EMPLOYMENT TRIBUNALS

Claimant: Mr T Murugan Shanmugam
Respondent: Activate Learning

Heard at: Watford
On: 7 to 11 and 17 October 2024

Before: Employment Judge Dick
Mr D Bean
Dr B Von Maydell-Koch

Representation
Claimant: In person
Respondent: Mr A Pickett (counsel)

An oral judgment was given in this case on 17 October 2024. Employment Judge ("EJ") Dick prepared a written record of that judgment on 22 October, which was sent to the parties on 7 December 2024. Before then, on 30 October 2024, the claimant emailed a request for written reasons to the Tribunal. This was passed to EJ Dick on 13 November 2024. The reasons for the judgment are as follows.

REASONS

Introduction and Issues

1. The claimant, having first started work for the respondent on a temporary teaching contract, began employment on a permanent contract from 13 July 2020. He resigned on 23 May 2023, and after working out his notice his last day of work was 23 August 2023. It was his case that he was constructively dismissed – that he resigned because the respondent had behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the parties. This resignation, he said, was mainly based upon poor treatment of him by another employee of the respondent, Mrs Shivender Parmar, both before and after January 2023, which was when she became his line manager. The claimant also complained about the actions of Mr Neil Brookes, Mrs Parmar's line manager, in dealing with the claimant's complaints about Mrs Parmar; he said that those actions also contributed to his constructive dismissal. It was also the claimant's case that Mrs Parmar's actions, as well as amounting to constructive dismissal, were also acts of discrimination and/or harassment because of or related to his race (or in one particular instance, also

religion). The claimant also claimed for two sums of money that he said the respondent owed him by way of a complaint of unauthorised deductions from wages.

2. During the hearing, the parties confirmed that the factual and legal issues for us to decide were, with three exceptions, unchanged from the list of issues that were prepared by my colleague EJ Findlay following the case management hearing on 25 March 2024. An edited version of that list is appended to these reasons. The exceptions were:

   2.1 Issue 1 (employment status) was no longer an issue. The respondent accepted that the claimant was an employee in both the Equality Act 2010 ("EqA") and Employment Rights Act 1996 ("ERA") senses for both his teaching and his Lead IV roles. Issue 1 was therefore resolved in the claimant's favour.

   2.2 An agreed addition to the Issue 6 (harassment) was made because the original list had omitted the final few parts of the legal elements of a harassment complaint.

   2.3 The nature of the unauthorised deductions from wages claim was clarified during the course of the evidence (see below).

3. At the start of the case we dealt with the claimant's application to add Mrs Parmar as a party, which we refused, and the respondent's application to remove Mr Brookes as a party, which we allowed. We gave oral reasons for those decisions on 8 October 2024; since the request for written reasons refers specifically to the (oral) judgment on 17 October, we do not understand there to have been a request for written reasons for those decisions.

4. Before the evidence was called we explained to the parties that we would read the witness statements, but they should be sure to refer us to any documents of relevance in the agreed bundles during the course of the evidence or submissions.

5. For reasons which are unclear to us we were provided with three bundles. (Mr Pickett for the respondent fairly took the view that he would not object to us having the third paper bundle with which the claimant arrived on Day 1.)

6. After taking time to read the statements, we heard evidence from the witnesses, in each case adopting the usual procedure. i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. The claimant gave evidence and the respondent called Mrs Parmar, Mrs Samantha Starvis (who conducted the investigation into the claimant's grievance), Mr Neil Brookes and Mr Sean Groves (HR business partner for the respondent).

7. At the conclusion of the evidence we heard oral submissions from Mr Pickett and then from the claimant. Both were supplemented by submissions in writing, for which we are grateful.

Factual findings

8. We find the following facts on the balance of probabilities. Where we have needed to resolve disputed facts we make that clear. We have not made findings on every disputed issue of fact presented to us, but merely on those which assisted us in coming to a decision bearing in mind the list of issues.

General findings

9. The respondent company is an educational provider which runs a number of colleges mostly in the Home Counties. Over the relevant time the claimant was employed as a business teacher at the respondent's Oxford Campus teaching NVQ/BTEC on a 37 hour a week contract which included 23 hours of teaching time. Students at the Oxford Campus also studied for T-levels and GCSE Maths and English resits amongst other things. The claimant also had a role on a separate contract as a Lead Internal Verifier ("IV") for Business Pathways at Oxford and four of the respondent's other sites. That role as we understand it involved ensuring that the colleges were complying with the requirements of the bodies which awarded the students' qualifications. This role was described as casual although, as we have said, the respondent now accepts that the claimant was in employment for this role too. The claimant was paid an hourly rate for his IV work. Over the time that we are concerned with the claimant had three line managers, at least as far as his teaching role was concerned. The first was Mr Aiden Arnold; the second Mr Mark Walsh, and the third, of course, Mrs Parmar.

10. Before we turn to findings on the individual facts we say something now about credibility and reliability. Many of the issues in this case depended upon whether the claimant had given an accurate account in his written and oral evidence. More specifically, there was often a straight conflict of evidence between the claimant on the one hand and Mrs Parmar on the other. In those instances there was often little or no corroborating evidence. We therefore consider it appropriate to make some general observations on the credibility of both of those witnesses, although we make clear that we have approached each issue individually on its merits. When applicable, we of course considered any potentially corroborating evidence.

11. When the claimant gave his oral evidence we noted a tendency on his part not to answer the question that had been asked but rather to answer the question that he wished had been asked. While in some circumstances it might be appropriate to characterise that as evasiveness and to hold it against the witness, we did not do that in this case. It is not a habit confined to the claimant, even in this case let alone in other cases, and it may simply reflect the fact that a witness is keen to get their case across. So, in this case, we do not think it appropriate to draw any adverse inferences against the claimant for it. Our findings are based not on the demeanor or attitude of any of the witnesses but rather on our view of what they actually said. It is of course appropriate, and we did so in some circumstances, to take account where appropriate of the fact that a witness has had the opportunity to answer a particular point but has not provided an answer.

12. So far as the claimant's actual evidence, i.e. what he said, and his approach

to the case are concerned, there were a number of points that gave us concern as to whether he was a reliable witness. Although we kept very much in mind the fact that the claimant's first language was not English, we did notice a tendency on his part to exaggerate in his use of language. As one example, he described a phone call that he had received from Mrs Parmar as threatening. When I asked what he meant by that he said simply that the call had come from an unknown number. On the same topic, despite having been given the opportunity to consider his position, the claimant persisted in his suggestion that the fact that Mrs Parmar had once called his personal mobile phone number amounted to a significant point in this claim, even though in our judgment it would not have been at all unusual for a line manager to have access to somebody's mobile phone number. The claimant also pursued this point despite having withdrawn his claim for a data protection breach at the preliminary hearing, no doubt after the Judge had explained to him that the Tribunal has no jurisdiction to deal with such a point.

13. In another example, the claimant repeatedly described, albeit in submissions not evidence, various witnesses as having "confessed" to things, clearly meaning that they had admitted to things which were against their interests of harm their case. But in fact, in almost all of those cases, the claimant was really referring to uncontentious facts which the witnesses had simply accepted.

14. Another point was that, during the course of cross examination the claimant suggested to various witnesses that particular documents proved things which clearly they did not prove. One example was at document number 27 of the claimant's bundle, an email exchange between the claimant and an employee who was a PGCE student and was therefore subject to supervision. The claimant asserted that the emails proved how helpful he had been to her. In fact, all that the emails showed was her requesting a copy of a certain document from the claimant, a request to which he responded by sending the document over to her eight days after she had made the request. It was also pointed out to us during the course of the evidence that she was asking for a document that she should not have had to ask the claimant for. The claimant sought to make a similar point about an exchange of emails at document number 27 in his bundle which simply shows the same PGCE student forwarding him an email from somebody else.

15. The claimant also persisted in the suggestion that the respondent had unfairly drawn out the dismissal and appeal process despite it not being listed as an issue in the case, and, even more to the point, despite it being made very clear during the course of the evidence that the delays happened almost exclusively at his request; we return to this point later.

