



EMPLOYMENT TRIBUNALS

Claimant: Frederick Lechmere-Smith

Respondent: Kensington Park School Limited

Heard at: London Central (by CVP)

On: 17-20 March 2026

Before: Employment Judge A.M.S. Green

REPRESENTATION:

Claimant: Mrs L Mankau, Counsel

Respondent: Mr J McKeown, Counsel

JUDGMENT having been sent to the parties on 31 March 2026 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

Introduction

1. In this claim, early conciliation started on 28 March 2024 and ended on 26 April 2024. The claim form was presented on 24 May 2024.
2. The claim is about direct sex discrimination.

The claim and the response

3. The claimant was employed as Director of Studies from late August/early September 2023 until his dismissal on 24 January 2024. He says that when he was recruited, he expressed concern to the then Headmaster, Mr Mellor, that

he could not comply with the contractual hours of 8am to 6pm because of his childcare responsibilities. He relies on what he describes as assurances from Mr Mellor that the stated hours were not rigid and that flexibility would be applied in light of his circumstances. On that basis he accepted the post, put revised childcare arrangements in place, and began work. He says that throughout the autumn term he worked extremely long hours, both on site and at home, and was permitted to work with a degree of flexibility in relation to his arrival and departure times. He states that no concerns were raised with him about his performance or his working pattern during this period until his probationary review on 13 December 2023. He further contends that female colleagues with childcare responsibilities were routinely permitted to work flexibly or leave early, including some senior leaders, and that none were formally warned or reminded of contractual hours.

4. He asserts that the position changed after Mr Mellor was suspended and Mr Tan became Acting Head. On 11 January 2024, Mr Tan wrote to him restating the contractual hours and indicating that from 19 February 2024 he would be expected to attend from 8am to 6pm and to support all evening events. The claimant says this amounted to a withdrawal of previously agreed flexibility and placed him in an impossible position given his childcare arrangements. He emailed Mr Tan challenging the letter but received no response. He was dismissed with immediate effect on 24 January 2024, paid in lieu of notice, and told not to return to the site. The stated reason was that he had failed his probation. The claimant denies that any performance concerns had been raised with him before this point and maintains that the real reason for the withdrawal of flexibility and his dismissal was his sex. He relies on the treatment of named female staff who he says were permitted to work flexibly or leave early without sanction and on the fact that he alone received the 11 January 2024 letter.
5. The respondent denies any discrimination and argues that the claimant's contractual hours were always 8am to 6pm and that no agreement to vary them was ever made. It relies on the signed contract of employment, which includes an entire agreement clause, and on the absence of any formal flexible working request. The respondent says that although the claimant raised childcare issues before accepting the job, Mr Mellor did not agree to alter his contractual hours. It accepts that some degree of flexibility may be given to staff from time to time but states that flexibility does not amount to a contractual variation. It asserts that punctuality at the 8am staff briefings and attendance at evening events were essential elements of the claimant's senior leadership role.
6. The respondent maintains that concerns arose early in the claimant's employment regarding his responsiveness to emails, the handling of timetable issues, his interactions with colleagues, and his conduct towards staff. It says these concerns were raised with him at the probation review meeting on 13 December 2023, along with concerns about his late attendance at morning briefings and leaving some evening events early. It states that he indicated he would apologise to a staff member who complained but did not do so. The respondent relies on complaints from two members of staff, feedback from

parents, and comments from an Advisory Board member, as well as wider concerns about his leadership and communication. It argues that the claimant's performance did not improve, and that given the level and range of concerns, he was not suitable for the role. It says the dismissal was a straightforward probationary termination based on performance and conduct, and entirely unrelated to his sex. It disputes that the claimant was treated less favourably than any female comparators and says that the individuals relied upon were not in materially similar circumstances.

The hearing

7. On the first day of the hearing, I noted that there was no schedule of loss despite this being ordered to have been filed and served by 25 April 2025. I ordered that this be produced by the morning of the second day of the hearing together with an explanation for why the claimant had failed to comply with the case management order. The schedule of loss was duly produced.
8. At the start of the second day of the hearing, Mrs Mankau informed me that shortly after April 2025, her instructing solicitor from the National Education Union ("NEU") was on unexpected leave for a significant time. The person who was the point of contact in their absence is no longer with the NEU and the new contact has been unable to establish what happened. The instructing solicitor is on sickness absence. She apologised for the failure to comply with the order.
9. Mr McKeown responded. He said there had been no prior indication that there was a loss of earnings claim until the schedule of loss was produced. The element for injury to feelings could have been advanced earlier and addressed by the respondent. The claimant is now advancing loss of earnings. Had the schedule of loss been produced in time, the respondent could have found data and information about average school earnings and mitigation. Mr McKeown would need to take instructions, but he believed that probably could not be done in time given the very late production of the schedule of loss and not being able to do so could prejudice the respondent if remedy needed to be dealt with within the timetable for this 4-day hearing.
10. I decided to determine liability first. If I found in favour of the claimant, then the Tribunal could proceed to remedy, either on day 4 or, if the respondent needed to time to deal with the loss of earnings point, a remedy hearing could be listed at a later date. It is a matter for respondent whether to make a costs application if a separate remedy hearing is necessary because of the very late submission of the schedule of loss.
11. We worked from a digital hearing bundle comprising 286 pages. A further piece of evidence was produced to the Tribunal after conclusion of the first day prior to the commencement of the second day of the hearing, namely a handwritten gift card which the claimant had referred to in his witness statement. I admitted this into evidence.

12. I heard oral evidence from the claimant and Mr Ben Tan. They adopted their witness statements. I permitted Mr McKeown to examine Mr Tan in chief on the gift card evidence.
13. After the first day of evidence, I invited the representatives to make submissions (if not already anticipated by them) in the following terms:

Although the primary position is that the written contract contains the agreed hours, I would be assisted by submissions on whether, on the evidence, there was any variation, formal or informal, to the claimant's contractual working hours, or whether there was any agreed or established flexibility affecting the operation of those hours in practice

14. The representatives provided skeleton arguments which they adopted and they made oral submissions.
15. On delivering judgment and oral reasons, Mr McKeown requested written reasons and indicated that his client would not be ready to proceed to the remedy hearing listed for day 4 of the hearing for the reasons outline above. He also indicated that the respondent would be making a costs application in respect of the remedy hearing having to be re-listed. Mrs Mankau said it would not be appropriate to deal with costs now and also stated that she needed full instructions for the reasons for the failure to file and serve the schedule of loss as originally ordered. I said that any costs application could be dealt with at the remedy hearing. Neither representative had instructions on availability for a 1-day remedy hearing. They were directed to write to the Tribunal with available dates in the next 7 days.

The issues

16. These are the issues that the Tribunal must determine.

Direct sex discrimination (Equality Act 2010 section 13 ("EqA"))

- 16.1 Did the respondent do the following things:

- 16.1.1 On 11 January 2024 Mr Tan issuing the claimant with a variation of contract (in breach of contract).

- 16.1.2 On 11 January 2024 Mr Tan informing the claimant that from 19 February 2024 he would need to be on site from 8am to 6pm.

- 16.1.3 On 24 January 2024 Mr Tan terminating the claimant's employment.

- 16.1.4 On 24 January 2024 Mr Tan terminating the claimant's employment with immediate effect and making a payment in lieu of notice.

- 16.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant says they were treated worse than

Elizabeth Emerton
Cheryl Lu
Laurence Fuld
Subha Sivaraman

Illder Davulcu
Sophie Phillips
Roula Kazani
Hamdi Mohammed
Afroditi Gregoriou
Shannann Row Lalji
Emma Stowe

And/or a hypothetical comparator

16.3 If so, was it because of sex?

Remedy for discrimination

17. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
18. What financial losses has the discrimination caused the claimant?
19. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
20. If not, for what period of loss should the claimant be compensated?
21. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
22. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

23. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
24. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
25. Did the respondent or the claimant unreasonably fail to comply with it?
26. If so is it just and equitable to increase or decrease any award payable to the claimant?
27. By what proportion, up to 25%?
28. Should interest be awarded? How much?

