaining why she had formed the view that the claimant had a negative opinion about same-sex relations, and in support of her primary contention which is that she reacted to the claimant's treatment of her at work.
- 7.76 It is for the claimant to establish that the treatment occurred at all. A tribunal cannot infer a primary finding of fact. The claimant fails to give any evidence on which we could find Miss Jones treated the claimant differently because of her Christian imagery and messages on her Facebook.
- 7.77 It is not enough for the claimant to suggest that there was some form of discussion which referred to matters on Facebook. The claimant has failed to identify any specific detrimental treatment which could be seen as less favourable treatment.

- 7.78 To the extent that an explanation is necessary, we observe that Ms Jones was explaining the totality of the reason why she had formed the view the claimant had behaved towards her negatively at work.
- 7.79 The claimant has pointed to no evidence that she gave at any time stating what her view was on same-sex relationships or her approach to them, whether as part of her religious belief or otherwise.
- 7.80 We are concerned with the behaviour of Ms Jones towards the claimant at work.
- 7.81 The respondent has given an explanation which is, in no sense whatsoever, because of a protected characteristic. This allegation fails.
- 7.82 That is the final allegation against Ms Jones. All the allegations against Ms Jones are out of time. We would not find it just and equitable to extend time in relation to any allegation against Ms Jones. The claimant has given us no reason why she should not bring the action against Ms Jones earlier. That is not conclusive. We must consider whether it is just and equitable. The claimant has advanced no argument as to why it is either just or equitable. Instead the claimant says that Ms Jones's conduct was part of a continuing course of conduct and therefore she may bring these claims as of right. We do not accept this. Ms Jones had no further involvement with the claimant, and she is not involved in any sense whatsoever with the further action about which the claimant complains. The fact that she may be the subject of a grievance is irrelevant. It is the actions of those who dealt with the grievance that she complains about.
- 7.83 We do not find it is just and equitable to extend time.

Allegation six: by Ms Diane Lawson not following up the incidents, despite email requests by Ms Hercules.

- 7.84 The allegation alleges Ms Lawson did not follow up incidents. The submissions do not refer to a failure, but instead refer to a delayed response.
- 7.85 During the hearing, the claimant clarified this concerned email requests on or around 11 December 2020.
- 7.86 The claimant's statement refers to the mediation meeting on 4 March 2021. She confirms that on 31 March 2021 there was a meeting with Ms Brooks to discuss the mediation.
- 7.87 This is a poorly articulated and supported allegation. It is wrong to say that Ms Lawson did not follow up the incidents. She did. The claimant fails to establish any specific detrimental treatment.

- 7.88 The claimant refers to an exchange of emails with the claimant after mediation.
- 7.89 On 24 March 2021, Ms Lawson apologised to the claimant for not having contacted her earlier. This was a few weeks after the mediation. She acknowledged receipt of the claimant's emails. She confirmed that following the mediation she had informed Ms Brooks and Mr Jones. It followed a short delay.
- 7.90 The allegation of failure to follow up fails. We accept Mr Lawson's evidence that there were discussions of the how best to proceed. That is not surprising. It is evident that the respondent continued to engage with the claimant. There is no fact from which we could conclude that the claimant was treated less favourably than others, or that the treatment was because a protected characteristic. In any event, the explanation is established.

Allegation seven: by continued failure to resolve the grievance, it being the claimant's case it was the original grievance.

- 7.91 This allegation refers to the original grievance from 6 October 2020. We do not accept that the respondent failed to resolve any grievance. The respondent dealt with and resolved all grievances. The original grievance was resolved. The claimant fails to establish any detrimental treatment.

Allegation eight

- 7.92 This concerns a failure to make reasonable adjustments and we will consider it below.
- 7.93 Allegation nine, ten, eleven, and twelve are put as allegations of victimisation. It is less clear if the claimant intended to put them as allegations of direct discrimination. We will first consider them as allegations of direct discrimination then we will consider them in the context of victimisation

Allegation nine: she was offered a "package to leave" in circumstances where a white 75-year-old female was not offered a package.

