# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **Respondents** |
|---|---|
| Mr Alagangan | Ormiston New Academy (R1)<br>Mr Craige Cooling (R2)<br>Mr Nick Hudson (R3)<br>Ms Amelia Webb (R4)<br>Ormiston Academy Trust (R5) |

**AND**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Midlands West **ON** 22, 23, 25 - 31 July 5 August 2024

**EMPLOYMENT JUDGE** Harding

**MEMBERS**
Mr Kelly
Ms Campbell

**Representation**
**For the Claimant:** In Person
**For the Respondent:** Mr Blitz, Counsel

**RESERVED JUDGMENT**

**The unanimous judgment of the tribunal is that:**

1 The claimant's claims of direct race discrimination contrary to sections 13 and 39(2) of the Equality Act 2010 fail and are dismissed.

2 The claimant's claims of harassment related to race contrary to sections 26(1) and 40 of the Equality Act 2010 fail and are dismissed.

3 The claimant's claim of harassment of a sexual nature contrary to sections 26(2) and 40 of the Equality Act 2010 fails and is dismissed.

An Apology

There has been a delay in sending this judgment to the parties. This was as a result of an oversight on the part of the judge, for which the judge sends her apologies to the parties.

Case Summary

1 The claimant pursues claims of direct race discrimination, harassment related to race and one complaint of harassment of a sexual nature. The claimant worked part time as a lunchtime supervisor at Ormiston New Academy. For some of the time with which this case is concerned the claimant also had additional duties in the form of working as a Reflection Coordinator and Exam Officer/Invigilator. He was employed by Ormiston Academy Trust. Respondents 2 – 4 are employees of Ormiston Academy Trust. The claimant was placed on precautionary suspension from duty by Mr Cooling, the Principal of Ormiston New Academy, on 26 May 2022 in order to allow for complaints from pupils about the claimant to be investigated. The complaints alleged inappropriate touching and use of inappropriate language. The day after the claimant was placed on suspension he raised a grievance against Mr Cooling in which he made various complaints about Mr Cooling's conduct towards him, and these form the subject matter of some of the complaints before the tribunal. Following an investigation no action was taken by the respondent against the claimant in relation to the pupil complaints but the claimant, who had gone off sick form work following his suspension, did not return to work. He was dismissed with effect from 12 December 2022, the respondent asserts for conduct, namely unauthorised absence/ failure to provide sick certificates.

## The Issues

2 During a case management preliminary hearing that took place on 2 August 2023 the claims pursued by the claimant had been clarified by Employment Judge A Smith. Judge Smith also ordered further clarification of a small number of the claims, which, we understand, was not then provided by the claimant. At a subsequent case management preliminary hearing conducted by Employment Judge Childe an application by the claimant to be permitted to amend his claims was refused.

3 We confirmed with the parties at the outset of this hearing that the claims that were before us for determination were as set out in Judge Smith's order and

where further clarification was still required we obtained this from the claimant. The complete list of claims (with clarification) is as follows;

Direct race discrimination

4 The claims are not set out entirely in chronological order, as they follow the order in which they were set out by Judge Smith. The claimant describes himself as black African for the purposes of this claim. The acts of asserted less favourable treatment are:

4.1 The claimant was not given a contract of employment for either the role of Examination Officer or Reflection Coordinator in or around October 2021.

4.2 The claimant was not allowed to stay in the exam hall in mid-2022. There is an actual comparator for this claim, namely Lisa Farrow.

4.3 The claimant was underpaid when carrying out his Reflection Coordinator duties between November 2021 and 4 April 2022. He was paid at the rate of £13.69 an hour whereas he asserts he should have been paid at the same rate as the following individuals when they carried out Reflection Coordinator duties; Mrs Leanne Clarke, Vice Principal Safeguarding, Mrs Jade McCrystal, Vice Principal Behaviour, Mrs Leanne Wilks, Vice Principal Training and Inclusion and Mrs Everest-Smith, Vice Principal Standards. The claimant confirmed that he did not actually know the earnings figures for any of these individuals but he asserted that they were all earned more than £13.69 an hour when carrying out these duties. The respondent accepted this was so.

4.4 The respondent changed the date of the claimant's absence review meeting in October 2022. There is an actual comparator for this claim, namely Linda, a lunchtime supervisor.

4.5 Mr Alan Westerman failed to uphold all of the claimant's grievance on 15 July 2022.

4.6 Ms Amelia Webb intentionally delayed meetings and letters in October 2022.

4.7 In approximately October 2021 Mr Cooling sat down with the claimant on two occasions and talked to him about the fact he had applied for jobs elsewhere. There is an actual comparator for this claim, namely Mr Preston.

4.8 On 12 October 2021 Mr Cooling refused to provide a reference for the claimant. There is an actual comparator for this claim, namely Mr Preston.

4.9 Ms Webb and Mr Cooling were not consistent with the dates of (the claimant's) absence in the disciplinary process in November 2022.

4.10 The claimant's dismissal. There is an actual comparator for this claim, namely Linda, the lunchtime supervisor.

4.11 Note; in relation to the claims set out at 4.1, 4.4, 4.5, 4.6, 4.7, and 4.9 it was also recorded in the list of claims set out in Judge Smith's case management order that the claimant compares his treatment to that of a hypothetical comparator. At the start of this hearing the claimant told us that this was wrong. He referred us to a document written by him headed "Response to Ground of Resistance from the Defendant and case bundle", also referred to as the "disputed documents" document. This was not in our bundle, but there was no objection to us looking at this document. At paragraphs 42 – 58 of this document the claimant had made reference to numerous Employment Tribunal decisions, as well as a decision of the Employment Appeal Tribunal and Court of Appeal. The claimant said these cases were his comparators. We explained to the claimant that decisions made by other Employment Tribunals and/or case law is not what is meant by the term comparator on the list of issues, and that if he was to identify an actual or hypothetical comparator for the purposes of these claims this would be an actual or hypothetical person who was working for the respondent in the same (material) circumstances as the claimant, but who was not black African. We explained to the claimant that if he wished to refer us to case law then closing submissions would be the appropriate point to do this, albeit we also explained that the decision of one Employment Tribunal is not binding on another.

Harassment related to race

5 The list of asserted unwanted conduct (again not in chronological order, as they follow the order in which they were set out by Judge Smith) is as follows:

5.1 The grievance officer, Mr Westerman, did not challenge Mr Cooling sufficiently when finding that Mr Cooling had made an "idiomatic comment".

5.2 The respondent locked the claimant out of his emails in June 2022.

5.3 The respondent failed to re-open the claimant's access to his emails in June 2022 despite being requested to do so.

5.4 The respondent's bus driver was sent to the claimant's house to deliver letters in January 2023.

5.5 Mr Cooling said to the claimant "are you one of those who punches above his weight" around May 2022.

5.6 Mr Cooling said to the claimant "you are blocking my sunshine", referring to the claimant's buttocks in February 2022.

5.7 Mr Cooling said to the claimant "I don't know how you are able to afford those" meaning his trousers, in around February/March 2022.

Harassment of a sexual nature

6 The asserted unwanted conduct is that Mr Cooling said to the claimant "you are blocking my sunshine" referring to the claimant's buttocks in February 2022.

**Evidence and Documents**

7 There was an agreed bundle before us which (minus the index) ran to 399 pages. However, it was quickly apparent that the bundle was incomplete. We were told by the respondent that a number of the documents which had been disclosed to the claimant had not, for some reason, made their way into the bundle. The missing documents included the disciplinary hearing notes, the claimant's grievances, and the claimant's first letter of appeal against his dismissal. The claimant told us there were two further documents missing, in the form of emails regarding being locked out of his work email account. All of these documents were added to the bundle, without objection from either party. We numbered them running on consecutively from existing pages as follows; claimant's first grievance, pages 400 – 402, claimant's second grievance, pages 403 – 404, disciplinary hearing notes, pages 405 – 411, claimant's emails 412 – 413 and claimant's first letter of appeal, page 414. The claimant also later produced a further email dated 28 May 2024, which the respondent did not object to being included, numbered as page 415.

8 The respondent produced witness statements for: Mr Cooling, Principal of the Academy, Ms Webb PA with responsibilities for HR, Mr Westerman independent Investigator, Mr Blower teacher and Head of Business and Computing, Ms Guest, Chair of the Governing Body and Mr Rogers, Vice Chair of Governors. The claimant also produced a witness statement, which ran to 18 pages. There was a further document from the claimant, which ran to 23 pages, which was headed "Response to Ground of Resistance from the Defendant and case bundle", which we referred to above. This, we clarified with the claimant at the start of this hearing, was not a document that we were being asked to treat as a further witness statement from the claimant; it was a document that the claimant had produced for a much earlier stage of the tribunal process.

9 The claimant raised with us at the start of the hearing that the respondent had exchanged witness statements late; the claimant told us that the respondent's statements had been sent to him the previous Thursday, 18 July 2024. Allowing for the fact that the tribunal had two reading days at the start of this hearing this meant that the claimant had had five days to read the statements. The order from the tribunal was that witness statements were to be

exchanged by 29 May 2024. We asked the claimant whether, in light of the late exchange, he needed more time to consider the respondent's witness statements. He told us that he did not. He said that he did not want any delays to the hearing as the case had already been ongoing for some time and he wanted to proceed. He raised the possibility of asking for a deposit order against the respondents instead. This had been raised by the claimant in correspondence also; he had requested that a deposit order be made against the respondents in the sum of £450,000 in relation to their late disclosure witness statements. This letter, we understand, had not been referred to a judge prior to the start of this hearing. We explained to the claimant that deposit orders cannot be issued for non-compliance with tribunal orders but are instead issued when a tribunal decides that a claim or response (or part of a claim or response) has little reasonable prospect of success.

10 The claimant had named a number of the Academy's pupils in his witness statement, and on occasion had also made reference to sensitive personal information about these individuals. Shortly before this hearing the respondent had made a written application for an anonymisation order to be issued in respect of these pupils, which had not been referred to a judge before the start of this hearing. Before us, Mr Blitz, for the respondent, confirmed that the respondent was in fact applying for a restricted reporting order for the purposes of this hearing and an anonymisation order. The claimant, having initially indicated in writing that he objected to anonymisation, told us that he did not object to either order. We granted a restricted reporting order and an anonymisation order in relation to the pupils at the school for the reasons that we announced orally at the time.

## Findings of Fact

11 The majority of our findings of fact appear in the section that follows. However some findings of fact, particularly when they also form the basis of our conclusions, will appear in our conclusions section. From the evidence that we heard and the documents that we were referred to we make the following findings of fact:

> 11.1 Ormiston New Academy is a school in Wolverhampton which has over 1,000 pupils and 130 staff. The claimant started employment with the fifth respondent on 1 September 2021, in the role of Midday Supervisor, page 107. His line manager was Mr Preston, who is white. The claimant was dismissed on 12 December 2022. The claimant worked part time, 10.5 hours a week, at a rate of pay of £13.69 an hour. This was the fifth respondent's standard rate of pay for lunchtime supervisors. The claimant was issued with a contract of employment in respect of this role on 1 September 2021, pages 107 – 188. It was identified in the claimant's contract that his employer was Ormiston Academy Trust, page 107, and that his place of work was Ormiston New Academy, page 107.

Disciplinary Procedure

11.2 As might be expected, the fifth respondent has a disciplinary procedure, pages 80 – 103. This sets out at clauses 2.9 - 2.11, page 81, that employees have the right to be accompanied at a formal disciplinary hearing by a trade union representative or a work colleague, and that they do not have the right to be accompanied by a legal representative save that, if the employee is at risk of being barred from working in their chosen profession, a legal representative may be allowed at the discretion of the employer. In the usual way, the procedure allows for different levels of disciplinary action from a formal verbal warning up to and including summary dismissal, page 88.

Reporting absence procedure

11.3 The fifth respondent's sickness absence reporting procedure states that a doctor's certificate is required if absence lasts beyond seven calendar days, page 147. The procedure sets out that doctor's certificates must run consecutively to cover all the period of absence, inclusive of bank holidays and all Academy closure periods for all employees, page 147. It is said that there is a requirement to ensure certificates are submitted in a timely fashion and ideally no later than three days after the previous note has expired. For repeat notifications of absence it is said that should normally be done by the fourth day of the absence, page 147.

References

11.4 The school does not have a particular person or point of contact who handles reference requests for members of staff. Usually, however, if a reference request is received it is the individual's line manager who will provide the reference. On occasion Mr Cooling provides references if he has direct knowledge of the work of the individual in respect of whom a request has been made.

11.5 We do not find that Mr Cooling, at some point during the events with which this case is concerned (no specific date was identified by the claimant), provided the claimant's line manager, Mr Preston, with a reference. We accept the evidence of Mr Cooling and find that he did, however, at one point, approach another school about the possibility of Mr Preston applying for a role at that school. Mr Preston wanted a job closer to home and this school met that criteria. Mr Preston subsequently applied for a job at that school. The fifth respondent provided a reference in support of this application, but it was not Mr Cooling who did that; it was Mr Preston's line manager, Ms Warner, Vice Principal.

Claimant's applications for other roles

11.6 We accept the claimant's evidence and find that around September 2021 he applied for a role as an Examination Officer at the Thomas Telford school. On 12 October 2021 he received an email to say that his application had not been successful because the school had been "unable to secure" any reference from the "additional referee" the claimant had supplied and consequently, it was said, it was not possible to proceed with this application, page 119. It was not identified in the email who the additional referee was. We prefer the evidence of Mr Cooling and find that he did not refuse to provide a reference for the claimant in respect of this role, and it follows from this that we do not find that the comment above, about not being able to secure a reference from the additional referee, referred to Mr Cooling. Nor do we infer and find, on balance, that someone else from the school refused to provide the claimant with a reference. We preferred Mr Cooling's evidence for the following reasons. Firstly, his evidence was cogent and consistent. Secondly, the claimant accepted in evidence that he had not approached Mr Cooling and asked him to be a referee, and so it seemed unlikely to us that he would have been the additional referee. Thirdly, we considered it highly unlikely that the Head Teacher of such a large school would have been involved in a reference request for a junior, part-time employee for whom he had no line management responsibility. Moreover, as we have set out above, all that was said in this email was that Thomas Telford school was unable to secure a reference from the "additional referee". Whilst the claimant had said for the purpose of the list of claims that the additional referee was Mr Cooling, he led no evidence about this at all, nor, indeed, did he tell us who the original referee was. He did not tell us, for instance, that he had put down one referee and had then been asked to provide another, and at this point he had provided the fifth respondent's (or Mr Cooling's) details. Moreover, the specific complaint form the claimant was that Mr Cooling had "refused to provide" a reference. We do not find there was a refusal to provide a reference because all that the email said was that Thomas Telford school were "unable to secure" a reference, which could mean a number of things, from simply not having received a reference to the reference being actively and deliberately withheld, as the claimant suggested.

