EMPLOYMENT TRIBUNALS

Claimant: Ms C Burton-York

Respondent: Diocese of Westminster Academy Trust

Heard at: Watford Employment Tribunal (in public; by video)

On: **8 to 12 and 15 to 16 March 2021**

Before: Employment Judge Quill; Ms G Bhatt; Ms A Brosnan;

Appearances
For the claimant: Mr D Stephenson, counsel
For the respondent: Ms A Johns, counsel

RESERVED JUDGMENT

(1) The following complaints succeed:
   (i) Unfair dismissal
   (ii) Breach of contract
   (iii) Harassment related to race:
      a. There was a contravention of section 40 Equality Act by not reappointing the Claimant in a Head of Year role
   (iv) Direct discrimination because of race:
      a. there was a contravention of section 39(2)(d) Equality Act 2010, around 12 May 2016 by requesting that the Claimant relinquish her Head of Year 7 role
      b. there was a contravention of section 39(2)(a) Equality Act 2010, around April 2017 by not reappointing the Claimant in a Head of Year role
      c. there were contraventions of section 39(2)(d) Equality Act 2010 by the contents of the following references: Brentslde High School (on or around 28 April 2017); Preston Manor (on or around 17 May 2017); Guru Nanak Sikh Academy (on or around 21 February 2018); Hammersmith Academy (on or around 3 October 2018); Northolt High School (on or around 31 October 2018)

(2) The remaining complaints do not succeed and are dismissed.

(3) There will be a remedy hearing by video before the same panel, with a time estimate of one day.

REASONS

Procedural History and Claims and Issues

1. This is a claim brought by a former employee of the respondent. The claimant is a teacher. The respondent is a multi-Academy trust.

2. The procedural history is as follows:

Claim	Presented	Conciliation	Respondents
Claim 1 3314332/2019	26.04.19	R122863/19/33 26.02.19 to 26.03.19	Diocese of Westminster Academy Trust The Douay Martyrs Catholic Secondary School
		R122976/19/83 26.02.19 to 26.03.19	The Douay Martyrs Catholic Secondary School
		R122990/19/54 26.02.19 to 26.03.19	Roman Catholic Diocese of Westminster (on ACAS certificate); Diocese of Westminster Academy Trust (on claim form)
Claim 2 3326186/2019	26.11.19	R525937/19/70 29.07.19 to 29.08.19	Diocese of Westminster Academy Trust
Claim 3 3304155/2020	23.04.20	R121956/20/45 26.02.20 to 26.03.20	Diocese of Westminster Academy Trust

3. The first preliminary hearing took place in November 2019, as a result of which the list of allegations which appears in the bundle at page 514 was submitted by the claimant to the tribunal and the respondent. This includes the same 10 factual allegations as race discrimination and in the alternative harassment related to race.

4. On Day 1 of this hearing, it was agreed that for the list of issues we would use that document as the 10 allegations of discrimination or harassment as per Claim 1.

5. It was agreed at the 2019 preliminary hearing, that the correct name for the first respondent was "The Diocese of Westminster Academy Trust" and that claims against the second and third respondents would be dismissed on withdrawal.

6. Shortly after the first preliminary hearing, a further claim was issued to and that was in due course consolidated with claim 1. There is a list of seven alleged acts of victimisation at paragraphs 9.13 to 9.7 of Claim 2. Claim 2 relates only to victimisation. The only protected act relied on is the fact that Claim 1 was issued. The introduction to paragraph 9 of the grounds of complaint states that the allegation is that the detriments were because the claimant had done that protected act.

7. It was agreed on Day 1 for the list of issues for claim 2 was that we would analyse the arguments about each of the seven alleged detriments, it being admitted that the presentation of Claim 1 was a protected act.

8. For both Claim 1 and Claim 2, we also had to consider time-limit issues as per section 123 of the Equality Act 2010

9. Claim 3 contained three claims, namely that:

    9.1 there was an unfair dismissal (alleged to be a constructive dismissal and the respondent denies that there was a dismissal)

    9.2 there was a dismissal in breach of contract (no notice)

    9.3 there was a breach of Section 1 or section 4 of the Employment Rights Act 1996 (and the argument, therefore, that, in appropriate circumstances an uplift under section 38 of the Employment Act 2002 could be awarded.)

10. The Respondent did not file a response to Claim 2. However, responses to Claims 1 and 3 were submitted and we consider the allegations in Claim 2 on their merits and on the basis that liability is denied.

The Hearing and the Evidence

11. We had a bundle of documents which was supplied as a PDF. Unfortunately, the PDF pages did not match the numbered pages on the documents. Furthermore, there were several pages missing which were supposed to be included. Those missing pages were supplied to us during the course of the hearing. In addition, there were several further batches of documents added to the bundle. Generally speaking, this was by agreement, and where it was not by agreement we gave our reasons at the time.

12. The claimant had produced a written witness statement and she gave evidence was cross-examined about it. She also sought to rely on another witness, Ms Kalsi, who produced a written statement. The respondent had no questions Ms Kalsi, and nor did the panel and therefore her statement was taken as read and given

exactly the same weight as it would have if she had attended to give oral evidence. In addition, the claimant had a further witness Ms Brown, who gave evidence via witness summons and her evidence in chief was by answering the claimant's counsel's questions and she was questioned by the panel and cross-examined by the respondent's counsel.

13. The respondent had four witnesses. One of these, Mr O'Reilly produced a single witness statement. Each of the other three and produced a main witness statement and then a supplementary statement responding to comments in the claimant's statement. The other three witnesses were Mr Corish, Ms O'Grady, and Mr Anderson. All four of the respondent's witnesses gave oral evidence and were questioned by the other side and by the panel.

14. The hearing was conducted wholly remotely via video. On Day 1, there was an application by the claimant to have the hearing converted to liability only and we declined that application, but with permission for either party to make a further application once the liability decision was made. The timetable that we set was: half a day reading on Day 1; the remainder of Day 1 and all of day 2 to be the claimant's witnesses; Days 3 and 4 to be the respondent's witnesses; first thing on Day 5, submissions from each side with a view to giving the liability decision first thing on Day 7.

15. Unfortunately, there was a technical problem with CVP on the afternoon of Day 3, meaning that witness evidence did not conclude until Day 5. There was an application by the claimant representative on Day 5 for an adjournment so that submissions would be dealt with on Day 6 and we refused that for the reasons which we gave at the time. Following submissions on Day 5, the claimant representative's purported to serve additional written submissions over the weekend which we refused to take into account for the reasons we gave in writing.

16. At the same time, he also sought to add two additional items to the bundle. It was in the interests of justice for us to look at these items for the reasons which we gave at the time (including that the items were referred to by the claimant in her witness statement and they were referred to by the claimant in the grounds of complaint for Claim 3, and that versions of the items - though by no means identical versions - were included in the hearing bundle). Because we gave permission for these items to be added to the bundle and we said we would take them into account. We also gave the parties permission to make additional written submissions on them.

The findings of fact

<u>The Respondent's data loss</u>

17. This is a case in which the claimant's side is inviting us to draw inferences from, amongst other things, the respondent's alleged failure to disclose certain documents which, the claimant argues, ought to exist. We will comment on that as we go through our reasons, but there is one particular issue which we will address separately at the outset of these reasons. That is the information that we were given about an IT problem of some description which we were told affected the respondent in December 2020.

18. The situation has not been explained to us very clearly by the respondent. We would like to make clear that that is in no way the fault of the claimant's counsel who has done her best to pass on to us the information she has received from the respondent, including information they have received from Microsoft and from the respondent's IT consultants.

    18.1 Nonetheless, the situation is unclear. We consider that it ought to have been reasonably straightforward for the respondent to say exactly which electronic documents had been lost. Not necessarily a list of file names, of course, as that might have been lost, but a description of the categories of documents and of how they were stored (and by whom) and of what efforts there had been to obtain duplicates (for example from anyone who drafted them or downloaded them before they were lost).

    18.2 In particular, at the very least, the Respondent should have been able to explain to us whether its position was that only the data from its email system had been lost (which would, of course, mean that both emails and attachments to the emails were included in what was lost) or whether it was also stating that files stored in other locations (outside of the email application) had also been lost). If it were the former, then while that would mean that the attachment (as well as the covering email) went missing, then it would not necessarily mean that the document itself (which had been circulated via an email) had been deleted from everywhere in the Respondent's electronic file storage.

    18.3 Mr Corish's position in evidence was that it was the latter. In other words, that it was not just emails and their attachments that had gone missing, but other file storage locations had also been lost and so (for example) it was not possible to track down documents (circulated via email) from anywhere in the Respondent's electronic file storage.

    18.4 Neither Mr Corish nor Mr Anderson were able to say whether any reports had been made to the school's/respondent's data protection officer or whether the matter had been reported to the Information Commissioner.

    18.5 The email from Microsoft used the word suspicious in describing the situation and referred to the fact that were the data should be there was now merely a row of zeros. Microsoft do not appear to have been suggesting that the explanation is that this was done deliberately and they seemed satisfied that it would be consistent with an accidental loss of data, followed by – they imply - an incompetent attempt to restore the data.

    18.6 The two communications shown to us from the respondent's IT consultants shed no particular light on the situation. We were told that as well as the 2020 version of the documents, the 2018 backup was also destroyed.

    18.7 In the circumstances, we assume that this was an accidental loss of data, which had no connection to the claimant's claim against the respondents. Furthermore, we accept the respondent's position that from December 2020 onwards, it was unable to disclose any further emails stored on the school's email system.

18.8 Therefore we draw no adverse inferences from the failure to disclose, from December 2020 onwards, further emails from the relevant period.

18.9 The events of December 2020, however, do not necessarily mean that it is inappropriate for us to draw adverse inferences in appropriate circumstances in relation to documents which ought to have been disclosed prior to December 2020, or in relation to documents which we decide the Respondent ought to have been able to obtain even after December 2020; for example, because someone received them to an email address that was not one which was affected by the data loss, and/or they were held in any other electronic or physical storage location that was not affected by the data loss.

The Claimant's employment up to 2015

19. The claimant describes her race as black Afro-Caribbean. She is a teacher. She started working at Douay Martyrs school in 2004 when it was a school maintained by the local authority. It was a voluntary-aided school, meaning that her employer at the time was the governing body of the school.

20. At the time her employment commenced her terms and conditions of employment were governed by the Burgundy book which is the national agreement between unions and employers which governs teachers. The parties did not put a copy of that document, or of any relevant pages from it, into the bundle.

21. Her employment was also governed by legislation, including statutory guidance published from time to time by the government, including the School Teachers Pay and Conditions Document (known as "The Document").

22. There is a 2004 letter in the bundle which offers the claimant's employment and which she has signed to accept. That is dated May 2004. There is also a written contract in the bundle which is signed by the school in April 2004 but not signed by the claimant. No evidence has been produced to say that the document was actually issued to the claimant and the claimant denies receipts. The person who signed on behalf of the school is Ms Doyle. Ms Doyle has, for some of the intervening period, acted as company secretary for the respondent and she is currently Mr Corish's assistant. She was not called as a witness, but she did attend some parts of the video hearing. The version of the 2004 contract which appears in the bundle was supplied to the claimant around January 2019 in response to a subject access request. On balance of probabilities, some version of it was given to the Claimant at the time.

23. In around April 2012 the respondent was created as a multi-Academy trust ("MAT"). The school in which the claimant worked was one of the schools, which became an Academy and joined the multi-Academy trust at around the time of its creation, April 2012.

24. No documents were placed in the bundle to specifically show what consultation happened with staff at the time, but we are satisfied that staff were aware that their employer was changing from the governing body of the school to the respondent in this matter.

25. The respondent asserts that all staff were issued with a new contract in the format which appears at page 173 of the bundle. This is a document for which the foorer information says “effective September 2013 (updated April 2016”.

26. Given the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”), the onus would be on the respondent if it was seeking to prove that there had been any variation in the Claimant’s contract as a result of her employer changing in 2012. The respondent has not done so. The claimant denies having been issued with a new contract and the respondent has not provided the copy of any version which it alleges were sent to her in 2012 or 2013 (but only a blank generic template created later) and has not supplied us with copies of any covering letter or email, etc, which was alleged to have supplied the document to the Claimant.

27. In around 2012, the claimant was appointed as head of year. The letter, appointing her to this position is in the bundle at page 151 and is on the respondents headed notepaper. In other words, it seems the letter post dates the change of employer. The letter is dated 9 July 2012. The letter includes full details of the respondent's name and address, including its company number. The claimant admits receiving this letter, and indeed relies on as part of her claim. The letter states that the contract as Head of Year is permanent and that it starts from 1 September 2012. stating it is a permanent position. It is from the then headteacher, Mr Rainsford.

28. The youngest pupils at the school were in Year 7 (in other words, they had done Years 1 to 6 elsewhere). Years 7, 8, 9, 10 and 11 were divided between key stages 3 and 4. Year 11 was when the pupils took their GCSEs. The school also had A level students after Year 11.

29. At the time that the claimant was appointed to the post, a head of year would stay with a particular group of students as they went through the school. So, for example, if the teacher was the head of Year 8 in one year, then the following year, she or he would stay with the same group of pupils and would be head of Year 9. The head of year 11 would be the following year's head of year 7.

30. One of the duties of the head of year 11 was - in the summer term (potentially while Year 11 pupils were on study leave) - to visit the local schools in the area which contained those Year 6 students who were to be admitted to the Douay Martyrs the following year: the new year 7.

31. Mr Eugene O'Reilly is deputy head teacher of the school. One of his functions was to be the leader of the heads of year. He tended to convene a meeting of the heads of year, approximately once every half term.

32. There was no formal written job description or role profile for head of year at the time. The head of year post attracted a “Teaching and Learning Responsibility Payment”, a “TLR”. Specifically it was awarded TLR1A.

33. We were given a one-page extract from The Document (the version that was supplied to us was dated 2016, but neither party sought to argue that there were any significant differences in the versions for other years as relates to TLR, other than the fact that the pay ranges change annually).

34. According to the extract, decisions to award a particular TLR payments, whether at level 1, which is the highest or else level 2 or 3, should be documented and the decisions made in accordance with a written pay policy document. We were told by Mr Corish that the respondent does not have pay policy documents and he regards such decisions as being matters for him to take as headteacher.

2015 and 2016

35. In around summer 2015, Mr Corish was appointed to be the new head teacher of Douay Martyrs, and he was due to start in the academic year 15/16, in other words, in September 2015. In summer 2015, he did some visits to the school and met some of the employees, including the claimant.

36. In April 2016, the claimant had a month off work due to a surgical procedure. Her first day back at work was 12 May 2016 and she had two meetings with Mr Corish that day. There was no detailed discussion between the two of them about the exact reasons for the claimant's absence. Mr Corish assumed that the claimant had been off because of an ankle problem which he was aware that the claimant had. However, the Claimant says that was not the case and, in any event, there was no discussion about the fact that Mr Corish believed that it was because of an ankle injury.

37. The claimant asked Mr Corish if it would be necessary or appropriate for an occupational health referral to be made for her. It was Mr Corish's opinion that an occupational health referral was not needed because he believed he had all the necessary information; he told the claimant that that was his opinion. The claimant did not seek to press the point further and did not supply any documentary evidence to Mr Corish to suggest that her own medical advisers believed that an occupational health referral was required.

38. At this time the claimant was head of year 11. The year 11 pupils were about to go on to study leave as they would shortly be taking their GCSEs. There is an important dispute of fact about what was said to the claimant during this meeting in relation to her role as head of year.