16. Finally, we note that during the course of the case the claimant's allegations against Mrs Parmar morphed from discriminatory acts that had to do with race to acts that, as he said several times, were motivated by "racial hatred". While any form of racial discrimination is or course to be deplored, racial hatred is at a particularly extreme end of that spectrum, and we would have expected such a serious allegation to have been raised before. In general therefore, we treated any evidence from the claimant which was

uncorroborated with considerable care.

17. In contrast, we found Mrs Parmar to be an honest and reliable witness even if she did sometimes share the claimant's habit of taking rather long before directly answering the question she had been asked. We say at the outset that, having considered all of the evidence, we found the claimant's allegations about Mrs Parmar's treatment of him, whether the allegations were that she was acting because of race or religion or because of racial hatred, to have been entirely without foundation. We explain why in a little more detail later.

18. We do stress that the fact we have found somebody to be an unreliable witness does not mean we found they were lying to us. Witnesses can be, and often are, wrong or mistaken without any dishonesty being involved.

First incident

19. The first untoward incident that the claimant alleges involving Mrs Parmar happened in December 2019 shortly after he began working for the respondent. That incident and the next few that we deal with happened before Mrs Parmar was the claimant's line manager and when they were both simply colleagues teaching at the same college. The claimant says that Mrs Parmar told him to clean a dirty table and to sit in a different seat. Although the claimant's statement says that she tried to force him into the seat, he made clear in cross examination that what he meant was that she asked him to move twice, and he refused. This incident, although it does not appear on list of issues, appears to have been the genesis of the claimant's idea that, to put it colloquially, Mrs Parmar had it in for him. Mrs Parmar's recollection of the event was different. She said that when the claimant started work, she and another colleague cleaned the desk that was to be his desk and tidied up the surrounding area. She asked if he wanted to move to a desk that did not have a broken drawer, but he did not want to. While we struggle to see how the claimant could have misinterpreted this as a hostile act, we find that he must have done so, because we find it even less likely that Mrs Parmar would have treated a new colleague in the way in which the claimant alleged for no apparent reason, and we say for no apparent reason because the claimant did not appear to us to be seriously suggesting that *this* incident was in any way motivated by race or religion. In short, on this event we prefer Mrs Parmar's version of events.

20. We turn now to deal with each of the factual points to be decided in the list of issues and we try to deal with those in chronological order rather than necessarily the order that they appear in the list. In between some of the points we make some other findings which were relevant to our decision.

Issue 5.3.1

21. The allegation here was that in January to March 2020 Mrs Parmar tried to influence the claimant against the faculty manager (then Mr Arnold), and the Faculty Director, Mr Emberly. Quite why Mrs Parmar should have wished to influence the claimant in this way was not made clear to us but it was the claimant's case that one day, after about 5 p.m., in other words when most of the staff had gone home, Mrs Parmar approached him in the staff room

and said that the management were giving him a lot of work and he was not able to speak up to them since he was from India and had no confidence to do that. Even on the claimant's version of events this seemed at worse to be a clumsy attempt to help him. The claimant sought to criticise Mrs Parmar for conducting that conversation when nobody else was around although we might have been surprised had someone tried to conduct such a conversation with other people around and listening. Mrs Parmar's version of events was that she had noted the claimant was working late and was struggling with his workload. She suggested he speak to his line manager for support partly because she was a union representative at the time. We consider Mrs Parmar's version of events by far the more plausible and prefer her account.

Issue 5.3.2

22. The allegation was that Mrs Parmar said the claimant was from a country, India, that was full of slums and that she did not come from such a country. That again was said to have happened in January to March 2020, shortly after the incident we have just dealt with.

23. Mrs Parmar herself identifies as British Indian. She told us that she lived in South India for three years and had had a wonderful time. She knew that the claimant also came from the south of India, and she did raise it in conversation, recalling that she mentioned the stark contrast in India between the poor and the rich. This was in the context of discussing the challenges that India faced. She told us that she would not talk negatively about India – she was Indian and deeply proud of her Indian ancestry. In her written statement she directly addressed the allegation that she had said India was full of slums as follows: "I also did not say India is full of slums but recall a conversation where I said there was extreme poverty in India which we didn't see in Britain due to the welfare state." In her oral evidence she explained to us that she had also spoken to the claimant about children she had seen in "slum villages." She understood this to be a commonly used term in India and did not believe that it was considered to be offensive. She had not detected any offence being taken on the part of the claimant. We did consider it somewhat surprising that Mrs Parmar had not mentioned this when she directly addressed in her statement whether she had used the word "slum." When EJ Dick asked her about that, she said that she had remembered the detail as she was giving her evidence. We also note that when interviewed in connection with the claimant's grievance (see page 199 of the bundle) Mrs Parmar did not say whether or not she had used the word "slum", although in fairness to her on that occasion she was not asked specifically whether she had; she was only asked in general terms whether she had ever made any reference to the claimant's cultural background. Having heard Mrs Parmar's evidence, we saw what, we find, was a genuine horror on her part at being accused of racist behaviour towards other Indians (although she used the term "British Indian" she also told us that she saw herself as Indian). Whilst of course we do not suggest that it is impossible for a British Indian person to be racist towards an Indian person, on the facts of this case, we find that is not what happened.

24. During the course of the case the claimant's case appeared to evolve, at

one point at least, into a suggestion that Mrs Parmar's treatment of him was linked to a distinction she made between South Indians and North Indians, which the claimant suggested was racial hatred which had somehow developed during Mrs Parmar's three years in India. This was not an allegation made before the trial began, and we find that it had no substance. Ultimately, despite our concerns about the omission in Mrs Parmar's statement, we still consider her version of events more plausible than the claimant's and we accept it. We find that during the course of the conversation Mrs Parmar told the claimant that she had lived in India, mentioned the poverty she had observed and also mentioned slum villages. We find as a fact that none of this was said with any malicious or otherwise improper intent and that Mrs Parmar did not believe, nor did she have any reason to believe, that what she said would have caused the claimant offence. They were two colleagues from a shared background, discussing Mrs Parmar's experiences.

Issue 5.3.3

25. The allegation was that on 16 December 2020 Mr Arnold had said to the claimant that he should move seats because of COVID (i.e. that he should not sit close to the door of the staff room to avoid contracting COVID from those passing in the corridors) but that Mrs Parmar did not allow him to move his chair and told him, or suggested, that he sit in a classroom instead as he did not need a chair in the staff room. The use of the word "allow" is a curious choice in this context since, at the time, Mrs Parmar had no authority over the claimant. She could no more tell him where to sit than he could tell her where to sit. The claimant's suggestion, as set out in the list of issues, was that Mrs Parmar did this because of religious belief and race in that the claimant believed that Mrs Parmar, as a Sikh, did not eat meat as a matter of religious belief and therefore did not want the claimant sitting near her whilst he was eating meat. The claimant, in his oral evidence, accepted that he had never had a conversation about religion or dietary preferences with Mrs Parmar. Mrs Parmar had no recollection of telling the claimant to sit in a classroom and thought it was most unlikely that she would say any such thing as she believed it was good for teachers to spend time in the staff room sharing good practice. (That is a belief that comes up later in this case in a different context.) She told us that she had never said, or felt, that she did not want the claimant eating meat near her. She eats fish she told us that some of her family at home eat meat and so she would not have said any such thing. We prefer Mrs Parmar's evidence on the point. We do not accept that she did what the claimant alleges.

Appraisal

26. The next point is not on the list of issues, but it is a point on which we make some findings. It relates to document number 34 in the claimant's bundle, an appraisal of him conducted for the academic year 2021-22. It was dated 6 July 2022. The appraiser was Mr Arnold, the claimant's line manager at the time. Of seven objectives, five are recorded as "fully met" and the other two as "partially met." It is undoubtedly a positive appraisal. The overall outcome is recorded as both "exceptional" and "exceeds career level expectations." We also note that, for example, there was an

intention to put the claimant on the respondent's management apprenticeship programme. We have no reason to believe that the appraisal did not reflect Mr Arnold's honest opinion at the time it was written. However, it does appear to us to be equally clear that Mr Arnold changed his view later. This is evident from the notes of an interview conducted with Mr Arnold in March 2023 during the course of the respondent's investigation into the claimant's grievance, to which we will return later. In the interview, Mr Arnold explained that he *had* thought the claimant was ready for a management role, but went on to set out in some detail how the claimant's behavior had changed when he took on a role as a cross-campus lead. While we accept that this was untested hearsay evidence, neither party chose to call Mr Arnold as a witness. We did consider that the claimant's suggestion that Mr Arnold was lying in this meeting to please his bosses was not a credible suggestion, particularly since moments beforehand in the context of Mr Arnold's appraisal the claimant had described Mr Arnold as an honest man. We consider that the most likely reason for the change in Mr Arnold's view was quite simply that the claimant had changed his behaviour. Although it was asserted on the respondent's behalf that the claimant must have been managed poorly before Mrs Parmar took over, we do not consider there was sufficient evidence to establish that fact, although there does not seem to be much doubt that, speaking more widely than management of the claimant, when Mrs Parmar took over her role in Janaury 2023, she found a department that was in some serious difficulties.