Reflection Co-Ordinator

11.7 Pupils who are withdrawn from lessons because of their behaviour are put into what is known as Reflection. Up until the events with which this case is concerned the school had, in recent times, had a number of senior members of staff, in excess of 12, who on rotation covered Reflection for usually one or two hours a week. These members of staff included Mrs Leanne Clark, Vice Principal Safeguarding, Mrs Jade

McCrystal, Senior Leader, Behaviour, Ms Laura Wilkes, Vice Principal Teaching, Training and Inclusion and Mrs Everest-Smith, Assistant Principal, Standards. These individuals are all white British and work full time. No new contracts or terms and conditions of employment were issued to any member of staff when they started carrying out these duties; the Reflection hours were simply considered to be additional duties which formed part of their existing roles, and so a practice developed of not issuing contracts for this work. Whilst we do not know the precise rate of pay of these individuals, they were all senior members of staff and were paid in accordance with their normal rate of pay whilst working in Reflection, which it was accepted was more than £13.69 an hour.

11.8 In the late summer/autumn of 2021 Mr Cooling decided that it would be better for one person to be responsible for Reflection, primarily because this would free up the other members of staff. He decided to create a part time Reflection Coordinator role. This, therefore, was a new role, and at the time it was also a temporary role because it was not fully funded; there was only sufficient money in place to fund the role until Christmas 2021.

11.9 Around October 2021 Mr Cooling became aware that the claimant was applying for roles at other schools. He was told this by either the claimant or Mr Preston, he could not remember which. We do not find that Mr Cooling then "sat the claimant down" on two occasions in October 2021 to discuss the fact that he was applying for jobs elsewhere, but we do find that there was a discussion between the claimant and Mr Cooling one lunchtime in which Mr Cooling offered the claimant additional hours at the school working as a Reflection Coordinator for two hours a day. Mr Cooling had been impressed by the claimant's hard work and thought that if the claimant was looking for additional work he could offer the claimant these additional duties within the school. The hours of work were 8.45am to 11.30am (with a break), page 372, and were additional to the claimant's two hours a day working as a lunchtime supervisor. The claimant agreed to take on this role. No written contract or amended terms and conditions were issued to the claimant and the agreement was not confirmed to the claimant in writing. The claimant started working in the role of Reflection Coordinator on 1 November 2021, page 339, working 2 hours each day.

11.10 We find that the claimant was paid at the rate of £13.69 an hour for the Reflection Coordinator role, which was the same amount that he was paid for carrying out his Midday Supervisor role. The claimant did not dispute this. It was not disputed that this was a lower rate of pay than that received by Ms Clark, Ms McCrystal, Ms Wilkes and Ms Everest-Smith who, as set out above, had been paid at their normal (higher) rate of pay when carrying out these duties. Mr Cooling was, in fact, advised by his Finance Director that, for the claimant, the role should be paid at the rate

of £9.69 an hour, which was the fifth respondent's standard rate of pay for a casual role. Mr Cooling has the ultimate decision making responsibility for pay and contract matters, and he overruled the Finance Director on this as he considered it appropriate that the claimant should receive the same hourly rate of pay as he did for the lunchtime supervisor role.

11.11 It was a role that the claimant found challenging. He regularly sent emails to senior members of staff making complaints about the children's behaviour, page 345. The role was subsequently extended twice up to Easter 2022, page 342. However, in March 2022 the claimant informed the fifth respondent that he no longer wished to continue in the role.

11.12 By spring 2022 the fifth respondent had full funding for a Reflection role, and in May 2022 the fifth respondent advertised for a permanent role of Reflection Manager, page 339, to start in September 2022. The role went through an external recruitment process and an appointment was made with the successful candidate, Mrs Rollason, starting in September 2022. Her rate of pay was £11.47 an hour. The rate of pay for the Reflection Manager position was, therefore, £2.22 per hour less than the claimant had been paid. Mrs Rollason is described as white British.

Exam invigilator role

11.12 During periods of the school year when there are exams the fifth respondent needs exam invigilators to supervise pupils whilst they are sitting their exams. At the time of the events with which this case is concerned the exam invigilators would be supervised on a day-to-day basis by an Exam Officer, Alison Dunnett. The number of exam invigilators that are needed varies day-to-day and consequently those members of staff who have agreed to take on these responsibilities will be deployed on an "as and when required" basis. Decisions will be taken on a daily basis, and throughout the day, by Ms Dunnett in relation to how many people are needed to invigilate, depending on what exams are being sat, the numbers of pupils sitting them and when the exams start and finish.

11.13 Mr Cooling suggested to the claimant that he might like to take on exam invigilator duties and he agreed. These were to be additional hours of work on top of the hours the claimant was already working as a lunchtime supervisor (and Reflection Coordinator). There was another member of staff whose principal role was that of lunchtime supervisor who likewise carried out exam invigilator duties as additional hours to her existing part time role, Ms Lisa Elwell (also referred to by the claimant as Lisa Farrow). She acted as an informal deputy for Ms Dunnett during exams. If two exam rooms were in use, for example, she would often be given responsibility for supervising the second exam room. Ms Elwell is white British. The claimant asserted before us that Ms Elwell was still paid

for her lunchtime supervisor role whilst she was working as an exam officer at lunchtimes (i.e. he asserted that she received double pay). When the claimant was asked how he knew she was getting paid for both roles at the same time he told us that a colleague had said this to him. However, the claimant, despite being given several opportunities to identify this colleague, refused to do so. In the circumstances we found that evidence completely lacking in credibility, and we rejected it.

11.14 The claimant was not issued with a contract of employment, or amended terms and conditions of employment in relation to his exam invigilator role. No one was, including Ms Elwell. These responsibilities had historically been viewed by the fifth respondent as additional responsibilities to existing duties carried out on a casual, as and when required basis, which did not require a change in contractual terms and a practice had developed, therefore, of not issuing contracts for this work.

11.15 The claimant, on occasion, carried out exam invigilation duties. For example, in October 2021 he did 9.25 hours of exam invigilation, page 165. All of these hours were in the morning prior to the claimant starting his lunchtime supervisor role, page 165.

Remaining in the exam hall

11.16 One of the claimant's complaints was that sometime around mid-2022, whilst he was invigilating, he was sent out of the exam hall at lunchtime in order to do his lunchtime supervisor duties, whereas Ms Elwell was allowed to stay in the exam hall. On balance we accept the claimant's evidence and find that this did happen, albeit we also accept the evidence of Mr Cooling that this was not a decision he was responsible for. Who was required to remain at any one time in the exam hall was a decision made by Ms Dunnett.

Complaints about comments made by Mr Cooling

11.17 Mr Cooling walks round the school three or four times a day, often stopping to chat to members of staff, which included the claimant. The claimant alleges that during these walkabouts Mr Cooling made a number of comments to him. Mr Cooling, for his part, could not remember whether the comments were made or not. On balance, we accept the evidence of the claimant and find that in February 2022, whilst the claimant was standing in a doorway, Mr Cooling said to the claimant as he tried to get past him, "you are blocking my sunshine". We do not find that the use of the word "sunshine" was an oblique way of referring to the claimant's buttocks, for the reasons we will explain in our conclusions.

11.18 On balance, we accept the claimant's evidence and find that around February/March 2022 Mr Cooling said to the claimant "I don't know how you are able to afford those" referring to the claimant's trousers.

11.19 On balance, we accept the claimant's evidence and find that around May 2022 Mr Cooling and the claimant were having a discussion about the claimant's family and the claimant told Mr Cooling that there was a difference in age between himself and his wife. Mr Cooling responded "you are one of those that punch above your weight".

Pupil complaints about the claimant

11.20 On 18 May and 25 May 2022 complaints were received from students about the claimant. One pupil alleged that the claimant had touched his private parts and the other pupil made allegations of use of inappropriate language. Given the seriousness of the complaints Mr Cooling met with the Vice Principal, Ms Clarke, on 26 May 2022 and a decision was made to suspend the claimant pending an investigation.

Claimant's suspension

11.21 The claimant was informed orally, during a meeting that took place with Mr Cooling and Ms Clarke on 26 May 2022, that he was being suspended, and he was told the reasons for this. This was confirmed to the claimant in writing on 27 May 2022, pages 203 - 204. In this letter it was explained to the claimant that he was suspended in relation to allegations of inappropriate physical contact with a student on 18 May and using inappropriate and threatening language towards a student on 25 May. It was said that these allegations were serious and could amount to gross misconduct. It was further explained that the suspension did not constitute disciplinary action and did not imply any assumption of guilt. It was said that the matter would be kept under review and the aim was to make the period of suspension no longer than was necessary. The claimant was told that if he required access to the premises or the computer network then he should discuss this with Ms Webb as this might be agreed to under supervision. He was told that he was not to enter school premises unless expressly authorised to do so and that his email account had been suspended and he no longer had access to the computer network, page 204. He was told that he must not communicate with any of his colleagues, members of the governing body, parents or students about the matter but that he should remain available to answer any work related queries. It was confirmed that if the investigation showed the allegations were unfounded the claimant would be notified and he would return to work.

11.22 The claimant, we find, found the accusation of inappropriate touching from a male pupil particularly upsetting. The claimant is someone who has very strong views concerning homosexuality; he told us that he believes homosexuality is prohibited by his religion and that stoning to death is the only punishment recommended for homosexuality by religious law. Having a complaint of this nature made against him, and then being suspended in respect of such a complaint, marked a major turning point, we find, in the claimant's attitude towards the respondents, and towards Mr Cooling in particular. What had been a positive relationship (illustrated, for example, by the claimant taking on more working hours when they were offered) turned into a relationship viewed with immense negativity and distrust by the claimant, because of this turn of events.

Claimant's email account

11.23 Whilst it was accepted that there was a period of time in June 2022 when the claimant could not access his work emails, there was a dispute between the parties as to how that came about. The claimant's case was that the respondents deliberately locked him out of his email when he was suspended. The respondents case was that this was not done, but that the claimant may have been unable to access his email for a short while because, after a period of time, if a person has not logged into Outlook, their password will expire and will need to be changed.

11.24 We did not find this a particularly easy dispute to resolve; Mr Cooling and Ms Webb were both adamant that the claimant had not been locked out of his email, and we found their evidence to be generally more credible than that of the claimant. They were also in a position to know whether this had happened or not because it was the IT department who would implement any lock out and the only people who could authorise IT to do this were Mr Cooling and Ms Webb. On the other hand, the terms of the claimant's suspension, confirmed to him in writing were very clear. As set out above, he was expressly told that his email account had been suspended and he no longer had access to the computer network. The claimant also relied on an email sent to him, see paragraph 11.31 below, in which it was written that his email would be "reinstated". But that we considered to be ambiguous in relation to this particular factual dispute; it could refer to either re-setting the password or unlocking the account. Whilst we had an element of doubt we find, on the balance of probabilities, that for a short period of time immediately following his suspension the claimant was unable to access his email because his password had expired. We do so because we found the respondent's evidence to be more credible than that of the claimant, because Ms Webb and Mr Cooling corroborated each other's evidence and because we accepted the respondent's explanation for why the wording referred to above was included in the claimant's suspension letter; which was that it was a

template letter and it was left in by mistake. We additionally find, as we set out below, that the claimant's access to his emails was reinstated at the latest by 16 June 2022.

Claimant's grievance

11.25 The day following his suspension the claimant raised a grievance against Mr Cooling. He wrote that he was making a complaint about verbal abuse, racial discrimination, sexual abuse, abuse of authority and failure and negligence to follow procedures (sic), pages 400 - 402. Under the heading of verbal abuse the claimant complained that on several occasions Mr Cooling had said to him "I don't know how you are able to afford your clothes". He said this had made him feel uncomfortable, as if he had not worked all of his life. In relation to racial discrimination he wrote that Mr Cooling preferred BAME people to work for less money with more responsibility. He complained that when he was offered a job to work as a Reflection Coordinator it was supposed to be a contract job but that what it was turned into was overtime so that he would be paid less money. He complained that up until the point that he left the role he had not been provided with any training. He complained that he had been asked to deal with special needs students when he should not have been dealing with them.

11.26 Under the heading sexual abuse he stated that he did not know Mr Cooling's sexuality but the way Mr Cooling approached him always made him feel uncomfortable. He said that he was once standing in the reception doorway and Mr Cooling said to him "you are blocking my sunshine" which he found a bit absurd and believed to be inappropriate and sexual abuse. He also complained that a few weeks previously Mr Cooling had started asking him questions about his family life and children, which he described as a normal thing, to be friendly and approachable. He said that he had told Mr Cooling about his and his wife's age and Mr Cooling had then said "you are one of those that punch above your weight". He described himself as shocked and stated that he felt that Mr Cooling was making sexual advances towards him.

11.27 Under the heading abuse of authority he complained that Mr Cooling had put him in the position of working with students with special educational needs without any formal training, and under the heading of failure and negligence to follow procedures he complained that he had reported a couple of students for abusive language and inappropriate behaviour and nothing was done and yet he was now facing a disciplinary procedure in relation to an allegation of verbal abuse and sexual abuse of students.

Investigation into the complaints against the claimant

11.28 Both of the pupils who had made complaints against the claimant were interviewed on 8 June 2022, pages 167 – 169. One pupil alleged that as he was going to the toilet the claimant had said to him "if I have to sort you out you'll be sorry" and "I'm going to fuck you up", page 167. The other pupil alleged that the claimant had said to him that he had not seen him in Reflection for a while. He asserted that the claimant had then picked up his tie, had told the pupil that he liked it and had then brushed against his private parts, page 169.

11.29 The claimant was invited, by way of a letter dated 1 June, to attend an investigation meeting to take place on 8 June page 412. In an email of 8 June the claimant requested that the meeting be rescheduled to Monday 13 June, page 412. He said that the invitation to the meeting had only arrived that day due to his email account being suspended which meant, he said, that he did not have access to evidence relevant to the disciplinary investigation. The meeting was rescheduled.