    38.1 On the respondent's case, Mr Corish suggested, that for the remainder of the 15/16 academic year, which had a couple of months left to run, the claimant should not perform, head of year duties. On his case, she would resume her head of year duties in September as head of year seven. On his case, therefore, the suggestion was that she simply leave the remaining head of year 11 duties and the visits to the year six schools to somebody else.

    38.2 On the claimant's case, however, the suggestion which Mr Corish made was that for the following year, 16/17, she should not act as a head of year at all, but would be paid as head of year. She said that he was not willing to put the proposal in writing and that he was not willing to confirm that once the year was up, she would return to her, head of year role.

39. On the balance of probabilities, we accept the claimant's version of the conversation. Our finding is that the language of “relinquishing” head of year role is more consistent with being asked not to do the role for a significant period of

time, as opposed to simply being offered some assistance with some aspects of the duties of the role for a short period of time. If Mr Corish had simply wished to provide assistance to the claimant because -as he claims - he was concerned that her ankle problems would make travelling to the other schools difficult, then there was no reason for him to mention to the claimant that her pay would not be affected. Indeed, he did not need to talk in terms of "relinquishing" the role at all. He could have simply stated, in simple and direct terms that he was making a proposal that (a) someone else would help with the visits to the other schools and (b) he was making the suggestion because he believed that the Claimant had been absent with an ankle problem and that this assistance was offered for physical reasons. Had he done so, the claimant would have had the opportunity to tell him, if she saw fit, that she had not been off with an ankle problem. In any event, on the evidence, we are satisfied that the conversation was as the Claimant recollects, and she was being asked to step down as head of year, on the same pay, but without the promise of a resumption of the duties.

Proposed restructure

40. The respondent's structure is that each of the schools within the multi-Academy trust has a local governing body. The head teacher of the school sits on that local governing body. In addition the respondent as a whole has a board of directors, the strategic board. At times relevant to this dispute, both Mr Corish and Mr Ray Anderson sat on that board. Mr Anderson was also on the local governing body of a different school.

41. At the regular meetings of this strategic board, each school would make what is called a part 2 report in relation to confidential issues such as staffing.

42. At the 29 November 2016 meeting, an item was reported, which in the minutes takes up a total of four lines. It refers to Mr Corish's school and states that he is reviewing the IT structure and is in discussion with lawyers in relation to that. It also states that he is considering a shadow structure for pastoral and teaching staff and currently reviewing the curriculum needs and aims to reduce headcount if possible. Mr Anderson and Mr Corish both attended at 29 November 2016 meeting.

43. The following day, there was a meeting of a committee of the local governing body. One person who attended was Mrs Michelle O'Grady, who is the chair of the local governing body. Mr Corish also attended this meeting. The comments include seven lines that are potentially relevant to this dispute, in that Mr Corish is reported as taking the committee through proposals to revise the pastoral structure to support the changing needs of the curriculum, move to specialist support in each of the key stages due to the radical difference in requirements at Transition, Key Stage Four and Post 16. The minutes state that there was a discussion about the potential cost of three years safeguarding of TLR. In this context, "safeguarding" refers to the pay protection that an employee would potentially have if, because of a change of duties, for example, their post/duties was no longer eligible for TLR.

44. Under the heading "decisions", the minutes state that it was agreed to consult with the heads of year then advertise. The minutes say "Role requirements moving forward Data and Progress analysis". The action was to update the next meeting

and the responsibility was Mr Corish's. These are documents which had not previously been supplied to the claimant until partway through this hearing, despite having previously been requested in writing by her.

45. No other minutes have been disclosed, other than for 27 June 2017 for to the strategic board, at which a report from the local governing body was made, stating that the previously reported establishment reduction as part of the financial and curriculum review-organisation framework was not actioned and no redundancy consultation was needed.

46. The school proposed to reorganise the key stages 3 and 4 so that only years 7 and 8 would remain part of key stage 3, and that year 9 would move to become part of key stage 4.

    46.1 The respondent's case is that it also decided to make what it has described as changes to the job description of the head of year. As mentioned, there was no existing written job description.

    46.2 On the claimant's case, the job description which was eventually created and published in around March 2017 simply contained the same duties as she had already been doing.

47. As already mentioned, there is no documentation stating why the previous head of year role attracted TLR 1A payment and nor was any documentation presented to us to show why the new head of year role profile would attract TLR 1A payment. It is common ground that the respondent decided that was (according to it) a new head of year role profile would attract TLR one payment. Had there been a formal exercise in which a new (according to the Respondent) role profile was assessed in accordance with a pay policy, to see whether it merited a TLR (and, if so, at what level) then that would have supported the Respondent's case that the role profile was indeed new (and, furthermore, that it was significantly different to the previous one). The fact that no such exercise occurred, and that the Respondent simply proceeded on the basis that TLR1A would simply continue be paid, as it had always been for Heads of Year, undermines the Respondent's case that the role profile was seen at the time as changing significantly.

48. The heads of year were told in autumn 2016 that there was a potential reorganisation. In around 1 February 2017, at a meeting, Mr O'Reilly reported to the heads of year that the reorganisation would require them to reapply for their posts, and that if they were unsuccessful then they would no longer be a head of year. He told them that there would be a further round of recruitment to fill any vacancies which were left. In other words, in the first instance all the existing heads of year 7 to 11 would be ring fenced and they and only they could apply for what the respondent was describing as new roles. There were still going to be 5 heads of year (for that age range), but, according to what Mr O'Reilly them, they were not guaranteed to be appointed to them.

49. The claimant has always maintained throughout this litigation that she was told that she could not apply in the second round if she was unsuccessful in the first round. This is a point that she made in her grievance and was considered by Mrs O'Grady. As we will discuss below, Mrs O'Grady's grievance outcome stated that

there was no reason that the claimant could not have applied in the second round. That is also the position which the respondent adopted in its pleadings for these proceedings. The first time that it was admitted that Mr O'Reilly had stated to the heads of year that they could not apply in the second round - if unsuccessful in the first - was during Mr O'Reilly's cross examination on Day 5 of this hearing.

50. A feature of the proposed new structure was that rather than the heads of year rotate all through years 7 to 11. They would either be a key stage 3, head of year (rotating just for years 7 and 8), or else a key stage 4 head of year (rotating years 9 to 11). The heads of year were told that they would choose which Key Stage they were applying to in the recruitment.

51. The only written document that was sent to the staff in relation to the proposal was an email sent on 7 February 2017 (page 574), which was sent to all five existing heads of year and some other senior staff within the school. The heading of the email was draft consultation-Pastoral leadership responsibilities. There was no attachment to the email. The email stated, amongst other things.

In addition, it is clear that the roles of head of year has evolved. It would be fair to say the following comprise the core features of the role.

- *Social/emotional support and guidance*
- *Behaviour management - understanding emerging Curriculum and assessment trends*
- *Using data and evidence based approaches to plan, implement, monitor, evaluate and lead a variety of interventions.*

52. The email stated that the need to build specialist capacity and expertise in each of the phases was critical and that to that end, the governing body had agreed the following from September 2017.

- To realign the Pastoral Structure with the Curriculum Structure, building on the structure already in place post 16
- Heads of Year to work only within a given phase, as current in 6'" Form.

53. The email invited comments on the proposal in writing by 28 February 2017. The email did not discuss whether the process was one of dismissal and re-engagement on a different contract, although that is what the claimant says she was told might be involved.

54. This written document says nothing about the process at all, including whether or not there would be interviews or what would be tested during the interview, and whether there will be any other selection criteria applied. Other than the three bullet points just mentioned and the comment that expertise in each of the phases was critical, there was no information about what the criteria would be for the new role.

55. The description that the role “has” evolved and the present tense of the word “comprise” are consistent with the Claimant’s claim that she was already performing the role, and inconsistent with the Respondent’s claim that it was

proposing to implement a new and significantly different set of duties for the post of head of year.

56. The claimant replied to the email by writing to the head on 9 February. The claimant made several bullet points and our finding is that her fourth bullet points is a reference to the conversation on 12 May 2016, in which Mr Corish had suggested that she stand down and not perform duties of head of year for the year 16/17. The claimant said that she felt apprehensive and would welcome a discussion with the head about it. The head did not reply to the email, notwithstanding the fact that he had signed off his own communication of 7 February with "I would welcome your comments on the proposal in writing by Tuesday 28 February 2017".

57. In due course, the role profile was published, and that is in the bundle at page 497. It is a two page document with seven headings, most of which have several sub paragraphs underneath.

    57.1 Under the aims and main purpose of the role were three bullet points, one of which had 4 sub paragraphs. The aims and main purpose of the role included supporting and contributing to the values and distinctive mission of the school and developing excellent working relationships with parents and carers with appropriate external agencies. It was also stated that the role required leading a team of tutors focused on securing high standards of personal, social and academic development. It referred to the need to ensure students within the year achieved certain levels of academic attainment and progress.

    57.2 Under academic progress, there were six bullet points. Item 2 directly and item 4 indirectly involved the need to understand and make use of data.

58. The claimant submitted an application for the Head of Year post by letter dated 13 March 2017. Of the existing five heads of year, one decided not to apply, meaning that there were four candidates for five vacancies. After the Claimant submitted her application, she considered withdrawing from the interview process and instead asking to be automatically appointed to one of the remaining vacancies after the others had been appointed to the first preference of Key Stage 3 or 4, as the case may be. She met with the head and he invited her to reconsider and she did so. The respondent made clear to the claimant that it would not appoint her to be head of year if she did not go through the selection process.

<u>The selection of Heads of Year circa April 2018</u>

59. There were four interviewers on the selection panel: Mr Corish, Mr O'Reilly, Ms Mead and Mr McGee. Ms Mead was one of the deputy teachers, and Mr McGee was in the maths department and one of his roles was to specialise in data analysis in relation to students at the school.

60. On the day of the interview, each candidate was to collect from their pigeonhole a data sheet. The sheet which they collected depended on whether they were being considered for Key stage 3 or Key stage 4.

    60.1 There is a dispute over this issue and our finding is that page 195 of the bundle represents the model answer that was drawn up by Mr McGee for the data analysis question that the candidates were to be asked during the interview. It

was question five, regardless of whether they applied for Key stage 3 or Key stage 4.

60.2 Our finding is that the document which the claimant was supplied with prior to the interview is the one which appears at page 197 of the bundle. The claimant does not accept that this is what she was given. We are satisfied that she is misremembering and that part of the confusion. We think that part of the confusion might be that it might not have been made clear to the claimant, including during cross examination, which of the documents in the bundle were alleged by the Respondent to have been supplied to her. She was not given all of pages 195 to 197 on the day of the interview. However, having heard the respondent's witnesses, we do not doubt that page 197 was supplied that day.

60.3 On the claimant's own account, she had document in her possession for about 45 minutes before the interview, and for the interview itself which also lasted about 45 minutes. She did not refer to the document in detail during the interview, but rather made her comments about it based on the analysis that she done before the interview.

61. During the interview, in relation to question five, the claimant's main focus was on the fact that the data showed that there were more boys than girls in the group of students. As per the model answer at page 195, while that was a relevant point to mention, there were also potentially other matters about which comment could have been made, including, for example, socio-economic disadvantage, special educational needs etc.

62. The four candidates were interviewed by the same panel over different days and were asked the same 10 questions. No advance model answers had been prepared for any of the questions other than question five. We were told that the answers were weighted differently, but that was the only information that we were given. We were not told what the different weighting was to be for the different questions. We were told that it was not written down.

63. Generally speaking, each of the four interviewers used the same pro forma marking sheet for each of the four candidates. In other words, there ought to have been 16 in total. We have all 4 for the claimant and but 2 are missing, so we only have 14 rather than 16.

64. Generally speaking, for each question, the interviewer marked the candidate out of five. Thus, in theory, the lowest score that a candidate could get from one interviewer would be a “1” for each question. In other words, 10, in total from that interview. Therefore the lowest score that they could get overall would be 10 from each interviewer, namely 40. Correspondingly, the maximums that the candidate could get would be 50 per interviewer and 200 overall.

65. However, the panel did not take the approach of adding up the scores for every candidate. After the interviews had finished the panel got together and had a discussion. No documentation was produced during or after this discussion. Had the panellists decided to take a more formal approach, it might have been noted that marks had not been given for every question. For example, Mr O'Reilly does

not seem to have given the claimant a score for question 1 and nor did Ms Mead. However, the person who we will call candidate 1 (whose marking sheets are at pages 477, 479 and 481) was given a score for question 1 by Mr O'Reilly, as was the candidates who we will call candidate 2 (whose interview notes are pages 483 to 490). Ms Mead meanwhile does not seem to have given a score for question one for any of the three candidates, including the claimant, whose sheets we have from her. (We do not have her sheet for candidate 1).

66. We have all four candidates' sheets for Mr Corish and the claimant scored the lowest out of the four candidates based on his marking. We also have all four sheets for Mr McGee and the claimant scored the lowest out of four from Mr McGee. We have three sheets each from Mr O'Reilly and Ms Mead, and in each case, the claimants scored the lowest out of those three.

67. In relation to the data question which we were told was particularly important in the panel's analysis, the claimant's scores were 1 from Mr Corish, 3 from Mr O'Reilly, 2 from Ms Mead and 1 from Mr McGee.

68. In comparison:

    68.1 the three scores which we have available for candidate 1 were 2 from Mr Corish, 2 from Mr O'Reilly and 2 from Mr McGee. In other words, that candidate was given one extra mark by each of McGee and Corish and one fewer mark by O'Reilly and we do not have Mead's sheet.

    68.2 Candidate 2 seems to have been the strongest overall candidate, including in relation to question five. Corish gave 4 and the others each gave 5.

    68.3 Candidate 3 was given a mark of 3 for question 5 from each of Mr Corish, Mr McGee and Ms Mead, and we do not have Mr O'Reilly's scores.

    68.4 In other words, Candidate 1 potentially scored slightly better (or about the same, if Mead gave a 1) than the Claimant on this question. The other 2 candidates were given significantly higher scores.

69. For the avoidance of doubt, before the interviews, there had not been a decision that there would be a particular score, or a particular standard, below which a candidate would not be appointed, either in relation to question 5 or at all.

70. In the bundle at page 473 is a sheet which we were told was produced by Mr Corish in autumn of 2020. He had not intended that reliance would be placed on it and seemingly it was placed in the bundle without his knowledge. It contains a totting up of the scores of the candidates, and is the only such document in the bundle. We note that the score of 56, which he has put down for the claimant seems to be quite wrong. Rather than 56, her actual total should be 80. Candidate 3 (whose interview notes appear at pages 491 to 496 of the bundle) has a total which adds up to 67, but with the marks of Mr O'Reilly missing. So if Mr O'Reilly's notes had been included, they would have shown whether Candidate 3's total was more or less than 80. However, we say this for completeness and - as mentioned - we were told that that totalling up the scores was not the selection method that was used by the panel. Instead they got together and decided that candidates 1, 2 and 3 would each be offered a head of year post and that the claimant would not be.

71. The claimant was told on 30 March 2017 that she was not to be appointed as head of year and therefore that from the academic year 17/18, she would no longer be head of year. She was not given any written feedback about what had led to being unsuccessful. She was not given the opportunity to work on whatever areas of weakness had been perceived and to reapply again for the two remaining vacant heads of year post. She was not told she could appeal.

72. On 3 April, a very short email, in the name of Mr Corish, was sent to the claimant and copied to senior teachers and Ms Doyle.