Findings of fact

29. Having considered the oral and documentary evidence I make the following findings of fact. The fact that I have not referred to every document produced to the Tribunal should not be taken to mean that I have not considered it.
30. The claimant began his career in education in 2009, initially working as a cover supervisor and later as a mathematics instructor, before completing his Graduate Teacher Programme and being appointed as a Teacher of Mathematics in January 2014. Over the following years he gained experience teaching across KS3 to KS5 and held a series of increasingly senior academic and leadership roles in different independent schools, including Assistant to the Head of Academic Performance and Mathematics at Colfe's, Assistant Director of Studies at FHS, and at Queen's Gate School roles including Head of Mathematics, Senior Tutor – Operations, Head of Academic Performance and Data, and Deputy Head – Director of Studies; during this period he also completed an MSc in Teaching and Learning at the University of Oxford. By June 2023 he was an experienced senior leader in the independent sector, and he applied for the Director of Studies post at the respondent from his position at Queen's Gate.
31. The respondent is Kensington Park School Limited (sometimes referred to as "KPS"), a small independent co-educational day and boarding school for pupils aged 11 to 18. It was established in September 2018 and, at the relevant time, employed approximately 72 members of staff across teaching, administrative, support and operational functions.
32. The school operates across two sites in London and delivers secondary (sometimes referred to as "SS") and sixth-form education (sometimes referred to as "SF"). Senior leadership functions include oversight of academic performance, safeguarding, pastoral care, and operational management,

supported by an Advisory Board.

33. At the time of the claimant's appointment, the respondent's senior management structure included a Headmaster (Mr Stephen Mellor) until his suspension in September 2023, after which Mr Ben Tan, its Business Director and Clerk to the Advisory Board, assumed the role of Acting Headmaster from October 2023. As Business Director, Mr Tan had responsibility for HR, IT, admissions, marketing, facilities, finance and short courses, and he reported directly to the school's shareholders in China.
34. Other key personnel at the respondent are/were:
- 34.1 Ms Sushma Bunger (sometimes referred to as "SB") was a Deputy Head and Head of Sixth Form. She was part of the leadership structure, the Senior Leadership Team (sometimes referred to as the "SLT") managing the school during the period after Mr Mellor's suspension and played a role in decision-making across the two school sites. She is identified in the evidence as a comparator relied upon by the claimant and as someone who attended leadership meetings with the claimant and Mr Tan.
- 34.2 Ms Elizabeth Emerton was also a Deputy Head (sometimes referred to as "EE"). She held the post of Head of Lower School (sometimes described in evidence as Head of Senior School). She worked alongside the claimant and Ms Bunger in managing the school after the suspension of the Headmaster and participated the SLT and Advisory Board interactions. She is also identified as one of the claimant's comparators.
- 34.3 In late October 2023, the school appointed Ms Cheryl Lu (or Lui) (sometimes referred to as "CL") to the temporary post of Assistant Head, Academic Operations and Data. Her role incorporated elements formerly belonging to the Head of Teaching and Learning, who had gone on early maternity leave in September 2023. Ms Lu worked closely with the claimant and sat within the extended leadership structure. She was the individual referred to as "Staff Member A" in Mr Tan's statement and was the author of the formal complaint made about the claimant on 26 November 2023.
- 34.4 The Advisory Board provided governance oversight for the school. It included Ms Stephanie Wicks, the Chair of the Advisory Board; Mr David Sibson, whose remit covered boarding, pastoral and sixth-form education; and Mr Geoff Feavyour, responsible for safeguarding, compliance and pastoral matters in the Senior School. Board members met individually with senior leaders, including the claimant, and provided feedback on the claimant's role, including concerns later relied upon by the respondent.
- 34.5 Other staff mentioned in the evidence include Harry Geoghegan, a staff member who raised concerns about the tone of an email from the claimant (sometimes referred to as "HG"); and several teachers identified

by the claimant as comparators based on their childcare responsibilities or their working patterns, including Laurence Fuld (Head of Year 10), Subha Sivaraman (Teacher of Mathematics), Illder Davulcu (Teacher of EAL and SEN), Hamdi Mohammed (Teacher of Mathematics), Sophie Phillips (Teacher of Geography), Roula Kazami (Teacher of Classics), Afroditi Gregoriou (Teacher of Biology), and Emma Stowe (Head of Year 7 & 8, Teacher of PE). Their roles varied across academic departments, year group leadership and pastoral duties. Those individuals played no part in the decision to dismiss the claimant but were relied upon by the claimant as comparators in the discrimination claim.

- 34.6 The school's HR function was led by Ms Charlene McMillan (or Macmillan), who issued the claimant's contract and dealt with post-dismissal correspondence regarding references and collection of belongings.
35. In June 2023, the claimant applied for the position of Director of Studies at the respondent. He was interviewed and offered the role.
36. The Director of Studies role at the respondent is a senior leadership position with extensive whole-school responsibilities. The Job Description was produced to the Tribunal [94]. I find as follows:
- 36.1 The postholder is expected to be an outstanding teacher, delivering a reduced timetable including Sixth Form classes, and to be a full member of the Leadership Team, working closely with the Headmaster, Business Director, Deputy Heads, Assistant Head/DSL, Head of Sixth Form and Head of Boarding. The role requires regular liaison with a wide range of staff across academic, pastoral, operational and administrative functions, and includes significant line-management responsibilities for Heads of Faculty and Departments, the SENDCo, Examinations Officer and the NQT Induction Tutor.
- 36.2 The Director of Studies has overarching responsibility for academic leadership and delivery. This includes the development and oversight of the curriculum; leadership, support and performance management of teaching staff; ensuring compliance with ISI regulatory standards; coordinating academic reporting and assessment systems; overseeing the use of data and value-added measures; and ensuring high-quality teaching and learning across the school. The postholder chairs Heads of Faculty meetings, leads curriculum planning and review, and maintains oversight of homework, marking, academic policies and student progress monitoring.
- 36.3 The role carries substantial administrative and operational functions, including responsibility for preparing and maintaining the whole-school timetable; managing the academic budget; oversight of internal and external examinations; producing required returns for regulatory bodies; and ensuring the accuracy and timely production of student reports and

grades. The Director of Studies is also responsible for academic representation and liaison with external agencies, for coordinating educational visits, and for contributing to marketing and admissions activities.

- 36.4 The job description places a significant emphasis on parental engagement. The Director of Studies oversees the organisation and delivery of parents' evenings, responds to parental enquiries, investigates curriculum-related concerns, and provides guidance on academic pathways and options. The role also involves supporting the Head of Sixth Form and UCAS Coordinator in relation to university applications and assisting with student recruitment and transition events.
- 36.5 The post carries collective responsibilities as part of the Leadership Team, including deputising for the Headmaster, contributing to whole-school strategic planning, maintaining discipline and good order, promoting staff welfare and development, and representing the school to external bodies. The Director of Studies is expected to uphold the highest professional standards, lead and motivate staff, and play an active role in the school's development and reputation.
37. On 4 July 2023, the claimant received his employment contract [106].
38. Clause 4 of the contract sets out the provisions for the probationary period of the claimant's employment:
- 4.1 The first three Terms of your employment are a probationary period. During this period, your performance and suitability for continued employment will be monitored and the School may terminate your employment at any time by giving not less than one month's prior written notice (or make a payment in lieu of notice).*
- 4.2 Your continued employment will be reviewed towards the end of your probationary period. The School may, at its discretion, extend the probationary period by up to two Terms. You will be notified in writing when your probationary period has been satisfactorily concluded. If you have not received any written confirmation, you should assume that your probationary period continues.*
39. Clause 19 states that the claimant's working hours were 08:00–18:00 Monday to Friday.
40. Clause 63 states:
- Entire agreement: This agreement and the Schedules set out the entire agreement and understanding between the School and you regarding your employment with the School and supersede any terms of service and all previous agreements or arrangements which you may have with the School. Each party acknowledges that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any*

statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement.

41. Clause 64 states:

Variation: The School reserves the right to make any reasonable changes to any of the terms and conditions of your employment. Any change will be notified in writing. You will be given not less than one term's written notice of any significant changes.

42. After reviewing the contract, the claimant emailed Mr Mellor on 4 July 2023 [125]. He stated:

Charlene has kindly sent over my contract and, after reading through it, I didn't anticipate that my contractual hours would be 8am -6pm. In the whirlwind of last Friday, I'm afraid I completely forgot to ask this and assumed it would be similar to my current contracted hours, which are 8.30am – 4.30pm (although I appreciate entirely that School commitments often require one to be on-site outside of this timeframe!).