11.30 On 10 June 2022 the claimant sent a sick note to the respondent, page 124. It was recorded in this sick note that the claimant was not fit for work as a result of work-related stress and that this would be the case until 22 July 2022. The school term was due to end on 23 July 2022.

11.31 An investigation meeting with the claimant and Ms Louise Kay took place on 13 June. Ms Kay emailed the claimant the notes of that meeting the following day, page 413. She also confirmed in this email that she had requested that the claimant's school email account be reinstated in order that this could be used to make arrangements in relation to the disciplinary investigation. She confirmed an email would be sent to the claimant's work email shortly inviting him to a further investigation meeting.

11.32 A further investigatory meeting took place with the claimant over Microsoft Teams on 16 June 2022, pages 125. Given that Ms Kay had confirmed in her email of 14 June that the invitation for this meeting would be sent to the claimant's work email account, we infer from the fact this meeting took place, and arrangements for the meeting had clearly therefore been made, that the claimant's work email was by this point reinstated. That is also consistent with what the claimant himself wrote in his grievance of 17 October 2022 (see below), which was that when he asked the school to restore his school email his email suspension was lifted, see page 403. Various CCTV footage was shown to the claimant during this meeting.

11.33 On 17 June 2022 the respondent wrote to the claimant confirming that his suspension was being ended with effect from Friday, 17 June 2022 and that he could return to work on Monday 20 June, page 207. Of

course, the claimant was certificated off sick from work at this point, see paragraph 11.30 above. This letter was correctly addressed to the claimant's home address but was not sent recorded delivery. It was sent via first class post. The claimant asserted that he did not receive this letter. We find, on the balance of probabilities, that he did receive it. It was, after all, correctly addressed and therefore likely to be delivered. Additionally, and significantly in our view, as the weeks went by and the autumn school term approached we think it likely, if the claimant had heard nothing from the respondent about the investigation as he asserted, that he would have been in contact with the school to check what was happening. It was not disputed that the claimant did not do this.

11.34 Moreover, we in any event accept Ms Webb's evidence and find that Ms Clarke, the respondent's Vice Principal also telephoned the claimant to inform him that his suspension had been lifted.

Investigation into claimant's grievance

11.35 On 8 June 2022 Mr Alan Westerman was appointed to investigate the claimant's grievance. Mr Westerman is not an employee of the respondent, he is an independent education consultant. He carried out a comprehensive investigation, spending a total of 34 hours on it. As part of his investigations he had a meeting with the claimant on 22 June, which was carried out by telephone, and on 28 June he had meetings with Mr Cooling, the Vice Principal, the Student Logistics leader (name unknown), Ms Webb and the Finance and Payroll Manager (name unknown). During Mr Westerman's interview with Mr Cooling he specifically put to Mr Cooling the two comments that the claimant alleged Mr Cooling had made to him which the claimant asserted in his grievance were sexual harassment, and he discussed these with Mr Cooling. In particular Mr Westerman explained to Mr Cooling that the claimant had asserted that Mr Cooling had said to him "you are blocking my sunshine" and that this was considered by the claimant to be sexual harassment. Mr Cooling told Mr Westerman he could not remember whether that comment (or any of the other comments) were made or not, explaining that he regularly walks the school and has conversations with various different members of staff. He also explained that if it was said it was likely used as a way of saying "excuse me please" as he passed the claimant in the doorway. Mr Westerman subsequently produced a detailed investigation report setting out his findings and conclusions, pages 338 – 351.

Mr Westerman's findings and conclusions

11.36 Mr Westerman was able to confirm, via the Payroll and Finance Manager, that Mr Cooling had been advised to pay the claimant £9.62 per hour for the role of Reflection Coordinator, as this was in line with the rate

of pay for other casual staff. He was informed that Mr Cooling had been adamant that the claimant should receive £13.69 per hour for this role, as that matched his existing rate of pay for his midday supervisor role. Mr Westerman was further able to confirm that when the permanent role for a Reflection Manager was advertised it was advertised at the rate of £11.47 per month. Mr Westerman therefore rejected the complaint that the claimant was paid at a lower rate than others because of his race.

11.37 Mr Westerman also investigated whether employment guidelines had been followed in relation to the claimant's appointment to the Reflection Coordinator role. He acknowledged that the appointment to this role had been verbal and concluded that, whilst this was acceptable, a letter or email confirming what had been agreed would have made the process clearer for everyone, page 343. He concluded that it would have been best to have drawn up a short, fixed term contract. He noted also that there was consensus that the role had not been advertised and he concluded this may have meant other staff who were interested in the role were not given the opportunity to apply. He partially upheld this complaint, page 343.

11.38 In relation to the claimant's complaint that he had not received adequate training for the Reflection Coordinator role he concluded that the school had provided an induction via the senior pastoral leader, page 346. However, he also concluded that it was evident from the volume of emails that the claimant sent concerning pupils behaviour that further support was required and could have been addressed by the Academy. This complaint was, therefore, partially upheld, page 346.

11.39 As to the complaints about the verbal comments which the claimant asserted Mr Cooling had made to him, Mr Westerman concluded on balance that the comments were likely made. However, he also concluded that if the comments were made they did not amount to sexual or racial harassment. The comments about punching above his weight and the claimant's clothes Mr Westerman concluded were "well-meaning and complimentary" and the comment about blocking sunshine Mr Westerman described as "idiomatic", page 347. By this he meant that a turn of phrase had been used by Mr Cooling, as opposed to using direct words; similar, for example, to someone saying they were "feeling under the weather". He concluded that none of the comments had the context or interpretation placed on them by the claimant. This complaint was not upheld.

11.40 He next considered whether the school's procedures for investigating complaints made by the claimant about student conduct directed at him had been appropriately actioned. The claimant had mentioned a specific incident in relation to this complaint and Mr Westerman had obtained copies of the relevant statements about the

incident and reviewed these. He also spoke to the student Logistics Leader about the incident. He concluded in relation to this incident that despite feedback having been given the claimant felt that a reasonable sanction had not been administered to the pupil and more consideration could have been given to the claimant's concern regarding this, page 349. More generally he concluded there was evidence to suggest that the school had been made aware of the issues relating to students raised by the claimant and had attempted to resolve these issues. Accordingly, he concluded this complaint was not upheld.

11.41 Mr Westerman, in his report, next referred to the claimant's complaint that the disciplinary investigation was a vindictive action on the part of Mr Cooling in retaliation for the claimant no longer undertaking his additional hours as a Reflection Coordinator. He decided that the disciplinary investigation was outside of the scope of his investigation. He specifically considered a complaint made by the claimant that Mr Cooling had said to him "I gave you a job, you couldn't do that" in reference to the Reflection Coordinator role. He concluded this comment had not been made. This complaint was not upheld.

11.42 Mr Westerman made eight recommendations to the fifth respondent for future practice. These included; that where additional duties can reasonably be added to an existing contract it would be useful to include them and that this should be communicated to the member of staff through a letter or memorandum, that where possible staff are offered the opportunity for an exit interview for internal and external posts, that where complaints are made about pupils and actions or sanctions are implemented these are shared in a timely manner with the involved parties and that the fifth respondent should revisit how members of staff are supported when they are subject to an allegation made by pupils. Mr Westerman did not speak to Lisa Elwell as part of the investigation process. Ms Elwell was not named by the claimant in his grievance nor was she someone who the claimant suggested Mr Westerman should speak to you. Nor, in fact, was the exam invigilation role, which is the complaint before us in respect of which Ms Elwell is relevant, part of the subject matter of the claimant's grievance.

Grievance outcome

11.43 On 12 July 2022 Ms Webb emailed the claimant using his work email address, page 221. She attached a letter from Natasha Rancins, Regional Principal Executive, inviting the claimant to a grievance investigation outcome meeting the following Tuesday, 19 July, page 215. This letter was also posted to the claimant, using the correct address. The claimant responded to this email, by an email sent from his work account, on 13 July, saying that he was unable to open the attachment and did not

understand why there was a need for an outcome meeting. He stated that he had handed in a sick note which meant he was not coming near the school until the sick note ended, page 221. We pause to note, therefore, that the claimant's work email address was clearly reinstated and working by this point in time.

11.44 On 15 July 2022 Ms Rancins wrote to the claimant with the grievance outcome, pages 225-228. The letter was sent by post, and it was correctly addressed, page 225. In her letter, Ms Rancins went through each aspect of the claimant's grievance in turn explaining for each complaint whether it had been upheld or not and the reasons why these conclusions had been reached. Essentially, she adopted all of the conclusions and recommendations made by Mr Westerman. It was further explained in this letter that if the claimant was dissatisfied he could take his concerns to the appeal stage within 10 working days. The claimant did not appeal. The claimant asserted he did not receive this letter. We think it more likely than not that the claimant did receive the letter and accordingly we make this finding. We do so because the letter was correctly addressed and so, therefore, was likely delivered. Additionally, the claimant knew, even without this letter, that the respondent had made decisions on the outcome of his grievance, see paragraph 11.43 above, and had he then heard nothing over the lengthy summer break abut this, as he asserted, then he surely would have been in contact to chase it up, which he did not do.

11.45 There was no further contact between the claimant and the respondents over the summer holidays.

The autumn term

11.46 The school term started on 5 September 2022. The claimant did not return to work. He did not submit another sick certificate. Nor did he contact anyone from the fifth respondent. Ms Webb, who was Mr Cooling's PA but who also had responsibility for HR matters, emailed the claimant on 7 September 2022 pointing out that his sick note had ended at the end of July but that the claimant had not returned to work and asking if everything was okay, page 231. Ms Webb also telephoned the claimant. He said that he had not received the letter lifting his suspension and that he was waiting for a sick note from his doctor. Accordingly, on 7 September 2022 Ms Webb emailed the claimant a copy of the June letter lifting the suspension and also posted a copy to him, page 235. Ms Webb informed the claimant in her email that he was expected to return to work given that his suspension had been lifted, and that they expected him in work the next day, page 235.

11.47 The claimant did not respond and did not attend work. He did not make any contact with the fifth respondent. Accordingly, on 14 September 2022 Ms Webb wrote to the claimant, page 239. She pointed out in this letter that the claimant had yet to return to work and that a copy of the letter lifting his suspension had now been re-sent to him. She pointed out that the sick note which had been submitted by the claimant was for the period 10 June - 22 July and the respondent had yet to receive a further sick note or reason as to why the claimant was not returning to work. The claimant was informed in this letter that if he did not attend work by Friday 16 September without a reason for his absence then this would be recorded as being absent without leave. It was further said that if the claimant failed to report absence or follow the reporting procedure without mitigating circumstances he might be subject to disciplinary action. This letter was emailed to both the claimant's personal and work email addresses.

The claimant's second sicknote

11.48 On 15 September 2022 the claimant emailed Ms Webb attaching a sick note to this email, pages 243 and 245. The claimant asserted in this email that, aside from Ms Webb's letter of 14 September, the other letters mentioned by her had not actually been delivered to his home address. He complained that the tone of Ms Webb's letter of 14 September was intimidating and bullying and said that he was unable to get a fit note from his GP "because I need to be sure I am ready to return to work as my self well-being is important to me and my family". He further wrote that due to the unnecessary stress and unsupportive behaviour (of the fifth respondent) his GP had given him a new sick note. The claimant also asserted that he had an outstanding grievance which had not been dealt with. Of course, that was not correct, on our findings. The grievance had been finalised and the claimant knew the outcome and had not appealed it, see paragraph 11.44 above.

11.49 In this second sicknote it was confirmed that the GP had assessed the claimant's case on 15 September 2022 (which was well after the school term had started, see paragraph 11.46 above) and that the claimant was not fit for work and would remain unfit for four weeks, page 129.

11.50 On 27 September 2022 Ms Webb emailed the claimant acknowledging receipt of his sick note, page 247. She also reminded the claimant that his grievance investigation had been completed in July and that he had been invited to attend a meeting to discuss the outcome, which meeting the claimant had said he could not attend. She wrote that, as agreed, a copy of the outcome of the investigation was then sent to the claimant. She sent a further copy of the grievance outcome to the claimant

that day recorded delivery. The claimant did not seek to appeal the grievance outcome at this point.

11.51 Whilst, by this point, the claimant had sick notes which covered him for the period 10 June - 22 July 2022 and 15 September 2022 onwards for four weeks, he had not provided a sicknote for the period in between, namely 23 July 2022 - 14 September 2022. The vast majority of this period (23 July 2022 – 4 September 2022) covered the period of the school's summer holiday. However, in relation to the holiday period, as set out at paragraph 11.3 above, the fifth respondent's absence management reporting procedure states that doctor's certificates must run consecutively to cover all the period of absence, inclusive of bank holidays and all Academy closure periods for all employees. This is important because employees are paid during holidays and, accordingly, if someone is off sick the correct rate/type of pay for them will be sick pay rather than full pay. Moreover, term had restarted on 5 September 2022 and the claimant was not certificated for the period 5 September 2022 – 14 September 2022.

11.52 On 7 October 2022 Ms Webb emailed the claimant at both his work and home email addresses asking him to provide sick notes for the period 23 July - 14 September, page 251. She confirmed to the claimant that employees were still required to send through sick notes during periods of continuous sickness absence which covered school holidays.

11.53 On 10 October 2022 Ms Webb sent the claimant three further letters. One letter was about sick pay. In a second letter of that date, page 261, Ms Webb explained that she was contacting the claimant about his current sickness absence. She pointed out that she had not received a certificate covering his absence from 23 July - 14 September 2022. She stated that sick notes should be submitted in a timely manner and that at present the claimant's absence from work for this period was considered to be unauthorised. In a third letter, also of this date, Ms Webb invited the claimant to attend an informal sickness absence interview to take place at 12.30pm on 17 October 2022, page 255. It was said in this letter that if the claimant was too ill to attend the meeting at the Academy then he could consider the following options: meeting in a neutral venue or at his home, attending via telephone conference, providing a written submission or requesting that the meeting takes place in his absence

11.54 The claimant responded to these letters by way of email sent from his work email address dated 14 October 2022, page 265. In this email he asserted that the period from 23 July to 14 September was a standard holiday period that was included in his contract and so he did not need to provide any sick notes as he was not on long-term sick, page 265. He stated that he was about to resume (work) but firstly his grievance letter

had not been dealt with and secondly just as he was about to get a fit note from his doctor he was told that he was not ready to go to work because of the respondent's treatment of him and so a new sick note was issued.