- 7.94 This allegation concerns the meeting on 8 June 2022. The meeting was to discuss the claimant's current sickness absence and the occupational health report. The claimant was due to return to work on 22 June. At that meeting, the claimant confirmed she would not be currently fit to return to work. We accept there was some discussion about the claimant returning to work. However, there was also a discussion about the claimant leaving in September. There was discussion about a package which could be offered.
- 7.95 The claimant had previously raised the possibility of flexible retirement. We do not need to set out the detail. That discussion was ongoing and

remained a possibility. Flexible retirement would have involved the claimant taking her pension, but continuing to work, on a contract, but less than 60% of full-time work.

- 7.96 At no time did the respondent close the possibility of flexible retirement. That remained an option open to the claimant at all times, and we find that she understood that. Pursuit of flexible retirement was a matter for the claimant. An alternative was offered to the claimant's on 8 June 2022. As an alternative to returning in September under a flexible retirement scheme, the claimant could retire on 31 August 2022, receive a lump sum settlement (from 1 September to 30 November 2022). The payment to be made in September. In addition, the respondent would consider giving her work on an ad hoc basis such as invigilation. No pressure was put on the claimant. The claimant was free to reject the proposal. Ms Brooks was exploring possible solutions which may be of interest to the claimant.
- 7.97 There has been reference to a 75 year old white woman. That person has not been identified. Ms Brooks did, at the meeting, give an example of another woman who had taken flexible retirement. We have limited details of this alleged comparator. There is a material difference between the claimant and the person referred to. That person decided to take flexible retirement; the claimant did not. That explains the difference in treatment. That difference in treatment was not because of any protected characteristic.
- 7.98 The respondent's explanation is made out. The respondent offered the claimant a package because it was a genuine attempt to explore all possibilities in an effort to find a solution which was acceptable to the claimant. That is not detrimental treatment. It is not treatment because of a protected act.

Allegation ten: by being subject to unwarranted management and monitoring of her day-to-day working activities.

- 7.99 The claimant has failed to set out any specific allegation of treatment which was said to be unwanted management.
- 7.100 The claimant's evidence on this point is poor.
- 7.101 The claimant submissions failed to deal with it at all.
- 7.102 The claimant's statement does refer to the claimant being micromanaged (particularly at paragraphs 269, 271, 278, and 279). Evidence was given at the hearing about the claimant being questioned when she did not appear to be in class, in accordance with the timetable. It was accepted this occurred.
- 7.103 The timetable was a public document within the school. The claimant was expected to comply. If the claimant was not in class when expected, particularly if this were reported by a teacher, it was appropriate to check.

7.104 We find no evidence of micromanagement. We find no evidence of unwarranted management or monitoring. Ensuring the claimant was complying with the timetable was legitimate and appropriate.

7.105 This claim fails. The claimant fails to plead what she says is unwarranted management. The claimant has failed to clarify the allegation at any time. We reject her assertion of micromanagement.

Allegation eleven: in October 2022 by receiving a warning from Ms Harry concerning alleged inappropriate support of a student.

7.106 The claimant fails to deal with this in her submissions.

7.107 The claimant clarified during the hearing that this concerned discussion with her line manager, Ms Sashie Harry, about a laptop. The discussion occurred on 21 March 2023.

7.108 We do not accept this discussion was a warning. Ms Harry explained the claimant had requested a work laptop in circumstances when that request was not authorised and the laptop was unnecessary. Informing the claimant that she did not need a laptop, and the continuing use was not authorised, was part of Ms Harry's legitimate managerial duties. There is no fact from which we could find that the claimant was treated less favourably than others. The respondent has established its explanation. The conduct was in no sense whatsoever because of any protected characteristic.