Unfortunately, our current childcare provision opens at 7.30am, and we must collect our children by 5:45pm when it closes. Therefore, unfortunately, I will be unable to be on-site from 8am until 6pm every day. That being said, I have always prioritised and managed my time effectively in the evening once our children are in bed, and ensured all my work is completed on time and to a high standard. My wife is a member of the Senior Leadership Team at Forest School (Head of Middle School), and we work collaboratively together to ensure that we support one another to fulfil our commitments to our respective schools.

I am thoroughly looking forward to working with you and the School Leadership Team at Kensington Park School; however, I understand entirely if there is no flexibility on this matter. Unfortunately, this would mean I would have no choice but to regretfully decline this incredibly exciting opportunity. However, if we are able to reach a mutually workable solution, I intend to sign my contract for Kensington Park School and submit my resignation by tomorrow lunchtime, which my current Principal has stipulated as a condition for my early release to start in September 2023.

43. Mr Mellor replied to the claimant in an email dated 4 July 2023 [124] in which he said, "This arrangement is not set in stone but I'm happy to confirm this if you're free for a call".
44. The claimant responded to Mr Mellor on the same day confirming he would appreciate a call [124]. Thereafter both men spoke to each other on a call.

45. After the call, Mr Mellor emailed the claimant on 4 July 2023 [124] in which he said:

Hi again Jake

Thank you for taking my call, despite the lateness of this conversation. I needed to reassure you that although the contractual hours are stipulated there is a professional approach to all of this. We, as members of the senior leadership team, have responsibility to ensure that all relevant work needs to be completed. However, as I explained to you this is not set in stone and there has to be a level of understanding of personal circumstances.

Please be reassured that this will not cause any issues for us in working together for the benefit of Kensington Park School, and I am looking forward to working alongside you in your new role. I also mentioned about the need to be on both sites during the week, but this will be dependent on the needs of the organisation and your decisions.

46. Mr Tan signed the contract on behalf of the respondent on 4 July 2023. The claimant signed the contract on 5 July 2023. He confirmed to the Tribunal that he had read the contract before signing it.
47. After signing the contract, the claimant began work on 29 August 2023. On his first day, during staff safeguarding training, he was called into a meeting with Mr Mellor, Ms Bungler and Ms Emerton, where he was informed that the external consultant contracted to produce the school timetable had failed to do so. The claimant had explained at interview that although he had assisted with timetable construction in previous roles, he had not previously constructed a full school timetable alone and had received no formal timetabling training. He nevertheless commenced work on producing a full timetable for the academic year and spent the next three days, including the weekend of 30 August to 2 September 2023, creating, and refining one. He produced a functioning timetable by 4 September 2023 and continued to revise it in the subsequent weeks.
48. In mid-September 2023, the Head of Teaching and Learning went on early maternity leave for medical reasons. As that role was not immediately filled, the claimant took on aspects of those responsibilities in addition to his own, including oversight of teaching quality, mentoring responsibilities, and contributing to staff development processes. This position remained unfilled until a temporary role, Assistant Head – Academic Operations and Data, was created and taken up by Ms Lu at the end of October 2023.
49. On or around 19 September 2023, the claimant was informed that Mr Mellor had been suspended from his role as Headmaster. Following that suspension, the three deputy heads, Ms Bungler, Ms Emerton and the claimant, jointly deputised for the Headmaster, and because the deputy heads were each based on different school sites, the claimant was required to travel between the two sites during this period. The claimant also met individually with members of

the Advisory Board, who oversaw the operation of senior leadership during the months following Mr Mellor's suspension.

50. The first half-term was operationally demanding. It has been described as a "baptism of fire". The claimant worked substantial hours to manage the timetable, respond to issues as they arose, and support continuity of teaching. His parents travelled from South Africa to provide childcare support during these early weeks in order to allow him to devote sufficient time to the role.
51. During the autumn term, the claimant, together with Ms Bungler, Ms Emerton and Mr Tan, contributed to the day-to-day running of the school pending the appointment of a new Head. The claimant attended a wide range of events, including parents' evenings, open evenings, assessments, and sixth-form and senior-school functions. He states that he attended the majority of these but left two events early due to his childcare responsibilities when his wife had her own professional commitments. His evidence is that he informed staff before leaving those events. Anonymous staff feedback and Mr Tan's account referred to instances of his early departure and to occasions on which parents or colleagues were said to have sought him at events.
52. During October 2023, the Advisory Board asked the claimant to develop performance management, probation, and PDR procedures, as existing policies were incomplete or absent. He drafted documentation, procedures and flowcharts and presented these to the Board, who informed him that they would require further review. He also learned during this period, through material provided by HR for the purpose of determining PDR eligibility, that he was paid less than the two female deputy heads. He raised this with Mr Tan, who acknowledged his contribution but indicated that the matter could be revisited after the claimant passed probation.
53. Morning staff briefings were held at 8am on Tuesdays and Fridays. The claimant acknowledged that he was sometimes a few minutes late due to childcare responsibilities, though he said he usually arrived between 7.45 and 8.15am and joined online when necessary.
54. The issue of punctuality at briefings was raised with him by Mr Tan at the probation review meeting on 13 December 2023. At that same meeting, Mr Tan raised concerns about a complaint made by a staff member, referred to as "Staff Member A," relating to an interaction in which she alleged he had spoken to her abruptly or in a raised voice. The claimant disputed her account but indicated that he would apologise. The minutes record that no apology was subsequently offered [201]. The claimant also accepted that he was inconsistent in signing the staff sign-in/out.
55. The school term ended on 14 December 2023; it was a half day.
56. Mr Tan handwrote a card to the claimant. In his oral evidence in chief, he recalled that he did this in early December 2023 and before the probationary review meeting. The text of the card is as follows:

Dear Jake

Thank you very much for everything. Your resilience and courage in stepping in from the start of the term. We very happy to have you joined KPS. I hope you're still excited to be on board with us for future adventures. It's time to switch off and enjoy your well deserved break of holidays.

Wishing you a sparkling Christmas and bright New Year! May the season bring much pleasure to you and family.

Ben Tan

57. He wrote similar cards to the other members of the SLT. All staff received a £50 voucher as a gesture of appreciation for their work that term. In addition, members of the SLT team were given a £100 John Lewis voucher. The cards were issued on 14 December 2023, being the last day of term.
58. On 2 January 2024, the claimant emailed Mr Tan following on from the probationary review meeting on 13 December 2023 [207]. He wrote, amongst other things, the following:

During our meeting, you mentioned two things that were really interesting, Firstly the fact that I am not always on time for the 8 am briefings on Tuesdays and Fridays – this is something I made clear I will not be able to commit to before accepting the role and have written confirmation of this.

59. On 9 January 2024, the first day of the new term, Mr Tan asked the claimant to provide the earlier emails exchanged with Mr Mellor regarding working hours [206].
60. On 11 January 2024, Mr Tan wrote to the claimant confirming that the school expected adherence to the contractual hours of 8am to 6pm and giving him one month to put childcare arrangements in place to ensure he could attend from 8am each day and support all evening events [208]. Mr Tan wrote the following:

Further to our email exchanges, I am writing to you to further confirm the contracted working hours in your employment contract signed on the 5th July 2023 is 8:00 -18:00 on Monday to Friday.

I appreciate that you had conversations with Mr Mellor regarding the flexibility of your working hours due to your child care issue; however, this was not formally requested by Mr Mellor nor by you which there was no amendment to your contract. Therefore, the current contracted hours are still in place.

Having said that, the School have considered your circumstance; therefore, we are giving you a month's notice to look into your child care

situation, from Monday 19th February 2024, the School expect that you are in school at 8:00 am Monday to Friday; also will be in school to support the evening events fully as needed.

I appreciate this anticipates there will be a significant work for you to sort out; however, I do hope you understand the contracted working hours is so important to your role, and to the overall business model to run effectively. The SLT have to demonstrate the highest standard to all other staff, and the attendance and working hours are part of it.