Issue 5.3.4

27. Around September 2022 Mr Arnold moved to work at the respondent's Banbury Campus. By now Mrs Parmar had been appointed as faculty manager although the claimant did not yet work directly under her. The claimant says that around this time Mrs Parmar did three particular things which were each sub-issues in the list:

    a. [5.3.4.1] The claimant said that Mrs Parmar started taking classrooms used by him or the business teachers so that the English, Maths and other tutors could use them. We note that in reality if this is an allegation of discrimination it is an allegation of discrimination against business teachers rather than on the basis of race. But in any case, we accept Mrs Parmar's evidence on this point which was that classrooms were shared by all courses not just the business course. When the classroom that was used by the claimant was empty, it was allocated to other teachers, which was common practice.

    b. [5.3.4.2] The second sub-issue was that Mrs Parmar was said to have taken the keys for the two racks which housed Chromebooks (laptop computers) from the claimant's desk without his consent. Again, we note that this is something that would have affected all of the business teachers and not just the claimant. We also question why the claimant might have taken umbrage at a colleague taking the keys to laptops the students might have wanted to use. The keys were not the claimant's personal property. But in any case, again we accept Mrs Parmar's evidence on this point. She had

noticed that business teachers tended not to put the Chromebooks away or not to lock them up. She had suggested that a system be implemented to stop that happening, but it was not. She had also noted that the Chromebooks were not used much because the classrooms in which business was taught had (desktop) PCs in them, so she asked the IT Department to service the Chromebooks so that they could be used by others. She certainly did not take the keys from the claimant's desk, she told us (and we accept that); she thought that perhaps they were taken by the IT Department when they serviced the Chromebooks.

c. [5.3.4.3] Mrs Parmar was alleged to have asked the business teachers, including the claimant, to do the work of the English and Maths staff. The claimant was not particularly clear on what sort of work he and the other business teachers were asked to do nor why at that time Mrs Parmar would have had the authority to make the request. Again, if this is an allegation of discrimination, it is an allegation of discrimination against the business teachers rather than on the basis of race. Mrs Parmar had some recollection of asking the claimant to deal with non-attendance at GCSE maths lessons by the students he was supervising and it may be that this was what the claimant was referring to. If it was, that is the extent to which we find that the allegation in 5.3.4.3 is proven and we consider that Mrs Parmar's request was perfectly reasonable.

28. So far as all three of these sub-issues are concerned, to the extent that Mrs Parmar did anything around this time, we find as a fact that what she did had nothing whatsoever to do with the claimant's race.

2023

29. Having been a faculty manager since 2021, on 23 January 2023 Mrs Parmar took on her role managing the business course (which the claimant taught). The claimant does not dispute that when he was told about Mrs Parmar taking over as his line manager he expressed publicly, in other words in a meeting with other colleagues, his doubts about whether she had sufficient experience. Mrs Parmar's evidence, which we accept, was that it went further than that. The claimant said to Mr Brookes (who at the time was a "director of delivery" for the respondent and Mrs Parmar's line manager) that Mrs Parmar should not be doing the role as she knew nothing about business. We consider this comment to have been unprofessional. When the claimant-cross examined Mr Brookes he put to him that he, the claimant, had said to Mr Brookes that Mrs Parmar would want to sack him and Mr Brookes agreed that the claimant had said something like that to him. Even if everything the claimant had said was correct about Mrs Parmar's behaviour up to that point (and it was not) we consider that would have been an unwarranted conclusion for the claimant to have come to. We consider that the reality was in fact that the claimant strenuously objected to Mrs Parmar taking over as his line manager because of his unreasonable reaction to her previous perceived slights against him.

30. It was Mrs Parmar's evidence that, following her appointment, the claimant

went out of his way to avoid coming to meetings she had arranged with him. He was essentially doing his best not to recognise her as his line manager. We accept that evidence. While it may be that, as the claimant says, some of those meetings might have been booked when he was teaching, we do not accept that was the case for all of them. We also accept Mrs Parmar's evidence that when she took over she realised there was a serious problem with timetabling and was unable to tell with certainty whether the claimant was in fact due to be teaching or not. Indeed, she told us, and we accept, that soon after taking over she realised that the claimant appeared not to be in some of the classes that he should have been in, at least some of the time. Also, she noticed that very few students were actually attending his classes. We accept that Mrs Parmar quickly formed a genuine concern about the claimant's performance. We find that her evidence on this point is substantially corroborated by the evidence in the bundle of the handwritten feedback provided by the claimant's students (in the main bundle from page 236). Although Mrs Parmar would not have had this material at the time she took over, the feedback does cover the time period that we are referring to. It is from 20 students by our count and is overwhelmingly negative as regards the claimant's teaching. The students say that they were taught fewer hours than they should have been and that their own attendance or the attendance of other students was low. While, again, this was evidence that was not tested under cross examination, we find the claimant's suggestion that the students produced this negative feedback to please the college's management to be far-fetched.

31. It was not disputed that almost immediately the claimant found out about Mrs Parmar being his line manager he asked to be moved to teaching T-levels and that the reason he did that was because, had his request been granted, he would not have been line-managed by Mrs Parmar. It was evident to us through the claimant's oral evidence that he appeared to consider that the mere fact that he had made that request, perhaps with the belief that he had the *initial* support of his previous line manager Mr Walsh, meant that for some reason he no longer had to deal with Mrs Parmar. To put it mildly, this was an unreasonable view for the claimant to have reached. We were also told in evidence by Mr Brookes that he had explained to the claimant the reasons why his request would not be granted. Having heard those reasons we accept that they were reasonable. The claimant, he told us, would have needed further development or training to teach T-levels and so even though there was a vacancy at the time, he would not have been able to fill it. The claimant's belief that he no longer needed to deal with Mrs Parmar also seemed to stem from the fact that he had put in what he described as a grievance on 30 January. We deal with that in a little more detail later.

<u>Issues 3.1.1.1 and 5.3.5</u>

32. The allegation was that after 23 January 2023 Mrs Parmar began calling the claimant for meetings more frequently than was necessary and placing pressure on him. We find that Mrs Parmar was indeed asking the claimant to attend meetings more frequently that had been the case, but not more than necessary. She had to ask more often because the claimant was refusing to attend, simply because he did not want to be managed by her.

Even if some of those meetings were arranged in error during teaching hours, and this of course was in the context of the timetabling problems that we have already referred to, we nevertheless accept Mrs Parmar's evidence that the claimant did not tell her that he would not be attending; see for example the email exchange at page 156 of the main bundle, where only after the event does the claimant tell Mrs Parmar that he was teaching. So far as "placing pressure" is a separate allegation as part of the list of issues, we find that to the extent that there was any pressure on the claimant it was entirely legitimate, for the reasons we have already set out.

Issue 5.3.6

33. The allegation was that from 23 January 2023 Mrs Parmar walked into the claimant's classrooms unnecessarily and without his consent. Mrs Parmar's evidence was clear, and we accept it. She did not need the claimant's consent to walk into his classrooms. "Learning walks", as she termed them, were a perfectly usual feature of the workplace and the claimant was not treated any differently to other staff in this regard. We find that the claimant took umbrage at her doing this because, as we have said, he did not want to be managed by her.