Allegation twelve: in October 2022 by Ms Harry failing to address the claimant's concerns about her role or hold a meeting to discuss them.

7.109 The claimant fails to deal with this allegation in her submissions.

7.110 There appears to be overlap with allegation 17.

7.111 The claimant's statement expresses concerns about a lack of personal growth development. The claimant's statement makes various criticisms of Ms Harry, and the alleged failure to develop the claimant, which span a substantial period.

7.112 Reference to October 2022 appears to be concerned with the claimant's working relationship with Ms Devi.

7.113 The claimant's email of 3 October 22 is critical of Ms Harry. She objects to her concerns regarding Ms Devi being seen as a personality issue. She states that she is willing to work with Ms Devi, but would not tolerate being treated "in a manner outside of the professional code." There was an exchange of emails on 3 October. Ms Harry spoke with Ms Devi, who agreed to a meeting with the claimant.

- 7.114 The matter had previously been raised in March 2021. The meeting had not occurred at that time largely because of the claimant's absence. It has been suggested a meeting should take place if the issue persisted, but it was not pursued.
- 7.115 Ms Harry's email of 3 October 22 makes it clear that the timetables would remain and also all must conduct themselves professionally. She confirmed that if barriers remained the claimant should inform her and she would provide further support.
- 7.116 We find the claimant had a personal issue with Ms Devi. This was part of her wider dissatisfaction with the respondent and her general concerns. Ms Harry sought to manage this, and did so in an appropriate way. There is no fact from which we could find less favourable treatment. The explanation, as explained above, is established.

Allegation thirteen: by rejecting the grievance against Mr Alan Jones having conducted a flawed investigation. It is alleged the flaws include the failure to obtain statements from Sally Brooks, Diane Lawson, Philip Barton and Dennis Wright.

- 7.117 This is an allegation against Ms English who dealt with the grievance against Mr Jones of 18 November 2022.
- 7.118 On 21 February 2023, Ms English sent her investigation report. The claimant alleges it was flawed, in particular because Ms English failed to interview Ms Brooks, Ms Lawson, Mr Barton, Mr Wright.
- 7.119 We find Ms English considered the grievance carefully. She sought to clarify it with the claimant. She identified the grievance was largely about handling the claimant's complaint about Ms Jones' behaviour in October 2020, and her an allegation that Mr Jones had lied by saying he had sent a letter of thanks. Ms English specifically asked the claimant why it was necessary to interview those people identified. The claimant failed to give any adequate reason. She stated they were part of the school. Ms English was reasonable in taking the view that they were not material witnesses. She was reasonable in taking the view that they should not be interviewed.
- 7.120 It may be possible to draw an inference of discrimination from unexplained unreasonable conduct. Here there is no unreasonable conduct, and it is not unexplained.
- 7.121 Ms English dealt with the complaints. She set out her reasoning cogently and thoroughly in her report. She found no evidence in support of the complaints. She gave adequate reasons for those findings.
- 7.122 There are no facts from which we could conclude that any of her conduct's was because of any protected characteristic. We accept that

she has given an explanation which in no sense whatsoever is because of a protected act.

Allegation fourteen: by accusing the claimant in January 2023 of a data breach by emailing a link for OFSTED staff questionnaire to our own email.

Allegation fifteen: by accusing the claimant in January 2023 of a data breach when sending her payslips to a personal email address.