11.55 He stated that he would attend the informal sickness absence meeting on 17 October but asked that it be at a neutral venue because, he said, he did not feel safe when Mr Cooling was around as his grievance about him had not been properly dealt with. Ms Webb responded by email on 17 October confirming that the absence meeting could be held in the community centre, which was outside of the main school area, page 269. It is an area that pupils and most staff cannot access, although Mr Cooling can access it. She said that she would meet the claimant at the school gates at 12 PM.

11.56 At the last moment, at 11:06am on 17 October to be precise, the claimant emailed Ms Webb saying that he had just realised that he had an important appointment and could not come to the meeting, page 275. He asked for it to be re-scheduled.

11.57 Ms Webb responded that day, emailing the claimant at 12.43pm to inform him that the meeting would be re-arranged to take place that Thursday (20 October). She also wrote that the claimant's current sick note had run out on 14 October and he would therefore need to provide an updated sick note, page 277. He was reminded that he also needed to provide a sick note for the period 5 September until 15 September as term had re-started on 5 September. She did not, at this point therefore, reiterate her request for a sick note covering the period 23 July – 4 September. Finally, Ms Webb informed the claimant that she was referring him to Occupational Health.

11.58 A formal written invitation to attend the re-arranged sickness absence review meeting on 20 October was not sent to the claimant until 22 October, page 133. The letter was dated 17 October 2022. In this letter it was once again said that if the claimant was too ill to attend the meeting at the Academy then he could consider the following options: meeting in a neutral venue or at his home, attending via telephone conference, providing a written submission or requesting that the meeting takes place in his absence. The letter was sent via Royal Mail and needed to be signed for. By the time the claimant received the letter the date for this meeting had passed, but the meeting had in any event already been rearranged, as we set out below.

11.59 The claimant emailed Ms Webb, on 17 October, at 2.17pm, page 281, in response to her email sent at 12.43pm that day, in which she said the meeting would be re-arranged to 20 October. In this email he stated that he would not be coming near the school or attending any meeting

until after the half term holiday. He said that this was because he was going through "non-disturbance therapy to be able to adjust to the aurora of negativity that arose from the establishment due to the treatment he experienced within the Academy". He wrote that the respondent "may take this as a leave of absence", of which the respondent had been informed via this email, or that the respondent could choose to go ahead and hold the meeting, although the claimant did not consent to this. He stated that he would return to work week commencing 31 October. That afternoon, at 4:53pm, Ms Webb emailed the claimant to say that the informal attendance review meeting would be reorganised for 31 October and that the claimant would be required to attend this meeting so that the respondent could look at support systems to put in place for his return. It was said that if he did not attend this meeting a decision might be made in his absence, page 285.

11.60 We do not, for the avoidance of doubt, find that because Ms Webb did not respond to this apparent request for a leave of absence that it could be inferred that the leave of absence request was granted by Ms Webb, as the claimant asserted. The claimant did not follow the proper process for requesting a leave of absence. The respondent has a specific leave of absence request form which needs to be filled in and submitted and which permits requests for time off work to be made for matters such as a medical appointment, jury service or a funeral, page 327. It is not retrospective and needs to be filled in and granted in advance of the absence requested.

11.61 Ms Webb further wrote in her email of 17 October that in relation to the missing sick notes the claimant would need to provide these as they gave the claimant access to sick pay. She confirmed that the dates for which sick notes were required were 5 September - 15 September and 15 October – 30 October. She did not, at this point therefore, reiterate her request for a sick note covering the period 23 July – 4 September. The claimant was asked to provide these sick notes by 24 October.

11.62 On Monday 31 October at 9:07am the claimant emailed Ms Webb asking for the attendance review meeting, which was due to take place that day, to be rescheduled to 1 November, page 291. The claimant stated that this was due to an emergency appointment which he had that day, 31 October, page 291. Ms Webb responded a couple of hours later confirming that 1 November should be fine for the meeting and asking the claimant to confirm if he would be returning to work the next day, page 293. The claimant responded on 1 November confirming that he would be returning, page 293, and there then followed emails between the claimant and Ms Webb about the timing of the attendance review meeting.

Claimant's second grievance

11.63 In the early hours of 17 October 2022 the claimant had sent a second grievance to the fifth respondent. He did this by email, pages 403 – 404. The claimant addressed his grievance to the respondent's CEO, Mr Nick Hudson as well as Ms Rancins. He wrote that he was raising a new grievance about the conduct and unprofessional behaviour of Mr Cooling. In fact, whilst the claimant described it as a new grievance, it repeated some of what the claimant had complained about in his first grievance. He wrote that Mr Cooling was not worthy of being given the responsibility of keeping the school safe because the claimant, as an adult, did not feel safe with him. He stated that he had lost trust in Mr Cooling when the disciplinary investigation (into the allegations made by the pupils) started and that he felt let down by him prior to the disciplinary process. He wrote that this investigation had concluded on 22 June. He asserted that he had been suspended because he was "not in Mr Cooling's good books" because he had left the Reflection Coordinator role. He wrote that he had needed to ask the investigating officer to restore his work email, because there was relevant evidence on it, and that he did get all the information he needed when the email suspension was lifted. He complained that he had not received the outcome from his first grievance until he was about to return after the summer break and that he could not work in a very hostile environment with Mr Cooling's behaviour.

Attendance review meeting 1 November

11.64 The attendance review meeting took place with the claimant, Ms Webb and Ms Sally Williams from the fifth respondent on 1 November. At the start of the meeting the claimant stated that he did not understand why the informal absence meeting was needed as he was not returning to work until the grievance had been sorted out, page 303. He stated that he wanted to go through the grievance and outcome with Natasha Rancins before a return to work meeting was completed.

11.65 Ms Williams discussed with the claimant the gap in the sick notes that had been provided by him. He responded that he did not believe he needed to hand in a sick note as he was on summer holiday. He said that he had not received the end of suspension letter, which was sent out on 17 June, and that was the reason he did not return on 5 September, it was due to the suspension letter, page 303. He stated that he believed letters were sent out late intentionally, asserting that one of the letters from Ms Webb, dated 17 October, did not get posted and signed for until 22 October, page 303.

11.66 Ms Williams provided the claimant with a copy of the staff absence policy, drawing his attention in particular to section 2.2.2.3 which stated that sick notes needed to cover all periods of absence, including holidays.

The claimant responded that he would have returned to work on 23 July if it had not been a school holiday as he was not sick at that point, page 303. The claimant was asked if he could provide sick notes for the period 23 July - 15 September and he said this was not possible.

11.67 It was pointed out to the claimant that he had not returned to work on the 14 October after his current sicknote had ended and his response was that he wished to have that week as a leave of absence due to undergoing therapy, page 303.

11.68 He stated that he would return to work as soon as the grievance had been dealt with and would like to meet with somebody from the respondent to discuss the outcome as he was not happy with it. He acknowledged that he had been given a right to appeal the grievance outcome. Ms Williams asked the claimant to confirm if he was saying that once he had had a meeting with the respondent to discuss the grievance he would return to work and he confirmed this was the case, page 304.

11.69 Ms Williams told the claimant that if he did not want to return to work he would need to provide sick notes. The claimant's response to this was he was not sick so he did not need to provide any, page 304.

11.70 The fifth respondent passed the claimant's second grievance over to Ormiston Academies Trust Head office as a view was taken that it would be more appropriate for them to handle this, page 305.

Invitation to disciplinary hearing

11.71 On 14 November 2022 Ms Leanne Clarke wrote to the claimant inviting him to attend a disciplinary hearing on 28 November 2022, page 311. She set out in her letter that she was writing with regard to the claimant's continued absence from work, noting that he had not attended work through either sickness or unauthorised absence since 10 June 2022. She set out that the position of the fifth respondent was that the claimant had on several occasions been absent from work without permission or had failed to follow the absence reporting procedures. We pause to note that the dates set out in this letter for the claimant's absences were, in fact, correct. The claimant had gone off sick on 10 June 2022, see paragraph 11.30 above, and had not returned to work. He had only been certificated off sick during this period between 10 June - 22 July, see paragraph 11.30 above, and between 15 September and 13 October, see paragraph 11.49 above. He was considered by the respondent to be on unauthorised absence both during periods when he was off sick but not certificated, and for any periods when he was not off sick but still absent from work, because no other form of leave of absence had been granted. Hence the respondent was correct when it said that he

had not attended work through *either* sickness or unauthorised absence (our emphasis) since 10 June 2022. Where the letter was unclear was that, having referred to the entirety of the period for which the claimant was absent from work, it failed to make clear the specific dates over which the respondent considered the claimant's absence to have been unauthorised, namely; 23 July – 14 September, and 15 October to date.

11.72 Ms Clarke set out that the claimant was currently still absent without permission and that this, and his failure to follow reporting procedures, would be referred to the Governors to consider his continued employment. It was explained to the claimant that this could result in his dismissal. The claimant was informed that he had a right to be represented by either a trade union representative or a work colleague and that if he was to be represented the name of his representative should be sent to the respondent at least three working days before the hearing. The claimant did not provide the respondent with any representative details.

Disciplinary hearing

11.73 The disciplinary hearing took place on 28 November 2022, pages 405 - 411. The meeting was chaired by Ms Hayley Guest from the respondent. There were two other panel members, Ms Rebecca Fisher and Ms Natalie Preece. Mr Mike Blower and Ms Webb both attended the meeting, as did the claimant. The claimant initially stated that he had a representative who would join the meeting via telephone. It was pointed out to him that he had not provided the respondent with details of the name of his representative, as he had been asked to do. There was further discussion about this during which the claimant said his representative wanted to remain anonymous. The claimant also suggested that the representative was a legal representative and he was told he did not have a right to legal representation.

11.74 To the extent that there had been any lack of clarity caused by the invitation letter having mentioned the entirety of the period for which the claimant had been absent from work (including those dates for which he had been certificated off sick), the respondent provided some clarification in relation to this at the start of the hearing. It was explained to the claimant that it was the respondent's position that the claimant had been absent and failing to follow procedures since 23 July, page 406. The claimant stated that he wanted to make the respondent aware that he had been going through therapy because the head of the school had bullied him, sexually harassed him and verbally harassed him, page 406. He stated that he had not communicated with the school because the head of school had lied and it was a disgrace what he had gone through, page 407. He said that he wanted Ms Clarke to be a witness at the hearing but

it was pointed out to the claimant that he had not raised this before and it was said that he should have let the respondent know three working days before the meeting if he wished to call anyone as a witness. It was said that this has been explained in the disciplinary hearing invitation letter, although that was not, in fact, accurate.

11.75 There was discussion around the fact that on 17 October the claimant had, in his view, requested a leave of absence retrospectively for the period 14 - 21 September, on the basis that he was undergoing therapy during this period. It was explained that in an emergency the respondent only requires 24 hours notice of leave of absence requests but that normally a minimum of seven days notice is required. The claimant stated that there was a reason why he had not been attending work. He said that he was going through depression and trauma due to the bullying, page 409. He was asked whether this had stopped him following the attendance policy and his response to this was that his (work) email had been blocked and he was using his private email to communicate with the school. He was asked how that related to attendance and not following the absence policy and the claimant's response was that he was going through a lot of trauma and was going to a therapist and could not attend the school and see "that man", page 410.

11.76 It was pointed out that because a sick note had not been submitted for the summer holidays the claimant had been paid full pay not sick pay over the summer and the claimant was then asked why he did not produce any certificate for the period between 1 and 14 September. He was asked what had stopped him notifying the school of his absence. The claimant responded that he was communicating with the school and there was going to be a leave of absence and his well-being was important, page 410.

11.77 The claimant was given an opportunity to sum up his position. He stated that he knew there was a policy in place and "the reason is that when I remember what had happened to me there then followed trauma", page 411. He stated that he tried to bring himself to the school to get it sorted but "that man" (a reference to Mr Cooling) "is an abuser". The claimant stated he could not bring himself to be there (i.e. at the school).

11.78 The claimant was informed that the respondent would write to him with its decision within five working days.

11.79 Around this time the respondent introduced a new HR system to cover matters such as payslips, management of holiday and sickness absence. Whilst this new system had not gone live for sickness absence management at this point, it was possible for people to log onto the system and record a sickness absence. After the disciplinary hearing the

claimant logged onto the system to report sickness absence between 29 November 2022 (the day after the disciplinary hearing) and 3 December 2022, which he recorded was due to bullying, verbal abuse and sexual harassment from Mr Cooling as well as the "nature of the panel", page 152. He also reported sickness absence between 5 December and 10 December, page 149, which he recorded was "due to stress from abuse from Mr Cooling". Additionally, he made a request for holiday on the system to cover the period 29 November - 16 December, which he said was due to bullying, sexual harassment and verbal abuse from Mr Cooling, page 155. The respondent did not grant this holiday leave request. The claimant did not submit any sick certificates for this period, he simply entered these absences on the system. To the extent that he was sick, therefore, his absence remained unauthorised.

Dismissal

11.80 On 9 December 2022 Ms Guest wrote to the claimant with the fifth respondent's decision, which was that he was dismissed with effect from 12 December 2022, pages 179 – 183. In this letter it was set out that it had been concluded that the claimant had been on unauthorised absence from 23 July (not 10 June) to 14 September 2022 and 14 October to present, page 181. What was meant by 14 October to present was the period 14 October up until the date of the disciplinary hearing on 28 November. Ms Guest set out in the letter the basis on which the panel had reached it conclusions and also set out why it had been concluded that the conduct warranted summary dismissal. The claimant was informed of his right to appeal.

The panel's conclusions

11.81 In relation to the claimant's assertion that he had assumed that he remained suspended up until the start of the autumn term, the panel rejected this as an explanation for absence because the claimant had said during the disciplinary hearing that once his sick note ended on 22 July he had planned to return to work. From this, the panel inferred, the claimant did know that his suspension had been lifted.