> *Thank you for attending the recent interview for the newly configured Head of Year post and for meeting with Eugene and I on Thursday, 30 March, 2017.*
>
> *Unfortunately your application was not successful.*
>
> *Your TLR will be protected for 3 years from 31 August 2017 to 31 August 2020. During this period of salary protection you will be allocated a role commensurate with your TLR*

73. This was the only written information that the Claimant was given about the cessation of her duties as Head of Year, or the reasons for it.

74. In paragraph 22 of his witness statement, Mr Corish stated that the decision that each head of year would have to reapply for the "modified position" was made after taking lots of advice from different sources. No such advice has been included in the trial bundle and nor was it detailed in evidence.

75. In paragraph 23 of his statement, Mr Corish states that "following an extensive consultation and interviewing process, it was decided the claimant was not going to be appointed to one of the new roles". He states that the decision was primarily because of her poor performance in the data analysis tasks. (In fact, we were only given evidence about one such task, namely question five in the interviews.) He says: "*This will all be discussed in further detail in the witness statement of Eugene O'Reilly*". In his witness statement, Mr O'Reilly states in relation to this claimant's performance on data analysis "*I would go as far as to say that I was very concerned by how poorly the claimant dealt with a fairly simple selection of data given that she was a head of year at the time"*. He also states in the same paragraph: "*Each interviewer's notes give the Claimant's answers a score out of five for each question. Question five related to data and she generally got scores of one or two out of five*".

76. It is notable that neither Mr O'Reilly nor Mr Corish suggest that there was a weighting applied for this question. That suggestion emerged for the first time during oral evidence. Furthermore, Mr O'Reilly does not address the fact that he claims to have been very concerned about how poorly the claimant dealt with the data, but he scored her a "3" and gave Candidate 1 a "2". Candidate 1 was, of course, also a head of year, just like the claimant. He mentions the fact that the Claimant generally scored 1 or 2 out of 5, but he fails to mention in his witness statement that he scored her a 3. He also fails to mention that Candidate 1 only got scores of 2 on the marking sheets which we have.

77. In paragraph 27 of the grounds of resistance, it is stated:

> *A key focus of the newly formed roles was data analysis. Those who chose to apply for a new position, including the Claimant had to carry out two data analysis tasks, one in advance of an interview and one during the interview. Unfortunately, the Claimant did not perform well in the data analysis tasks and it was decided that she would not be suitable for one of the newly formed positions as a result.*

78. Apart from the reference to tasks (plural) in Mr Corish's statement, there is no evidence of two tasks, either in the statements of any of the witnesses or in the documents in the bundle. Therefore the assertion in paragraph 27 is not made out, either to the extent that there were 2 data tasks, or to the extent of the implication that the fact that there were 2 such tasks shows how important data analysis was.

79. In paragraph 32 of its grounds of resistance, the respondent states:

> *The Respondent denies that the Claimant was precluded from applying for the two vacant Head of Year positions when they were advertised in June 2017. The Respondent did not inform the Claimant that she could not reapply for the vacancies and it was her choice not to do so as the positions were open to all staff to apply. The Respondent appointed two members of staff … to the Head of Year positions based on merit alone. The Respondent denies that it treated the Claimant less favourably because of her race.*

80. The respondent advertised the remaining vacant heads of year post. The claimant did not apply. The reason she did not apply is that she had been told that she could not do so and that advice never changed. We were given no purported explanation as to why the Respondent made a false claim to the contrary in its grounds of resistance as part of its reasons for denying that the Claimant's removal from post of Head of Year (and, on the Respondent's case, non-appointment to what it was arguing were new posts) was because of race.

81. A number of applicants applied. The two successful candidates were each white.

<u>Heads of Faculty</u>

82. In June 2017, the respondent appointed three heads of faculty. The respondent did not advertise any of these posts and nor were there any published criteria for what any person might need in order to be considered as head of faculty. In each case. Mr Corish spoken to the existing heads of the departments that were to be grouped within a faculty and as a result of those discussions, in each case, only one of those people was interested in being head of that faculty and that person was therefore appointed head of faculty. In each case, the appointee was white. (According to the respondent's reply to the request for further information).

83. In paragraph 33 of its grounds of resistance,

> *In June 2017, … was appointed as Head of Maths, Design and Technology and Computing, … was appointed as Head of Physical Education and Performing Arts and … was appointed as Head of English and Media. These members of staff were all appointed based on merit alone. The Claimant was not appointed as a Head of a faculty because she was not qualified to undertake this role. The positions were advertised internally however there was requirement that the candidate first had to be a Head of Department*

before becoming a Head of Faculty. As the Claimant did not work in any of the above departments, she was not eligible to apply for the vacancies. The Respondent denies that the Claimant was treated less favourably because of her race.

84. In fact, the posts were not "advertised internally", as the phrase would usually be understood. Mr Corish's explanation is that the expression is accurate and "advertised internally" means that he had conversations the people whom he believed needed to know about the forthcoming vacancies. In relation to the alleged requirement that a person be a head of department, this was Mr Corish's own personal opinion of what was required and not something that was published anywhere. Mr Corish did not enquire, and does not know, whether or not other schools within the respondent MAT had such a requirement for similar roles.

85. The claimant did not have significant experience of teaching any of the subjects within any of the departments within any of these three faculties. In relation to the claim in the grounds of resistance that that as the claimant did not work in any of the above departments, she was not eligible to apply for the vacancies. There were no written criteria stating that that was a requirement for any of the vacancies. There were no written criteria at all.

86. The grounds of resistance also states that the members of staff were all appointed based on merit alone. Upon being challenged as to how the respondent could be sure that the best candidates based on merit had been appointed given that the posts were not advertised. Mr Corish replied that he was sure that he had appointed the best candidates.

87. In around September 2017, Ms Slavin, who was the head of year who decided not to go through the selection process in March 2017, was appointed as head of department for design and technology. The process was that there were two individuals in that department. Mr Corish asked each of them if they would be interested in being head of department, one of the teachers said "no" and Ms Slaving said "yes". At paragraph 34, the grounds of resistance states:

In September 2017, Ms Slavin applied for the role of Head of Department of Design and Technology and was successful in her application. Ms Slavin was not redeployed as the Claimant suggests. The post was advertised internally and Ms Slavin chose to apply. The Claimant was therefore not treated less favourably than Ms Slavin because of her race.

88. It does not allege in the grounds of resistance that the claimant was not eligible. By implication, it suggests that the reason the claimant was not appointed was (in part at least) because she did not apply for the post.

89. In paragraph 31 of his statement, Mr Corish states:

The reason that the Claimant was not offered the job of head of department for the design and technology department in 2017 was that she did not apply for the position. The role was advertised internally but the Claimant decided not to apply.

90. The contentions in paragraph 31 of his statement and paragraph 34 of the Grounds of Resistance are contradicted by Mr Corish's oral evidence to the tribunal. There

was nothing “advertised internally” and the Claimant had no opportunity to apply for the post. The claimant did not have any significant teaching experience in design and technology, and therefore might not have been a better candidate than Ms Slavin, but that is not the point being stated/implied in extracts just mentioned. (It is a point made by Mr Corish in paragraph 32 of his statement when he also asserts that neither the claimant nor anyone else outsider the faculty was “in a position to apply for this job”).

91. As a result of Ms Slavin’s appointment as head of department, the situation was that of the five people who had been head of year at the start of 16/17, three remained entitled to TLR 1 as a result of remaining as head of year, one remained entitled to TLR 1 as a result of being appointed as head of department, and the fifth person was the claimant.

92. In around June 2018, Mr Corish sent an email to all staff congratulating Ms Urquhart on being promoted to the head of humanities faculty. This email is not in the bundle. No documents in relation to Ms Urquhart's appointment are included. We take the date of June as being from Ms Kalsi’s unchallenged evidence.

93. In paragraph 36 of the grounds of resistance, it states

> *In September 2018, Sally Urquhart ("Ms Urquhart") applied for the role of Head of Humanities and was successful in her application. As above, all Head of Faculty positions are filled by persons who have previously been a Head of a subject. Ms Urquhart was Head of History. As the Claimant was not 'Head of' a subject she was not suitably qualified for the position of Head of Humanities and did not meet the Respondent's criteria. The Claimant was, therefore, not treated less favourably than Ms Urquhart because of her race.*

94. There were no published criteria for the role. The faculty of humanities included geography and history. The claimant's line manager and head of geography was Mr Pearce. Mr Corish asked Mr Pearce if Mr Pearce would like to be considered for head of humanities and Mr Pearce declined.

95. The staff handbook for 2015 to 2016 included a page headed teaching staff by responsibility. This was a time prior to the introduction of the faculty system. It listed the leadership group, including Mr Corish. It listed the heads of year, including - at that stage - the claimant. It listed the pastoral support team. There was then a table with the heading “heads of department”. The table had four columns. The three columns on the right were made up of the teachers title / first name / last name. The column on the left listed subjects in alphabetical order. One of the subjects listed was “leisure and tourism”. The claimant's name appeared on that row. This subject had in brackets after it the words “teacher in charge”. It was one of five such subjects in the list. Mr Corish's evidence is that this was because these were not actual departments and therefore the person named on each row was not regarded as a head of department. In other words, his claim was that being in the list of “Heads of Department” does not signify the person is a head of department wherever there words “teacher in charge” appear next to the subject.

96. There is no written criteria stating whether or not a “teacher in charge” should be regarded as a head of department or not, and nor is there any published criteria

stating that a teacher in charge would not be eligible to apply for head of faculty, but a head of department would be. There were no written criteria at all.

97. There was no advertisement for the post of head of humanities and therefore nobody who was either a teacher in charge, (or simply a teacher) had the opportunity to put forward an application form, arguing that they should be considered to be of equivalent rank or experience as a head of department.

98. The leisure and tourism course run for three years. It started in 13/14 when a group of students went through the course and took the exam in a single year. It then ran in 14/15 and 15/16 when a student group took the exam, having followed the course over two years. The course was not particularly successful. In the first year that the student coursework was not submitted on time. The Claimant said that there were reasons for this, which were beyond her control and that the leadership of the school had known and understood this. She said that if Mr Corish had spoken to her other people then he would have understood the reasons that the course was unsuccessful. After 2016, the subject did not continue and the claimant no longer was in charge of leisure and tourism or any other subject.

Meeting with Mr O'Reilly

99. In February 2018, there was an occasion in which the claimant became upset work. She wanted to meet Mr O'Reilly to discuss leaving early that day, and her message was passed to Mr O'Reilly by his secretary. Because of the interruption of a fire alarm, they were not able to meet that day. However, the following week, at lunchtime, a meeting took place. The claimant was very upset in the meeting and was in tears. She made clear to Mr O'Reilly that she was very upset by events at work, including the fact that she had been removed as head of year around 10 months earlier.

100. We are satisfied that even though the claimant might be of the opinion that she made clear to Mr O'Reilly that she was feeling bullied or harassed, she did not use either such word. Furthermore, on the claimant's own account, she did not allege that her treatment amounted to race discrimination or any other breach of the Equality Act. After this discussion, there was no follow-up by either party. Mr O'Reilly did not contact the claimant to find out if she was feeling better, and/or if there was anything that she wanted him to do. The claimant did not contact Mr O'Reilly to ask him to do anything. As far as Mr O'Reilly was concerned, this had been a one off incident and the claimant had not been asking him to take any action of any description, and nor did he think of his own accord that it was necessary for him to do anything.

References

101. There is an allegation in relation to 5 references which were supplied by Mr Corish in relation to the claimant. For three of the references, we have both Mr Corish's reference and also the reference supplied by another member of staff for the same vacancy.

102. The first reference is for Brentside high school in April 2017. The post which the claimant applied for was a leadership role and was for lead practitioner for

geography. The claimant's head of department Mr Pearce gave a reference specifying that he had known her since she started teaching in the school (so in other words, for 13 years).

102.1 He stated that she worked diligently within the geography department and regularly obtained very good grades for observed lessons. This remark was consistent with, for example, the lesson observation dated 25 January 2017 (page 464 of the bundle) by Mr Pearce in which the claimant is marked as good in relation to "achievements of pupils", good in relation to "teaching", outstanding in relation to "behaviour for learning" and good in relation to "overall comments". It is also with the observation from 16 March 2017 (pp456-459 in bundle, albeit out of sequence) by Liz Mead, in which the claimant was marked as outstanding in relation to "expectations and progress", "teaching", "assessment to support and learning" and "overall judgment".

102.2 Mr Pearce's added that the claimant had excellent awareness of what an outstanding lesson comprises of, and is able to implement it. He said she has very good classroom management and that she had assisted several trainee teachers in the past and that the entertainment of her students was broadly in line with the attainment of other students by other teachers in the department.

103. In commenting on Mr Peace's reference and observation, Mr Corish dated in his evidence to the tribunal that he believed that Mr Pearce had low standards and that Mr Pearce would not be able to say what an outstanding lesson was.

104. In Mr Corish's reference to Brentside, dated 28 April 2017, his summary was: "Ms Burton York is experienced and committed. She is highly professional and has undertaken appropriate leadership training."

104.1 On a tick box form 35 ticks were required with a choice of four options. On each row. The left hand side stated a desirable attribute and the right-hand side tended stated the opposite of that attribute. Ticking "A" said that the applicant was strongly towards the positive end, and "D" strongly towards the negative end. "B" was more positive than "C".

104.2 Mr Corish gave no A's or D's. He gave 6 Bs and 28Cs (with one question not answered, which is likely to have been an oversight).

105. In relation to Preston Manor, one of the claimant's colleagues, Mr Marshall, who had twice been her line manager and who had known her for 13 years, gave a reference dated 19 May 2017.

105.1 Amongst other things, Mr Marshall stated that the claimant was very well qualified for the job which was director of student development (which we find was broadly similar to head of year).

105.2 He said that she was very good at managing the various needs of the year group and had the respect of children and members of staff and members of department and that as well as performing the duties of head of year. She was a very successful teacher achieving outstanding grade, the most recent time she was observed.

105.3 A tick ox page gave options very good, good, sound and weak. Mr Marshall ticked "very good" for the majority of options (around 28) and good for the rest (around 8).

105.4 On the option whether he would reappoint the claimant in the future, he said "yes" to all, including "yes" he would go out his way to appoint the Claimant if recruiting to a similar role to director of student development.

106. Mr Corish's s reference for the same vacancy was also dated 19 May 2017. In it, he stated: "*Ms Burton York has not fully demonstrated in her current post that she meets the requirements of your advertised post. She would need guidance and support with this. She is capable of meeting your person specification*."

106.1 He commented favourably on her relationship with colleagues and students and parents and on her passion and empathy. He stated that she needed to improve in relation to priorities and ensuring tasks were completed on time. He said that he would definitely not appoint or retain the claimant for a similar post.

106.2 On the tick box. He gave one "very good" (self presentation). The remainder were split fairly evenly between "good" and "sound", with no "weak".

107. In relation to Guru Nanak Sikh Academy, we have Mr Corish's reference from 21 February 2018.

107.1 The tick box options were "excellent", "good" and "needs improvement".

107.2 The claimant was given "excellent" in relation to 3 matters (timekeeping, honesty and relationship with colleagues) and "good" for 3 (conduct, attitude, interaction with students).

107.3 She was given needs improvement in relation to 5 individual matters (reliability, ability to achieve agreed targets and deadlines, initiative, ability to cope with pressure, ability to manage others).