Issues 5.3.7 and 3.1.1.2

34. The allegation was that on 30 January 2023 Mrs Parmar forced the claimant to leave his seat using a loud/high tone, a seat that he had used for six months in the standardisation meetings and team meetings. Mrs Parmar accepted that she had asked the claimant to begin sitting in the business staff room. He had previously been sitting in a different room two floors away. She asked him to do this, she told us, because if the claimant moved he would be sitting with his colleagues, and she thought that for a number of reasons that was good practice. He would also be sitting on the same floor as the classroom that he taught in, and the reason that was significant was that students would often knock on the staff room door if they needed help. Mrs Parmar also noted that others in the room that the claimant had been using had begun to question why he was using that room.

35. The claimant seems to have formed the view that the room was his office, having been given permission by his previous line manager to work there. We heard quite a lot of evidence about whether it was called the business lounge; that evidence did not help us decide any of the issues that we had to decide. Ultimately we accept Mrs Parmar's evidence that the request to sit in the business teacher's staff room was a reasonable request that was made in a reasonable tone and in a reasonable manner. There was no shouting.

First "grievance" – 30 January 2023

36. On 30 January 2023 the claimant raised what he referred to as his first grievance. We consider that to be an inaccurate description. The claimant sent an email in which he complained of a number of things including being called to too many meetings, although we note he does

not say at that point that he had been unable to attend the meetings as he had been teaching. He also complained that Mrs Parmar had been coming to his lessons and had forced him out of his seat that day, and he referred back to the December 2020 incident where he said she had told him to move as well. The email is addressed to Mrs Parmar, not her line manager or anybody else, and it does not say that it is a complaint or a grievance. It was sent not just to Mrs Parmar, although she was the principal recipient of the email. It was also sent to her line manager Mr Brookes and to eight other members of staff as well. All except Mrs Parmar were cc'd in. In our view, that (i.e. including eight others) was clearly an inappropriate action on the claimant's behalf. Although we were told that the respondent treated the email as a grievance, it did not appear to us that there was any formal response to it beyond Mrs Parmar's email response which was:

> "Neil [Brookes] and I will be in touch to discuss any concerns you may have. For the present could you please only direct emails to Neil and I."

37. We should also note that Mr Brookes told us in his evidence that when the claimant first raised his concerns about Mrs Parmar he, Mr Brookes, had offered to attend meetings with the two of them as support, although the claimant did not take him up on those offers and those meetings never happened. We accept that Mr Brookes, as he told us, did not treat the 30 January email as a formal grievance, and we accept that he was entitled not to do so.

<u>Issue 3.1.1.3 (part one)</u>

38. The next significant event came on 9 February 2023, the allegation being that Mr Brookes put the claimant on a Performance Improvement Plan ("PIP"). It was not actually Mr Brookes that put the claimant on the PIP. It was Mrs Parmar's decision, although we accept that by then she had asked for and was receiving support from Mr Brookes and indeed he attended the meeting with Mrs Parmar where the PIP was provided to the claimant. We accept Mr Brookes' evidence that when the PIP was presented to the claimant he began shouting and left the room. One question for us to answer was whether that PIP was presented because of either what the claimant calls the first grievance or the grievance that was presented the same day 9 February. We will describe that 9 February grievance in more detail in a moment. We find that the PIP was not presented to the claimant because of his 30 January email, having heard both from Mrs Parmar and from Mr Brookes on the point. Mr Brookes, as we have said, had not even considered that there was a grievance in the 30 January email. We make the clear finding that the PIP was not done as any form of retaliation or for any other reason than that it was a reasonable management response to the claimant's behaviour over the previous two weeks. The PIP cannot have been given to the claimant because of what he calls the second grievance because in that grievance the claimant complains about the PIP being given to him – it is clear that the PIP came before the 7 February grievance.

39. So far as the PIP itself is concerned, and we should say we were able to see it at page 170 of the bundle, the claimant criticised it, picking up on a

particular point that he was told to review outstanding marking and complete any unmarked work. The claimant seemed to believe, at least by the time of the hearing, that this related to marking for formal examinations that had been taken in January and for which the marks would not have been received in time for him to be able to complete the objective. However, as Mrs Parmar told us, the claimant's complaint was based on a fundamental misunderstanding of what was written in the PIP. The requirement was in fact to do marking of work the students had done during their course before Christmas, not as part of formal exams, but as work in preparation for those external exams. It was therefore perfectly possible for the claimant to have met the objective. Overall, having considered the contents of the PIP, we find the objectives were reasonable in light of what was known to Mrs Parmar.

40. The claimant also made the point that the PIP came very quickly after Mrs Parmar had taken over. It certainly did come quickly, but we accept that Mrs Parmar had quickly run out of other options given the claimant's lack of cooperation with her.

Issue 3.1.3.3 (part two)

41. The complaint here was that, as well as giving the claimant a PIP, Mr Brookes failed to support the claimant's complaints about Mrs Parmar. We have already said that we consider that Mr Brookes was entitled not to treat the 30 January email as a formal grievance, and we have already explained nonetheless that he had offered to sit in on meetings as support and those offers were not taken up. So far as the February grievance is concerned, quite simply the formal procedure was invoked, and the grievance was investigated, so we can see no basis for the suggestion that Mr Brookes did not offer proper support for the claimant. In so far as issue 3.1.1.3 is also a separate allegation that Mr Brookes increased pressure on the claimant, no evidence about this was produced.

Grievance of 7 February 2023

42. Turning now to the grievance of February 2023, at page 160 of the main bundle, this broadly covered most if not all of the claimant's complaints in this case. There was no dispute that it was a formal grievance presented to the respondent. There was some issue about exactly when it was presented. The date on the foot of the document is 9 February although correspondence in the bundle shows that the document (at least in the form it appeared in the bundle) was only sent to the respondent on 20 February. However, it does appear that it had been sent in another form earlier and that the claimant was then asked to put it in a proper format. So we accept that it may well have been sent, originally at least, as early as 9 February. But, as we have said, clearly it post-dated the PIP because part of its content was a complaint about the PIP.

Issue 5.3.8

43. The allegation here was that Mrs Parmar refused to authorise IQA hours (i.e. payment for work the claimant had done in his lead IV role) between 1

and 7 March 2023. These were the dates of the alleged refusal. The claimant was asking here for Mrs Parmar to authorise hours that he had done before she had been in post. That, she told us, was not something she would be in a position to authorise without any evidence that the claimant had done the hours. Her evidence was that she asked the claimant for evidence, and he did not provide it. The claimant pointed us to two particular documents in his own bundle. The first was document 4, that was an email that went to a number of people, one of whom was Mrs Parmar, who was cc'd in. It shows that the claimant had conducted a meeting. It does not show how long he spent doing that, nor did it show that he was entitled to separate payment for it. The second document, number 10, shows the claimant "chasing" other people, not Mrs Parmar, for payment later on in May. So, we find that to the extent that Mrs Parmar did refuse to authorise those hours, she was entitled to in the absence of evidence from the claimant, which she had asked for.

Sick leave; Issues 3.1.1.7 and 5.3.12

44. On 8 March the claimant began a period of sick leave. The complaint is that, while the claimant was on that leave, Mrs Parmar had brought in an employee by the name of Craig to take over the claimant's lead IV role without his knowledge or consent. Mrs Parmar's evidence was quite clear on this. Firstly, the claimant was not removed in the sense that he was never coming back to the role. What happened was that the work needed to be done while the claimant was off sick, and she asked Craig to do it. The claimant's approval was not required, and it might even not have been appropriate to seek it anyway because he was off sick.

3.1.1.5 and 5.3.10

45. The next allegation was that Mrs Parmar reduced the number of "pathway subjects" from four to two and removed the claimant from leading them, again while the claimant was off sick. Mrs Parmar, we accept, realised that in light of the problems with teaching that she had identified, the students' choices needed to be narrowed, essentially in order to maximise their chances of getting their qualifications. That was a decision she was plainly entitled to make and if anyone were adversely affected, and we saw no evidence that they were, it would have been the students and not the claimant. Again, we fail to see how this can be something that required the claimant's consent. Clearly, the claimant cannot have led the pathways while he was off sick. As to the work he was assigned on his return, see below.