11.82 The panel concluded that for the period 23 July - 14 September the claimant was, more likely than not, off sick, given that he had produced sick notes for the dates either side of this period. The panel concluded that the absence for this period (which covered the school holidays and the first 9 days of the autumn term) was unauthorised because the claimant had failed to produce sick notes, as he was required to do under the respondent's absence procedure, to cover him for this period. For the period from 14 October 2022 onwards, when the claimant's second sick note had expired, the panel concluded that the claimant was likely well

enough to attend work, as the claimant himself had said he was not sick. As he had not received any form of authorisation to be absent from work (be it holiday or leave of absence etc) for this period his non-attendance at work was likewise, the panel concluded, unauthorised for this period. As to the claimant's suggestion that he had applied for a leave of absence for at least part of this period, the panel concluded it was inappropriate to use leave of absence requests to try and account for absence that had already happened. Leave of absence requests, the panel concluded, were for up-and-coming appointments, they could not be used to cover absences retrospectively.

11.83 On the basis that it was not disputed that the claimant had not provided sick notes, as he would be required to do if had he been off sick, it was also concluded that the claimant had failed to follow the absence reporting procedure.

11.84 In concluding that this conduct warranted summary dismissal the panel noted that the claimant had said he felt depressed and was working through trauma but considered that this was outweighed by the length of the unauthorised absence. The respondent concluded this had occurred over a very sustained period of time and that this demonstrated a gross disregard for the respondent's policies and procedures, and for the needs of the school. There were, in the panel's view, repeated failures on the part of the claimant despite him being given numerous opportunities to either produce sick notes or return to work.

Linda

11.85 Linda (we do not know her surname) was a colleague of the claimant's, who, we understand was a lunchtime supervisor. In October 2022 she informed the fifth respondent that she would be retiring (on age grounds) at the end of December 2022. She then broke her leg and was not at work in December 2022. She was covered by a sick note for the entirety of this period. She retired as planned.

The Appeal

11.86 The claimant appealed by way of email dated 12 December 2022. The claimant wrote that the grounds for dismissal were not substantial. He wrote that Mrs Guest, the chair of the panel, was not impartial and showed a lack of professionalism. He wrote that he had submitted a sick note for the period up until 23 July and had tried to resume work in September and that he was not aware that he had to submit sick notes during holidays. In relation to failing to follow reporting procedures for his absence he wrote that he had found out that there was a new system of absence reporting and that he had used this system to report his absence. He also wrote that

he had constantly and systematically been bullied, abused and sexually harassed by Mr Cooling, who he described as a sexual predator.

11.87 On 4 January 2023 the respondent wrote to the claimant inviting him to attend an appeal hearing to take place on 20 January 2023, pages 184 - 185. The claimant was informed that the hearing would be a full re-hearing and he would therefore be required to present his case in full and call any witnesses he intended to rely upon. He was informed of his right to be accompanied. This letter was not delivered by post it was delivered by one of the fifth respondent's two bus drivers. This was a decision of Ms Webb and Mr Cooling, taken in conjunction with the Senior Leadership team, and this decision was made in order to ensure that the respondent could be certain the claimant received this letter, given his history of asserting that letters sent by post had not been received. We do not find that the bus driver was a relative of one of the pupils who had complained about the claimant; we prefer the evidence of Ms Webb and Mr Cooling in relation to this issue.

11.88 Prior to the appeal hearing, we know not when, the claimant sent a further letter to the respondent concerning his appeal, pages 355 – 357. In this letter he requested the attendance of Mr Cooling, Mr Nick Hudson and Mrs Melanie Wheeler as witnesses at the hearing. He also went through the respondent's attendance policy in detail. He complained, for example, that the respondent had not followed its long-term sickness process and complained that he had not had a formal stage 1 attendance review meeting, but had instead gone straight into a disciplinary process. That, in fact, confused two different process; the attendance process and the disciplinary process.

11.89 He described Mr Cooling as an abuser, a bully and a sexual harasser, page 356 and he complained that Mr Cooling had blocked him when he had applied for an examiner position at Thomas Telford school, page 356. He stated that he had applied for a leave of absence on 17 October and that Ms Webb had responded "thank you for letting us know", which he asserted signified her approval for the leave of absence. In fact, she had not responded in this way, see paragraphs 11.59 and 11.60 above. He stated that his absence during 23 July to 14 September was part of his contractual holidays and should not be counted as absence, page 357. He stated that he had reported his absence through the new electronic channel and had provided documentation to this effect, page 357. This reference to documentation was not, for the avoidance of doubt, sick notes. What the claimant produced was screen shots which showed him reporting his absence on the new (not live) HR system for the period after the disciplinary hearing.

11.90 The appeal hearing took place on 20 January, pages 186 – 187. The appeal panel comprised Alan Rogers, Julie Grice and Amy Taylor. Mr Rogers was the chair of the panel. The claimant once again indicated that he had a representative, who was a solicitor, who was on the telephone. The respondent responded that phones were not allowed because no recording devices were allowed in the meeting. The claimant asserted this was a bullying tactic, he told Mr Rogers that he could not tell him (the claimant) what to do and pointed out that Mr Rogers had not removed his smartwatch, page 186. Mr Rogers removed his smartwatch. Mr Rogers asked if the meeting could now continue. The claimant stated that he was refusing as the respondent would not allow him to have a representative, page 186.

11.91 The respondent was concerned that the claimant was trying to record the meeting and there were further discussions about this. Eventually the meeting got under way and Mr Rogers informed the claimant that the proceedings were confidential and should not be discussed. The claimant responded that he could not be given a gagging order, page 187. Discussion about this continued, with Mr Rogers struggling on occasion to make himself heard, leading to the claimant being told that Mr Rogers needed to be allowed to speak otherwise the respondent would close the meeting. The claimant's response to this was that he did not care if the respondent closed the meeting, a bully who had worked at the school had harassed him since 2010, page 187. The meeting was brought to an end.

11.92 A letter was subsequently sent by the respondent to the claimant, pages 352-353, in which the claimant was offered a further appeal hearing to take place on 8 February 2023. It was explained that the meeting would be subject to the following conditions; that only a work colleague or trade union representative was an acceptable companion, that all parties would have their mobile phones switched off and that the parties agreed to maintain confidentiality in relation to the process. This letter was once again sent to the claimant via one of the fifth respondent's bus drivers.

11.93 The claimant did not attend this meeting. He did not provide any explanation for his non-attendance.

11.94 On 14 February 2023 the respondent wrote to the claimant with the outcome of his appeal, which was that it was rejected, pages 188 – 190.

## The Law

12 Section 13 of the Equality Act 2010 states that:

(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.

13 Section 23(1) provides that on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

14 The burden of proof is set out in section 136 which states:
(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.

15 It is now well established that the term "because of" in the Equality Act has the same meaning as that given to the words "on the ground of" under the legacy legislation; see for example **Onu v Akwiwu [2014] ICR 571**. Accordingly, we directed ourselves in accordance with the legacy case law as follows. When dealing with claims of direct discrimination the crucial question that has to be determined in every case is the reason why the claimant was treated as he was, Lord Nicholls **Nagarajan v London Regional Transport [1999] ICR 877**. As Lord Nicholls stated in the case of **Nagarajan**;

"Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances. The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination under section 1(1)(a), as distinct from indirect discrimination under section 1(1)(b), the reason why the alleged discriminator acted on racial grounds is irrelevant."

16 So far as the burden of proof is concerned, the proper approach has been addressed by the Court of Appeal in **Igen Ltd v Wong [2005 IRLR 258**, **Madarassy v Nomura International plc [2007] ICR 867** and **Laing v Manchester City Council [2006] IRLR 748**. The Supreme Court in **Royal Mail Group v Efobi [2021] EWCA Civ 18** confirmed that the law remains as set out in these cases despite changes to the wording of the burden of proof provisions in

the Equality Act. In summary, as per **Igen**, the burden is on the claimant to establish facts from which a tribunal could conclude on the balance of probabilities, and absent any explanation, that the alleged discrimination had occurred. At that stage the employer's explanation for the treatment - the subjective reasons which caused the employer to act as he did - must be left out of the account. It was also explained in **Madarassy** that the facts from which discrimination could be inferred can come from any evidence before the tribunal, including evidence from the respondent.

17 Whilst something else is needed to reverse the burden "not very much" needs to be added to a difference in status and a difference in treatment in order for the burden to be on the respondent to prove a non discriminatory explanation, paragraph 56 **Veolia Environmental Services UK v Gumbs UKEAT/0487/12** and **Deman v The Commission for Equality & Human Rights [2010] EWCA Civ 1279**, paragraph 19.

18 Although a two stage approach is envisaged by section 136 it is not obligatory. In some cases it may be more appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatever in the adverse treatment, the case fails. It was explained in **Amnesty International v Ahmed [2009] ICR 1450** that where explicit findings as to the reason for the claimant's treatment can be made this renders the elaborations of the "**Barton/Igen** guidelines" otiose. "There would be fewer appeals to this tribunal in discrimination cases if more tribunals took this straightforward course and only resorted to the provisions of s54A (or its cognates) where they felt unable to make positive findings on the evidence without its assistance." This approach was expressly endorsed by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37**. That said, the EAT in **Field v Steve Pye & Co Ltd and ors [2022] IRLR 948** cautioned against an automatic application of this approach. The EAT highlighted the earlier guidance in **Hewage**, that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination.

19 At the second stage, the respondent is required to prove that they did not contravene the provision concerned if the complaint is not to be upheld. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever because of, in this case, race. That requires the tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that (in this case) race was not a reason for the treatment in question. Since the facts necessary to prove an explanation would usually be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof, **Igen**. If the respondent fails to establish that the tribunal must find that there is discrimination.

20 In the case of **Chief Constable of the West Yorkshire Police v Khan [2001] UKHL 48** Lord Hoffman explained that being subjected to a detriment (or being treated in one of the other ways mentioned in section 4(2) of the RRA as it was then) is an element of the statutory cause of action additional to being treated "less favourably", which forms part of the definition of discrimination. A person may be treated less favourably and yet suffer no detriment. There is moreover no contravention of section 39(2)(d) of the EQA unless both elements of discrimination, less favourable treatment on grounds of a protected characteristic *and* detriment are present, **Cordant Security Ltd v Singh & Anor [2015] UKEAT/0144/15**. Detriment should however be given a wide meaning and Lord Hoffman adopted the definition used in **Ministry of Defence v Jeremiah [1979] IRLR 436**; " a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment", see also Lord Hope's formulation at paragraph 35 of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.** There is conflicting EAT authority as to whether this formulation entails a wholly objective test, see on the one hand **Kaul v Ministry of Justice and Ors 2023 EAT 41** and on the other **Warburton v Chief Constable of Northamptonshire Police EA-2020-000376.** We prefer the approach set out in **Kaul**, that it is a wholly objective test, given that the test is formulated by reference to the reasonable worker. The use of the words "would or might" go only to the threshold that must be passed.

Harassment

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

26(2) A also harasses B if –
(a) A engages in unwanted conduct of a sexual nature…….
(b) the conduct has the purpose or effect referred to in subsection 1(b) above.

(4) In deciding whether the 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."

Section 40 prohibits harassment in the workplace and states:

"An employer (A) must not, in relation to employment by A, harass a person (B)… who is an employee of A's."

22 Accordingly, there are three different elements to the statutory test to be considered. In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, a case bought under the RRA, it was explained that it is a healthy discipline for a tribunal specifically to address each of the three elements and to ensure that clear factual findings are made on each in relation to which an issue arises.

(1) *The unwanted conduct*. Did the respondent engage in unwanted conduct, (or unwanted conduct of a sexual nature for subsection 26(2))?

(2) *The purpose or effect of that conduct*. Did the conduct in question either:
(a) have the *purpose* or
(b) have the *effect*
of either (i) violating the claimant's dignity or (ii) creating an adverse environment for him (We will refer to (i) and (ii) as "the proscribed effect".)

(3) *The relationship of the conduct to the protected characteristic.* Was that conduct related to the claimant's protected characteristic (for claims under section 26(1)).

23 So far as effect cases are concerned, in the case of **The Reverend Canon Pemberton v The Right Reverend Inwood [2018] EWCA Civ** 564 Lord Justice Underhill reformulated the guidance that he had given, whilst sitting in the EAT, some years previously in **Dhaliwal**, as to the approach to be taken by Tribunals to harassment claims. It is now as follows, paragraph 88;

In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then (even if the claimant did feel that his dignity was violated or an adverse environment created) it should not be found to have done so.

24 Although Underhill LJ's observations in **Pemberton** were strictly obiter they have been followed and applied by the EAT in **Ahmed v The Cardinal Hume Academies UKEAT/0196/18** in which it was confirmed that the question

whether it is reasonable for the impugned conduct to have the proscribed effect is effectively determinative. See also paragraph 102 **Seyi Oomba v Global Artists and anor 2024 EAT 30**. Accordingly, in judging whether conduct had the proscribed effect three matters fall to be considered, although they will overlap;

(i) Did the claimant perceive the conduct as violating his dignity or having the proscribed effect (a subjective question),
(ii) the other circumstances of the case, and
(iii) whether it was reasonable for the conduct to have that effect (an objective question).

25 The conduct must be "related to" the relevant protected characteristic. This stands in stark contrast to the use of "because of" elsewhere in the Act. There is no requirement for a causative link. It is enough if there is a connection or association with the prohibited ground. Often with harassment complaints the nature of the conduct complained of consists, for example, of overtly racial abuse. If such conduct is proved on the facts then it follows that the conduct will be related to the protected characteristic. Sometimes it will not be obvious from the face of the comment or conduct that it is related to a protected characteristic. Then the focus is on the alleged perpetrator's conduct and whether that conduct, objectively, is related to the protected characteristic, **Unite the Union v Nailard [2016] IRLR 906.** Whilst the mental processes of the alleged harasser will be relevant to the question of whether the conduct complained of was related to the protected characteristic (see for example **Bakkali v Greater Manchester Buses (South) Ltd UKEAT/0176/17**) it is not determinative, the question is a broader one than that. It is a question of fact as to whether conduct is related to a protected characteristic, **Warby v Wunda Group Plc [2012] EqLR 536**.

26 The burden of proof applies to harassment claims in relation to whether the conduct in question is related to the relevant protected characteristic.