- 7.123 The claimant was accused of data breaches. The first related to her own payslips. The second related to forwarding an OFSTED link. The dates attached to each allegation lacked clarity. However, the allegations are sufficiently clear. We will consider them both.
- 7.124 We first consider the allegation that concerned the data breach relating to the claimant's payslips.
- 7.125 The claimant made a request for copies of her payslips from June 22 to November 22. That was a reasonable request and the respondent sought to comply. Unfortunately, when responding the respondent also sent payslips of the approximately thirty of the claimant's colleagues. This was a clear data breach and appears to have been caused by human error.
- 7.126 The claimant received the payslips on or about 25 November 2022. The claimant failed to inform the respondent of the breach.
- 7.127 The claimant failed to respond until 16 December 2022, when she sent an email to Ms Brooks. In that email she stated that she was not aware of the payslips of others. In the meantime she stated she had printed hard copies the PDFs and given them to a legal adviser. She also emailed the payslips to "other advisers who are supporting me on a personal matter." She did not explain this reference.
- 7.128 This allegation is brought against Ms Brooks and Ms Beason. The claimant referred to a second copy that she had printed. She stated she had lost the original hard copy of the payslips when her bag was "misplaced or stolen." The PDF was also downloaded on her mobile, which had been lost. She stated the PDFs were not password protected and would be accessible to anyone who had a mobile. She went on to say "due to the serious nature of this personal data breach I trust that FCAT will report both the incident to its GDPR lead and inform all the staff members that have been impacted by the breach."
- 7.129 Ms Lawson responded on 12 January 2023 and sought further information from the claimant. This email doubted the claimant had failed to observe, prior to 16 December 2022, that she had 39 payslips when the claimant had requested six, and a number of those payslips did not relate to the claimant. She noted that handing over payslips that belonged to other members of staff may be a criminal offence under section 170 of GDPR 2018. She raised other concerns and she asked for explanations.

- 7.130 There is no doubt that this email accused the claimant of a data breach. It is that accusation which is said to be the detrimental treatment.
- 7.131 At the time the accusation was made, the respondent's managers had strong grounds to believe that the claimant had behaved inappropriately. It appeared the claimant may have inappropriately distributed payslips that belong to others. Further, it appeared that she may have taken inadequate steps to protect the data. This was potentially a serious breach of data protection. It was reasonable to assume that the respondent's error did not excuse any inappropriate behaviour by the claimant.
- 7.132 We reject any suggestion the respondent acted unreasonably. The claimant's account, particularly that in some manner she only realised she had other people's payslips on 6 December, was inherently unlikely and it warranted investigation.
- 7.133 The accusation was made because the claimant's email demonstrated that she behaved in the way which was a potentially serious breach of the data rights of others. It was appropriate to investigate the matter. There is no fact from which we could find that the treatment was because of a protected characteristic. The respondent's explanation is established.
- 7.134 The second potential breach concerned the forwarding of work email.
- 7.135 The claimant accepts that she sent to her private email address a work email with the Ofsted link. On 10 February 2023, Ms Lawson sent the claimant an email requiring her to attend a disciplinary hearing to deal with two allegations. The claimant was accused of sending two "all staff" emails to a private account. This followed Ms Beason's email of 3 February 2023. On 14 March 2023, Ms Tolley undertook a meeting. She sent her outcome on 21 March 2023. She reviewed the evidence and the respondent's policies. She noted that the communications policy did not allow the use of personal email addresses for work based matters. The prohibition was also referred to in respondent emails. She concluded that on 3 February 2023 the claimant had received clear instructions which prohibited the use of personal email addresses for work matters. She concluded on 6 February 2023, the claimant sent an email to her own email address in breach of the policy. In addition, she sent a second email, which contained a link to the Ofsted survey, to our own email. That email expressly stated that the link should not be shared with anyone outside the school.
- 7.136 The panel chaired by Ms Tolley issued a first written warning.
- 7.137 All of the respondents employers involved in the investigation of the complaint against the claimant and the subsequent disciplinary proceedings behaved in a way which was appropriate and within the respondent's procedures. The investigation was adequate. The conduct

was established. Policies and procedures were considered appropriately. There were proper grounds of finding the claimant committed misconduct when sending the emails.

7.138 There are not facts from which we could find any of the process leading to the disciplinary sanction was less favourable treatment on the ground of any protected characteristic. The respondent establishes an explanation which is in no sense whatsoever because of any protected characteristic.