Grievance outcome

46. On 5 May 2023, the claimant was provided with the outcome of his grievance. That had been prepared by Samantha Starvis, the head of the respondent's Banbury campus. The date of the written decision was 15 March 2023. The claimant's grievance was not upheld. This outcome was not the subject of challenge as an issue in the case, so we did not need to make any substantive findings about it, but we do now say a little about the timings. There is an email at page 274 of the main bundle, dated 4 May, in which the claimant is complaining that he had not had the

outcome of his grievance. Mr Groves replied the same day to say that they (i.e. he and the claimant) had agreed that this was something best not done in person and so it had not been sent to him before. Mr Groves pointed out that it was at the claimant's request because he did not want to be contacted on sick leave and they had agreed that they would wait until the claimant was better. We note from the correspondence at page 232 of the main bundle that on 15 March the claimant was told there was an outcome to the grievance, and he was offered a meeting. His response was:

> I do not want to take any further stress discussing the grievance at this point since I am on sick leave. I would like to discuss the grievance outcome upon my return.

47. So, there is a very simple reason why the grievance took two months to be delivered to the claimant. It was because he had asked for it to be withheld until he was back from sick leave. In fact, after the claimant contacted Mr Groves requesting it on 4 May, Mr Groves sent it the following day.

Return to work

48. On 16 May 2023, the claimant returned from sick leave and was the subject of a return-to-work plan which is set out in writing in the bundle at page 296. It records:

> A phased return to work commencing 15 May for two days per week, Tuesday and Thursday. Regular reviews thereafter. Work allocated will be mainly back office and preparation for forthcoming EV visit. Teaching will be minimal as this has been covered by other members of the Business Team and the faculty want to ensure that there is no more disruption to students as we approach the end of term.

49. Two points about that Return-to-Work Plan. First, it was not signed by the claimant but there does not seem to be any suggestion that the claimant took any serious issue with it at the time. Second, on the face of it, the document suggests it was written by Mrs Parmar, but her evidence was clear that, in fact, the plan was agreed by the claimant with Hannah O'Neill (by then Mrs Parmar's line manager) essentially because it had by now been decided it might be best if Mrs Parmar did not deal directly with the claimant. Mrs Parmar's email of 9 May (at page 298 of the main bundle) makes clear that the claimant had agreed his return-to-work with Ms O'Neill. In that email Mrs Parmar makes clear what work the claimant will be doing; it lists marking, and it also says:

> Any marks you have for L3 Business Year 2 and Year 1 will need to be shared with Craig who is *currently* the Lead IV for Business *until the end of this year*. [Our italics.]

50. So we accept that in some ways the claimant had been replaced but the use of the word "currently" there is particularly significant. The claimant was back on reduced hours, and it seems clear to us that it was entirely appropriate for Mrs Parmar and her line manager, Ms O'Neil, to leave Craig in that post while the claimant was back on reduced hours. As

regards teaching (as opposed to IV) they noted (in the last-but-one quote above) how disruptive it would have been for the students for things to be changed at exam time.

51. In the same email Mrs Parmar also notes the following, "As you will be marking on your return you will need a quiet place to work. I am happy for you to use the T Level Hub." That is the area that the claimant referred to as his office which we have dealt with previously. Clearly, Mrs Parmar had changed her mind in the sense that she was now content for the claimant to use that different room, but simply it is a different decision because of different circumstances. As Mrs Parmar set out there, the claimant would not be teaching in the short term and so, of course, he would not benefit from sitting with the other business teachers. So it is not contradictory even though it might appear so on its face.

Issues 3.1.1.4 and 5.3.9

52. The allegation here was that Mrs Parmar removed the claimant from the Lead IV post without discussing that with the claimant or his line manager Salwa Boom. We have dealt with that already to some extent. The question arises, was Salwa Boom the claimant's line manager, as he asserts? The answer to that is no. We were shown emails (at document 10 of the claimant's bundle) that show that the claimant thought, likely rightly we accept, that Ms Boon was showing as his line manager on the respondent's systems for the purposes of his IV work. However, that correspondence shows that Ms Boon declined his request for the IV payments. She told him it would be necessary to complete a service desk request to change his line manager on the system to Mrs Parmar. He then replied to the effect that he had asked for Mrs Parmer not to be his line manager, and Ms Boon then directed him to another employee. We saw no evidence about whether the claimant in fact then went on to contact that other employee who he had been directed to. Mrs Parmar's evidence was clear – she was the claimant's line manager for all purposes, and we accept that. Nevertheless, on this issue, the claimant was removed from being Lead IV in the sense of a temporary cessation of that role or responsibility but that was for the good reasons that we have already set out. He had returned from sick leave and was on a phased return to work on short hours.

Issues 3.1.1.6 and 5.3.11

53. The next allegation was that after 16 May 2023 Mrs Parmar failed to provide the claimant with teaching hours and only gave the claimant back-dated assessments to grade for other teachers. Quite simply, in our judgment, this was a reasonable decision made as part of the claimant's phased return-to-work. It was not a decision made by Mrs Parmar; it was a decision made by Mrs O'Neil for reasons explained in the email of 11 May which is at page 325. The reasons in short were reducing the disruption to students by another change of teacher and that would, we note, have been very close to exam time.

Issues 3.1.1.8 and 5.3.13

54. The allegation here was that between 16 and 23 May 2023 the claimant was excluded from his office because he was not given keys unlike other staff. We have already observed that the room the claimant is referring to here was not in fact his office. The respondent's witnesses told us that while the claimant had been on sick leave, the locking system changed from a key lock to an electronic lock, or perhaps the other way around. It is clear to us that neither Mrs Parmar nor Mr Brookes made the decision to change the locks and what seems particularly significant is that there was no suggestion made that when the claimant came back he actually asked anybody for access to that room. Mrs Parmar made the point that she had been the one in an email earlier to tell him that he might want to work there so we consider it most unlikely, indeed we find, that she did not shut him out from that room, nor did Mr Brookes or anybody else.

Resignation

55. On 23 May 2023 the claimant resigned. He set out his reasons in an email at page 350 of the main bundle and those reasons essentially mirror some or most of the issues before us in this case. He had lodged an appeal against the result of his grievance as well and it appears that that was done around 9 May 2023 or at the latest by 17 May (which is apparent from looking at an email at page 325 of the main bundle). So that appeal against the grievance was lodged before the claimant's resignation, although he received the result afterwards, on 19 June 2023 (main bundle page 341).

56. Because the appeal against the grievance is not listed as an issue for us to consider, we do not make any substantial findings upon it although, for the sake of completeness, we note two things. Firstly, the original decision on the grievance was largely upheld. Second, the exception to that was the following:

> "Finally I have looked into the missing payment for hours worked last autumn and I can confirm that the claim form you submitted for these hours has been approved by the budget holder and will be paid in this month's payroll."

57. We take that to be a reference to the £600 which the parties agreed ended up being paid to the claimant and on that note, we turn to the wages claims in this case.

Wages claims

58. During the course of the hearing we were able to clarify with the parties that all agreed that following his dismissal the claimant was paid £600 for overtime he had done. It was paid late but it was paid.

59. The money claims that we had to adjudicate upon therefore related to two things:

    a. Firstly, for 30 hours' teaching which the claimant said Mr Brookes had verbally agreed to pay him. That teaching was said to have taken

place in the academic year 2021 to 2022 and therefore to have been due in June 2022. The claim for those hours was therefore substantially out of time unless the deductions formed part of a series. Despite us asking him specifically, the claimant did not provide a reason why he could not have made a claim to the Tribunal about that in time. The claimant has not produced any evidence to show that he did those 30 hours outside his normal contract teaching hours, and he has not shown any evidence that he put in a formal request for the payment following the respondent's normal procedures. Mr Brookes specifically said that he did not recall agreeing to make any such payment. We therefore find there was no contractual basis for the payment the claimant seeks.

b. Secondly, for four hours' IQA in March 2023. As we have already said, document 4 in the claimant's bundle does not show that he was entitled to that payment. It shows that he attended a meeting, not that he did it for four hours and not that those hours were outside his normal contractual hours although it does, in fairness, say it was for a QA meeting. The claimant has not shown that he put in a claim for those hours in accordance with the respondent's procedures and therefore has not shown that he was entitled to payment. We were shown, as I have said, the emails at document 10 in the claimant's bundle, the email exchange with Salwa Boon. The exchange shows Ms Boon declining the claimant's request for the payments for the reasons that we have already set out. We also note that Mr Brookes' oral evidence, when questioned about whether he had ever been asked by the claimant to authorise those hours, was that he had asked to claimant to contact Mr Arnold about it; there was no evidence provided that the claimant in fact did that. So, for those reasons, we find that there was no entitlement to the pay for those four hours.