61. The claimant emailed the following morning asking whether this meant he was required to be on site until 6pm every day or only on briefing and event days [209]. He did not receive a reply.
62. Following receipt of the letter, the claimant adjusted his family's childcare arrangements so that he arrived for the 8am briefings. He continued working full-time in the period leading up to 24 January 2024.
63. The parties arranged to hold a second probation meeting on 19 January 2024, but due to an early nursery closure that day it was rearranged for 24 January 2024. The meeting took place at around 6pm on 24 January, following a faculty meeting chaired by the claimant. Mr Tan informed the claimant that matters were "not working" and dismissed him with immediate effect.
64. In the termination letter [216], Mr Tan stated, amongst other things:

We are very appreciative for the effort you put in to the timetable at the beginning of the school year. I appreciate you have many experiences and knowledge; however, after careful observation and consideration, we feel that your suitability for the role as Director of Studies has not fitted to the School. Therefore, the School has decided to terminate your employment on 24th Jan 2024.

In the accordance to your contract, as you are still under probation period, you are entitled to one month's notice. Per our discussion, you are not required to work your notice; therefore, the School will pay you one month notice as payment in lieu of notice (PILON). Your final payments will include the salary for the full month of January and one month notice pay, and they will be paid to you on 31st January 2024. All payments are subject to normal PAYE and PENSION deductions.

Please return any School property in your possession that is rightfully owned by Kensington Park School, including keys and passes, equipment, document papers or student work.

I am very sorry it has come to this decision; we wish you all the best in your future job.

The dismissal letter did not refer to the claimant having any right of appeal.

65. In his oral evidence, Mr Tan admitted that he intended to dismiss the claimant at the meeting originally scheduled for 19 January 2024.
66. The parties disagree about the operative reason for the claimant's dismissal. The claimant says it had nothing to do with his performance but his working hours. The respondent disagrees and maintains that the operative reason for the dismissal was the claimant's performance.
67. On reviewing the evidence, I am satisfied that the claimant's performance was not the operative reason for his dismissal for the following reasons:
- 67.1 After the contract was signed and when the claimant started his employment, there is no evidence that the respondent characterised any aspect of the claimant's performance as inadequate or as falling below the standard expected of a Director of Studies at any time during the autumn term. Although staff raised questions about the timetable in September, these were addressed collaboratively and were not presented to the claimant as failings. Indeed, contemporaneous emails show Mr Tan acknowledging the substantial work undertaken by the SLT, including the claimant, during this period and expressly thanking them for their efforts [151]. In his oral evidence, he acknowledged that the claimant's first term had been a "baptism of fire" given the challenges of the timetable and the aftermath of Mr Mellor's suspension.
- 67.2 The probation review meeting on 13 December 2023 was the first formal meeting between Mr Tan and the claimant dealing with performance. The meeting lasted approximately 30–45 minutes and was described in evidence as amicable. Mr Tan told the claimant that the purpose of the meeting was simply to check on his progress and what support he might need. According to the minutes, the only issues raised that touched on performance were a complaint from "Staff Member A" which Mr Tan stated he wished to deal with informally; punctuality at Tuesday and Friday morning staff briefings; and occasional inconsistency in signing the staff sign-in/out sheet. The claimant said that any lateness was due to childcare and that he believed this had been agreed with Mr Mellor at the point of appointment. Although he said he was willing to apologise to Staff Member A, the evidence shows that Mr Tan did not give him a deadline, set expectations, or indicate that this was a formal requirement affecting his probation. There were no warnings, no suggested improvements, no timeframes and no communication at the meeting that the claimant's employment was in jeopardy. Indeed, in the section headed "Do you believe you inspire the pupils and colleagues? How do you inspire?" Mr Tan is recorded as saying:

People do feel you are inspirational; however, they hope the actions to be followed through. People like your attitude, being apologetic for things. My own observation to you is also, you need to stop promising things quickly to people, so you can organize your workload. Support to HoFs, cover manager need more, and the new exams officer.

This feedback is inconsistent with the respondent's later assertion of serious performance concerns. Rather than indicating inadequacy, this feedback reflects positive assessments of the claimant's leadership and interpersonal qualities and identifies only minor developmental points, which were never portrayed at the time as capability issues requiring formal action.

- 67.3 Crucially, the day after the probation meeting, on 14 December 2023, Mr Tan personally gave the claimant the handwritten card and a £100 John Lewis voucher in addition to the £50 voucher given to all staff. There was no suggestion in the evidence that the claimant's card was issued in anything other than genuine appreciation of work and contribution to the School. The claimant understood this to mean that he was performing well, and there is no evidence that the respondent regarded this impression as mistaken at the time. This gesture is inconsistent with the respondent's later assertion that serious performance concerns were already crystallising by mid-December 2023.
- 67.4 The respondent relies upon several staff and parental complaints, but none of these were communicated to the claimant as disciplinary or capability issues nor were they pursued formally before his dismissal. The written complaint from Staff Member A of 26 November 2023 [176] was expressly treated as an informal matter, consistent with her request and Mr Tan's preference, and remained at that level. Staff Member A made no further formal complaint before the claimant was dismissed. Her later sickness absence in March 2024 allegedly connected to the claimant's treatment of her, nearly two months after the claimant had left employment, cannot logically have influenced the decision to dismiss him.
- 67.5 The complaint from "HG" played no operational role prior to dismissal. The email relied on by Mr Tan in his statement about HG being made to feel uncomfortable by the claimant's behaviour is dated 24 January 2024 at 18:37 [163], which is after the dismissal earlier that day. Although Mr Tan said in oral evidence that conversations occurred on 20 November 2023, these alleged conversations were not disclosed to the claimant, were not recorded contemporaneously, were not included in the respondent's pleaded case, and were not referred to in the probation review. There is no record of HG's concern being presented to the claimant as a performance or conduct issue during his employment.
- 67.6 Similarly, the parental matters cited by the respondent were not treated contemporaneously as capability concerns. In the first incident regarding a subject change, the claimant had emailed the parent and subsequently resolved the matter [148]; Mr Tan accepted this in cross-examination. In the second incident relating to a former Year 13 student, the parents' early correspondence records a constructive meeting with the claimant and their appreciation of the action plan he devised [132]. No evidence

was presented that this matter was revived or escalated as a capability concern between September 2023 and January 2024. It does not appear in the termination letter and was not cited as a reason at the dismissal.

- 67.7 The letter of 11 January 2024, sent by Mr Tan, makes no reference to concerns about performance, capability or conduct. It deals solely with contractual working hours and states that the claimant is expected to attend from 8am to 6pm Monday to Friday, giving him one month to arrange childcare. The claimant responded on 12 January 2024 asking for clarification as to whether he was required to be present until 6pm each day. Mr Tan accepted that he did not reply prior to dismissing the claimant. There is no evidence that any further performance issues were raised with the claimant between 11 January and the claimant's dismissal on 24 January 2024.
- 67.8 At the dismissal meeting on 24 January 2024, Mr Tan informed the claimant that "it was not working" and that his employment was being terminated immediately. There was no discussion of performance concerns, no reference to the staff complaints relied upon in the respondent's witness evidence, and no examples of inadequate performance were put to the claimant. The claimant was not given an opportunity to respond. The meeting lasted only a few minutes, and Mr Tan's evidence was that he had intended to terminate the claimant's employment the previous week on 19 January 2024 when he had originally arranged to meet the claimant. At the time of termination, the claimant's latest communications to Mr Tan concerned clarification of his working hours following the 11 January 2024 letter, not performance issues.
- 67.9 The termination letter of 24 January 2024 records only that the claimant was found not suitable for the role of Director of Studies. It contains no particulars of performance failings and does not refer to staff complaints, parental complaints, punctuality issues, communication issues, or the alleged lack of professionalism later raised in the respondent's case. No process resembling a capability or probationary improvement procedure was commenced, and no steps were taken to support the claimant in meeting any supposed performance targets. The absence of any such process is inconsistent with performance being the operative reason for dismissal.
- 67.10 The claimant's contract of employment provided for a probationary period of three Terms, during which his performance and suitability would be monitored, and the respondent could terminate employment on one month's notice or PILON. The contract also provided that the claimant's employment would be reviewed towards the end of the probationary period, and that the probation period could be extended by up to two further Terms. It further stated that written confirmation would be issued if probation was successfully completed, and that in the absence of such confirmation, the employee should assume probation continued.