Allegation sixteen: by conducting a formal disciplinary process, to include the manner of the process undertaken by Ms Victoria Tully.

7.139 This is reference to the disciplinary process which we have considered above. Ms Tolley had appropriate and proper grounds for disciplining the claimant, as referred to above. The allegation fails to set out what is meant by the manner of the process. This is not dealt with adequately or at all in the submissions. We find there is nothing in the manner which could amount to discrimination.

Allegation seventeen: : by the action of Ms Harry in or around March 2023 in the following respects:

- (i) giving a warning considering the use of a laptop for work with students*
- (ii) failing to organise a meeting between the claimant and Ms Devi, such meeting having been requested in autumn 2022, and*
- (iii) by holding an impromptu meeting (on a date not specified) with the claimant which ended when Ms Harry told the claimant to get out of the room.*

7.140 We have considered the events of March 2023 when looking at allegation 12.

7.141 Ms Harry did not give a warning considering the use of laptops. Ms Harry gave proper managerial instructions, as she was entitled to.

7.142 There is no fact from which we can could conclude that any of this treatment was because of any protected characteristic. Ms Harry has established an explanation.

7.143 We have considered the circumstances relating to the potential meeting between the claimant and Ms Devi. As noted, this was an ongoing situation and one which required management. It was the claimant who was unhappy with Ms Devi. Ms Harry sought to manage this and did so in a way which was appropriate. There are no facts from which we could conclude that any this treatment was because of a protected characteristic. The explanation is established.

7.144 The reference to an impromptu meeting refers to the meeting on 21 March 2023. This was a simple management meeting. To the extent the claimant is suggesting that any meeting required notification, we find that

that is an unreasonable stance. Ms Harry was entitled to hold managerial meetings without giving notice.

- 7.145 It is apparent from the contemporaneous email of 21 March 2023 that the meeting was difficult. Ms Harry accepts that she ended the meeting. That meeting discussed the need for a laptop. The timetable was discussed. Ms Harry recorded that she had not understood there remained continuing issues with Ms Devi. This was discussed at the meeting. We accept Ms Harry's evidence that the claimant became angry and raised her voice and this led to Ms Harry ending the meeting.
- 7.146 We do not find that Ms Harry was told to get out of the room. She does not say that in her email at the time. Paragraph 265 of her own statement simply says she was asked to leave the office.
- 7.147 We find that this was a reasonable meeting which dealt with managerial issues. We find the claimant became angry and Ms Harry reasonably terminated the meeting.
- 7.148 There are no facts from which we could find that any of this conduct was less favourable treatment on ground of any protected characteristic. Ms Harry's explanation is established.

Allegation 18: by the trust responding on around December 2022 and failing to uphold the claimant's complaints.

- 7.149 It was clarified in the hearing this related to a decision on 7 December 2022 which was the outcome of the grievance appeal meeting stage II. This was conducted by Mr Barton, chair of directors. The purpose of the appeal was to establish if Mr Wright's original decision of 13 October 2022 would have changed the basis of on evidence provided at the appeal hearing on 28 November 2022. The outcome letter sets out in detail matters taken into consideration. It explains the decisions reached.
- 7.150 We find that Mr Barton had proper grounds for the decisions he reached. There is no fact from which we could find that any of his actions or conclusions were less favourable treatment because of any protected ground. We find the explanations established. The explanation revolves around his making findings which are supported by proper evidence.

Allegation nineteen - The allegation allowed to proceed against Mr Barton was limited to an alleged failure to deal with the grievance of 11 June 2022, and alleged failure to perform an appropriate investigation and undertake an adequate grievance procedure.

- 7.151 We have dealt with this under allegation 18. The claimant fails to identify any treatment which can be seen as less favourable. The explanation given by Mr Barton is made out. The allegation fails. It also fails as claim of victimization because the explanation is an answer to that claim.