LAW

60. Aside from some of the cases we refer to in the passage below about constructive dismissal, we were not referred directly to any decided cases. Indeed, so far as the law that we had to apply in this case is concerned, none of it was controversial and it was reflected in the questions set out in the list of issues. For the sake of completeness we do however set out the applicable law in some detail below, including referring to the cases and statutes which are authority for the questions to be answered in the list of issues.

<u>Constructive unfair dismissal</u>

61. Section 94 of ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s 111 ERA. The right only applies if there was a dismissal. Generally, then, it will not apply to resignation. However, by s 95 ERA, a resignation is to be construed as a dismissal (and therefore may engage the right not to be unfairly dismissed) if the employee terminates the contract under which they are employed in circumstances in which they are entitled to terminate it without notice by reason of the employer's

conduct. The employer's conduct here is a "fundamental" or "repudiatory breach", in other words a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract (*Western Excavating (ECC) Ltd* v *Sharp* 1978 ICR 221). A resignation which amounts to a dismissal by operation of s 95 is known as a constructive dismissal.

62. In this case, the claimant's case was that the respondent breached the implied contractual term as to trust and confidence, formulated in *Malik and Mahmud* v *BCCI* [1997] ICR 606 as an obligation that the employer must not "without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." A breach of this term will inevitably be fundamental (*Morrow* v *Safeway Stores plc* 2002 IRLR 9). Merely acting in an unreasonable manner is not sufficient. The strength of the implied term is shown by the fact that it is only breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract; this is a "demanding test" (*Frenkel Topping Limited* v *King* UKEAT/0106/15/LA). In practice the tribunal proceeds by asking: (i) was there reasonable and proper cause for the employer's action and (ii) if not, when viewed objectively was the conduct calculated or likely to destroy or seriously damage trust and confidence?

63. Simply establishing a breach of contract is not enough. In order to succeed in a claim for constructive dismissal, a claimant must prove that they resigned as a direct result of the respondent's breach and not for some other reason; there has to have been a causal connection between the breach of contract and the resignation (*Ishaq* v *Royal Mail Group* [2017] IRLR 208, EAT). If there was a fundamental breach by the employer, it must be *a* (though not *the only*) reason for the employer's resignation – see for example *Wright* v *North Ayrshire Council* [2014] IRLR 4, in which the EAT held that the crucial question, in establishing whether an employee who had more than one reason for resigning had been constructively dismissed, was whether a repudiatory breach of contract had played a part in the resignation.

64. There is no constructive dismissal if, after a fundamental breach, the employee affirms the contract, i.e. behaves in a way which shows that he or she intends the contract to continue (*Western Excavating (ECC) Ltd* v *Sharp* 1978 ICR 221). The issue is one of conduct, not merely the passage of time. Delay in resigning is relevant to whether the breach was affirmed, though it is not determinative of the issue. Delay in resignation whilst an employee is on sick leave is less likely to amount to an affirmation than if the employee is still attending work.

65. A sequence of events may meet the test even if none of its individual components does. An employee may rely on a "last straw" which was not

itself a repudiation of the contract; this is so even if the employee affirmed the contract after the earlier matter as long as the last straw adds something new and effectively revives those earlier concerns (*Kaur* v *Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 97). If the last straw is entirely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim of constructive dismissal will fail. In *Meikle* v *Nottinghamshire County Council* [2005] ICR 1, in considering a "last straw" case, the Court of Appeal held that, in determining whether an employee had accepted the employer's repudiation of the employment contract, the fact that the employee objected not only to the repudiatory conduct but also to other actions of the employer, not amounting to a breach of contract, did not vitiate acceptance of the breach.

66. A constructive dismissal is not necessarily an unfair one (*Savoia* v *Chiltern Herb Farms Ltd* 1982 IRLR 166).If there was a constructive dismissal, just as with any other form of dismissal, under ERA the Tribunal must consider whether it was fair. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason and in particular whether the respondent in all respects acted within the so-called "band of reasonable responses". In a case of constructive dismissal, the reason the reason for dismissal is the reason for which the employer breached the contract of employment (*Berriman* v *Delabole Slate Ltd* 1985 ICR 546). However, if an employer does not attempt to show a potentially fair reason at all in a constructive dismissal case but instead simply relies on the argument that there was no dismissal, a tribunal will be under no obligation to investigate the reason for dismissal (or its reasonableness) for itself — *Derby City Council* v *Marshall* 1979 ICR 731, EAT.

Discrimination Generally

67. The EqA prohibits discrimination on the grounds of various "protected characteristics", set out at sections 5 to 18. An employer must not discriminate against (or harass or victimise) an employee by (amongst other things) dismissing them or by subjecting them to any other detriment (sections 39 and 40). There was no dispute here that the claimant was the respondent's employee within the meaning the Act. Nor was there any dispute that the respondent would be liable under s 109 for any contraventions of the Act done by other employees (e.g. the claimant's managers).

68. The Equality and Human Rights Commission Employment Code ("the EHRC Code" provides a detailed explanation of the EqA. The Tribunal must take into account any part it that appears relevant to any questions arising in proceedings (s 15 Equality Act 2006).

69. We remind ourselves that discrimination may be sub-conscious. As Lord Nicholls said, in the context of a case about race discrimination, in *Nagarajan* v *London Regional Transport* [1999] IRLR 572:

> All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.

Direct discrimination because of race

70. Under s 13(1) EqA read with s 9, direct discrimination takes place where because of race a person treats the claimant less favourably than that person treats or would treat others. By s 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage* v *Grampian Health Board* [2012] UKSC 37. In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of a protected characteristic (in this case, race). However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the "reason why" the claimant was treated as they were (*Shamoon* v *Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).

71. The protected characteristic need not be the only reason for the treatment, provided it had a significant influence on the outcome (*Nagarajan* v *London Regional Transport* [1999] IRLR 572, HL). The case law recognises that very little discrimination today is overt or even deliberate; people can be unconsciously prejudiced. A person's motive is irrelevant, as even a well meaning employer may directly discriminate.

72. S 136 of the EqA makes provisions about the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the Tribunal must hold that there was a contravention, unless the respondent proves that that there was not a contravention. S 136 requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but has nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another (*Hewage*

above). The burden of proof does not shift where there is no evidence to suggest the possibility of discrimination (*Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68). Guidelines on the application of s 136 were set out by the Court of Appeal in *Igen Ltd* v *Wong* [2005] EWCA Civ 142 and the importance of these was recently restated by the Employment Appeal Tribunal in *Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68. We do not reproduce the thirteen steps of the guidance here, but we took account of all steps. One important point to note is that the question is whether there are facts from which a Tribunal *could* decide… It is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required (*Madarassy* v *Nomura International Plc* [2007] EWCA Civ 33). Unfair or unreasonable treatment on its own is not enough (*Glasgow City Council* v *Zafar* [1998] IRLR 36). If the burden of proof does shift, under the *Igen* guidance the employer must prove that the less favourable treatment was "in no sense whatsoever" because of the protected characteristic. Because the evidence in support of the explanation will usually be in the possession of the employer, Tribunals should expect "cogent evidence" for the employer's burden to be discharged.

Harassment related to race

73. Under 26(1) of the EqA read with s 9, harassment related to race takes place where there is unwanted conduct related to race which has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether the conduct has that effect the Tribunal must take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

74. In *Richmond Pharmacology Ltd* v *Dhaliwal* [2009] IRLR 336, the EAT said (at para 22):

> 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… it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

75. A similar point was made by the EAT in *Betsi Cadwaladr University Health Board* v *Hughes and others* [2014] EAT 0179/13 (at para 12):

> The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

Unauthorised deductions from wages

76. S 13(1) ERA provides that an employer shall not make an unauthorised deduction from wages of a worker employed by him (except as authorised in circumstances which are not relevant to this case). Paying less than is due under the contract is one example of such a deduction.