- 67.11 In his paragraph 14 of his witness statement, Mr Tan emphasised that a three-term probationary period was necessary in order for the respondent to conduct a fair and reliable assessment of capability, performance, consistency and suitability across different points in the academic year. In paragraph 15, he described a shorter period as inadequate because it would not allow the respondent to provide support, feedback and improvement opportunities where needed. In paragraph 16, he stated that the claimant's performance was being "continuously monitored" throughout probation.
- 67.12 However, Mr Tan's oral evidence revealed a pattern of practice inconsistent with this stated framework. There was only one probationary review meeting, held on 13 December 2023, less than four months into the claimant's employment. That meeting was framed by Mr Tan as "just a chat", intended to see how the claimant was getting on and what support he might need. He accepted that no formal capability concerns were put to the claimant; no warnings were issued; no performance targets were set; and no deadlines for improvement were discussed. Mr Tan did not tell the claimant that he was at risk of failing probation, nor did he outline any specific steps the claimant needed to take to successfully complete it.
- 67.13 Furthermore, the meeting notes record that Mr Tan explored accommodations for the claimant's punctuality difficulties, including offering to move briefing days, rather than treating these as disciplinary or capability matters. Mr Tan accepted in cross-examination that he attempted to find ways to "work around" the claimant's childcare situation. There is no evidence that these issues were treated as capability concerns requiring correction; nor did Mr Tan communicate that failure to comply would jeopardise employment.
- 67.14 Mr Tan gave no evidence that he ever commenced a capability process or considered extending the claimant's probation period, despite the fact that the contract expressly provided for extension and despite his own evidence in his statement that a full assessment required the probation to run across multiple terms. Indeed, Mr Tan acknowledged that the claimant's employment was summarily terminated on 24 January 2024 without following any staged probation process and before the expiry of even the first term's assessment cycle. This is inconsistent with his stated view in his statement that probation should allow for support, feedback and improvement.
- 67.15 Mr Tan's oral evidence also confirmed that he intended to dismiss the claimant on 19 January 2024, only eight days after sending the 11 January 2024 letter dealing with working hours and without raising any new performance matters in the interim. No documentation was produced showing any evaluation of performance during that period or at any time after the December review. Mr Tan accepted that the 11 January 2024 letter did not refer to performance concerns at all; it addressed only contractual hours. He acknowledged that he did not

respond to the claimant's follow-up email querying whether he was required to work 8am–6pm every day.

67.16 The manner of dismissal was also inconsistent with the operation of a probation process. The meeting lasted only a few minutes, and Mr Tan accepted that no performance issues were raised with the claimant at the dismissal meeting. Instead, he told the claimant simply that “it was not working.” The termination letter similarly contained no specifics relating to performance or capability. There is no evidence that Mr Tan gave consideration to extending probation or giving the claimant an opportunity to improve, steps that the contractual scheme expressly contemplated.

67.17 Taken together, the contractual probation provisions, Mr Tan's own description of the purpose of probation, and his evidence in cross-examination demonstrate several inconsistencies between the respondent's stated probationary framework and the manner in which the claimant's probation was handled. These inconsistencies support a finding that the dismissal did not occur as the result of a structured evaluation of performance or suitability conducted in accordance with the contractual probation terms. Rather, the evidence shows that the dismissal was not preceded by the type of monitoring, feedback or support envisaged by either the contractual provisions or Mr Tan's own account of typical practice as per his statement, casting doubt on the respondent's assertion that performance was the operative reason for the decision to dismiss.

67.18 The Tribunal received a document described as redacted “Staff Wellbeing Survey Feedback,” [221] which purported to contain anonymous critical comments by staff about the claimant. A version of a similar document had previously been disclosed to the claimant through his Data Subject Access Request (“DSAR”). In the DSAR version, the name of Ms Elizabeth Emerton had been deleted. In contrast, the version provided in the respondent's hearing bundle had Ms Emerton's name redacted. She was also the subject matter of the complaint. Indeed, under cross examination Mr Tan accepted that the thrust of the complaint (heavily redacted) was against Ms Emerton and not the claimant. No explanation was given in evidence for this inconsistency between the DSAR version and the version produced to the Tribunal. Mr Tan accepted under cross-examination that he had been responsible for producing the document for disclosure and that he made decisions regarding how the document was redacted. It is reasonable to infer that the removal of Ms Emerton's name from the DSAR version was to give the impression that the claimant was the sole subject of the complaint.

67.19 Mr Tan accepted that the survey was completed and received in the first or second week of January 2024.

67.20 The redacted comments in the survey included assertions that the claimant was “always late to briefing meetings”, “rarely in the sixth form”,

“never responded to staff emails”, “left parents’ events early”, and “lied” about conducting learning walks. None of these statements was attributed to a named individual, and Mr Tan confirmed that the authorship of each comment was unknown. He also accepted that anonymous feedback of this nature had not been put to the claimant at any point, either formally or informally, and that he did not inform the claimant during his employment that these views had been expressed.

67.21 The respondent did not provide the Tribunal with unredacted versions of the survey responses, and no witness was called who could speak to the reliability, context, or authorship of the remarks. There was no evidence that the survey had been commissioned, completed or reviewed before the decision to dismiss the claimant, nor that the feedback formed any part of Mr Tan’s reasoning at the time of the dismissal meeting on 24 January 2024. Mr Tan did not refer to the wellbeing survey in the dismissal meeting, and the termination letter made no reference to any concerns arising from such feedback.

67.22 In cross-examination, Mr Tan accepted that the wellbeing survey comments were not included in the respondent’s pleaded reasons for dismissal, were not cited in his invitation to the second probation meeting and played no role in the 11 January 2024 letter. He further accepted that the decision to dismiss the claimant had already been made by the time he received at least one of the staff emails the respondent later relied on. He confirmed that none of the concerns expressed anonymously in the wellbeing survey were shared with the claimant before he was dismissed.

67.23 Notwithstanding the above, in paragraphs 48 and 49 of his statement Mr Tan contradicts himself by stating that because of the survey he held the meeting with the claimant on 24 January 2024 to “address continuing issues with his conduct and performance”. This inconsistency, coupled with the absence of any contemporaneous reliance on the survey, raises serious concerns about the reliability of Mr Tan’s account. It suggests that the wellbeing survey may have been deployed retrospectively to justify a decision already taken, which materially undermines the credibility of his explanation for the dismissal

68. The contemporaneous documentation shows that, by January 2024, Mr Tan considered the claimant’s childcare-related limitations on attendance to be incompatible with his view of the role. The 11 January 2024 letter identifies punctual attendance at 8:00am and physical on-site presence as the issues to be resolved within one month. Nothing in the evidence indicates that performance concerns influenced the timing or substance of the decision to dismiss. Instead, the working-hours dispute was the only matter raised immediately before dismissal, the only matter put to the claimant in writing, and the only matter discussed between 11 and 24 January 2024.
69. On the evidence, the Tribunal finds that the operational reason for the claimant’s dismissal was the respondent’s decision to require strict compliance

with on-site working hours of 8:00am to 6:00pm and the claimant's perceived inability to meet that requirement. Any performance concerns relied upon in these proceedings were not contemporaneously raised, not operative at the time, and not the real reason for the dismissal.