**Submissions**

27 Both parties provided oral submissions only. We summarise the main points here. Mr Blitz, for the respondents, submitted that there were three overarching themes to his submissions; the circumstances in which the claimant's allegations came about, the credibility/reliability of the evidence and what he termed the building blocks (by which he meant the essential legal elements) of each claim. In relation to how the allegations came about, he submitted that there had been a positive relationship between the claimant and Mr Cooling right up until May 2022. An example of this, he submitted, was the claimant taking on additional responsibilities at Mr Cooling's suggestion. Things only changed, he submitted, when the pupils made their allegations against the claimant. These were serious allegations and so the respondent (Mr Cooling) had to suspend the claimant whilst they were investigated. The claimant, it was submitted, was very upset by these allegations and very upset about being suspended. This, Mr Blitz submitted, was the flashpoint. The very next day the claimant submitted his grievance against Mr Cooling. It was only then, Mr Blitz

submitted, that the claimant started to review and analyse past events and look at them through a different lens.

28 In relation to the quality of the evidence, Mr Blitz submitted that the respondent's witnesses were generally more reliable than the claimant. He submitted, more specifically, that there were certain aspects of the claimant's case that lacked credibility because they relied on an unusual interpretation of the facts, as the claimant understood them to be. For example, Mr Blitz submitted, the claimant had asserted that Mr Cooling should not have suspended him because he should, in some way, have known that the allegations made against him by the pupils were false. He also submitted that some of the claimant's evidence demonstrated an extreme reaction to events, such as the claimant's repeated assertions that Mr Cooling was unsuitable to work with children.

29 In relation to the decision to dismiss the claimant he reminded us that this was a discrimination complaint not a complaint of unfair dismissal. As to that, the reason for dismissal was clear, he submitted. The respondent had, moreover, given the claimant plenty of opportunity to produce sick notes. The claimant had given various explanations, some contradictory, for failing to attend work and the respondent in these circumstances had concluded perfectly reasonably that none of the explanations were satisfactory and that the claimant should be dismissed for his unauthorised absence.

30 As to the building blocks for the various claims, Mr Blitz submitted that some of the claimant's direct race discrimination complaints could not, in law, amount to less favourable treatment. In relation to both the direct discrimination and harassment claims Mr Blitz submitted that there was simply nothing to link the conduct complained about to race. The claimant himself, he submitted, had been inconsistent as to the reason why some of the acts about which he had complained had occurred. For example, the claimant had said that he was locked out of his emails in order that Mr Cooling could hide evidence. Even if the tribunal was satisfied that acts of less favourable treatment/unwanted conduct had occurred it was his submission that the claimant had not moved the burden of proof across to the respondent. Even if the burden did move, Mr Blitz submitted, there was a non discriminatory explanation for all of the conduct about which complaint was made.

31 As to the complaint of sexual harassment Mr Blitz submitted there was no basis on which the tribunal could conclude that the conduct of Mr Cooling was sexual. Mr Blitz submitted that the claimant had attempted to draw a link to sexual conduct via the use of the word "sunshine", which the claimant had asserted was a means of referring to his buttocks, in a broader context of the claimant having questioned Mr Cooling's motivations towards him. That link, Mr Blitz submitted, was very tenuous. He pointed out that it is possible to think of a number of idioms involving the use of the word "sunshine" that do not have the

connotation suggested by the claimant. “You are a ray of sunshine” was an example provided by Mr Blitz.

32 Mr Blitz also submitted, that many of the claims that pre-dated dismissal were out of time. As to the correct parties for the claims, Mr Blitz reminded us that the first respondent is not a legal entity, it is the name of the school. The fifth respondent, he submitted, is the correct legal entity for the claims. Moreover, whilst Mr Nick Hudson had been named as a respondent, it was not clear that there was any claim made against him. To the extent that there was a suggestion that Mr Hudson had initiated the disciplinary process, it was clear on the evidence that this was not a decision of Mr Hudson’s and, in any event, this was not a claim of discrimination/harassment on the list of issues.

33 The claimant reminded us that he was pursuing claims of harassment and race discrimination. He stated that he believed he had presented substantial evidence of this and the court should find in his favour. He reminded us that he was pursuing a claim of harassment under section 26 (1) of the Equality Act and a claim of direct race discrimination under section 13 of that Act. He submitted that the case of **Richmond Pharmacology v Dhaliwal** is authority for the proposition that whether something is harassment is to be judged from the perspective of the claimant. He submitted that **Jones v Tower Boot** is authority for the proposition that an employer is liable for acts of discrimination committed by its employees in the course of their employment.

34 He reminded us that he identifies as a black person and that it was his case he was subjected to racial harassment and discrimination. Mr Preston, who is a white male, was given a reference but not just this Mr Cooling also helped him find another job. That was differential treatment. Ms Lisa (a reference to Ms Elwell) was allowed to stay in the exam hall when he was not. He asserted that was confirmed by the respondent in cross examination. That was also differential treatment.

35 It was harassment, the claimant submitted, to send the bus driver to his house and the respondent did this twice, which he believed was intentional. He submitted that this was criminal behaviour. He had been subject to false allegations and not given any support. He had, moreover, reported students behaviour and no action had been taken.

36 He reminded us that under the Employment Rights Act there are five fair reasons for dismissal and he went through each in turn. He stated that the respondent had failed to follow a proper procedure when it dismissed him. He queried why Mr Cooling had not been suspended when he (the claimant) had made serious allegations against him. He stated that dismissal was outside the range of reasonable responses. He submitted that the decision to dismiss him had been pre-judged. He submitted that witnesses had committed perjury.

37 He submitted that Mr Roger had refused to allow him a solicitor in his appeal hearing and this was against section 10 of the Employment Rights Act 1999. He submitted that section 44 of the Employment Rights Act 1996 entitled him to remain off work if, in his belief, there was serious and imminent danger. Yet this was not taken into consideration despite him having told the respondent about the danger (presented by Mr Cooling) many times.

38 He told us that he was going to therapy to help him get back his confidence due to the trauma he had suffered as a result of the harassment and bullying and he drew a comparison with the recent atrocity in Southport where three children had sadly lost their lives. He submitted that in his case the respondent had been prepared to compromise safeguarding. Ms Guest and Mr Roger, he submitted, should not be allowed anywhere near children.

39 He queried why Ms Lisa had not been asked to leave the exam hall and complained that Mr Westerman, during his grievance investigation, had not interviewed Ms Lisa which, he said, was not just an error but showed that Mr Westerman's conclusions were not correct. In relation to being locked out of his email he reminded us that both Ms Webb and Mr Cooling had denied this but, he submitted, the documentation was clear.

40 He submitted that Mr Cooling did not deal appropriately with the false allegations that were made against him and even now he had showed no remorse. The buck, the claimant submitted, stopped with Mr Cooling. He stated that he was now working with an agency on a zero hours contract and the court should award him a substantial amount not just in relation to loss of earnings but also injury to feelings which could not be quantified. He had been impacted for life, he told us.

## **Conclusions**

41 For the purposes of our conclusions we have identified each claim using the numbering as set out in the list of issues contained in Judge Smith's case management order.

42 The first respondent, Ormiston New Academy, is the name of the school, and the claimant's place of work, paragraph 11.1. His employer (R5) was Ormiston Academies Trust, paragraph 11.1. It follows from this that the correct respondent for any successful claims bought against the employer would be R5.

Direct race discrimination

Claim 2.1.1; not being issued with a contract for the Reflection Coordinator/Exam officer role

43 There are two parts to this claim; a complaint that the claimant was not given a contract of employment for the role of Examination Officer/Invigilator and a complaint that he was not given a contract of employment for the role of Reflection Coordinator. These complaints are factually accurate, on our findings the claimant was not given a contract of employment in relation to either role, paragraphs 11.9 and 11.14. The relevant decision maker was Mr Cooling.

44 We considered the part of the complaint relating to the Exam Officer/Invigilator role first of all. For the purposes of this complaint the comparator would be someone who was not black African who was already working part time at the school in another role and who took on exam invigilator duties as additional hours on top of their contracted hours. There were no facts from which we could conclude that the claimant was treated less favourably than this comparator because of race but even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved that the reason why the claimant was not issued with a contract in respect of this role was because a practice had developed of not issuing contracts for this work because the hours were viewed as additional responsibilities to existing duties on a casual as and when required basis, for which no change in written contractual terms was necessary, paragraph 11.14 above.

45 One can readily see how this practice developed in relation to full time staff, who were, effectively, simply being deployed on exam invigilation duties as part of their existing role without any change in contractual terms. The situation was, of course, somewhat different in relation to part time staff, such as the claimant, who took on the exam invigilation role as a new and additional role, working additional hours to those for which he was contracted. In contrast to full time staff, this did, therefore, amount to a change in the claimant's contractual terms and clearly it would have been best practice to provide a written record of those new terms. Indeed, the Employment Rights Act 1996 requires that workers are given a written statement of changes in terms.

46 But this is a discrimination claim, it is not a claim brought under section 11 of the ERA. The question for us is the reason why the claimant was not given amended terms of employment/a contract in relation to this role. Was it because of race, as the claimant suggested? We had little difficulty in concluding on the evidence before us, as we have set out above, that the respondent had proved it was not because of race but was because the respondent had a practice of not issuing contracts for this type of work. We reached this conclusion principally because, on our findings of fact, *no one* was issued with contractual terms in relation to the exam invigilation role. That included, for example, Ms Elwell. Significantly, she was in similar circumstances to the claimant. She was a part time lunchtime supervisor who took on extra duties working as an exam invigilator, paragraph 11.13. She is white British. This was strong evidence, in our view, that the reason why the claimant was not issued with a contract was because the respondent had a practice of not issuing contracts for this type of

work, which is a complete explanation that is in no sense whatsoever because of race.

47 The comparator for the part of the complaint concerning the Reflection Coordinator role would be someone who was not black African who was already working part time at the school in another role and who took on Reflection Coordinator duties as additional hours/duties on top of their contracted hours. There were no facts from which we could conclude that the claimant was treated less favourably than this comparator because of race.

48 It appeared to be the claimant's case that an inference of discrimination could be drawn from Mr Cooling's conduct in allegedly requiring BAME (terminology used by the claimant) members of staff to work for less money with more responsibility. The claimant asserted that is why he was not given a contract, so that the Reflection job could be "turned into overtime so he would get less money".

49 But there was no evidence before us that BAME members of staff were paid less than others of a different race whilst having more responsibility. Indeed, in respect of the role in Reflection the person who came in and, effectively, took over from the claimant, Ms Rollason (white British), was paid *less than* the claimant, paragraph 11.12 above. Moreover, the claimant was paid *more than* the usual, casual rate for this role, on our findings, paragraph 11.10 and Mr Cooling overruled his Finance Director in this regard. It is true that Ms Clarke, Ms McCrystal, Ms Wilkes and Ms Everest-Smith were all paid at a higher rate than the claimant when carrying out these duties, paragraph 11.10. However, these were all senior members of staff, who were carrying out Reflection Coordinator duties as part of their existing role (in contrast to the claimant) and who were therefore paid at their normal rate of pay, paragraph 11.7, which was higher than the claimant because of their much more senior grade. Indeed, in such circumstances it is wholly unsurprising that they were paid more; to reduce their rate of pay to bring it down to what the claimant was being paid (unilaterally at least) would have been a breach of their contracts. We do not infer or find, therefore, that BAME members of staff were paid less than others of a different race whilst having more responsibility.

50 We concluded that there were no facts from which we could conclude that the claimant was treated less favourably than this comparator because of race, and accordingly this claim fails on that basis. However, for the avoidance of doubt, even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved that the reason why the claimant was not issued with a contract in respect of this role was because a practice had developed of not issuing contracts of this work because the hours were viewed as additional hours to existing duties for which no change in written contractual terms was necessary, paragraph 11.7 above. Once again, of course, this is not best practice; whilst it may not have been a contractual change for full time

members of staff to pick up these duties, it clearly was a change in contractual terms for the claimant and written confirmation of this should have been provided. But in relation to the reason why this had happened we were entirely satisfied that the respondent had proved a complete, non-discriminatory explanation.

Claim 2.1.2: not being allowed to stay in the exam hall in mid 2022

51 On our findings this complaint is factually accurate. The claimant was sent out of the exam hall to carry out his lunchtime supervisor duties, paragraph 11.16. This was, in fact, pursued by the claimant as a complaint against Mr Cooling: the claimant specifically asserted that it was Mr Cooling who had sent him out of the exam hall. To the extent that this was the complaint, it fails on the facts, the decision maker on our findings was Ms Dunnett, paragraph 11.12. The claimant relied upon an actual comparator for the purposes of this complaint, Ms Elwell. Ms Elwell, who is white British, was certainly in broadly similar circumstances to the claimant, in that she was also a part time lunchtime supervisor carrying out additional duties as an exam invigilator, paragraph 11.13. She was clearly, therefore, of evidential significance to this claim. Whether she was actually a statutory comparator (in the same material circumstances as the claimant) was hard for us to determine on the evidence that was put before us, which was somewhat lacking in detail. We know that Ms Elwell was viewed as an informal deputy of Ms Dunnett, paragraph 11.13, but we know very little about what this actually meant in practice and Mr Cooling was unable to assist with this in any real detail. Therefore, we cannot reach a conclusion on whether this was a material difference or not.

52 For the purposes of this analysis we were prepared to assume that Ms Elwell was a statutory comparator and as, on our findings at least, Ms Elwell stayed in the exam hall when the claimant did not the claimant had proved a difference in treatment and a difference in race (Ms Elwell was white British, as we have set out above). But it is well established that “something more” is required to move the burden of proof across to the respondent. We concluded that there were no facts from which we could conclude that the claimant was treated less favourably than this comparator because of race. Aside from asserting a belief that this treatment was because of race the only other matter which the claimant appeared to rely on in relation to this claim was a further example of what he asserted to be more favourable treatment of Ms Elwell; namely he asserted that she was paid for both her lunchtime supervisor role and the exam officer role when working as an invigilator. As we have set out at paragraph 11.13 above, however, we have rejected this evidence and not found as a fact that this happened.

53 In any event, even had the burden of proof moved across to the respondent we would have concluded that that the respondent had proved that the reason why the claimant was sent to carry out his lunchtime supervisor duties

rather than remain in the exam hall was because the number of exam invigilators that are needed at any one time varies, and decisions are taken throughout the day as to how many people are needed to invigilate, paragraph 11.12 above. It is a dynamic situation, and it stands to reason that the respondent would not retain more people than are needed in the exam hall at any one time. It can be inferred from this that the claimant was released, most likely, because he was not needed, which is a complete explanation that is not because of race.