77. An employee has a right under s 23 ERA to complain to an Employment Tribunal of an unauthorised deduction. Subject to the usual provisions extending time to facilitate early conciliation, a claim under s 13 must be presented to an Employment Tribunal within a period of 3 months beginning with the date of the payment (or the date the payment was due if it was not made) or, if the Tribunal is satisfied that it was not reasonably practicable to have done so, within such further period as the Tribunal considers reasonable. Where there is a series of deductions, time runs from the last one. The Tribunal has no jurisdiction to consider complaints relating to deductions made before the period of two years ending with the date of presentation of the complaint.

Time limits

78. For time limits relating to unauthorised deductions, see above. In discrimination claims, under s 123 EqA a complaint must be brought after the end of (a) the period of 3 months starting with the date of the act complained of or (b) such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

CONCLUSIONS

Issue 2 – Time limits

79 Given our conclusions below we did not need to decide whether to extend time for the Equality Act claims even if an extension was necessary.

80 So far as the unauthorised deductions claim is concerned, we find that the two separate elements of that claim were not deductions that formed part of a series. They were for quite different work remunerated under two separate contracts. The first part of that claim (30 hours' teaching) is therefore well out of time, and it was reasonably practicable for the claim to have been submitted in time – indeed we were presented with no reason at all why it could not have been. So, that part of the claim is out of time. Even if it had not been, the claim would have failed – see the reasons above and below. The second part of the claim was not out of time.

Issue 3 – Unfair dismissal

81 We have dealt with the issues at 3.1.1.1 to 3.1.1.8 during the course of our factual findings.

82 Answering the question posed at 3.1.2, so far as we have accepted that the

respondent did the things that were alleged, the respondent did not behave in a way calculated or likely to destroy or seriously damage the trust and confidence. To the limited extent that the matters alleged were proved, they were neither calculated nor likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. Each "incident", on the facts as we have found them was either (or both) entirely innocuous or a reasonable action on the part of the respondent. In the latter case the reactions were reasonable either in the sense that they were management decisions which the respondent was perfectly entitled to take, and/or they were a reasonable response on the part of the respondent to the claimant's unreasonable behaviour. Even if we are wrong about all of that, the respondent had reasonable cause for its actions. We have already set out essentially the reasons why we say the respondent's actions were entirely reasonable on that front.

83 Answering question 3.1.3 – did the particular matters 4 to 7 breach the terms of the claimant's Lead IV contract or teaching contract? No. Clearly, when the claimant was not able to do the work, somebody else had to. The claimant was "removed" from his Lead IV role only temporarily, initially as he was off sick so unable to do the role. After his return, even if someone else had taken over, that was temporary and was agreed with the claimant as part of his staged return to work.

84 There was no breach, either of the lead IV contract or of the implied term of trust and confidence. The claimant was not constructively dismissed; rather, he chose to resign and so there is no need for us to answer the other questions in the list of issues so far as unfair dismissal complaint is concerned.

Issue 5 – Direct discrimination

85 So far as direct race or religion discrimination is concerned, there is no particular question for us to answer at 5.1 or 5.2.

86 Issue 5.3 sets out a number of things that the respondent was said to have done. We have run through those in quite some detail in our factual findings above. Leaving aside for the moment 5.3.2, to the extent that the events as alleged happened (and many of them did not, or happened differently to how the claimant says they did), we find that they were not less favourable treatment (issue 5.4). The claimant was not treated worse, than someone else was or would have been treated, whether that someone was the claimant's specifically pleaded comparators, about whom we heard little, or a notional comparator in the same circumstances who did not share the claimant's protected characteristics. More specifically:

> 5.3.1 – Any other colleague who Mrs Parmar thought to have been struggling with workload would have been treated in the same way.
>
> 5.3.3 – The alleged conduct did not happen.
>
> 5.3.4 – Mrs Parmar's decisions impacted teachers other than the claimant; she did not take the keys to the Chromebooks.
>
> 5.3.5 – Mrs Parmar did not call the claimant for meetings more

frequently than necessary. To the extent that pressure was placed upon him, any member of staff who had behaved in the way in which he did would have been treated in the same way.

5.3.6 – Mrs Parmar was entitled to come into the claimant's classrooms; there was no evidence to suggest she treated other teachers any differently.

5.3.7 – Any other teacher not sitting in the usual staff room would have been treated in the same way.

5.3.8 – Any member of staff who did not produce the required information in these circumstances would have been treated in the same way.

5.3.9 to 5.3.12 – Any member of staff taking time off work and then returning would have been treated in the same way.

5.3.13 – The claimant was not "excluded" from "his" office. The locks happened to be changed when he was away; the same would have happened to any other member of staff in similar circumstances.

87 Although strictly not necessary given our findings on issue 5.4, we also find that none of the treatment in any of issues 5.3.1 and 5.3.3 to 5.3.13 had anything whatsoever to do with the claimant's race or religion. In our factual findings above we have set out, where necessary, the reasons for Mrs Parmer's and others' actions. As we said above in a different context, each "incident", on the facts as we have found them, was either (or both) entirely innocuous or a reasonable action on the part of the respondent. In the latter case the reactions were reasonable either in the sense that they were management decisions which the respondent was perfectly entitled to take, and/or they were a reasonable response on the part of the respondent to the claimant's unreasonable behaviour. We therefore see no reason to conclude that the claimant's race had anything to do with the respondent's actions.

88 The slight qualification for that is issue 5.3.2. We have found that the word "slums" was mentioned during the course of a conversation, albeit in somewhat different circumstances to how the claimant says it was said. We have considered whether that particular conversation was less favourable treatment. We accept it was *different* treatment, in that it may well have been that Mrs Parmar would not have entered into a conversation about her time in India with somebody who was not Indian We do not however accept that that amounted to *worse* treatment given the innocuous nature of the conversation as we have found it to have been. If we are wrong about that, we would have gone on to answer question 5.5 to say that it was because of race, again in the sense only that Mrs Parmar might not have said that to someone who was not Indian, but we would have gone on to answer question 5.6 in the negative – in other words, the treatment was not a detriment as it was an innocuous conversation.

89 Given our clear factual findings, s 136 EqA is not engaged – there are no facts from which the Tribunal could decide, in the absence of any other explanation, that there was discrimination. For all but 5.3.2 there was no

difference in treatment, let alone "something more". In 5.3.2, the "something more" was absent. As will be clear, even had the burden been shifted, in our judgment the respondent would have proved that the treatment was in no sense whatsoever because of the claimant's protected characteristics.

Issue 6 - Harassment

90 We have already dealt with whether the respondent did do the things at 6.1. Those that we found to have happened did amount to unwanted conduct. However, none of them in our judgment "related to race or religious belief" – we need not repeat what we have found to be the reasons for the respondent's actions, which plainly had nothing to do with the claimant's race or religion. Again, the slight qualification to that is the particular conversation where the word "slum" was used. We might just have been prepared to find that that did relate to race in the sense that the conversation would not have been started with somebody who was not Indian. However, we firmly conclude that, on the facts as we have found them, the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Did it have that effect? We accept that there is a possibility that it caused, at worst, mild offence, but mild offence is not sufficient to amount to any of the words that are set out at s 26(b) – the claimant's dignity was not violated, nor was a intimidating, hostile, degrading, humiliating or offensive environment created. Even if we are wrong about that, in answering question 6.5 we would have concluded that it would not have been reasonable for the conduct to have had that effect. The following is applicable both to 6.4 and to 6.5. Context is important here. We have already described the conversation as an innocuous conversation between two people who, at least to some extent, had a shared background. The use of the word "slums" did not come out of the blue, it was in the course of a rather longer conversation; it was not objectionable for Mrs Parmer to have spoken to the claimant about her experiences in India and she did not do so in an objectionable way. For all the reasons that we have already set out, it did not amount to harassment on the basis of race or religion. For reasons that we think will already be clear, none of the other things alleged to have amounted to harassment came even close to meeting that definition.

Issue 8 – Unauthorised deductions

91 As we have said, issue 8.2 was no longer a live issue before us. As to 8.3, the 30 hours' teaching and the four hours of QA were simply payments that we have found the claimant has not shown he was entitled to.