107.4 She was given "needs improvement" for the overall performance.

108. We have Mr Corish's reference dated 3 October 2018, following the Claimant's Hammersmith Academy. This included a tick box with four options: Similar to Brentside, the ticking towards the left hand side was positive and towards the right-hand side negative in relation to a particular attribute. (For each row, there was "Description A" which was a good quality, and then "Description B" which was the opposite) . The claimant was given the most positive rating (Fits A) in relation to one item: well presented. She was given the most negative rating (Fits B) in relation to 12 items ("usually needs prompting", "is defensive", "is vaugue and haphazard", "poor at public presentation", "does not offer activities", "has restricted view of responsibilities", "disorganised: little planning", "meetings not effectively managed", "satisfied with average or less", "accepts low standards", leaves it to others", "seldom meets deadlines". She got the second most negative ("Tends to B") for about 26, including "creates poor first impression". She got "tends to A" In relation to 5 categories. He ticked "definitely not reappoints or retain this candidate".

109. On 3 October 2018 (17:20), Ms Urquhart emailed Mr Corish to offer to speak to him in relation to the reference request and said that the Claimant would be happy to speak to him about her work at the school prior to his arrival. He replied later the same day (20:52) to say:

Thanks Sally, I have completed a reference, it was very general and didn't require details such as the ones you mention.

110. On 31 October 2018, Mr Corish gave a reference to Northolt High School. The post applied for was "Teacher of Geography". The reference said, amongst other things,

"Mrs Burton York previously held the role of Head of Year. She is currently a Teacher of Geography. She was unsuccessful when applying for HOY role when the Pastoral Structure Was reorganlsed."

and

"Ms Burton-York teaches geography in Years 7-11. She has taught: Leisure and Tourism. Outcomes in Geography generally have been below school outcomes

"When Mrs Burton York was responsible for Leisure and Tourism the coursework element was a problem. Ms Burton York has a history of not meeting key deadlines."

111. The questionnaire part had 26 of which 3 were left blank (which we find was intended as "0 - unable to comment") and 12 were "1 – weak". There was one "4- very good" (relationship with staff) and one "5 – outstanding". The remainder were 2s and 3s.

112. The head gave the following explanations in relation to what he had written in the references. He pointed out that, as we accept, he had an obligation to the recipients of the reference to give his honest opinions and in explanation of his opinions, he mentioned that he believed he had reliable information that the Claimant was not meeting deadlines and that the exam performance of her students was below expectations.

113. Ms Urquhart also provided a reference to Northolt, dated 30 October 2018. In it she wrote that the Claimant was a "committed teacher" and "I have known Cathie for 11 years. Initially as Head of History but now as her Line Manager".

Cathie has worked at Douay Martyrs for 12 years as a Geography teacher. During this time she has always shown a willingness to take on new responsibilities such as developing environmental awareness. She ran a whole school initiative to grow vegetables within school as well as holding a green fashion show. Under her initiative all classrooms now have recycling bins.

Cathie is able to develop schemes of work and was responsible for the planning, preparation and delivery of Leisure and Tourism some years ago. She is able to develop a positive rapport with students who enjoy her lessons and have a good rate of progress. She has experience of running trips and values the use of learning outside the classroom.

Cathie has also had leadership experience as a Head of Year and in this capacity demonstrated her ability to lead different groups of people. She can work well both in leadership capacity and as part of collaborative team.

Cathie is committed to the students and to developing meaningful lessons whereby all students are able to make progress. She has a good track record of results.

114. We have quoted this extract in full for context. We note in particular that it states that it was the Claimant's initiative which had led to the school having recycling bins in all classrooms; this contrasts to Mr Corish's oral evidence in cross-examination that the project had finished before he joined and so he could not comment on it first hand, but he inferred that it had not been particularly significant because no traces of it remained by the start of his headship. Other differences include the opinions that the Claimant was willing to take on new responsibilities and that she had a good track record of exam results. In the questionnaire, she gave three 5s, three 3s and the remainder 4s and stated that she would be happy to appoint the Claimant to a similar post.

115. The Respondent did not disclose this document to the Claimant and objected to our seeing it and its being added to the bundle. We agreed to accept it into evidence for the reasons which we gave at the time. Neither side called Ms Urquhart. We have no reason to doubt that the comments made in the document represent Ms Urquhart's genuine opinions. While Mr Corish was somewhat dismissive of the opinions stated by the Claimant's previous line manager, Mr Pearce, at the time that she gave this reference, Ms Urquhart had recently been appointed by Mr Corish to be head of faculty. From that, we infer that she was somebody whose integrity and aptitude was not doubted by him.

116. In the bundle, there were the following emails to the claimant in relation to submitting tracking data and marking sheets:

116.1 17.10.14. Naidoo to the Claimant (only):

Sorry, I made a typo -the tracking that has not been completed is 10C/Gg1 (not 10D).

Apologies for any confusion, but would appreciate if you could do this asap.

Thank you for completing the year 9 mark sheet.

116.2 18.05.15. Naidoo to the Claimant (only):

Can I ask you to please complete the tracking mark sheet for class 10D/Gg1 (the bottom half of the page)?

I would appreciate if this could be done asap.

116.3 22.01.16. O'Donnell to 3 people, one of whom was the Claimant. As well as listing 4 incomplete sheets that the 3 had between them (one by the Claimant):

Can I ask you to complete your Year 11-Tracking as a matter of urgency

116.4 12.02.16 Naidoo to the Claimant (only)

Can you complete your tracking for 9C/Gg1 pleas? Need this done-asap.

116.5 21.03.16 Naidoo to 17 people, one of whom was the Claimant. This said in part:

Can you please review your year 7 mark sheets.

…

All other students now have a flight path and you should, therefore, enter their current progress.

I would appreciate if the mark sheets could be updated by the end of today.

116.6 10.02.17: Naidoo to the Claimant (only) with subject line "9B/Gg2 Tracking":

Can I please ask you to complete your mark sheet for the above class as a matter of urgency?

116.7 19.04.17: Naidoo to Claimant (only) at 07:59 chasing a Year 11 marking sheet that needed to be completed "asap" and a reply at 09:43 in which the Claimant said "*Apologies. All completed at 8.30*". The Respondent alleges that this was a day late, but only produced a document which showed that other another member of staff, not the Claimant, had been told that the deadline on 18 April that deadline was "end of today".

116.8 16.05.17. Naidoo to the Claimant (only), which was a Tuesday:

Sorry to bother you, but I can see that the tracking for the above group has not been completed. Can I please ask you to do this as a matter of priority as the reports are expected to go out on Friday?

The Claimant's reply was to apologise and say she was "doing it now".

116.9 21.03.18. Daly to 7 people, including the Claimant

Could the following 6th form tracking be completed as a matter of urgency please.

10 items of work were said to be outstanding. 4 from one teacher, and one each from the other 6, including the Claimant. It was a follow-up to an email from Ms Naidoo on 20 March, which chased 18 pieces of work (including the one from the Claimant) which were – at that stage – one day late.

116.10 22.05.18. Magee to the Claimant and another member of staff, chasing up 5 incomplete mark sheets: 4 from the other person, 1 from the Claimant.

117. The head explained that while he did not have sight of these emails prior to writing his reference sources for the claimant what he had, he had contacted Ms Naidoo and asked her to give him her opinion of whether the claimant was good at meeting the deadlines. According to Mr Corish, he said that Ms Naidoo had said that the claimant was not. He was asked if this exchange had been in writing and said no, it was oral. He was asked if he always contacted Ms Naidoo every time he received a reference request and at first he suggested that he would always do so; he then

changed his answer to say that he would not contact Ms Naidoo if he had been copied in on some information which stated that the teacher seeking the reference had been late supplying some data. He was then asked if that meant that he would write therefore write a reference for such a person, which stated that they were poor at meeting deadlines. He said no, he would not base his opinion on such on one such email. He said that if he believed he already had information that the teacher was poor at supplying information on time, then he would write the reference, but if he did not have information then he would ask Ms Naidoo each time. Based on that account, therefore, prior to receiving the reference requests he did not have an opinion that the claimant was poor at meeting deadlines; on his own account, had he already known that, he would not have spoken to Ms Naidoo.

117.1 The assertion that Mr Corish asked Ms Naidoo about the Claimant's ability to submit tracking and marking data on time is not contained in his main witness statement or his second statement.

117.2 The chaser emails that have been sought and placed in the bundle have been selected on the basis that the claimant is the recipient of those emails. 6 were sent by Ms Naidoo to the Claimant only, and there is no evidence in the bundle in relation to how often, over the same period (the October 2014 to May 2017) other teachers were similarly contacted by Ms Naidoo individually. Based on the emails that were sent to several people at the same time, it does not appear that the Claimant was the worst of those who were chased in those particular emails. We do realise, of course, that there could potentially be a large number of teachers who were not chased at all. That being said, many of the emails, on their face, are not accusing the Claimant of having missed a deadline.

118. We did not find Mr Corish's oral evidence on this point to be persuasive. He did not seem sure about what would lead him in general to check with Ms Naidoo before writing a reference, or about what – according to his evidence – led him to do so in the Claimant's case. He did not seem clear what led Ms Naidoo to say – according to his evidence – that the Claimant was poor at meeting deadlines. He did accept that the emails we mentioned above were not emails that he had seen and taken into account when writing his reference, but rather they were collated later on. They are a specific set of emails collated for the purpose of supporting the position that the Claimant is, in fact, poor at meeting deadlines.

119. In relation to lesson observations, the head did not address these in either his original statement or his second statement. However, in cross-examination he stated that he did not believe that lesson observations were a reliable indicator of a teacher's performance and that they only showed that the claimant had been able to deliver in each case a single good lesson which was specifically prepared in the knowledge that the lesson was going to be observed. In relation to the Mead observation, he did not regard it as a useful measurement, because the Claimant had been given advance notice that she was to be observed (and he believed she had done less well when Ms Mead had observed her unannounced). This seems to refer to something referred to in the claimant's statement (though not his own), in which the claimant insisted that Ms Mead made another observation on an agreed future date. The claimant's witness statement also mentioned that she had

been observed by Ofsted, as well as by her colleagues at the school and had received good feedback from Ofsted.

120. The head stated that he had been unaware were that the Claimant worked with a team of OFSTED inspectors inspecting two schools in 2012. He was also not familiar with the Claimant's work in the Eco School Project in 2010, which became a whole school project, liaising with heads of department across the school.

121. In relation to marking, Mr Corish said that he did not rely on the measurement mentioned by the claimant, namely, how many GCSE students had received grades between A star (the highest) and C. He stated that that measure was seen as inadequate and outdated and that most schools (and also Ofsted) were moving away from it. He said that instead what he thought was the better indicator was what he referred to as residuals. He explained to was that this was an analysis done internally by the school by Mr McGee) which sought to analyse the students' expected exam performance for a given subject, by comparison to what that student had achieved in other subjects. As well as other relevant factors. The outcome would show that a given teacher for a given subject would either have a positive residual (their class had done better than expectations) or else a negative residual, meaning that they had done worse than would have been expected based on performance in other subjects. Mr Corish's oral evidence was that he had looked at this data before giving references in relation to the claimant, including that which said (the Northolt one) that she was a poor teacher of geography.

121.1 The suggestion that Mr Corish had looked at this residual data, was not contained in the grounds of resistance and nor is it contained in Mr Corish's first written statement or his second written statements. The existence of and description of the residual data is not mentioned.

121.2 He also did not mention it to Ms O'Grady when she interviewed him in relation to the claimant's grievance.

121.3 The first time it was suggested that he had looked at this data was during cross examination. His oral evidence was that the claimant had negative residuals.

121.4 We were not taken to any documents in the bundle to confirm or contradict his recollection. Ms O'Grady gave evidence that during the grievance investigation, she had spoken to Mr McGee and that Mr McGee had stated that the claimant had negative residuals.

121.5 This was not something mentioned by Ms O'Grady in her grievance outcome letter and there is no way of knowing if she made a note of it in her contemporaneous handwritten notes of her interviews with Mr McGee because she destroyed her notes after the grievance outcome letter was written.

122. The other issue which Mr Corish relied on for his opinions as stated in the reference was that the claimant had performed poorly at the interview in March 2017.

2018 resignation (later retracted)

123. In the autumn term of 2018 the claimant decided that she would resign. She reached this decision on the evening of 31 October and typed out a resignation which she sent by email. Although the claimant believes that she hit 'send' slightly before midnight, the email was received by the school a few seconds after midnight, so very early on 1 November 2018.

124. Although the although there is a dispute between the parties in relation to what, if any information the claimant received in compliance with section 1 and/or section 4 of the employment rights act 1996 and although copies of the relevant parts of the Burgundy book are not in the bundle, it seems to be agreed between the parties that for the claimant to resign with effect from 31 December 2018, without being in breach of contract, she would have had to give her notice so that the Respondent received it by no later than 31 October.

125. The email itemised two reasons for resigning. Firstly, loss of Head of Year role (which was something she had been informed of about 18 months earlier, and she had worked the full academic year 17/18 without being head of year) and secondly alleged bullying by head of department (which is not part of the claim before the tribunal).

126. The claimant had meetings with the head on three dates in November, approximately 6, 11 and 28 November 2018. During the course of November, the Claimant was told that if she wanted the school to accept a resignation effective from 31 December 2018, then it would need to be justified as being due to some exceptional circumstances such as ill-health. Alternatively, her resignation would take effect from 30 April 2019, or alternatively she and the school could mutually agree that her resignation was retracted. After giving the matter some thought and discussion with the union. The claimant decided that she was willing to retract her resignation and that was what was agreed with the school.. The retraction was communicated to the school on 20 November 2018 by the claimant's union. This was with the claimant's full agreement and consent, and her employment continued.

127. The Claimant had been seeking copies of references. She received the Northolt one on 7 November and the Hammersmith one on 9 November. In other words, she had them after she resigned, but before she mutually agreed with the Respondent to retract the resignation. (She received the remainder in January 2019). She discussed those that she had seen with Mr Corish on 14 November 2018, and he said he stood by the contents.

128. Neither the resignation letter, or the communication about reinstatement, alleged discrimination because of race. The retraction email, referring to the matters in the resignation letter, stated that the Claimant thought she was being "treated differently" and wished to pursue those matters via "internal processes". It also referred to allegedly inaccurate references and that the Claimant wat to discuss a "permanent substantive role". The Claimant already had (as a result of the retraction) a "permanent substantive role", but this was a reference to the fact that the Claimant wanted to have a role which would enable her to retain TLR1 once the protected period ended.

129. At the meeting on 28 November 2018, there was a discussion about the types of activity that the Claimant might do which would be commensurate with the TLR that she was still entitled to receive. Our finding is that there was a slight difference of emphasis. Mr Corish was mindful of the fact that the Claimant was in a period of pay protection until 31 August 2020 and that, during the protected period, the Respondent had the contractual right to require the Claimant to perform duties that were consistent with TLR1. The Claimant's interpretation of the situation was that the Respondent had an obligation to find her a role which was consistent with TLR1, and not on a temporary basis, but on a permanent basis; in other words, the Claimant was envisaging a role which would enable the TLR1 payments to continue after 31 August 2020 and that is what she wanted to discuss.

130. The Claimant was not satisfied with the meeting and believed that, while some roles were discussed, there was insufficient detail about them and they did not amount to a firm offer, or a firm commitment that there would be a continuation after 31 August 2020. The Claimant went home do to ill health after the meeting and never resumed her duties prior to resigning a little over 12 months later.