70. The Tribunal heard evidence about a number of named comparators identified by the claimant as individuals who, he said, were permitted to arrive late or leave early. The evidence came from the claimant's witness statement, his oral evidence, and Mr Tan's statement and his oral evidence. The findings below relate only to what the evidence establishes, not whether any comparator is materially similar for the purposes of the EqA. These are as follows:

- 70.1 Ms Elizabeth Emerton – Deputy Head: The claimant stated that Ms Emerton travelled weekly from Nottingham and left the school at 4pm every Friday to travel home. There was no contradiction of this in Mr Tan's oral evidence; indeed, he accepted that she "left every day on Friday at 4pm." There was no evidence that she routinely arrived late in the mornings. The Tribunal finds as a fact that Ms Emerton routinely left early on Fridays at approximately 4pm. She does not have childcare responsibilities.
- 70.2 Ms Sushma Bungler – Deputy Head / Head of Sixth Form: The claimant stated that Ms Bungler "regularly left... before 6pm." Mr Tan accepted that she left before 6pm in oral evidence but added that she attended all events. There was no evidence that Ms Bungler arrived late in the morning. The Tribunal finds as a fact that Ms Bungler did leave before 6pm on some days, though she attended required events. She does not have children.
- 70.3 Ms Cheryl Lu – Assistant Head (Academic Operations & Data): The claimant stated that Ms Lu left around 5pm most afternoons to collect her child. Mr Tan denied this, stating "untrue" in his oral evidence. There was no evidence she regularly arrived late. No documentary evidence corroborated either position. The Tribunal does not find reliable evidence that Ms Lu routinely left early; the evidence is disputed and not independently corroborated.
- 70.4 Ms Laurence Fuld – Head of Year 10 & DDSL: The claimant stated that Ms Fuld "left regularly before 5pm" and was "occasionally late" for 8am Tuesday/Friday briefings. Mr Tan stated he "did not know" whether she left early, and there was no evidence contradicting the claimant's account. On the balance of the evidence, the Tribunal finds that Ms Fuld did on some occasions leave before 5pm and was occasionally late to 8am briefings.
- 70.5 Ms Subha Sivaraman – Teacher of Mathematics: The claimant stated that Ms Sivaraman "regularly arrived after 8am and left before 5pm" due to childcare responsibilities. Mr Tan accepted that "we had some arriving late," but did not specifically contradict the claimant's position in relation to Ms Sivaraman. The Tribunal finds it is more likely than not that Ms

Sivaraman was occasionally late and occasionally left early due to childcare, and that management were aware.

- 70.6 Ms Illder Davulcu – Teacher of EAL/SEN: The claimant stated that Ms Davulcu “left the premises at around 5pm.” Mr Tan did not confirm this but did not deny it either. The Tribunal finds the evidence is insufficient to establish a routine early departure but accepts she may have left before 6pm on some days.
- 70.7 Ms Hamdi Mohammed – Teacher of Mathematics: The claimant stated that Ms Mohammed left the school around 5pm. Mr Tan’s evidence was that he was “not aware” of this. No documentary evidence confirms or contradicts this.
- 70.8 Ms Sophie Phillips – Teacher of Geography: The claimant stated that Ms Phillips regularly left early despite not having childcare responsibilities. Mr Tan stated he was not aware of this practice. There was no independent corroboration. The Tribunal finds that the evidence is insufficient to make a finding that Ms Phillips routinely left early.
71. The claimant did not appeal the decision to dismiss him.
72. The claimant was paid in lieu of notice and instructed not to return to the school site. His email access was disabled later that evening, and arrangements were made via HR for him to collect his belongings at a time when no pupils or staff were present.

The law

Entire agreement clauses in contracts of employment

73. Entire agreement clauses are contractual provisions stating that the whole agreement between the parties is contained within the written document. Their purpose is to prevent parties from relying on oral statements, prior negotiations, or extrinsic terms said to form part of the bargain.
74. Such clauses are generally effective. In **White v Bristol Rugby Ltd [2002] IRLR 204 (QBD)**, a professional rugby player attempted to rely on an alleged oral “opt-out” arrangement said to have been discussed during negotiations. The High Court held that the express entire agreement clause precluded reliance on that term; the player was bound by the written contract and could not set up a collateral oral agreement contradicting it.
75. However, an entire agreement clause is not automatically conclusive, particularly in the employment context, where tribunals will scrutinise the reality of the working relationship. If the written document does not reflect the actual bargain or is inconsistent with how the contract was performed, the clause may not prevent the tribunal from looking beyond the written terms. This was the approach in **Bushaway v RNLI [2005] IRLR 675 (EAT)**, where an agency agreement stated (a) that it was the entire agreement and (b) that no employment relationship existed. The tribunal was nevertheless entitled to

examine the true nature of the relationship during the first five months' service. The EAT upheld that approach, holding that the entire agreement clause was not determinative where the factual working arrangements demonstrated an employment relationship different from that described in the written document.

76. A further limitation arises where the party seeks to rely on the clause to exclude liability for representations not actually forming part of the contractual terms. In **AXA Sun Life Services plc v Campbell Martin Ltd [2011] 1 CLC 312 (CA)**, the Court of Appeal held that an entire agreement clause did not bar a claim based on misrepresentations relating to matters outside the terms of the written agreement. The clause could supersede prior representations only to the extent that they related to contractual terms; it could not extinguish liability for misrepresentations about matters outside the contract.
77. Taken together, these authorities show that while entire agreement clauses normally operate to confine the parties to the written terms, courts and tribunals will look at the true substance of the relationship and the consistency of the parties' conduct. Where the written terms clearly reflect the agreement, an entire agreement clause will prevent reliance on alleged oral variations. Where they do not, the existence of the clause will not necessarily prevent the tribunal from considering whether additional terms or different contractual realities arose in practice.

Variation of Contractual Terms

78. A contract of employment may only be varied with the agreement of both parties. A unilateral change imposed by one party will normally amount to a breach. However, agreement to a change may be express or, in some circumstances, implied from conduct. Because employment contracts are relational and ongoing, courts are cautious about finding implied agreement.
79. Implied agreement arises only where the employee's conduct is unequivocally referable to accepting the new term. The test, originating in **Solectron Scotland Ltd v Roper 2004 IRLR 4, EAT**, is:
 - 79.1 Is the employee's conduct, in continuing to work, explainable only on the basis that they accepted the new terms?
 - 79.2 If the conduct is reasonably consistent with the original contract continuing to operate, no variation is inferred.
80. Courts emphasise that implying consent to contractual changes is a course to be adopted with great caution (**Jones v Associated Tunnelling Co Ltd 1981 IRLR 477, EAT**).
81. Where a variation has an immediate effect (e.g. pay cut, change in duties), continuing to work without protest may, in limited circumstances, imply acceptance, but only where the inference is clear and unequivocal.
82. Where a variation has no immediate effect (e.g. mobility clause to be exercised later), tribunals and courts are even less willing to infer acceptance merely

from continued employment. This cautious approach was followed in cases such as **Aparau v Iceland Frozen Foods plc 1996 IRLR 119, EAT.**

83. If the employee objects, works “under protest”, or acts in a way that shows ongoing disagreement, this prevents any inference of consent. Similarly, where the employee’s continued work is reasonably capable of explanation other than acceptance of new terms, the inference cannot be drawn.
84. Custom and practice can imply terms into a contract but cannot easily vary existing express terms. To do so would require a very long-established, consistent practice showing clear acceptance by the employee, and courts remain doubtful that custom alone can undermine express rights.

Direct discrimination

85. Section 13(1) of the Equality Act 2010 (“EqA”) provides that a person (A) directly discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
86. The statutory test requires the Tribunal to determine:
 - 86.1 whether the claimant was treated less favourably;
 - 86.2 the circumstances of the actual or hypothetical comparator (s.23 EqA); and
 - 86.3 whether the less favourable treatment was because of the protected characteristic.
87. As explained in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 (HL)**, the issues of less favourable treatment and the reason for that treatment may in some cases be “intertwined”, and it may be appropriate to examine them together.
88. The Tribunal recognises that direct discrimination is rarely overt. In **Glasgow City Council v Zafar [1998] ICR 120 (HL)**, it was observed that alleged discriminators “do not... advertise their prejudices: indeed they may not even be aware of them”. For this reason, Parliament has enacted the burden-of-proof provisions now contained in s.136 EqA. Once a claimant establishes facts from which the Tribunal could conclude, in the absence of an explanation, that discrimination has occurred, the burden shifts and the respondent must prove that the treatment was in no sense because of the protected characteristic.
89. When determining whether there has been less favourable treatment, the Tribunal is entitled to consider the whole evidential picture. In **London Borough of Ealing v Rihal [2004] IRLR 642 (CA)**, it was confirmed that the Tribunal may look at conduct before or after the alleged discriminatory act. Similarly, in cases involving multiple allegations, the Tribunal may take a holistic view: **Fraser v University of Leicester (EAT 0155/13)**.