Claim 2.1.3: the claimant was underpaid whilst carrying out the Reflection Coordinator role

54 The claimant identified actual comparators for the purposes of this claim, namely, Ms Clarke, Ms Wilkes, Ms McCrystal and Ms Everest-Smith. The respondent did not dispute that these individuals were more highly paid than the claimant. The relevant decision maker in relation to pay was Mr Cooling, paragraph 11.10.

55 Ms Clarke, Ms Wilkes, Ms McCrystal and Ms Everest-Smith, we concluded, were not statutory comparators; they were not in the same material circumstances as the claimant. Their circumstances were, in fact, completely different to those of the claimant, as we have already set out in paragraph 49 above. They were carrying out Reflection duties under a completely different set of arrangements to the claimant and at a different period in time. They were covering Reflection, on rotation with others, for a couple of hours each week as part of their existing role; the Reflection duties did not comprise additional hours of work from them, as they did with the claimant. As it was part of their existing role/normal hours of work they were paid their normal salary whilst carrying out those duties. All four of these individuals were senior members of staff; three Vice Principals and one Senior Leader. Obviously, therefore, their normal rate of pay was considerably higher than the claimant's; a very junior member of staff.

56 The hypothetical comparator would be someone who was not black African who was already working part time at the school in another role earning £13.69 an hour, and who took on Reflection Coordinator duties as additional hours of work on top of their contracted hours. We concluded there were no facts from which we could conclude that the claimant was treated less favourably than this comparator because of race, or put another way that there were no facts from which we could conclude that this comparator would have received a higher rate of pay than the claimant. To the contrary, the evidence pointed entirely the other way in that the claimant's effective successor, Ms Rollason (white British) was paid less than the claimant despite, nominally at least, being in a more senior role (she was described as the Reflection Manager whereas the claimant was the Reflection Coordinator), paragraph 11.12 above.

57 In any event, even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved that the

reason why the claimant was paid £13.69 an hour for his Reflection Coordinator duties was because this was the rate of pay that he was already earning for his lunchtime supervisor duties and Mr Cooling though it appropriate to pay the claimant at the same rate for the two roles, paragraph 11.10. That is a complete explanation that is in no sense whatsoever because of race. It was also a significant factor, in our view, that on our findings of fact Mr Cooling overruled his Finance Director, who had suggested that the claimant should be paid at the (much lower) usual rate of pay for a casual role of £9.69 an hour, paragraph 11.10. Had race been a factor in Mr Cooling's decision making process that surely would not have happened.

Claim 2.1.4: changing the date of the absence review meeting in October 2022

58 The October absence review meeting was first fixed to take place on 17 October 2022, paragraph 11.53. Shortly before the meeting was due to start the claimant emailed to say that he had just realised he had an important appointment and could not come to the meeting, and he asked for it to be rescheduled, paragraph 11.56. Ms Webb initially rescheduled the meeting to 20 October, paragraph 11.57, but the claimant immediately responded saying that he would not be attending any meeting until after the half term holiday and would return to work week commencing 31 October, paragraph 11.59. Consequently, Ms Webb reorganised the meeting to take place on 31 October, paragraph 11.59. The claimant again asked for this meeting to be rescheduled stating that he had an emergency appointment, paragraph 11.62, and it was then rescheduled to 1 November.

59 It is factually correct, therefore, that the date of the absence review meeting was changed three times in October 2022. Pausing there, we considered and concluded that the claimant's pursuit of this complaint as a claim of race discrimination significantly undermined his credibility. This complaint, was, with all due respect to the claimant, hopeless. That is because it was evident from the contemporaneous paperwork that all of the delay that took place in the meetings during this month was *at the claimant's request and/or as a result of the claimant saying he could not attend on the date chosen*. After some prevarication, and having been taken to some of the relevant documents, the claimant accepted in evidence that he had requested the meetings to be rearranged. It is very difficult to see how the claimant could possibly believe that having a meeting rescheduled twice at his own request and once because he said he could not attend until a later date could be less favourable treatment of him which was to his detriment and because of his race.

60 Whilst changing dates of meetings of this nature may often be less favourable and detrimental treatment (because of unwanted delay), it is for the claimant to prove that the treatment complained of was to his detriment. As set out above, a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. In circumstances

where all the changes to the dates of the meetings were caused by the claimant's own requests for date changes/refusal to attend until a later date, we concluded that the claimant had not proved that a reasonable worker would take the view that this was detrimental treatment. To the contrary, a reasonable worker would conclude that this was treatment that was to his advantage. The fifth respondent, in making these changes, was agreeing to what the claimant had requested.

61 In any event, on the assumption, contrary to our primary conclusion, that the claimant had proved less favourable treatment that was to his detriment and on the assumption that the burden of proof had moved across to the respondent, we would have concluded that the respondent had proved that the reason why the dates of the meetings were changed were because the claimant requested date changes on two occasions and refused to attend the meeting until a later date on the other occasion. That is a complete explanation that is in no sense whatsoever because of race. Accordingly, this claim fails.

Claim 2.1.5: Mr Westerman did not uphold all of the claimant's grievance

62 It is factually correct that Mr Westerman did not uphold all of the claimant's grievance, paragraphs 11.36 – 11.42. The comparator would be a person who was not black African who had made similar complaints to the claimant in a grievance. We concluded that there were no facts from which we could conclude that the claimant was treated less favourably than this comparator because of race. Aside from asserting a belief that this was because of race the only other matter which the claimant appeared to rely on in relation to this claim was an assertion that he could "tell something was wrong" with the grievance investigation because Mr Westerman did not speak to Lisa Elwell as part of the investigation process. The difficulty with this, however, is that Ms Elwell was not named by the claimant in his grievance nor was she someone who the claimant suggested Mr Westerman should speak to you. Nor, in fact, was the exam invigilation role, which is the complaint in respect of which Ms Elwell was most pertinent, part of the subject matter of the claimant's grievance, paragraph 11.42. In such circumstances it is wholly unsurprising that Mr Westerman did not speak to Ms Elwell, and for these reasons, we concluded, this is not something which moved the burden of proof across to the respondent.

63 For these reasons we concluded that there were no facts from which we could conclude that the claimant was treated less favourably than this comparator because of race, and accordingly this claim failed on that basis. However, even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved that the reason why some of the claimant's grievance was rejected was because Mr Westerman considered that this was the right conclusion to draw based on the evidence that was available to him.

64 We would have reached that conclusion for the following reasons. Mr Westerman was someone who was independent from the respondent, paragraph 11.35. He carried out a detailed investigation, spending a total of 34 hours on it, paragraph 11.35. As part of this investigation he carried out interviews with five different individuals and he also examined the relevant paperwork, paragraphs 11.35, 11.36 and 11.40. He rejected parts of the claimant's grievance but upheld other parts, paragraphs 11.36 – 11.41. He explained his reasons for reaching these conclusions in his report. He made a total of eight different recommendations where he considered that the respondent had not followed best practice, paragraph 11.42. Everything about this speaks of a careful and balanced approach in which the evidence was properly weighed up and considered and conclusions drawn based on that evidence. The claimant, of course, disagrees with the outcome but the fact that the claimant disagrees, in part, with the outcome is not in and of itself evidence that Mr Westerman, in rejecting parts of the claimant's grievance was influenced, consciously or subconsciously, by the fact that the claimant is black African. Accordingly, we would have concluded that the respondent had proved a complete explanation that is in no sense whatsoever because of race.

Claim 2.1.6: Ms Webb intentionally delayed meetings and letters in October 2022.

65 We have already set out above our conclusions in relation to the delay to meetings that occurred in October 2022.

66 The second part of this complaint, that letters were delayed in October 2022, in fact related to a specific letter; the letter dated 17 October re-arranging the sickness review meeting to 20 October. This was not sent until 22 October, paragraph 11.58 above. It is beyond doubt that this letter was delayed, it was not sent until two days after the day scheduled for the meeting. The person who was responsible for this was Ms Webb.

67 The comparator would be a person who was not black African who the respondent had invited to attend a sickness review meeting. It would be a person who had then requested a change to the date of the meeting, which was agreed to by the respondent. It would be a person who, on being informed by email of the new date for the meeting, immediately (in under 2 hours) stated they would not attend on that date also, as they were not returning to work, and it would be a person in respect of whom a further meeting date was then immediately, that day, arranged.

68 We concluded that the claimant had not proved facts from which we could conclude that he was treated less favourably than this comparator because of race, or put another way that there were no facts from which we could conclude that this comparator would have received the letter dated 17 October any more quickly then the claimant did. Accordingly, this claim fails. Apart from asserting a

belief that this was race discrimination the claimant did not point to any evidence on which he relied to suggest that this had happened to him because of his race. Ms Webb, for her part, could not remember the sequence of events around this particular letter and why it was posted when it was.

69 However, looking at the evidence as a whole, even had the burden moved across to the respondent, it seemed to us, more likely than not, that the letter was posted late because events completely overtook it, which is a complete explanation that is no sense whatsoever because of race. Ms Webb had emailed the claimant at 12.43pm on 17 October to say the meeting would be rearranged to 20 October, paragraph 11.57, and he responded by email under 2 hours later saying that he could not make that date, paragraph 11.59. Ms Webb immediately agreed that the date would be re-arranged to 31 October, paragraph 11.59. That was all done within a matter of hours on 17 October. The letter rearranging the meeting to 20 October became redundant well before it was sent (in the sense of its purpose having been to make arrangements for the review meeting on the 20th). It therefore became significantly less important that it was sent out; its only remaining purpose in reality being as a record of the arrangements made.

Claim 2.1.7: the claimant was twice sat down by Mr Cooling to discuss the fact he had applied for jobs elsewhere.

70 This claim, in the main, fails on the facts. We have not found that Mr Cooling twice "sat the claimant down" to discuss the fact that he was applying for jobs elsewhere, paragraph 11.9. On our findings what happened is that Mr Cooling became aware that the claimant had made an application to the Thomas Telford school. Knowing that he had additional work available at the Academy, and having been impressed with the claimant's hard work in his existing role, Mr Cooling thought the claimant might be interested in the Reflection Coordinator role. He therefore had a chat with the claimant one lunchtime to see if he would be interested in that additional work, paragraph 11.9.

71 Put in this context, we concluded that the claimant had not proved that this treatment was to his detriment. Having an informal chat with someone to see if they would be interested in taking on additional hours when that person is, in fact, already looking for additional work is not something, in our view, which a reasonable worker would view as a detriment. It is something which a reasonable worker would likely view as being to their advantage.

72 In any event, even if there was less favourable and detrimental treatment, and even if the burden of proof had moved across to the respondent, we would have concluded that the respondent had proved that the reason why this conversation took place and the offer of additional work was made was because Mr Cooling needed someone to fill the newly created position, paragraph 11.8, he became aware that the claimant was seeking additional work, paragraph 11.9 and he had been impressed by the claimant and thought he could offer the

claimant these additional duties, paragraph 11.9. This is a complete explanation that is in no sense whatsoever because of race.

Claim 2.1.8: Mr Cooling refused a reference request for the claimant

73 This complaint has failed on the facts, see paragraph 11.6 above.

Claim 2.1.9: Ms Webb and Mr Cooling were not consistent with the dates of absence in the disciplinary process.

74 This, we understand, was a complaint about the letter inviting the claimant to attend a disciplinary hearing. In this letter, as we have set out at paragraph 11.71, the respondent had written that the claimant had not attended work through either sickness or unauthorised absence since 10 June 2022. Whilst this was, in fact, an accurate statement what the letter did not then do is set out the specific dates in respect of which the respondent considered the claimant's absence had been unauthorised during this period. On our findings, therefore, it would be more accurate to say that the letter was unclear as opposed to inconsistent. Neither Mr Cooling nor Ms Webb were the authors of this letter; it was written by Ms Clarke, paragraph 11.71.

75 The comparator would be someone who was not black African who had been on an extended period of absence which covered periods of both certificated sickness absence and unauthorised absence and who had been invited to a disciplinary hearing to discuss the periods of unauthorised absence. We concluded the claimant had not proved facts from which we could conclude that he was treated less favourably than this comparator because of race.

76 Of course, the letter could, and should, have been more clearly written. But the fact that something could have been done better is not evidence of race discrimination; many employees, regardless of protected characteristics, will experience things that their employers could have done better on a regular basis. It was Ms Clarke who wrote this letter and she, of course, had not been involved in the management of the claimant's absence to date. It appears, on the face of it, to be no more than a simple omission. The claimant did not point us to a single factor from which, he suggested, we could conclude that this omission occurred because of race and there was nothing that we could identify in the context or background from which such an inference could be drawn. Accordingly, we concluded that the burden of proof had not moved across to the respondent, and this claim therefore fails.

Claim 2.1.10: Dismissal

77 It is, of course, factually correct that the claimant was dismissed. On the list of issues the claimant had identified Linda as his comparator for the purposes of this claim. We concluded that she was not a statutory comparator, nor a comparator of evidential value, because her circumstances, on our findings, were

wholly different to those of the claimant. In particular, she had not had any periods of unauthorised absence. When she went off sick her sickness was certificated, paragraph 11.85.

78 The comparator, we concluded, would be someone who was not black African who had had several extended periods of unauthorised absence from work (either by not providing sick notes as required when off sick or by being absent from work when not unwell) and who had been given several opportunities in this period to either return to work or provide a sick note. We concluded that the claimant had not proved facts from which we could conclude that he was less favourably treated than this comparator because of race, but for the purposes of analysing this complaint we were prepared to assume that the burden of proof had moved across to the respondent. We had no hesitation in concluding that the fifth respondent had proved that the reason why the claimant was dismissed was because of repeated, and extended, periods of unauthorised absence from work and because of failures to follow the absence reporting procedure. This is a complete explanation that is no sense whatsoever because of race.

79 It was, after all, beyond doubt that the claimant had extended periods of unauthorised absence from work. Employees can only be absent from work in certain, specified, circumstances; certificated sickness absence (when the sickness absence is over seven days), approved holidays and certain other types of approved leave such as compassionate leave or time off to attend a medical appointment. Outside of those circumstances, employees cannot, generally speaking at least, choose whether to attend work or not. At the risk of stating the obvious, there is no right to refuse to attend work because of disagreement over a grievance outcome or because of personal distaste over allegations that had previously been made.