131. Mr Corish wrote to the Claimant on 28 November 2018, stating:

> *Thank you for meeting with me this morning. I am sorry that you feel unwell today. It was unfortunate that we ran out of time, but we agreed to continue at a future meeting.*
>
> *We discussed roles that I asked you to consider as appropriate to your protected TLR and your UPS3 Allowance. These were leading whole school projects on the Unicef Award and the International Schools Award. We agreed that you would take some time to consider this.*
>
> *We briefly discussed an issue raised by you in which you suggested that references I have provided for you are inaccurate. I explained that any reference I have written would reflect views given to me by Senior Colleagues who have worked with you. We agreed to discuss this further at our next meeting.*

Claimant's grievance

132. In December 2018, the Claimant submitted a Data Subject Access Request. She requested all personal data from the previous 5 years, including performance reviews, etc, and including data in relation to the decision to "remove" (in her words) her as Head Of Year and including data which was the "basis" for the opinions stated in references. At the time that she submitted this request, the Respondent had not yet suffered the data loss problems that we mentioned at the outset of these reasons.

133. On 31 January 2019, NASUWT, the Claimant's union, submitted a grievance on her behalf. It complained about to the 5 references from Mr Corish mentioned above and referred to the other 3 references (Pearce, Marshall and Urquhart) as being more favourable, and as being from people who had more direct knowledge of the Claimant. The grievance also stated that Mr Corish's references were inconsistent with documents such as lesson observation and pointed out – correctly – that the Claimant had not been given feedback about the allegedly perceived weaknesses. The grievance letter did not refer to the matters raised in

the 31 October / 1 November resignation letter and it did not mention race discrimination (or any other breach of Equality Act 2010) and did not mention race at all. This was sent to the school by email to Ms Doyle's account at 14:30 on 31 January, and was also posted. By 15 February, it had not been acknowledged, and an email acknowledgment was sent on 4 March 2019 (stating that, for personal reasons, Ms Doyle had been unable to reply sooner).

134. On 5 February 2019, the Claimant wrote a letter addressed to the chair of governors (the local governing body of the school), Ms O'Grady. She described this as an "add on" to her grievance. This was submitted by way of email to Ms Doyle's email address; on 8 February, not having had a response, the Claimant sent a further email to ask if the letter ought to have been addressed to Ms Doyle rather than Ms O'Grady.

    134.1 The letter did not mention the word "race". It complained about being treated "differently" and about not being given "equal opportunities".

    134.2 As well as complaining about the Head of Year issue, and some of the specific remarks in the references, the letter (i) refers to the discussion with Mr OReilly in February 2018 and states that she told him she was being bullied (she does not say she alleged the treatment was a breach of Equality Act 2010) and (ii) alleges in clear and express terms that Mr Corish, in summer 2016 had suggested she step down as Head of Year (with pay) for the year 16/17.

135. On 4 March 2019, the Claimant wrote to Mr Corish and referred to their 28 November 2018 discussion. In the letter she alleged that, on 28 November 2018, she had said that she was concerned that "people like me, of my ethnicity" were denied substantive roles "in schools". She gave her reasons for rejecting the additional duties which he had offered her; in doing so, she stated her understanding that the duties had been offered to her until 31 August 2020. Ie that they would cease when her TLR1 pay protection ceased. She also implied that she believed that she had the right to be given duties which would satisfy TLR1 requirements and that these would not (even up to 31 August). She described Ms Slavin as a "comparator" who had been given such TLR1 duties after ceasing to be Head of Year, and concluded:

    > *Regrettably, I am of the view that I have been treated less favourably to my comparators because of my protected characteristic and that I have been discriminated through a series of adverse continuing acts (intentionally or not) throughout my employment at The Douay Martyrs Catholic Secondary School. I also believe that I have been victimised and bullied. This has had far reaching impacts on my mental and physical health.*

    Our finding is that by implication the Claimant is alleging that her treatment is because of (or related to) her ethnicity. The protected characteristic she is referring to in the paragraph just mentioned is "race" and that would have been clear – or ought to have be clear – to Mr Corish and the Respondent. The letter was sent by email on 4 March 2019 at 10:52 am (and re-sent with some corrections on 5 March 2019) to Mr Corish, Ms Mead and Ms Doyle.

136. At 11:58am, Ms Doyle acknowledged (by email to the union, cc'ed to the Claimant) the Claimant's 31 January grievance. Our inference is that it was the 10:52am submission which prompted the 11:58am acknowledgment of the earlier correspondence.

137. On 5 March 2019, Mr Corish replied to acknowledge that the Claimant was not taking on the additional duties, but making no further comments on her letter of 4 March. He expressly stated that he would not comment on the 31 January grievance, as that was a matter for the chair (Ms O'Grady). He said TLR1 would continue to 31 August 2020.

138. On 12 March 2019, the Claimant wrote to Ms O'Grady calling her letter "letter of protest". The letter alleged that the removal from Head of Year was a breach of contract and that it was a dismissal (an unfair dismissal) and re-engagement. It repeated the assertion that in Summer 2016 the Claimant had been asked to step down as Head of Year for a year. It said that the Claimant was purporting to reserve the right to treat the alleged breaches of contract as grounds to treat herself as constructively dismissed at some future date and asserted that the non-resignation in the mean time was not a waiver.

139. On 13 March 2019, there were two letters from Ms OGrady to the Claimant.

    139.1 The first said that everything in the 31 January 2019 was out of time under the grievance policy, with the exception of the Northolt High reference. Ms O'Grady said she would meet the Claimant to discuss the Northolt reference on 22 March 2019.

    139.2 The second said that everything in the "add on" of 5 February was outside the scope of the grievance policy and would not therefore be considered. It stated that there were some points which she, Ms O'Grady, "would like to clarify for your records". The letter stated that the Claimant had not complained at the time about the Head of Year issue and had had the opportunity to raise matters at the time under the appropriate polices, and likewise could have raised pay issues under the appropriate policies.

140. On 19 March 2018, a letter from Ms O'Grady was sent which commented on the "letter of protest". It stated that while the matters were more than 3 months old, Ms O'Grady might be willing to consider them under the grievance policy due to their seriousness, subject to clarification being provided by the Claimant.

141. The Claimant and her union each wrote to the school/Ms OGrady, seeking postponement of the 22 March meeting and suggesting that (in the case of the union) the entirety of the references be considered because the Claimant did not know about their contents until less than 3 months before 31 January and (in the case of the claimant) all matters raised be considered as forming part of a continuing course of conduct. The postponement was granted and the Claimant sent a detailed letter dated 27 March 2019 outlining matters that she thought were relevant to her grievance. She also sent a letter via ACAS dated 26 March 2019 (over which both sides have waived privilege) headed "continuing acts of discrimination". By letter dated 29 March 2019, Ms OGrady agreed that the contents of the 12 March 2019 letter (the "letter of protest") as well as the 26 and

27 March documents would be considered as part of the grievance, even where the incidents were more than 3 months old.

142. It is clear both from the fact that the Claimant had contacted ACAS and the contents of the letters (eg references to specific decided cases, and expressions such as continuing act, and description of the implied term of trust and confidence) that the Claimant was aware of the possibility of bringing a tribunal claim, and was contemplating doing so by no later than March 2019.

143. The Claimant sought what she described as "reasonable adjustments" for the meeting because of health issues (described as psychiatric and physical injury, which she described, including the medication she was taking). The adjustments were breaks in the meeting and to have a family member assist. By email from Ms Doyle, the Respondent confirmed that Ms OGrady agreed to the adjustments and the meeting went ahead on 12 April 2019. Ms Doyle also attended the meeting and took notes. Where the Claimant commented on particular events, Ms Doyle also supplied information to the meeting about those events.

144. The outcome letter bears the date 22 May 2019. It is signed. However, it was not sent on 22 May 2019. It was received by the Claimant in the evening of 31 May. Ms OGrady described that the letter (which is 14 pages of closely typed A4) was produced on 22 May 2019 by her and Ms Doyle sitting together with Ms Doyle typing as she, Ms OGrady, dictated, and that she signed the letter on 22 May 2019 and believes that the delay in posting/emailing the letter was because Ms Doyle had personal reasons keeping her from doing so.

144.1 The letter refers to Ms OGrady interviewing 5 people (Corish, OReilly, Mead, Magee, Pearce). We accept that she did so. No notes of these interviews have been supplied to the Claimant to us.

144.2 The letter also asserts that Ms OGrady examined various documents, which she lists in generic terms: "Class tracking, Examination Analysis for the Summer Results, Reports to the Governing Board on Departmental Progress, Performance Management Reports, Departmental documentation and Lesson observations reporting, interview process with specific focus on the Heads of Year new roles following the restructuring of the Pastoral roles and responsibilities following the consultation period and the Grievance and Complaints on file at the school." It is not clear (in all cases) which specific documents she looked at, and whether they are in the hearing bundle or not. Later in the letter, she refers to some specific items which we have not seen (letter dated 4 May 2016, for example, allegedly commenting on what Mr Corish might be willing to do on the Claimant's return to work).

144.3 We note that paragraph 11 of her statement refers to certain pages from the hearing bundle, and states that she saw those items (being the emails about tracking data, etc, mentioned above). She does not explain the mechanism by which those emails came to her attention (we have not seen evidence that they were forwarded to her electronically) or why she is sure those are exactly same documents she saw (she told us that she did not personally retain the documents she had considered). The emails seem to have been printed by Ms Naidoo, who was not an interviewee, but we do not know when or why.

144.4 The letter does not deny that Mr Corish said, in Summer 2016, that the Claimant should cease to be Head of Year for the following academic year. By implication, the letter accepts that the comment was made, and justifies it as a reasonable attempt to assist the Claimant. We infer, therefore, that Mr Corish did not deny the remark to Ms O'Grady and that he sought to justify it.

144.5 The letter states that Ms OGrady has reviewed the Head of Year documents and it was clear "*that you did not meet the requirements of the new role*". The letter states: "*The school is not aware why you advise you could not reapply for the two posts advertised in the summer term as this was open to all staff.*" It also states "*I can find no evidence of you not being able to reapply*." Given the failure to provide notes of interviews, it is not possible to be sure whether Mr O'Reilly and Mr Corish were asked, and denied giving that information to the Claimant, or whether Ms O'Grady decided not to ask the interviewees if they had told the Claimant she could not apply.

144.6 The letter stated: "*Internal posts within the school are advertised and there is evidence of the advertisements within the school briefings, for some posts there is a requirement to be working within a specific department when it is a TLR linked to a departmental responsibility or for a member of staff to have already achieved a certain level of TLR responsibility within the school*" and "*The Heads of Faculty posts as detailed earlier in my response were advertised and open to existing Heads of Department within the Faculty*." It is true that the Head of Year posts were advertised (albeit with the Claimant having been told orally by Mr OReilly that she could not apply) but it is not true that all vacancies were advertised. Several were filled by Mr Corish simply speaking to members of staff and offering them the post. It is not clear if Ms O'Grady asked Mr Corish questions about that issue. There is no written policy about when staff have to be working within a particular department to apply for the jobs discussed by the Claimant, and – therefore – Ms O'Grady did not see such a policy.

144.7 The letter asserted that the consultation process for Head of Year had been correctly followed and – by implication – rejected the Claimant's assertion of a breach of Equality Act.

144.8 In relation to Ms Slavin's appointment, the letter states: "*This post was advertised internally within the DT Department*." There is no clarification of what Ms O'Grady means by this comment, or what the source of her information was. She did not see a written advert, because Ms Slavin's appointment was done by Mr Corish having conversations – for which no written documents were produced – as a result of which he decided that Ms Slavin was the only person who was eligible and willing to accept, and so he appointed her.

144.9 In rejecting the criticism of Mr Corish's references, the outcome includes the comment "*it is factually correct that outcomes have been low in Geography*". The letter itself does not state the basis for this opinion, and does not address what Mr Pearce and Ms Urquhart said in their references (and in particular Ms Urquhart's claim that the Claimant had a good track record of results). In answering the tribunal's questions, Ms O'Grady expressly confirmed that Mr

Corish had not mentioned residuals to her when she interviewed him; she said that Mr Magee had told her that the evidence from residuals were such that the Claimant's exam results were below expectations. No notes of Mr Magee's words to Ms O'Grady were retained and there is no way for the tribunal to know which specific documents – if any – Mr Magee looked at when forming his opinion.

144.10 The letter also says it is "factually correct" that the Claimant misses deadlines and has to be chased "on numerous occasions" by the school office. It does not state that Mr Corish had spoken to Ms Naidoo about this before writing the references, or state what documents Mr Corish or Ms O'Grady had taken into account.

144.11 Overall, in relation to references, and having discussed the obligation to be accurate, Ms O'Grady states: "I would view the Headteacher has been as fair as possible".

144.12 In relation to the Head of Year issue, Ms O'Grady did not accept that there had been a demotion or a loss of pay. She did state that she was aware that the pay protection was until 31 August 2020 and that the Claimant was no longer Head of Year.

145. We accept that the letter was signed by Ms O'Grady prior to the Respondent's receipt of the 24 May 2019 letter from the tribunal which enclosed Claim 1. It seems more likely than not that Ms Doyle had some input into the wording of the letter, and was not simply receiving dictation. We accept that Ms OGrady is stating opinions which are her honest opinions. For the reasons mentioned, we cannot see, in some cases, what information she received before the opinion was formed.

Appeal against Grievance Outcome

146. The Claimant appealed on 7 June. Mr Anderson was appointed to chair a panel of three. The Claimant objected to his appointment alleging that he was not independent. She also sought to have the same adjustments made for the appeal hearing as had been made for the grievance hearing on 12 April 2019. She also requested notes and documents from Stage 1. On 17 July 2019, Ms Doyle replied stating that the other points would be referred to the panel and she would "resend a copy of the typed notes from the Stage One meeting". In fact, no such notes had previously been supplied to the Claimant, and nor were they afterwards. On 18 July 2019, Ms Doyle wrote to say

> *Please find attached a further copy of the Chairs response to your Grievance the discussions at the Stage One hearing are contained within the Chairs reply and form a record of the discussions at the Grievance meeting, hence this letter runs to fourteen pages.*

147. In other words, the outcome letter (which the Claimant had received and responded to) was re-sent, but no notes etc were supplied, either in relation to the 12 April meeting, or the interviews and other documents that Ms O'Grady's letter had said had been considered.

148. On 18 July 2019, an email from Ms Doyle's email account went to the Claimant at 12:29pm. It said that the meeting would go ahead that evening – and that Ms OGrady would participate – and the Claimant should reply by 3.30pm. She replied about 4.30pm to say she could not attend without the information she had asked for. Upon receipt, Ms Doyle obtained legal advice for the Respondent and privilege has been waived, and the advice – sent by email on 18 July 2019 – is in the bundle. It states:

> *Hi Teresa*
>
> *She clearly continues to challenge the steps being taken. I suggest you make a clear note of the chronolgy of communications in case this escalates. It might be helpful if this is gone through and minuted tonight and so can be considered by the panel and noted in the outcome letter.*
>
> *I presume an absence management plan will be considered in September. Her engagement with these processes is sufficient evidence of her ability to engage with occupational health, which will establish whether there is a genuine reason for her being off sick.*

149. The Respondent declined to change the decision-makers for the appeal. The panel declined to make the adjustments requested by the Claimant. the Claimant's communications were treated as a refusal to attend and so the panel met by conference telephone call on the evening of 18 July 2019. Ms Doyle made notes which were converted by her into a draft of the outcome letter dated 25 July 2019 (page 424-425 of bundle) which was signed by Mr Anderson and sent to the Claimant. In other words, the panel did not meet in person. The fact that this was the hearing method is not stated in the outcome letter or the witness statements, and nor is Ms Doyle's role.