90. On causation, I remind myself that in **Nagarajan v London Regional Transport [1999] ICR 877**, it was held that where sex has a “significant influence” on the outcome, discrimination is made out.
91. Unreasonable or unfair treatment does not, without more, establish discrimination, but it may support such an inference in the absence of any other credible explanation. **Madarassy v Nomura [2007] ICR 867** emphasises that “something more” than difference in treatment and difference in sex is required (see also **Anya v University of Oxford [2001] ICR 847 (CA)**). The suggestion that an employer treats “everyone badly” may rebut such an inference, but as noted in **Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust (EAT 0269/15)**, such a submission may be difficult to sustain where the evidence shows that only one individual was treated in the particular complained-of way. However, Tribunals must not jump from a finding of unreasonable conduct to an assumption of discrimination: **Messeri v Royal Hospital for Neuro-Disability (ET 2301983/20)**.
92. The rationality of the employer’s actions may be relevant when determining whether an inference of discriminatory motivation should be drawn: **Nelson v Newry & Mourne DC [2009] IRLR 548 (NICA)**.
93. Less favourable treatment is assessed objectively. The claimant’s perception is not determinative, although it may be relevant. In **Burrett v West Birmingham Health Authority [1994] IRLR 7 (EAT)** and **Land Registry v Grant [2011] ICR 1390 (CA)**, tribunals and courts confirmed that subjective feelings of affront do not establish less favourable treatment unless objectively justified.
94. Nevertheless, treatment may be “less favourable” even if the outcome is not disadvantageous in a material sense. In **Chief Constable of West Yorkshire v Khan [2001] ICR 1065 (HL)**, the Court held that withholding a reference could constitute less favourable treatment even where the reference would likely have been unfavourable. The key question is whether the claimant would have preferred not to be treated differently. This approach is reflected in the EHRC Code (para 3.5).
95. The Tribunal must identify a comparator, actual or hypothetical, whose circumstances are the same or not materially different, save for the protected characteristic. This requirement derives from s.23(1) EqA and the guidance in **Shamoon**, where the House of Lords stressed that the comparator must share all material circumstances relevant to the employer’s decision-making, except the protected characteristic. The same approach was reiterated in **Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield School [2003] ICR 937 (HL)**.
96. Where there is no suitable actual comparator, the Tribunal must construct a hypothetical one: **Balamoody v UKCC [2002] ICR 646 (CA)**. In constructing such a comparator, the Tribunal may draw inferences from the treatment of broadly similar colleagues: **Chief Constable of West Yorkshire v Vento (No 1) [2001] IRLR 124 (EAT)**, approved in **Shamoon**. However, the comparator must include all circumstances relevant to the employer’s reasoning. Failure to

do so constitutes an error of law, as illustrated in **Governing Body of Sutton Oak CE Primary School v Whittaker (EAT 0211/18)**.

97. In deciding how a hypothetical comparator would be treated, the evidence that comes from how real individuals were actually treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the weightier will be the significance of their treatment. Certainly, comparing the treatment of those in non-identical but not wholly dissimilar cases, 'evidential', rather than 'statutory' comparators, is a permissible means of constructing a hypothetical comparator and judging how he or she would have been treated,
98. In **Gould v St John's Downshire Hill 2021 ICR 1, EAT**, Mr Justice Linden put it in the following terms: 'Where a tribunal does construct a hypothetical comparator, this requires the creation of a hypothetical "control" whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic... The question is then whether such a person would have been treated more favourably than the claimant in those circumstances. If the answer to this question is that the comparator would not have been treated more favourably, this also points to the conclusion that the reason for the treatment complained of was not the fact that the claimant had the protected characteristic.'
99. It is not enough for the claimant to identify differential treatment; they must show that the reason for that difference was the protected characteristic. As explained in **R v Birmingham CC ex p EOC [1989] IRLR 173 (HL)** and **Royal Bank of Scotland v Morris (EAT 0436/10)**, discriminatory motivation may be inferred where stereotypes or assumptions based on a protected characteristic operate, even subtly.
100. Finally, section 13 EqA requires that the claimant personally experience less favourable treatment. A person with no genuine interest in an advertised role cannot claim detriment when they were not shortlisted: **Keane v Investigo (EAT 0389/09)**; **Berry v Recruitment Revolution (EAT 0190/10)**.

Discussion and conclusions

What was agreed about the claimant's hours?

101. On the evidence, I am satisfied that during the pre-contract discussions on 4 July 2023, the claimant raised concerns about being unable to work on site from 8am to 6pm because of his childcare responsibilities, and that Mr Mellor reassured him that although those hours appeared in the written contract, they were "not set in stone" and would be applied with an understanding of personal circumstances. I have found that the claimant relied on this reassurance when deciding to accept the role and that, in practice, some degree of flexibility was afforded to him during the autumn term.

102. However, the contract of employment signed on 5 July 2023 contains an entire agreement clause stating that the written contract constitutes the whole agreement between the parties and supersedes any prior discussions or representations. The general position is that such a clause prevents either party from relying on pre-contractual assurances that contradict or supplement the written terms: **White**. On its face, the clause is capable of excluding reliance on any alleged side-agreement about working hours.
103. Nevertheless, it is well-established that an entire agreement clause is not automatically conclusive, particularly in an employment context where tribunals must consider whether the written contract genuinely reflects the whole of the parties' agreement (**Bushaway**).
104. Applying **Bushaway**, I find that although the entire agreement clause is relevant, it does not preclude the Tribunal from examining (a) what was in fact communicated between the claimant and Mr Mellor; and (b) how the working-hours provision operated in practice once employment commenced. The evidence shows that, following the claimant's appointment, the parties did not conduct themselves entirely in accordance with the written 8am–6pm requirement. The claimant was not required to adhere strictly to those hours in the first term; his occasional late arrival for briefing meetings or early departure for childcare reasons did not lead to any suggestion of breach, warning, or formal action until mid-December. Mr Tan himself accepted in evidence that the school accommodated the claimant's childcare needs on several occasions. The manner in which the working-hours clause was operated between August and December therefore departed to some degree from the strict terms of the written contract.
105. In those circumstances, applying the approach in **Bushaway**, I am entitled to consider whether the written clause represented the full agreement between the parties as to working hours, or whether the parties reached an informal understanding, albeit not amounting to a contractual variation, that the claimant would not be required strictly to observe the 8am–6pm hours every day. While I do not find that the pre-contract discussions created a legally binding contractual term varying the written hours, the evidence does demonstrate that the parties operated on the basis of a degree of agreed flexibility during the first term. That agreed flexibility does not override the written contract, but it is relevant for the purposes of determining: (a) the claimant's reasonable expectations; (b) the timing and nature of the 11 January 2024 letter; and (c) whether the respondent's sudden insistence on strict hours was a departure from prior practice and understanding.
106. Accordingly, I find that the entire agreement clause prevents the July 2023 discussions from amounting to a contractual variation of the claimant's working hours, but it does not prevent the Tribunal from considering those discussions and the subsequent conduct of the parties when assessing the respondent's reasons for its later actions, including the 11 January 2024 letter and the dismissal.

107. In the alternative, if I am wrong, and assuming the entire agreement clause prevents the Tribunal from relying upon the July 2023 discussions with Mr Mellor as having contractual effect, I consider whether the claimant's contract of employment was nonetheless varied by the conduct of the parties after his employment commenced. The relevant legal question is whether the claimant's conduct in continuing to work, and the respondent's conduct in permitting a degree of flexibility, amounted to unequivocal agreement to a contractual variation. The authorities emphasise that variation by conduct is a "course to be adopted with great caution", and that continued working will amount to acceptance of a variation only where the conduct is only referable to accepting the new term; silence, ambiguity or mixed explanations are insufficient.
108. Applying those principles, and in the alternative, I do not find that the claimant's contractual working hours were varied by conduct. Although I accept that the claimant occasionally arrived after 8am or left before 6pm for childcare reasons, and that the respondent did not challenge these instances during the autumn term, that flexibility is not, on the facts, capable of amounting to a variation of contract. The evidence shows that the claimant attended work within or close to the core hours on most days, worked long hours, and undertook significant additional tasks remotely. The respondent's tolerance of this pattern was sporadic, informal, and unaccompanied by any statement, express or implied, that the contractual hours no longer applied. Mr Tan did not indicate, either externally or internally, that the claimant's contractual hours had been relaxed or amended. Nor did he treat the claimant's occasional lateness as the exercise of a contractual right. On the claimant's side, his conduct is not unequivocally referable to having accepted a different contractual regime: his attendance pattern was driven by childcare responsibilities, and he continued throughout to assert that flexibility had been agreed before he joined. That assertion is inconsistent with an acceptance that the contractual hours had been formally or impliedly replaced by a different term.
109. Further, the alleged variation would have been detrimental to the respondent, which strengthens the need for clear acceptance. There is no evidence of any positive act of acceptance by the respondent of a new working-hours term, nor evidence of any consistent practice sufficient to indicate that the contractual hours clause had been abandoned or replaced. The relatively short period of work before dismissal, together with the upheaval within the school, further undermines the suggestion that a settled course of dealings capable of varying the contract had been established.
110. Accordingly, and in the alternative, even if the July discussions are excluded from consideration, I find that the claimant's contractual working hours were not varied by conduct, custom, practice or acquiescence. The entire agreement clause therefore has full effect in preserving the written terms, and the contractual working hours remained as stated in the contract throughout the claimant's employment.