80 Over the entire period that the claimant was not at work there were only two periods of certificated sickness absence; 10 June – 22 July and 15 September - 14 October. Setting aside for one moment the perhaps slightly more nuanced situation in relation to the summer holidays and the period immediately after the holidays, for the period 15 October to 28 November (a period of 6 weeks) the claimant was absent, uncertificated, refusing to return and not on any form of agreed absence from work.

81 In relation to the earlier period, given the claimant's initial assertion in early September that he was waiting for a sick note and the fact that he had been signed off sick towards the end of the summer term, the fifth respondent, perfectly reasonably, concluded that the claimant's ill health from June/July had continued and so requested sick notes from the claimant. One was produced but only for 15 September to 14 October. The claimant remained uncertificated for the school summer holidays (23 July to 4 September) and the start of term (5 September to 14 September). Uncertificated sickness absence (after 7 days) is

unauthorised absence. The claimant asserted he did not need to produce a sick note for the summer holiday period, but the fifth respondent explained on a number of occasions to the claimant that he did, and showed him the relevant part of the absence policy, the terms of which were clear.

82 The claimant was given numerous opportunities by the respondent to produce sick notes or return to work; the claimant was reminded of the need to produce sick notes on 14 September, paragraph 11.46, 7 October, paragraph 11.52, 10 October, paragraph 11.53, 17 October, paragraphs 11.57 and 11.61, and during the attendance review meeting on 1 November, paragraphs 11.65 and 11.68. He was asked if he was returning to work/ told he was expected to return on 7 September, paragraph 11.46, 14 September, paragraph 11.47 and 31 October, paragraph 11.62.

83 The claimant gave inconsistent reasons as to why he could not return which included; he had not received confirmation his suspension had been lifted, his grievance was still outstanding, he was unwell, he was not unwell but he was going through therapy and he wanted a leave of absence. By the time of the disciplinary hearing the claimant's explanation was that he could not return because he had experienced trauma, was going through therapy, he had depression and trauma due to bullying (although he maintained he was not unwell) and he could not return because "that man is an abuser".

84 The fifth respondent, entirely reasonably, rejected the claimant's explanation that he had not received the letter lifting his suspension. After all, the letter had been sent to his home address, he had in any event been telephoned and given the information verbally and the claimant himself accepted in the disciplinary hearing that he had planned to return to work on 22 July when his sick noted had ended.

85 The fith respondent had, of course, investigated the allegations of sexual harassment that the claimant had made against Mr Cooling and rejected those as unfounded. The grievance was not, therefore, outstanding. The respondent had also, entirely reasonably, concluded that the claimant had inappropriately tried to use a leave of absence request to retrospectively cover some of his unauthorised absence and, in any event, no leave of absence had ever been granted. In the circumstances the fifth respondent, perfectly reasonably, rejected these explanations as being satisfactory reasons for the claimant's non-attendance.

86 Before us, the claimant repeatedly pointed out that employees are entitled not to attend work if they are placed in circumstances of danger which they reasonably believe to be serious and imminent, a reference to section 44 of the Employment Rights Act. The claimant asserted that he was placed in circumstances of danger which he reasonably believed to be serious and imminent, namely being required to work with Mr Cooling who, he said, was a

sexual harasser/predator/abuser and who had conducted himself inappropriately with the claimant. The claimant repeatedly quoted section 44 of the Employment Rights Act, both in cross examination and during submissions. There was, of course, no such claim before us but for the avoidance of doubt these assertions were, in our view, hopeless. The belief in serious and imminent danger has to be a reasonable one. It was not because the claimant, on our conclusions, has not been subjected to sexual harassment by Mr Cooling, for which see more below. These beliefs about Mr Cooling, it seemed to us, were born out of the claimant's continuing inability, given his particular views, to cope with the nature of the allegations that had been made against him by one of the pupils and the immense distrust that the claimant then felt towards Mr Cooling because he suspended him whilst those allegations were investigated.

87 Unauthorised absence from work is a serious matter. Many employers will dismiss after a day or two's unauthorised absence. In this case, as the respondent pointed out several times, the period of unauthorised absence was very protracted indeed. The claimant had been given numerous opportunities over this period to regularise the position, either by returning to work or producing sick notes and he failed to do so. In such circumstances the respondent, perfectly reasonably, concluded that the claimant had demonstrated a gross disregard for the respondent's policies and procedures and the needs of the school. Indeed, given the length of the unauthorised absence and the repeated failures by the claimant, it seemed to us to be wholly unsurprising that the claimant was dismissed. For these reasons we concluded that the respondent had proved that the reason why the claimant was dismissed was because of unauthorised absence, which is a complete explanation that is not because of race.

Harassment related to race

Claim 3.1.1: Mr Westerman did not challenge Mr Cooling sufficiently, by finding that he had made an idiomatic comment

88 This is a reference to Mr Westerman's investigation into the claimant's complaint that Mr Cooling had said to him "you are blocking my sunshine", which was a complaint of sexual harassment.

89 The claimant never explained what he meant by Mr Westerman not challenging Mr Cooling sufficiently. Doing the best we can, this complaint, it seemed to us, fails on the facts. This complaint was adequately investigated by Mr Westerman. The claimant's allegations were put clearly to Mr Cooling by him. He specifically asked Mr Cooling about whether he had made this comment, discussed with him that it was a complaint of sexual harassment, explored with him the possible context in which the comment had been made, and drew a conclusion on whether this was sexual harassment, paragraphs 11.35 and 11.39.

Claim 3.1.2: the claimant was locked out of his emails in June 2022

90 On our findings, this complaint fails on the facts. The claimant was unable to access his emails for a brief period of time following his suspension but this was because his email password had expired, paragraph 11.24. He was not locked out.

Claim 3.1.3: not reopening the claimant's access to his emails in June 2022 despite being requested to do so

91 On our findings, this complaint fails on the facts. The claimant was able to access his emails again by 16 June 2022, paragraph 11.32, and that access clearly continued, paragraphs 11.43 and 11.54.

Claim 3.1.4: bus drivers being sent to the claimant's house to deliver letters in January 2022

92 This complaint is factually accurate, on our findings of fact. Two letters were delivered to the claimant in January 2023 by the respondent's bus drivers, paragraphs 11.87 and 11.92. The decision to do this was made by Ms Webb and Mr Cooling, in conjunction with other members of the SLT. We have not found, however, as the claimant asserted, that one of the bus drivers was related to one of the pupil's who had complained about him, paragraph 11.87.

93 We concluded that the claimant had proved that this conduct was unwanted. We did not consider that the actions of Ms Webb and Mr Cooling could be characterised as conduct up that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him but we concluded that the claimant had proved that it had that *effect* on him, particularly given his own perspective. On balance, we also concluded that the claimant had proved that it was reasonable for the conduct to be regarded as having that effect. This conduct happened on two occasions and many people, we concluded, might consider that an unannounced visit to their home from a work colleague, even if it is just to deliver a letter, is an unwanted intrusion.

94 We did not conclude that there were facts from which we could conclude that this conduct was related to race and consequently it did not appear to us that the burden of proof had reversed. However, even had the burden of proof reversed we would have concluded that the respondent had proved that the conduct was not in any way related to race. Before us, the claimant himself did not suggest that this conduct was related to race; his complaint was a more general one; that it was harassing to send somebody from work to his house, particularly when, as he asserted, that person was a relative of somebody who had complained about him.

95 The reason why the respondent delivered letters to the claimant via their bus drivers, we concluded, is that the respondent wanted to be sure that the claimant had received the letters, given the previous, repeated assertions from the claimant about letters having gone astray, paragraph 11.87. The concept of conduct related to a protected characteristic goes wider, of course, than the reason why the conduct occurred but there still requires to be some association between the conduct and the protected characteristic. We concluded that the respondent had proved that no such connection existed.

Claim 3.1.5: Mr Cooling said to the claimant "you are one of those who punches above their weight"

96 This complaint is factually accurate on our findings, paragraph 11.19. We concluded that the claimant had proved that this conduct was unwanted. We did not consider that the actions of Mr Cooling could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We concluded, with some hesitation, that the claimant had proved that it had that *effect* on him, particularly given his own perspective. After all, the implication of such words is along the lines of "you've done better than expected", which has both positive and negative connotations. Analysed as a complaint on its own, however, we did not consider that the claimant had proved it was reasonable for the conduct to be regarded as having the proscribed effect. An environment is a state of affairs as opposed to a moment of fleeting offence. This was a one off, very short lived, incident and there was nothing overtly offensive about the comment made.

97 In any event, we concluded that there were no facts from which we could conclude that this conduct was related to race and consequently we concluded the burden of proof had not reversed. This claim therefore failed on this basis also. We reached this conclusion for the following reasons. The words do not, on their face, have any association with race. We took into account that the claimant himself in evidence clearly and categorically stated that this was *not* conduct related to race. What the claimant told us in evidence was that this comment amounted to Mr Cooling "making a sexual advancement towards him". There was, moreover, no association to race provided by the context in which the conversation took place. To the contrary, the context in which the comment was made was a discussion concerning the age differential between the claimant and his wife. That is not something that is related to race.

Claim 3.1.6: Mr Cooling said to the claimant "you are blocking my sunshine", referring to the claimant's buttocks

98 On our findings this comment was made, paragraph 11.17. We were prepared to assume that the claimant had proved that this conduct was unwanted. We did not consider that the actions of Mr Cooling could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for him. Nor, we concluded, had the claimant proved that it had that *effect* on him, even taking into account his own perspective. An environment is a state of affairs. On the face of it, this was an entirely innocuous comment (for which see more below). It is unlikely in our view that a one off comment of this nature would create the proscribed state of affairs. In that regard it is also significant that the claimant made no complaint about this incident at the time. In fact, it was over two months before the claimant complained about this. We conclude, therefore, that the claimant did not perceive the conduct as having the required offensive qualities. In the alternative, for the same reasons, we would have concluded that the claimant had not proved it was reasonable for the conduct to be regarded as having the proscribed effect.

99 In any event, even if we were wrong on that, we concluded that there were no facts from which we could conclude that this conduct was related to race and consequently we concluded the burden of proof had not reversed. In reaching this conclusion we took into account that the claimant himself in evidence did not seek to suggest this was conduct related to race, he told us it was sexual harassment. There was, moreover, nothing inherent within the words used to link the words to race and neither was there any association to race provided by the context in which the conversation took place, which was a conversation as Mr Cooling passed the claimant in a doorway, paragraph 11.17 above.

Complaint 3.1.7: Mr Cooling said "I don't know how you are able to afford those", referring to the claimant's trousers

100 On our findings this comment was made, paragraph 11.18. We concluded that the claimant had proved that this conduct was unwanted. We did not consider that the actions of Mr Cooling could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. But we were prepared to assume for the purposes of our analysis that it had that *effect* on him, particularly given his own perspective, and we were prepared to assume that it was reasonable for the conduct to be regarded as having that effect.

101 As to whether the conduct was related to race, we asked the claimant to explain to us the basis on which he asserted that this comment was related to race. He explained that he is someone who likes to be smartly dressed, and he made reference to wearing designer label clothing. He said that Mr Cooling was implying that he could not afford such clothes, because he is black, and the implication was that he must have been stealing or doing drugs in order to be able to afford them.

102` We concluded that the claimant had not proved facts from which we could conclude that this conduct was related to race, and accordingly this claim fails. The words used were not overtly related to race, nor can it be said that the conduct was, objectively, related to the protected characteristic of race. The

claimant's case, essentially, was that it was the mental processes of Mr Cooling that provided the necessary association with race. His case was, effectively, that Mr Cooling had made some stereotypical assumptions about him as a black man, and the comment was an outward reflection of those inner assumptions. This interpretation of the words was not put to Mr Cooling by the claimant in cross examination and so he did not have any opportunity to comment on it. We were also provided with very little of the context in which this comment was made. Mr Cooling could not remember whether he made the comment or not and all we know from the claimant is that this comment was made during an informal chat, and whilst the claimant was wearing some designer clothing. The claimant did not point us to any other facts which he asserted helped prove this conduct could be related to race. The question for us was whether, on this very limited evidence, it could be inferred from the comment alone that Mr Cooling *could have* had those stereotypical assumptions in mind when making this comment, in which case the burden of proof would move across to the respondent to prove such assumptions were not in the mind of Mr Cooling. We concluded that the burden of proof did not move across to the respondent. We reached this conclusion because the comment is the sort of thing that is regularly said, regardless of any protected characteristic. It most often relates to the expensiveness of the item under discussion not any particular protected characteristic. It is the sort of thing that can be said by anyone to anyone regardless of race. For these reasons the nature of the comment alone is insufficient, in our view, to amount to facts from which it could be concluded the conduct was related to race. Accordingly, this claim fails.

Harassment of a sexual nature, section 26(2) of the Equality Act

103 NB; whilst in the list of issues drawn up at the case management preliminary hearing it had been recorded that the complaint of harassment of a sexual nature related to the comment "I don't know how you are able to afford those", page 71, in subsequent further and better particulars of claim the claimant had confirmed that, in fact, the claim of harassment of a sexual nature concerned the comment that Mr Cooling had made "you are blocking my sunshine", page 78.

104 On our findings this comment was made, paragraph 11.17. We were prepared to assume that the claimant had proved that this conduct was unwanted. However, we concluded that the claimant had not proved that the conduct was of a sexual nature. The claimant's case was that it was of a sexual nature because the phrase "you are blocking my sunshine" was a way of referring to his buttocks. When he was asked to explain in cross examination how this was so he stated that it was "common sense". He then said, by way of explanation, that we all understand what "stick it up where the sun don't shine" means, it means "stick it up your arse".

105 But the comparison drawn by the claimant is totally inapt, in our view. This is because, on the claimant's own case, Mr Cooling did not say to him "stick it up where the sun don't shine". He said something different. Moreover, to suggest that the phrase "you are blocking my sunshine" was, just by use of the word "sunshine", a way of referring to the claimant buttocks is to stretch the phrase beyond any sensible interpretation of the natural meaning of the words used. The claimant at one point suggested that the word "sunshine" by and of itself is a commonly understood way of obliquely referring to a person's buttocks. We reject that. It is not, in our view, a commonly understood way of obliquely referring to a person's buttocks. Were this the case, as Mr Blitz for the respondents pointed out, the phrase "you are a ray of sunshine" would take on a wholly different meaning to that which is commonly understood. For these reasons we concluded the comment was not of a sexual nature, it was a wholly innocuous comment, and this claim therefore fails.

Employment Judge Harding
Dated: 12 December 2024