150. As the outcome letter makes clear, there were several items which the panel had not seen but which they were aware which the Claimant thought were relevant:

- The Proposals document produced for the organisational review;
- Evidence on which Mrs OGrady relied in reaching her determination.
- A word version of grievance meeting notes which formed the Chairs response letter For Stage One

151. The panel stated that they did not need to see those documents, but Ms Doyle would send them to the Claimant. She did not.

152. The appeal panel noted what the Claimant said about lesson observations being inconsistent with Mr Corish's comments in the reference, and stated: "*However, the judgments which Mr Corish made were also based on evidence which was referenced in Ms OGrady's letter*". In fact, the O'Grady letter – when read carefully, and with the benefit of having received her answers in cross-examination – makes no comment about what evidence Mr Corish used to form his "judgments". Rather, Ms O'Grady's approach was to make her own mind up about whether evidence/documents existed which could potentially support the opinions stated in the references by Mr Corish (and without addressing the opinions of

Pearce/Marshall/Urquhart). Since the appeal panel did not see the documents which Ms O'Grady purportedly relied on, they were not forming their own assessment, merely reiterating their understanding of what Ms OGrady had written. Similarly, they took the same approach to asserting that comments about exam performance and late submission of data were justified.

153. Mr Anderson was aware of the tribunal proceedings. The Claimant received the outcome on around 27 July 2019.

Claimant's queries in November 2019 and resignation

154. The school did not contact the Claimant when the academic year started. The Respondent asserts that the reason it did not do so was because of legal advice. That is not what the email cited above states. On the contrary, that email states that there should be contact with the Claimant in relation to sickness absence. (The Respondent asserts that a different lawyer provided the advice not to contact the Claimant, but advice of that description has not been disclosed.)

155. An Occupational Health report dated 16 April 2019 was received by the Respondent. Amongst other things, the document included the following extracts:

> *"She does not feel able to return to the workplace" …*
>
> *"Clearly, at present, Mrs Burton-York is not fit to work. if you plan to proceed with her grievance in the near future, this should ideally be conducted in writing rather than by means of face-to-face meetings. If a meeting is essential, then she should be offered an advocate of her choice to accompany her." …*
>
> *"I have not arranged to see Mrs Burton-York again but at your discretion I should be delighted to do so whenever you feel this would be appropriate. if you have any queries relating to this report, do please feel free to contact me by email and I will do my best to assist."*

156. On 29 November 2019, the Claimant wrote to Ms Doyle about her pay (9:31) and expressing dissatisfaction about the way her absence was dealt with (10:34). We are satisfied that both emails were received by Ms Doyle, notwithstanding the dispute. (The versions in the original bundle were drafts sent by the Claimant to herself slightly earlier, but the additional items found by the Claimant and submitted on 15 March 2021 include header information. We are satisfied that the Respondent could and should have been able to locate the originals long before its December 2020 data loss.)

157. The first email was presumably sent by Ms Doyle to a colleague, Ms Smith, because Ms Smith replied the same day to say that the Claimant's half pay entitlement had ceased 22 November and that a schedule of payments would be provided. The Claimant replied to that on 5 December 2019, suggesting that she still needed clarification and that she disputed that her half pay should cease. There was no further reply to that.

158. There was no reply at all to the email of 29 November 2019 at 10:34 which complained about not having been contacted recently, claimed that there had been

no attempt to assist her to return to work, and noted that she had not been re-referred to Occupational Health (referring to the 16 April comments).

159. On 20 December 2019, the Claimant resigned. The letter was acknowledged by Ms OGrady on 17 January 2020, in a response which stated that it had been received after the school closed and that Ms OGrady received it in the New Year.

160. We accept that the Claimant resigned because of the things stated in the letter, which included her opinion that she had been discriminated against, harassed and victimised. She also believed her health had been damaged. The historic events that she referred to, and which formed part of her reason for leaving, included her perception of the Head of Year issue and the references issue described above. The particular trigger for her resignation is that her sick pay entitlement had ran out and that she had made enquiries about possible extension (5 December to Smith) and about what the Respondent might do to assist her return to work, including OH referral (29 November at 10:34 to Doyle) and had received no response.

The Law

Time Limits for Equality Act complaints

161. Section 123 of EA 2010 states (in part)

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

162. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

163. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. The Tribunal has a

broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The factors that may helpfully be considered include, but are not limited to:

163.1 the length of, and the reasons for, the delay on the part of the claimant;

163.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

163.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

163.4 Extension is the exception rather than the rule. That means that the tribunal must be satisfied that it is just and equitable from the default position, but does not mean that the circumstances have to be truly extraordinary, or that the Claimant has to be able to show that it would not have been practicable to submit the claim earlier.

163.5 The prejudice to the Claimant of not extending must be considered, and weighed against the prejudice to the Respondent of extending. It is always true that the Claimant will suffer prejudice to some extent if not allowed to pursue a claim that she prefers to have decided on its merits, and that the Respondent will suffer prejudice to some extent if not given the benefit of being able to rely on the unextended period set out in the legislation.

Burden of Proof for Equality Act complaints

164. Section 136 of the Equality Act deals with burden of proof and is applicable to all the Equality Act claims in this action, namely all the claims of discrimination, harassment or victimisation which rely on the definitions in section 26 and 27.

165. Section 136 of EA 2010 states (in part)

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

166. Section 136 requires a two stage approach:

166.1 At the first stage the tribunal considers whether the Claimant has proved facts (on the balance of probabilities) from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the

contravention has occurred. At this stage it would not be sufficient for the Claimant to simply prove that what she alleges happened did, in fact, happen. There has to be some evidential basis upon which the tribunal could reasonably infer that the proven facts did amount to a contravention. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

166.2 If the Claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the contravention did not occur.

167. Where the Claimant fails to prove, on the balance of probabilities, that a particular alleged incident did happen, then complaints based on that alleged incident fail. Section 136 does not require the Respondent to prove that alleged incidents did not happen.

Harassment

168. Section 26 of the Equality Act defines harassment.

> Section 26 of EA 2010 states (in part)
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

169. We will refer to the contents of section 26(1)(b) as “the prohibited effect”, but we do take into account the full wording of the subsection, including that it is the purpose or effect which must be considered.

170. Race is a relevant characteristic for the purposes of section 26. The Claimant needs to establish - on the balance of probabilities - that she has been subjected to “unwanted conduct” which has the “the prohibited effect”. To succeed, in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it has the purpose or effect described in Section 26(1)(b) Equality Act 2010. The conduct also has to be related to the particular protected characteristic, ie race. However, because of section 136, the claimant does not necessarily need to prove - on the balance of probabilities - that the conduct was related to the protected characteristic. To shift the burden of proof, she would need to prove facts from which we can infer that the conduct could be so related.

171. In HM Land Registry v Grant 2011 ICR 1390, the court of appeal stated that – when considering the effect of the conduct, and taking into account section 26(4) – it was important not to “cheapen” the words used in section 26(1). It said.

> *Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. … to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.*

172. When assessing the effects of any one incident which is one of several incidents, it is not sufficient to consider each incident by itself in isolation. The impact of separate incidents can accumulate and the effect on the work environment may exceed the sum of the individual episodes. In Qureshi v Victoria University of Manchester, the EAT warned against taking too piecemeal an approach to the analysis of a set of incidents which were each said to amount to harassment or discrimination. Taking the allegations as a whole (as well as considering each individually) is necessary not just when assessing the effect of the Respondent's conduct on the claimant, but also when deciding whether to draw inferences that the unwanted conduct (or any of it) was related to race.

Direct Discrimination

173. In relation to direct discrimination, Section 13(1) of EA 2010 states

> *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.*

174. The definition in section 13(1) incorporates two elements: Firstly, whether A has treated B "less favourably than" than others, ("the less favourable treatment question"); secondly, whether A has done so "because of the protected characteristic", ("the reason why question".)

174.1 For the first of these elements ("the less favourable treatment question"), the comparison between the treatment of the claimant and the treatment of "others" can potentially require decisions to be made about the characteristics of a hypothetical comparator. The two questions are intertwined and sometimes a tribunal will approach "the reason why question" first. If a tribunal decides that the protected characteristic was not the reason (even in part) for the treatment complained of it will necessarily follow that a person whose circumstances are not materially different would have been treated the same, and there will be no need to embark on the task of constructing a hypothetical comparator.

174.2 When a comparator is used, it can either be an actual person or a hypothetical person. Either way, the comparator's circumstances must be the same as the claimant's other than the protected characteristic in question.

175. When we consider the reason that the Claimant was treated in a particular way (and/or the reason for a difference in treatment in relation to a comparator), we must consider whether it is because of the protected characteristic or not. We must analyse both conscious and subconscious mental processes and motivations for actions and decisions. However, the burden of proof does not simply shift

where a claimant proves a difference in race and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient. "Something more" is needed. However, it need not be a great deal more. It could, for example, be an untruthful or evasive response from the alleged wrongdoer. It is important for tribunals to recognise that where a discriminatory motivation does exist, then it is likely to be hidden, and not, for example, set out explicitly in a contemporaneous written document. This does not mean, of course, that tribunals can rely on intuition or guesswork, but it does mean that when there is a denial of a discriminatory reason, the tribunal is entitled and obliged to analyse the contemporaneous evidence and explanations as well as the denial.

176. When there are multiple allegations, the tribunal must consider each allegation separately to determine whether the burden of proof shifts for each, rather than taking a broad-brush approach in respect of all the allegations. However, evidence relating to one particular allegation can also be taken into account when assessing other allegations.

Victimisation

177. Section 27 Equality Act 2010 reads:

> 27 Victimisation
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
> (4) This section applies only where the person subjected to a detriment is an individual.
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

178. There is an infringement if (a) a claimant has been subjected to a detriment and (b) she was subjected to that detriment because of a protected act. The alleged victimiser's improper motivations might be unconscious or conscious.

179. A person is subjected to a detriment if they are placed at a disadvantage. There is no need to prove that their treatment was less favourable than another's.

180. As per section 27(2)(d), an act may be a protected act where the allegation is either express or implied. There is no requirement for the claimant to have specifically mentioned the phrase "Equality Act" or to have used specific words such as "discrimination" or "race". However, to be a protected act in accordance with 27(2)(d) the allegation relied on must assert facts which, if true, could amount to a breach of Equality Act 2010. Where an employee makes an allegation of wrongdoing by the employer, but without asserting (either expressly or by

implication) that the wrongdoing was a breach of the Act (eg that it was less favourable treatment because of a protected characteristic, or harassment related to a protected characteristic) then the allegation does not fall within section 27(2)(d).

181. To succeed in a claim of victimisation the claimant must show that she was subjected to the detriment because she did a protected act (or because the employer believed she had done or might do a protected act). Where there has been a detriment and a protected act then that is not sufficient, in itself, for the complaints of victimisation to succeed. The tribunal must consider the reason for the claimant's treatment and decide what (consciously and/or subconsciously) motivated the employer to subject the claimant to the detriment. This will require identification of the decision-maker(s) and consideration of the mental processes of the decision-makers. If the necessary link between the detriment suffered and the protected act is established, the complaint of victimisation succeeds. The Claimant does not succeed simply by establishing that "but for" the protected act, she would not have been dismissed (or subjected to another detriment).

182. The Claimant does not have to persuade us that the protected act was the only reason for the dismissal or other detriment. If the employer has more than one reason for the dismissal (or other detriment), the Claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected acts have a "significant influence" on the decision making. For an influence to be "significant" it does not have to be of great importance. A significant influence is rather "an influence which is more than trivial".

183. A victimisation claim might fail where the reason for the dismissal (or other detriment) was not the protected act itself but some feature of it which could properly be treated as separable, such as the manner in which the protected act was carried out. See Martin v Devonshires Solicitors 2011 ICR 352,

184. Section 136 applies to victimisation complaints. Therefore, the initial burden is on the claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent has contravened section 27. If the Claimant does that, the burden then passes to the respondent to prove that victimisation did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the claim.

Unfair dismissal

185. In relation to constructive dismissal, for an employee to claim constructive dismissal four conditions must be met. There must be a breach of contract by the employer (actual breach or anticipatory breach). The breach must be sufficiently serious to justify the employee resigning, in other words it must be what is known as a repudiatory breach. The employee's resignation must in part at least be in response to the breach and not solely for some other unconnected reason and the

claimant must not act in such a way as they are deemed to have waived the breach.

186. Examples of repudiatory conduct includes breaches of express term but as per Malik v BCCI there is an implied term of a contract that the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or serious damage the relationship of confidence and trust between employer and employee.

187. If the Claimant proves constructive dismissal, the reason for the dismissal – when deciding if it is a fair reason - is taken to be the reason for the treatment which amounted to the repudiatory breach that influenced or caused the resignation (see: Berriman v Delabole Slate Ltd [1985] ICR 546).

188. The Tribunal should assess the question of whether there has been a repudiatory breach of contract objectively. For the purposes of considering the implied term of mutual trust and confidence there are two essential questions:

188.1 Was the employer's conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties?

188.2 If so, did the employer have reasonable and proper cause for that conduct?

189. The employer's repudiatory breach need not be the sole or main reason for the resignation. It is sufficient that the employee resigns "in part" in response to the breach.

190. Once a repudiatory breach has occurred, in Bournemouth University Higher Education Corp v Buckland [2010] ICR 908, CA where Jacobs LJ said:

When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation.

191. On the facts of a given case, affirmation might be found to have occurred where an employee waited a significant period of time before resigning and/or gave notice of resignation. However, the mere fact alone that termination of employment did not take place until some future date, such as after expiry of notice, does not automatically mean that the employee has affirmed (for the purpose of considering if there is a dismissal as per the Employment Rights Act 1996, at least; potentially there can be a different answer at common law). Time is a factor, and an important one, but it is not the only factor.

192. It is important to consider whether the cause of the termination was a so-called "last straw" case. The last straw doctrine will potentially apply in cases where a course of conduct is relied upon as amounting to a fundamental breach.

192.1 Where a prior fundamental breach has not been affirmed by the employee, the last straw doctrine is not applicable. The employee will be entitled to rely upon the totality of the employer's repudiatory conduct without needing to resort to the last straw doctrine (Williams v The Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589, EAT at §§36-38).

192.2 However, where a prior fundamental breach has been affirmed, it may be necessary for the employee to rely upon the last straw doctrine. The last straw need not be a breach of contract in itself – it merely must be more than "entirely innocuous". In such a case, the effect of the last straw is to revive the employee's right to terminate based upon the totality of the employer's conduct, including that before affirmation (Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1).

193. Section 98 of ERA 1996 says (in part)

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> …
> (b) relates to the conduct of the employee,
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

194. If there has been a dismissal, the respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for the fair reason relied on. Provided the respondent does persuade us that the claimant was dismissed for that reason, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

195. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

196. It is not the role of this tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. In other words, it is not our role to substitute our own decisions for the decisions made by the respondent.

Analysis and conclusions

Allegation One. Harassment/Discrimination. 12 May 2016 - Mr Corish's failure to refer the Claimant to Occupational Health

197. The Claimant has not proven that the non-referral was unwanted conduct and that is part of the reason for this harassment allegation failing.

198. We are satisfied that the reason why Mr Corish did not make a referral to Occupational Health is that he did not think it was necessary. He thought that the Claimant was fit to return and he treated the Claimant's comments as a simple enquiry by her as to whether the Respondent required her to visit Occupational Health, and not as a request by her that the Respondent should obtain medical advice about her fitness for the full range of her duties.

199. The Claimant has not proven any facts from which we might infer that the non-referral was because of race or related to race, and both the harassment and discrimination allegations fail for Allegation One.