Was the claimant directly discriminated against because of his sex?

111. The legal consequence of both routes of analysis relating to the claimant's contractual hours is the same.
112. Whether the contract was varied or not, and regardless of the effect of the entire agreement clause, the Tribunal must answer the statutory question under section 13 EqA: Why was the claimant dismissed? Was sex a significant influence on that treatment (**Nagaraian**)? I remind myself that motive is irrelevant. The issue is whether sex had a significant influence on the treatment.
113. Thus, even if the claimant was dismissed because the respondent wished to enforce the contractual hours, the Tribunal must determine whether that enforcement was applied only to him, and whether his sex materially influenced that differential application.
114. Section 23 EqA requires that comparator circumstances be the same or not materially different from the claimant's. The claimant identified eleven women whom he said received childcare-related flexibility or were permitted to arrive late or leave early. I must determine:
- 114.1 which are materially similar comparators;
- 114.2 which are not; and
- 114.3 which, though not materially similar, may still be used as evidential comparators to assist in constructing a hypothetical comparator.
115. In the alternative, the claimant relies on a hypothetical comparator.
116. Material similarity requires relevance to the reason for treatment. The respondent's operative reason (as I have found) was the claimant's inability to be physically present from 8am–6pm due to childcare responsibilities.
117. Accordingly, the materially relevant circumstances are:
- 117.1 seniority / leadership responsibility;
- 117.2 requirement to attend morning briefings and evening events;
- 117.3 childcare-related constraints.
118. I apply this to the named comparators.
- Ms Sushma Bunker (Deputy Head / Head of Sixth Form)*
119. In relation to Ms Bunker the following apply:

- 119.1 Senior leadership role.
 - 119.2 Worked on the same leadership structure as the claimant.
 - 119.3 Evidence shows she sometimes left before 6pm.
 - 119.4 She did not have childcare responsibilities; she does not have children.
 - 119.5 No evidence of written warnings, formal correspondence or enforcement.
120. My finding: Materially the same. However, she is not materially the same for the specific purpose of comparing childcare-related flexibility, as there is no evidence she had childcare responsibilities and she has no children. She remains an evidential comparator assisting the construction of a hypothetical comparator.

Ms Elizabeth Emerton (Deputy Head)

121. In relation to Ms Emerton the following apply:
- 121.1 Senior leadership role.
 - 121.2 Accepted by Mr Tan to leave at 4pm every Friday.
 - 121.3 No evidence of disciplinary action or formal enforcement of hours.
 - 121.4 Although she commuted from Nottingham, the key relevant factor is seniority and regular early departure.
 - 121.5 Although she has children, no evidence she had childcare responsibilities.
122. My finding: Ms Emerton is a valid comparator for the purposes of assessing whether the respondent enforced the 8am–6pm contractual hours against the claimant in a discriminatory manner. She held a senior leadership position, was required to attend the same types of meetings and events and regularly left early without sanction. However, she is not materially the same for the specific purpose of comparing childcare-related flexibility, as there is no evidence she had childcare responsibilities. She remains an evidential comparator assisting the construction of a hypothetical comparator.

Other named comparators

123. The remaining individuals occupy roles that differ materially from the claimant in responsibilities, seniority, and expectations, particularly regarding:
- 123.1 chairing or attending leadership meetings;
 - 123.2 oversight of academic systems;

- 123.3 parental-facing functions; and
- 123.4 expectations of availability.
- 124. These include:
 - 124.1 Laurence Fuld (Head of Year 10);
 - 124.2 Subha Sivaraman (Teacher, Mathematics);
 - 124.3 Illder Davulcu (Teacher, EAL/SEN);
 - 124.4 Hamdi Mohammed (Teacher, Mathematics);
 - 124.5 Sophie Phillips (Geography);
 - 124.6 Roula Kazami (Classics);
 - 124.7 Afroditi Gregoriou (Biology);
 - 124.8 Emma Stowe (Head of Years 7&8 / Teacher of PE).
- 125. Their attendance patterns may be relevant contextual evidence, but they are not materially similar comparators for the purposes of section 23 because:
 - 125.1 they had no role within the SLT;
 - 125.2 they were not subject to the same expectations of early/late availability;
 - 125.3 they had no responsibility for academic systems operation;
 - 125.4 the respondent produced no evidence that the expectation of on-site presence applied identically to them.
- 126. My Finding: Not materially the same for section 23 EqA but can be used as evidential comparators in constructing a hypothetical comparator.

Hypothetical comparator

- 127. None of the named comparators is materially identical to the claimant. Where no real comparator is materially identical, the Tribunal must construct a hypothetical comparator whose circumstances are the same in all material respects except sex.
- 128. The relevant circumstances are: senior leadership status; the requirement to comply with an expectation of attendance broadly between 8am and 6pm; responsibility for attending senior meetings and school events; occasional lateness for briefings; occasional early departures; and the logistical impact of childcare responsibilities on strict compliance with those hours.

129. Accordingly, the appropriate hypothetical comparator is: a female senior leader, subject to the same leadership expectations and demands as the claimant, who also has childcare responsibilities that at times affect her ability to comply strictly with the 8am–6pm hours, and who on occasion arrives late, leaves early, or leaves the school site before 6pm.
130. The Tribunal must then ask whether such a hypothetical woman would have been treated more favourably than the claimant. In light of the evidence of how other senior female leaders were treated, who enjoyed flexibility and were not subjected to disciplinary enforcement, and taking into account the respondent's failure to enforce hours consistently, I find that such a woman would not have been:
- 130.1 issued with the 11 January 2024 letter;
- 130.2 required to "sort out" her childcare within one month;
- 130.3 subjected to strict enforcement of hours; or
- 130.4 dismissed on 24 January 2024.
131. The treatment the claimant received was materially less favourable than that which would have been afforded to the hypothetical comparator. This satisfies the requirement identified in **Gould** that a properly constructed comparator would have been treated more favourably. That is a strong indicator that the claimant's sex was a material influence on the respondent's actions.

Conclusion on liability

132. Taking into account the hypothetical comparator, I find:
- 132.1 On a balance of probabilities, a hypothetical comparator would be permitted to work flexibly without sanction and without formal enforcement of contractual hours;
- 132.2 The claimant alone was subjected to written enforcement of the 8am–6pm hours and dismissed for issues arising from those hours;
- 132.3 The respondent provided no evidence (despite notice) showing that women in comparable roles received equivalent treatment;
- 132.4 The respondent's explanation for differential enforcement was inconsistent, retrospective, and unsupported by contemporaneous evidence;
- 132.5 On the authorities (**Nagarajan**, **Madarassy**, **Shamoon**), the claimant has shown facts from which the Tribunal could conclude discrimination.
133. The respondent has not discharged its burden under s.136(3) to prove that sex played no role.

134. Accordingly, whether or not the contract was varied, and notwithstanding the effect of the entire agreement clause, the respondent's selective enforcement of the working hours, the issuing of the 11 January 2024 letter, and the decision to dismiss the claimant were materially influenced by his sex.
135. The claim is well founded, and Tribunal therefore finds that the claimant was directly discriminated against contrary to section 13 Equality Act 2010.

Approved by:

Employment Judge A.M.S. Green

31 March 2026

Judgment sent to the parties on:

31st March 2026

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For the Tribunal:

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