Final Conclusion

92 For the reasons given above, none of the claims were well-founded, and we formally dismissed them.

APPENDIX:
EDITED VERSION OF THE LIST OF ISSUES

(First Drafted by EJ Findlay following the case management hearing on 25 March 2024, then edited during the course of the final hearing; *those later edits are in italics*)

1. [**Employment status** – conceded by Respondent at outset. The claimant was an employee for all material purposes.]

2. **Time limits**

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 1 March 2023 may not have been brought in time.

2.2 Were the discrimination claims made within the time limit in section123 of the Equality Act 2010? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.2.2 If not, was there conduct extending over a period?

2.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.2.4.1 Why were the complaints not made to the Tribunal in time?

2.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2.3 Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:

2.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

2.3.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

2.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

2.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3. **Unfair dismissal**

3.1 Was the claimant dismissed?

Constructive dismissal

3.1.1 Did the respondent do the following things:

3.1.1.1 From on or about the 23rd of January 2023, when [Mrs Parmar] became faculty manager for the B.Tech business courses, she began to call the claimant for meetings more frequently than was necessary and placed pressure upon him;

3.1.1.2 On or about the 30th of January 2023, [Mrs Parmar] forced the claimant to leave his seat, and which he had used for the previous six months to conduct standardisation meetings and team meetings, and told him “you cannot sit in this seat” in a high/loud tone;

3.1.1.3 After January but before 23 May 2023, the [then] second respondent, Neil Brookes, gave the claimant a performance improvement plan (PIP), failed to support his complaints about [Mrs Parmar] and increased pressure upon the claimant;

3.1.1.4 on or about the 16th of May 2023, [Mrs Parmar] removed the claimant from the Lead IV post without discussing it with him or his line manager, Salwa Boon.

3.1.1.5 [Mrs Parmar] reducing the “Pathways” subjects from 4 to 2 and removing the claimant from leading these pathways without his consent

3.1.1.6 [Mrs Parmar] failing to provide any teaching hours to the claimant upon his return from sick leave on the 16th of May 2023, but instead, only giving him backdated assessments from other teachers to grade;

3.1.1.7 [Mrs Parmar] bringing in an employee called Craig to take over the Lead IV post without the claimant's knowledge or consent

3.1.1.8 from the 16th of May 2023 (up to and including the 23rd of May 2023 when he resigned, excluding the claimant from his office by failing to give the claimant keys to the office, unlike other staff.

3.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

3.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

3.1.2.2 whether it had reasonable and proper cause for doing so.

3.1.3 Did the matters at 3.1.1.4 -3.1.1.7 breach the terms of the claimant's Lead IV and/or teaching contract?

3.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

3.1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

3.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

3.2 If the claimant was dismissed, what was the reason or principal reason for dismissal [constructive dismissal only - i.e. what was the reason for the breach of contract]?

3.3 Was it a potentially fair reason?

3.4 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?

3.5 The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

4 [Remedy for unfair dismissal]

5 **Direct race/religion or belief discrimination** (Equality Act 2010 section 13)

5.1 The claimant's protected characteristics are colour, that his ethnic or national origin is Indian and that his religious belief is Hindu.

5.2 I took the claimant through his claim form and checked which matters were said to be discriminatory (and on what basis) and which were not. In addition to the matters set out below, he wishes to use the alleged incident on 24 January 2023, when [Mrs Parmar] is alleged to have contacted him on his personal mobile phone number, as "background information).

5.3 Did the 1st respondent do the following things (unless otherwise indicated these are complaints of race discrimination):

5.3.1 On an evening between January and March 2020, the 1st

respondent's employee [Mrs Parmar] approached the claimant after 5:00pm and tried to influence him against the faculty manager and faculty director by saying that the management was giving him a lot of work and that he was unable to speak up to them because he was from India, and therefore had no confidence to challenge them.

5.3.2 Around the same time in 2020, [Mrs Parmar] mentioned that the claimant was from a country (India) which she said was full of slums and that she did not come from such a country.

5.3.3 Around 16th December 2020, although the claimant's faculty manager [Mr Arnold] had suggested he should move his seat further away from the office door to protect himself from contracting COVID, [Mrs Parmar] did not allow the claimant to move his chair and told him to sit in a classroom (D302) because he did not need a chair in the staff room (D317). The claimant says this is discrimination because of religious belief as well as race (he believes that [Mrs Parmar] is Sikh and does not eat meat as a matter of religious belief whereas he does, hence she did not wish him to sit near her while eating meat);

5.3.4 From in or about September 2022, when Aidan [Arnold] moved to Banbury campus, [Mrs Parmar]

5.3.4.1 started taking business classrooms so that English, Maths and AAT tutors could use them, and

5.3.4.2 took the claimant's keys for two Chromebook racks from his desk without his consent and

5.3.4.3 asked business teachers, including the claimant to do the work of English and maths staff.

The claimant says that these practises continued until he resigned.

5.3.5 From on or about the 23rd of January 2023, when [Mrs Parmar] became faculty manager for the B.Tech business courses, she began to call the claimant for meetings more frequently than was necessary and placed pressure upon him;

5.3.6 From that date when he was at work teaching she would walk into his classrooms unnecessarily and without his consent;

5.3.7 On or about the 30th of January 2023, [Mrs Parmar] forced the claimant to leave his seat, and which he had used for the previous six months to conduct standardisation meetings and team meetings, and told him "you cannot sit in this seat" in a high/loud tone;

5.3.8 [Mrs Parmar] refusing to authorise his IQA hours for payment (1.03.2023 -7.03.2023)

5.3.9 on or about the 16th of May 2023, [Mrs Parmar] removed the claimant from the Lead IV post without discussing it with him or his line manager, Salwa Boon.

5.3.10 [Mrs Parmar] reducing the “Pathways” subjects from 4 to 2 and removing the claimant from leading these pathways without his consent

5.3.11 [Mrs Parmar] failing to provide any teaching hours to the claimant upon his return from sick leave on the 16th of May 2023, but instead, only giving him backdated assessments from other teachers to grade;

5.3.12 [Mrs Parmar] bringing in an employee called Craig to take over the Lead IV post without the claimant's knowledge or consent

5.3.13 from the 16th of May 2023 (up to and including the 23rd of May 2023 when he resigned, excluding the claimant from his office by failing to give the claimant keys to the office, unlike other staff.

5.4 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s.
If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.
The claimant says they were treated worse than the following in relation to 5.3.3 (asked to sit in classroom when other could sit in staff room): the 1st respondent’s staff known as Craig, Amreen, Phil Thompson and Charlotte; and than Craig, who is fair skinned and English, in relation to allegation 5.3.12, than Lindsey Crowley (or Clowley), who is white, in relation to allegation 5.3.13. In respect of the other allegations, the claimant has not named anyone in particular who they say was treated better than they were.

5.5 If so, was it because of race and (re allegation 5.3.3 only),religious belief?

5.6 Did the respondent’s treatment amount to a detriment?

6. **Harassment related to race and religion** (Equality Act 2010 section 26) Note: this is an alternative to direct discrimination, the claimant cannot succeed in both.

6.1 Did the respondent do the following things:

6.1.1 As set out at 5.3.1 -5.3.13. Only 5.3.3 is said to be related to religious belief

6.2 If so, was that unwanted conduct?

6.3 Did it relate to race and/or (5.3.3 only) religious belief?

6.4 *If so, did the conduct have the purpose and/or effect of:*

a. violating the Claimant's dignity, or
b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

6.5 If so, was it reasonable for the conduct to have that effect?

7 [Remedy for discrimination]

8 **Unauthorised deductions**

8.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? The claimant says this relates to two discrete matters:

8.2 He says that he had a verbal agreement with the second respondent on behalf of the 1st respondent that he would be paid for teaching "Business Access" during the academic year 2021-2022. The claimant will have to set out how much he is claiming in his schedule of loss. I have explained that this claim may well be out of time as the claimant says that he should have been paid by June 2022. He should set out the reasons why he delayed claiming in his witness statement.

8.3 The payment for 30 hours teaching and 4 hours IQA (Internal Quality Assurance) payment referred to in the attachment to his claim form. The claimant says that they were due for payment in June 2023.

8.4 How much, if anything, is the claimant owed?

Employment Judge Dick

Date: 13 December 2024

Judgment sent to the parties on

17 December 2024

For the Tribunal office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any

oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/