Allegation Two. Harassment/Discrimination. 12 May 2016 — Requesting that the Claimant relinquish her Head of Year 7 role

200. It was proven to our satisfaction that Mr Corish did – as the Claimant alleged – invite her stand down for the whole of 16/17 (and with no guaranteed return date) and that he did not – as he claimed – simply offer that someone else would do school visits in the summer terms.

201. We are satisfied that it was not something simply said casually, but was a firm and specific proposal that the Claimant would not be a Head of Year, but would be paid as if she was. We infer that it was not because of (Mr Corish's opinion about) the Claimant's ankle injury. That explanation worked only if we accepted his evidence that it was only the school visits, and only the summer term 2016 which were affected by his offer; but we did not accept that. So, if not for the ankle injury, it was for some other reason, that has not been expressed.

202. Given that the usual system was that a Head of Year for Year 7 would stay with that group of pupils throughout their time at the school, and given that Mr Corish would not commit to when the Claimant would resume as Head of Year if she agreed to stand down, we are not persuaded that he intended the arrangement to last just a single year. Our inference is that once someone else had been Head of Year 7 for the whole year, there was a significant chance that the Respondent's position would be that the normal system should be retained and that worker would follow the group through the school. Had there been a firm intention that the offer was to stand down for one year, and one year only, then it would have been possible to give the Claimant written confirmation of that, as well as confirming if the plan was for her to take over in Year 8 or start with a new Year 7.

203. This was unwanted conduct in that the Claimant did not wish to step down as Head of Year. That being said, she was prepared to consider the proposal, and she did so before rejecting it. It is not alleged, and we do not find it to be the case, that the offer was made in an intimidating or threatening way; no adverse consequences were stated or implied if the Claimant declined. The Claimant was not distressed

by the discussions on the topic. In all the circumstances, we do not think it would be reasonable for us to decide that the conduct would have Prohibited Effect. The harassment complaint fails for Allegation Two.

204. A difference in treatment and a difference in race is not enough for a finding of direct discrimination. Something more is required. In this case, there is something more; we have an explanation which we do not accept in two respects (that it was because of the ankle, and that it was just for summer term 2016). We consider, on an allegation by allegation basis whether the burden of proof shift, but we note that there are other explanations given by the Respondent as well, for the other allegations, which we have also rejected. These are facts from which we could infer that there was a contravention of section 39(2)(d) Equality Act 2010, in that the Respondent treated the Claimant less favourably because of race. Our decision is that the burden of proof shifts for Allegation Two.

205. The Respondent has not satisfied us that its decision to ask the Claimant to step down as Head of Year was in no sense whatsoever connected to race. This does not mean that there was necessarily conscious discrimination. In any event, Allegation Two succeeds in relation to direct discrimination.

206. We cover time limit below.

<u>Allegation Three. Harassment/Discrimination. April 2017 – (a) Not reappointing the Claimant in a Head of Year role and (b) not redeploying the Claimant to another role commensurate of TLR1 when she had been told she would be redeployed</u>

207. In relation to part (a), it does not refer to the decision to require the Heads of Year to go through a process, it simply asserts that the outcome of that process should have been that the Claimant was appointed. However, the background is potentially relevant. That background is that a few months after Mr Corish asked the Claimant – and only the Claimant – to step down as Head of Year for 16/17, and she said "no", proposals were brought forward that all Heads of Year would have to go through a competitive selection process. Not going through the process would mean losing the Head of Year role. The Respondent did not have an existing written role profile for Head of Year, or existing documentation which said why that role was entitled to the TLR1 supplement. It decided that TLR1 was automatically appropriate for the new roles, and there is no evidence that it even addressed its mind to the issue. There was no systematic attempt to compare the allegedly new role profiles to the actual duties that the Heads of Year were performing as of 16/17, though there was the tacit acknowledgment (see the email of 7 February 2017 - page 574), that "new" role profiles were formally putting in writing what the role had evolved into, rather than an attempt to require the Head of Year to do, from 17/18, tasks that they had not done up to that point.

208. There was no decision in advance of the process about what the pass/fail borderline would be. Although there was a decision to use marks 1 to 5 for questions, there was no decision in advance about which questions would be marked 1 to 5 and which would be left unmarked; different interviewers took a different approach to this. There was no decision put in writing that any question would have higher weighting than the others and there was no decision about what "higher weighting" actually meant in practice. The marks of all the candidates were

not added up and compared to each other and (therefore) they were not first added up without weighting, and then adjusted to have a weighting applied. Rather, there was a completely undocumented meeting, the outcome of which was that the Claimant, and only the Claimant (of the 4 candidates), would not be a Head of Year for 17/18.

209. Not offering to "reappoint" the Claimant was unwanted conduct. It had the effect on the Claimant of causing her significant distress. It is reasonable in all the circumstances to regard refusal of "reappointment" (as it is described in Allegation Three) as having the prohibited effect in all the circumstances.

210. The Claimant was treated less favourably than other Heads of Year (who are of a different race than her).

211. We have found that there was direct discrimination in summer 2016 when the Claimant was asked to step down as Head of Year for 16/17. The circumstances are that in 16/17, all the other Heads of Year (who wanted to remain in that post) were "reappointed" but the Claimant was not. The circumstances are that, as just mentioned there was no documentation for the specific reasons that the Claimant's interview was deemed to make her below the (unwritten) pass/fail standard. We take each allegation in turn when considering if the burden of proof has shifted, but the Respondent has not given accurate explanations for several matters, including the lack of transparency about the fact that it told the Claimant that she could not reapply if she was not appointed the first time around. Not allowing the Claimant to be part of the second round of recruitment would lead to a situation where she was not directly compared to the eventually successful round 2 candidates. was There are facts from which we could infer that the decision was a contravention of either s40 Equality Act 2010 as being related to race, or of section 39(2)(a), as giving the Claimant less favourable terms of employment because of race (or, in the alternative, s39(2)(d), the detriment being loss of status and, in due course, reduction in pay, after 31 August 2020).

212. We are persuaded that the burden of proof has shifted. The Respondent has not persuaded us that the decision was not related to race (and has not persuaded us that it was in no sense whatsoever because of race). The Claimant's scores on question 5 – relied on by Mr OReilly and Mr Corish as the most important – were not significantly different to one of the appointed candidates, and Mr OReilly's comments about how badly the Claimant answered question 5 do not address that he scored her a 3. The marking sheets are not all supplied, and the apparently crucial discussion between interviewers was entirely undocumented.

213. Allegation 3(a) succeeds in relation to harassment. It also succeeds in relation to section 39(2)(a).

214. In relation to Allegation 3(b), we do not accept that the Respondent ever told the Claimant that she "would" be redeployed. There was a notable lack of written information supplied to the Claimant about the exact implications of the cessation of the Head of Year role. However, from what little information there is, it seems to us that the Respondent's position was that since it was paying the Claimant the "safeguarded" (ie pay protected) sums for TLR1, it would be entitled – if it saw fit - to allocate additional duties to her during the safeguarded period (ie up to 31

August 2020). It did not promise her that it would give her such additional duties (temporarily or permanently), or that it would redeploy her (permanently).

215. Although not clearly explained to the Claimant at the time, the Respondent was terminating the arrangement created in 2012 ("post of Head of Year on a permanent contract the role will be paid at TLR 1A").

216. The way that Allegation 3(b) is phrased, it does not succeed in its own right.

217. Allegation Four. Harassment/Discrimination. May/June 2017 – (a) Excluding the Claimant from the second round of interviews for one of the vacant Head of Year roles and (b) appointing two less experienced and less qualified Caucasian members of staff as Heads of Year

218. In her grievance outcome, Ms O'Grady argued that the Claimant could have applied in Round 2. This was also the Respondent's position in the litigation until Mr O'Reilly answered questions on oath.

219. There is – therefore – no principled reason that the Claimant could not apply in Round 2. Had there been – for example – some written policy preventing people applying a second time for the same vacancy (as it was, on the Respondent's case) within a short period of time, then Ms O'Grady could have said that in her grievance outcome letter and Mr O'Reilly could have referred to that in his evidence.

220. Mr O'Reilly did not claim that he forgot making this comment, and only remembered during the hearing. Therefore, either that he kept the information from the Respondent, or the Respondent hoped that he would not be cross-examined on the point. In relation to Ms O'Grady's investigation, either she carried out almost zero investigation before asserting that she had found no evidence to support the Claimant's claim, or Mr OReilly lied to her. There are no notes of her interview with Mr O'Reilly, and neither of them can say what questions were asked.

221. This was unwanted conduct, because the Claimant wanted to be able to apply. However, we think it would be cheapening the words of section 26(1)(b) to regard the fact that the Claimant was one of the people told she could not reapply as having the prohibited effect. All the Heads of Year were told that they could not reapply.

222. Given that they were all given the same information, we are not persuaded that the burden of proof shifts.

223. We are not persuaded that the comment made by Mr O'Reilly was related to race, or because of race. There is not really a clear explanation of why he said it, but we do not think that the proper comparators are those people who were not previously Heads of Year, and who were allowed to apply. We think the proper comparators are the other Heads of Year who did apply and who would – had they hypothetically not been "reappointed" – have been unable to apply in Round 2.

224. For the same reasons, it is not necessary to say more about allegation 3(b). The people who were appointed in Round 2 are not valid actual comparators. The

difference was that they were eligible to apply in Round 2 (not having been part of Round 1) and the Claimant was not.

225. Allegation Four fails in relation to harassment and discrimination.

Allegation Five. Harassment/Discrimination May/June 2017 - Failing to redeploy the Claimant to a TLR1 role when Caucasian members of staff were assigned Head of Faculty roles without the roles being advertised or interviews

226. On the assumption that the Claimant did want to be appointed as Head of Faculty, then her non-appointment was unwanted conduct. However, it would not be appropriate to regard the Claimant's non-appointment into roles for which she had no previous relevant experience as having the Prohibited Effect.

227. We accept the Respondent's explanation that the only people who were offered the roles were people who were already a head of department in one of the departments which was going to make up the faculty. The Claimant was treated no less favourably than all the other people who did not match that description.

228. The burden of proof has not shifted. The Claimant has not proven any facts from which we might infer that a hypothetical comparator (a displaced Head of Year, of a different race to the Claimant, but who was not head of department) would have received an offer of Head of Faculty.

229. Allegation Five fails in relation to harassment and discrimination.

Allegation Six. Harassment/Discrimination. September 2017 — Failing to redeploy the Claimant to a TLR1 role when a Caucasian member of staff was assigned a Head of D&T role prior to the termination of a Head of Year role

230. The reason that Ms Slavin was appointed was not because she was a former Head of Year (being redeployed due to an obligation to redeploy) but was because she was a member of the relevant department. No-one outside the department was asked.

231. The Claimant has not been treated less favourably than all the other people who were not asked. We are not persuaded that she wanted the post of Head of D&T. We do accept that she would have wanted an appropriate Head of Department role, but there were no vacancies in September 2017 for Head of Geography.

232. The burden of proof has not shifted. The Claimant has not proven any facts from which we might infer that a hypothetical comparator (a displaced Head of Year, of a different race to the Claimant, but who was not in D&T) would have received an offer of Head of D&T.

233. Allegation Six fails in relation to harassment and discrimination.

Allegation Seven. Harassment/Discrimination. On or around 2 February 2018 - Failing to investigate and/or treat as a grievance the Claimant's complaint of bullying and harassment

234. The Claimant had a conversation with Mr O'Reilly and it is common ground that she was upset. The issue for us is not whether Mr O'Reilly could or should have followed it up, but whether he would have done so if the Claimant had been of a different race.

235. As mentioned in our findings of fact, she did not use either the word "bullied" or the word "harassed". She did not allege that her treatment amounted to breach of the Equality Act. The claimant did not subsequently contact Mr O'Reilly to ask him to do anything. As far as Mr O'Reilly was concerned, this had been a one off incident and the claimant had not been asking him to take any action of any description.

236. The Claimant has not proven, on the balance of probabilities that she wanted Mr O'Reilly to commence a formal investigation. Put another way, she has not proven that the absence of such investigation was unwanted conduct.

237. In relation to direct discrimination, the burden of proof has not shifted. The Claimant has not proven any facts from which we might infer that Mr O'Reilly would have acted differently had she been of a different race. {To the extent that it is relied on at all [and we do not think the Claimant relies on it for this point] we acknowledge that some staff and pupils strongly disagreed with some language used by Mr O'Reilly in assembly, but all witnesses agreed that – whether appropriate for him to say it out loud or not – he had been using the language as an example of what everybody knew was wholly unacceptable. It does not lead us to infer that he potentially could treat complaints from black members of staff differently to those from staff of other races.}

238. Allegation Seven fails in relation to harassment and discrimination

<u>Allegation Eight. Harassment/Discrimination. September 2018 — Failing to redeploy the Claimant to Head of Humanities when a Caucasian member of staff was appointed to the role without interview and without the role being advertised</u>

239. The Respondent has persuaded us that the decision to appoint Ms Urquhart was in no way because of race or related to race.

240. We are satisfied that if the former teacher in charge of Leisure and Tourism had been (for example) white, then they would not have been asked by Mr Corish if they wanted to be Head of Faculty – Humanities.

241. It is understandable that the Claimant might feel aggrieved that this post was not advertised (and, contrary to the Respondent's pleaded case, it was not). As an experienced geography teacher, and former Head of Year, it is understandable why she might feel that the post ought to have been one for which she was allowed to apply. There was no written policy to say she was not eligible, and no advert which she could reply to and make a case as to why she had equivalent knowledge and experience as the (unpublished and unwritten) criteria, especially given her role leading Leisure and Tourism.

242. However, given that Mr Corish used the same approach in Summer 2018 for this faculty that he used in Summer 2017 for 3 other faculties, we are satisfied that the Claimant's race played no part whatsoever in his decision as to which people he would approach.

243. Allegation Eight fails in relation to harassment and discrimination

Allegation Nine Harassment/Discrimination. Giving inaccurate. misleading and/or negative references to various schools, namely: Brentslde High School (on or around 28 April 2017); Preston Manor (on or around 17 May 2017); Guru Nanak Sikh Academy (on or around 21 February 2018); Hammersmith Academy (on or around 3 October 2018); Northolt High School (on or around 31 October 2018)

244. It was not unwanted conduct for Mr Corish to supply these references. It was the contents which were unwanted. We do not think it is reasonable to regard the specific contents of these specific references as having the Prohibited Effect. We do not suggest that the effect on the Claimant was anything other than very upsetting indeed; however, the context is that the Claimant is an experienced teacher and it is reasonable to expect that there be some degree of resilience when a teacher reads a reference about them given to another school.

245. We have to consider whether the burden of proof has shifted. The Claimant has proven that Pearce, Marshall and Urquhart were all willing go give far better references, and has also proven that they knew her work better than Mr Corish did. The lesson observations were more relevant to the purely teaching post (Northolt) than to the leadership posts, but the Claimant has proven that she had good lesson observations which were more consistent with Pearce's, Marshall's and Urquhart's than with Corish's references. We did not find Mr Corish's answers about tracking data and his approach to asking Ms Naidoo for information before giving a reference to be convincing. We have found that there was discrimination when the Claimant was asked to step down as Head of Year in summer 2016 and when she was not "reappointed" in April 2017.

246. For these reasons, our decision is that the burden of proof has shifted for each of the references. There are facts from which we could conclude that the references were less favourable to the subject of the reference than they would be if the Claimant was a teacher of a different race, with the same history of lesson observations, submission of marking and tracking data, exam results, and opinions of those who had known her as line managers.