- 7.152 It follows all claims of direct discrimination fail.
- 7.153 We next consider victimisation.
- 7.154 Allegations 9, 10, 11, and 12 are put as allegations of victimisation. We have also understood that they may have been intended as allegations of direct discrimination and have considered them in that context.
- 7.155 The allegations of victimisation were not pursued with the witnesses. It was not put to the witnesses that any other conduct was because of a protected act.
- 7.156 Allegation nine fails as a claim of victimisation because the explanation which was set out above is also an answer to that victimisation claim.
- 7.157 Allegation ten fails as a claim of victimisation because the explanation we have set out above is also an answer to the victimisation claim.
- 7.158 Allegation eleven fails as an allegation of victimisation because the explanation we have set out above is also an answer to the victimisation claim.
- 7.159 Allegation twelve fails as a claim of victimisation because the explanation is also an answer to victimisation claim.
- 7.160 We next consider the allegations of victimisation in claim two as allegations thirteen to eighteen are out as allegations of victimisation and harassment as well as allegations of direct discrimination.
- 7.161 For each we have found that there is an explanation which is an answer to the direct discrimination claim. Those explanations are also an answer to the claims of victimisation and harassment.

Allegation eight: it is the claimant's case that a number of adjustments have been recommended. The claimant alleges that there was a failure to hold a meeting concerning adjustments and that this is a failure to make adjustments. In the alternative, it appears she advances the failure to make adjustments as an allegation of unfavourable treatments arising in consequence of disability (section 15 Equality Act 2010), or direct disability (section 13 Equality Act 2010).

- 7.162 This is concerned with an alleged failure to make reasonable adjustments. This concerns the meeting of 8 June 2022. This meeting was to consider the occupational health report from 25 May 2022. It is alleged that there was a failure to discuss the report.
- 7.163 The claimant fails to set out the provision criterion or practice which is alleged to have caused her disadvantage when compared to people who are not disabled. It is possible to infer that the practice was to hold a meeting in order to discuss a return to work. It is also possible the claimant is referring to the return to work itself.

- 7.164 A meeting was held. There was some discussion about the occupational health report. It was made clear to the claimant that the adjustments would be made, and those adjustments were primarily for her line manager on return. When the claimant did return to work the adjustments, as recommended by occupational health were made. The claimant does not clearly identify what was a disadvantage. We can find no disadvantage.
- 7.165 To the extent that a meeting can be an adjustment, that meeting took place, and it was clear that there would be a further meeting about the actual adjustments when she returned to work. That further meeting did take place when adjustments, particularly a phased return, were made.
- 7.166 The adjustments concerns sciatica. There were no specific adjustments requested in relation to the claimant's mental health.
- 7.167 The question of compliance is one of fact. Either the respondent complied or it did not. The claimant has identified no potential adjustment which was not implemented by the respondent. This claim fails.
- 7.168 The claim also appears to be put as a section 15 claim. The claimant fails to identify adequately or at all what was the unfavourable treatment. It would appear to be failure to consider the occupational health report on 8 June 2022. This claim fails. The report was considered.
- 7.169 There was also discussion about options for the claimant. That reflected an ongoing difficult situation and the continuing desire to try and find a solution which would be acceptable to the claimant. The without prejudice discussion was entered into in good faith. The claimant did not object. This is not in our view unfavourable treatment. In any event, it related to the claimant's desire to retire in a way that she found acceptable. It did not relate to the matter arising in consequence of disability. In any event, a discussion about retirement was a proportionate means of achieving a legitimate aim. The aim was to find an amicable solution. The means was an open without prejudice discussion when the pressure was applied to the claimant. We find that was a genuine attempt to find a resolution to a difficult relationship. It was proportionate.
- 7.170 IT follows that all claims fail and are dismissed.

Employment Judge Hodgson

Dated: 2 August 2024

Sent to the parties on:

8 August 2024

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For the Tribunal Office