247. One thing we noted, and asked Mr Corish about, is that his written statement says:

> *I have given out many references for the Claimant during her period of employment. Some of these have been positive references [213-216] [217-219] [220-221] [223-230]…*

248. However, 213 to 216 is not Mr Corish's reference. It was given by Mr Pearce. Further, 223 to 226 is Mr Marshall's. Less significantly, [217-219] [220-221] are not separate documents, whereas 223-230 is two documents, 227 to 230 being the reference authored by Mr Corish. It does not seem to us that, at the time he gave his statement, he carefully reflected on his own actual comments and sought to explain what his thought process had been. He simply wrote in his statement, without giving it proper thought that: "*Every reference I have given the Claimant has been fair and accurate and based on my professional experience of working with the Claimant*," and "*I would take the same course of action with any other teacher in the same position, irrespective of their race*" and similar.

249. He also did not explain to Ms O'Grady what specific evidence he had relied on to form his opinions. In giving his oral evidence, he was notably dismissive of any question that invited him to consider the Claimant's good points (eg lesson observations are not much use, Mr Pearce does not know outstanding teaching, analysing how many grades A* to C is out of fashion, the Claimant's eco project had no longlasting effects). He did not tell Ms O'Grady that he considered data from residuals, and we think it very likely that had he considered data from residuals he would have told her that he had done so. In any event, we were not shown any data from residuals; we were just asked to accept the Respondent's position that there was information in its possession that could be used to justify the claim that her pupils had lower than expected exam results.

250. The Respondent has not discharged its burden of showing that race did not influence these references.

251. Allegation Nine succeeds in that there was a contravention of section 39(2)(d) in that the reference contents were direct discrimination because of race, and subjected the Claimant to a detriment. The harassment allegation fails.

Allegation Ten. Harassment/Discrimination. 28 November 2018 — Failing to redeploy the Claimant to a substantive leadership role / role commensurate with TLR1

252. The offer of new duties on 28 November 2018 was an offer of genuine TLR1 duties, and not a contravention of Equality Act 2010. This would have been a temporary offer and not sufficient to discharge an obligation (if there was one) to redeploy the Claimant and/or keep her permanently on TLR1. However, there was no freestanding obligation to redeploy the Claimant. The contraventions of the Act are the removal of the Claimant from the Head of Year role (described as failure to reappoint in the first part of Allegation Three), not the failure to find a different role for her.

253. Put another way, had the Claimant not lost her Head of Year role, then she would have stayed on TLR1 because, that is what that post attracted. So, but for the discrimination, she would have stayed on TLR1. However, taking a hypothetical comparator as someone of a different race who has lost the TLR1 role, and was on pay protection for 1 September 2017 to 31 August 2020 (3 complete academic years), the Claimant has not proved facts from which we might infer that there were vacant roles (which were not offered to the Claimant) to which a hypothetical comparator might have been appointed.

254. Allegation Ten fails for both harassment and discrimination.

Allegation Eleven. Victimisation. Took almost 2 months to determine the Claimant's grievance;

255. Paragraph 1 of the Details of Claim of Claim 2 defines "Protected Act" as being "claim number 331483212019 (Claim 1) presented on 26 April 2019". Claim 1 is indeed a Protected Act within the meaning of section 27(2)(a) Equality Act 2010. The detriments are all pleaded on the basis that the Claimant "had done" that particular protected act; not because the Respondent anticipated that she might do it, or because anything else amounted to a protected act.

256. In relation to the timings, the grievance document was 31 January, but added to on 5 February, 12 March, 26 March and 27 March 2019. A meeting in March was arranged but cancelled at the Claimant's request, and it then took place on 12 April 2019. There was then about 7 weeks until the Claimant received it. However, we have accepted Ms O'Grady's testimony on oath that she prepared it and signed it on 22 May 2019 and that the delay until 31 May 2019 was not her responsibility (and was due to unavoidable circumstances not connected with the Claimant).

257. For Ms O'Grady to have carried out all the investigations that she claims to have carried out on the face of the outcome letter, 40 days from 12 April 2019 is not a suspiciously long turnaround time.

258. We are satisfied that the reason it took until 22 May is that the outcome letter needed to respond to many different allegations, some of which were very old (and are not discussed in these reasons because they do not relate to the issues before us). It was a lengthy letter. There is no reason to suspect that it would have been produced any sooner if the Claimant had not presented Claim 1.

259. In any event, Ms O'Grady could not have known that the Claimant had done the protected act (as opposed to suspecting that she might do it) any earlier than 24 May 2019, when the notice of claim was issued by tribunal.

260. Allegation Eleven fails.

<u>Allegation Twelve. Victimisation. Rejected her grievance as set out in the Stage 1 Resolution Letter</u>

261. The Claimant's argument is that, but for Claim 1, the Respondent might have been more amenable to upholding some aspects of her internal complaints but that, as soon as litigation commenced, they decided to deny everything.

262. The Claimant has not proven any facts from which we might infer that the Respondent would have upheld any aspect of her grievance had Claim 1 not been presented in April 2019. The initial reaction to the 31 January 2019 and 5 February 2019 letters was for Ms O'Grady to rule out everything other than the Northolt reference on technical grounds (ie being more than 3 months earlier). Our point is not about whether it would be right or wrong for an employer to waive or rely on technical grounds. It is simply that on 13 March 2019, before ACAS conciliation had commenced, and more than a month before Claim 1 was presented, the Respondent expressed a willingness to dismiss the grievance. We do not think the process was well-documented or transparent, and several of the assertions made in the outcome letter did not stand up when the witnessed were questioned in the tribunal, but we are fully satisfied that the Respondent would have rejected the grievance regardless of whether Claim 1 had been presented or not.

263. Allegation Twelve fails.

<u>Allegation Thirteen. Victimisation. Refused her request to have the Stage 2 Resolution Meeting determined by someone independent of the Respondent</u>

264. We are satisfied that the Respondent would not have appointed a different panel even if Claim 1 had not been presented. We do not think Mr Anderson gave it

particularly serious consideration, because he thought the request that he be replaced had no merit. However, he would not have thought otherwise if there had been no claim 1 presented.

265. Allegation Thirteen fails.

Allegation Fourteen. Victimisation. Refused her request to be accompanied at the Stage 2 Resolution Meeting by her daughter (who had previously accompanied the Claimant to the Stage 1 Resolution Meeting)

266. This is suspicious. Given that, before Claim 1, the Claimant could be accompanied by her daughter to the 12 April meeting and after Claim 1, she could not be so accompanied to the 18 July 2019, and given that Medigold's April report recommended allowing the Claimant a relative as companion, our decision is that the burden of proof shifts to the Respondent.

267. However, we note that different decision-makers have different approaches. Just because Ms O'Grady was comfortable with an employee's daughter attending, it does not mean that all other governors had the same approach. Having listened to Mr Anderson, we are satisfied that if he had been the Stage 1 decision maker, then the Claimant would not have been allowed to bring her daughter on 12 April. As far as he was concerned, the policy says work colleague or union rep, and that's the end of the matter. The presentation of Claim 1 (which he did know about) did not influence him to deny this request.

268. Allegation Fourteen fails.

Allegation Fifteen. Victimisation. Refused to provide her with documentation she had requested prior to the Stage 2 Resolution Meeting

269. The Claimant's document requests were fairly standard. Most employees (particularly those with union or legal assistance, and Claim 1 was presented with solicitors named in Box 11) would ask for the type of documents that the Claimant requested.

270. It is remarkable that the Claimant was told that she could have the documents, and they were then not provided. However, the information that she could have the documents was itself provided after the Respondent knew about Claim 1, and was not a change of position once it found out.

271. The presentation of Claim 1 created a situation where the Respondent was (once case management orders were issued, at least) under a duty to disclose relevant documents to the Claimant. It does not make logical sense to believe that, if there was no claim 1, they would have voluntarily disclosed the documents to the Claimant (or done so pursuant to a belief that the grievance procedure required it, say), but once Claim 1 was issued they decided to withhold the documents instead.

272. There are various conceivable explanations for the Respondent's failure to supply the Claimant with the documents which she asked for (and which they, at first, said that they could provide) but we are satisfied that the failure was not because of Claim 1, even in part.

273. Allegation Fifteen fails.

Allegation Sixteen. Victimisation. Held the Stage 2 Resolution Meeting in her absence

274. The Claimant had 3 reasons for seeing postponement. She wanted change of panel, she wanted her daughter to attend and she wanted documents to be provided.

275. In relation to the first two, the Respondent had made clear that it was not going to change its mind. There was no reason, from the Respondent's point of view, to delay the hearing to contemplate these requests further, and they told the Claimant they were not budging and gave her a deadline by which to respond. She did not do so. These facts would not be enough to think that the burden of proof should shift.

276. The Claimant's 4.30pm response did not reassert the first two points, just the documents/information point. There was no reply sent to the Claimant, but Ms Doyle took legal advice which was as quoted in the facts section.

277. It seems to us to be quite a dogmatic stance to insist on an appeal hearing taking place without the appellant having had documents which, in the appeal outcome letter, the Respondent promises to provide later. They were not irrelevant requests or attempts to move the goalposts.

278. Having heard Mr Anderson's evidence, we are satisfied that he would have adopted a similar stance regardless of whether Claim 1 was issued or not (and see Allegation Seventeen).

279. Allegation Sixteen fails.

Allegation Seventeen. Victimisation. Rejected the grounds of appeal set out in the GRP2 - Notification of Appeal against Grievance Resolution form

280. Mr Anderson's believed that the correct approach to the appeal/evidence was to have a telephone conference call in which it was decided that since Ms O'Grady's letter said that she had seen evidence which justified rejecting the grievance at Stage 1, then the Stage 2 outcome should also reject it. His opinion was that Stage 2 should (usually) only consider new evidence, and we are satisfied he would have held the same view for any appellant, regardless of whether a tribunal claim was issued or not.

281. The letter was likely to have had significant input from Ms Doyle. Mr Anderson signed it because he thought it accurately represented what the panel decided, and he would have signed it – and the decision would have been the same - even if there had been no Claim 1.

282. Allegation Seventeen fails.

Allegation Eighteen. Was there a dismissal and, if so, was it an unfair dismissal?

283. The specific trigger point for the Claimant's resignation was the fact that the Respondent had ceased contacting the Claimant. In the immediate period after

the grievance appeal outcome was issued in July 2019, the Claimant was not pushing the Respondent to engage with her. She was receiving sick pay and suppling sicknotes.

284. Although the Respondent's position is that early in the absence it did try to engage with the Claimant, it admits that it did not seek to have any further follow up to the April 2019 OH report, or to contact the Claimant about her potentially coming back to work, with or without adjustments.

285. On 29 November, the Claimant did contact the Respondent, by sending two separate emails. She got a reply to one, but not the other, and, then no reply to her 5 December query. Her resignation was 3 weeks after the second 29 November email (expressing interest in a return to work, OH assessment) and 15 days after her query about sick pay.

286. The Respondent had not contacted the Claimant substantively for more than 4 months, by 29 November, and when she made the first move, they still ignored her. They did not reply to say – for example – "we will not be able to reply until after the Xmas holidays" or "for legal reasons we have been advised not to contact you". Thus the issue is not whether such replies – if sent – would have been good enough. The fact is that there was no reply at all. The Respondent's failure to respond to those emails before 20 December 2019 was conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. The Claimant resigned in response to that breach. (The fact that her sick pay ran out was probably part of her reason too, but the lack of response was an important issue.) She did not wait too long to resign in response to that breach.

287. Thus there was a dismissal and it is not necessary for us to comment in detail on the Claimant's 12 March 2019 attempt to indefinitely preserve her right to resign, or, indeed, on the fact that some of the conduct which the Claimant relied on in the resignation letter pre-dated the November 2018 decision to mutually agree that her 2018 resignation would be retracted.

288. The respondent has not persuaded us that the reason for its failure to reply was that which it relied on, namely that there had been legal advice not to contact the Claimant.

289. The dismissal was unfair. Any issues in relation to Polkey or contributory fault can be dealt with as part of remedy hearing.

<u>Allegation Nineteen. Breach of Contract (no notice)</u>

290. The Claimant resigned in response to the Respondent's repudiatory breach. She had not waived that breach. She resigned with immediate effect.

291. She is, in principle, entitled to damages for dismissal without notice. Any arguments about whether she would actually have been entitled to pay during a notice period, and/or about when the notice period would have elapsed can be dealt with as part of the remedy hearing.

Allegation Twenty. Written Particulars of Employment

292. There is no breach of Part I of the Employment Rights Act 1996 in relation to written particulars. The 9 July 2012 letter shows she has all the respondent's address, etc, details. The older documents, from around start of employment, together with items such as the Burgundy Book, etc, show that the Claimant had been provided with all the required written particulars, at the time, albeit some of that information might no longer be readily accessible to the current respondent.

293. There is therefore no uplift for this reason.

Time Limits

294. The allegations in claim 1 are in time to the extent that they occurred between 27 November 2018 and 26 April 2019 (inclusive) including where they were part of an act which continued to any date within that period. None of the successful claims are within that period (the Northolt reference of 31 October 2018 being the latest to succeed).

295. It is just and equitable to extend time in relation to the successful claims within claim 1. Mr Corish was the only respondent's witness for the summer 2016 suggestion that she step down as Head of Year. The Respondent did not assert that documents about that had been destroyed between the date of the incident and the date it became aware of presentation of claim 1. Ms OGrady's outcome letter defended the decision and referred to some items which we have not seen. If those items became mislaid after 22 May 2019, it was not because of the delay issuing the claim, but for other reasons. In relation to the fact that the Respondent decided that the Claimant would be terminated as Head of Year unless she successfully went through an interview process (in which 4 people applied for 5 posts), we had 2 members of the panel give evidence and it was not argued that Mead or Magee would have been able to give better evidence for the Respondent. It was not alleged that (barring 2 of the 16 score sheets) documents had gone missing. All of the Claimant's scores still existed, as did the data question sheets. The Respondent's position that no other documents had been created at the time (apart from the 2 score sheets). Mr Corish was adamant that everything that was relevant had been disclosed during the litigation by Ms Doyle.

296. The Respondent naturally suffers some prejudice given that the earliest incident was summer 2016, and the interview process was 2017 and there were references in 2017 as well as 2018. Memories can fade, and rather than being prompted to mount a defence around 3 months after the incidents, the claim was presented 3 years after the earliest incident, and 2 years after the interviews and some references. However, the prejudice to the Claimant of not being entitled to have the claims heard outweighs that to the Respondent, taking into account that (a) re the references, she only obtained copies between November 2018 and January 2019 and (b) re the Head of Year issues, she received no letters offering her an appeal against the termination outcome, she was told that she could not apply in Round 2, and the Respondent inaccurately denied that, and she was under the impression that the Respondent was obliged to – and would – be seeking to redeploy her to a replacement TLR1 role.

297. In relation to Claim 2, had we upheld the allegations, we would have been likely to find that they were a continuing act (or, at the very least, the appeal complaints were a continuing act) up to 18 July 2019. So, ignoring early conciliation, the deadline would have been 17 October 2019. Even on the assumption that the Claimant gets the benefit of an additional 30 days for early conciliation, she would have been out of time, subject to our discretion to extend. The claims failed in any event.

298. In relation to claim 3, we accept that the resignation was a new matter and that time is extended by the early conciliation provisions. The claim is therefore in time, as early conciliation stated less than 3 months after dismissal and the claim was presented less than 1 month after the end of that conciliation.

Outcome and next steps

299. There will be a one day remedy hearing by video before the same panel.

Employment Judge Quill

Date: 14 June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
15 June 2021
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THY
.....
FOR EMPLOYMENT TRIBUNALS