



EMPLOYMENT TRIBUNALS

Claimant: Miss D Okobia
Respondent: Leigh Academies Trust
Heard at: Ashford
On: 4th, 5th and 6th March 2024
Before: Employment Judge Pritchard
Members: Mr P Dodd
Ms R Effeny

Representation

Claimant: In person
Respondent: Mr M Withers, counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

- (1) The Claimant's claim of direct race discrimination is dismissed.
- (2) The Claimant's claim of harassment related to race is dismissed.

REASONS

1. The Claimant claimed direct race discrimination and harassment related to race. The Respondent resisted the claims.
2. The hearing was conducted in-person save that Tribunal Member Mr P Dodd attended remotely by video. The third day of the hearing was used by the Tribunal Panel to deliberate which took place remotely by video.
3. The Tribunal heard evidence from the Claimant and on the Respondent's behalf from: Julia Collins (Principal) and Mark Shepherd (Vice Principal and Designated Safeguarding Lead). The Tribunal was provided with a bundle of documents to which the parties variously referred. The parties put in evidence a further document comprising three emails marked without prejudice in respect of which they waived privilege. At the conclusion of the hearing the parties made oral submissions supported by their respective written skeleton arguments.

Issues

4. The parties had prepared a list of issues in pursuance of a Case Management Order issued by Employment Judge Truscott QC. However, the Tribunal was not satisfied that the list accurately represented the issues it would have to decide. An amended list of issues was provided to the parties which they helpfully completed and, as further amended in discussion with the parties, can be described as set out below.

Direct race discrimination (Equality Act 2010 section 13)

5. The Claimant describes herself as black and of Nigerian heritage.
6. Did Julia Collins of the Respondent do the following things:
 - 6.1. On 30 June 2022, call the Claimant from the line up;
 - 6.2. On 30 June 2022, raise the issue of the Claimant not dealing with homophobic behaviour in her classroom;
 - 6.3. On 30 June 2022, bring out a file of paperwork regarding alleged racism against Africans;
 - 6.4. On 30 June 2022, put the Claimant on paid leave;
 - 6.5. On 25 August 2022, send the Deputy-Principal to tell the Claimant to leave the school because she was on paid leave;
 - 6.6. In July 2022, place allegations on the Claimant's personnel file;
 - 6.7. On 30 June 2022, give instructions that the Claimant was to be escorted off the school premises;
 - 6.8. On 30 June 2022, question the Claimant about making alleged homophobic comments to herself under her breath?
 - 6.9. Use discriminatory language in conversation on 30 June 2022 and by letter dated 6 July 2022?
7. Did the Respondent's employees do the following things:
 - 7.1. Did Naomi Mercer intentionally delay both investigation into the alleged misconduct of the Claimant and the investigation into the Claimant's grievance?
8. Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who she says was treated better than she was. However, she may refer to evidential comparators.

9. If so, was it because of race?
10. Did the Respondent's treatment amount to a detriment?
11. The Claimant says the treatment amounted to a detriment as follows:
 - 11.1. Under 6.1 above, it caused her embarrassment in front of students;
 - 11.2. Under 6.2 above, it amounted to bullying and harassment of the Claimant;
 - 11.3. Under 6.3 above, it amounted to intimidation of the Claimant;
 - 11.4. Under 6.4 above, it humiliated the Claimant and caused her distress and prevented her from working her notice period;
 - 11.5. Under 6.5 above, it humiliated the Claimant, caused other staff to draw adverse inferences and required her to physically stand in the rain;
 - 11.6. Under 6.6 above, the allegations were placed on file in order to cause adverse inferences;
 - 11.7. Under 6.7 above, to cause adverse inferences to be drawn, to humiliate the Claimant, to create a hostile work environment and caused the Claimant to feel degraded;
 - 11.8. Under 6.8 above, it caused the Claimant to feel degraded, and to intimidate her;
 - 11.9. Under 6.9 above, the delay prevented the Claimant from returning to work;
 - 11.10. Under 7.1 above, to degrade her, to create a hostile work environment and to bully and harass the Claimant.
12. With the exception of 11.2 and 11.8 above, the Respondent conceded that if the factual bases for the allegations were established then the Claimant would have been subjected to detriments (but not necessarily the detriments alleged).

Harassment related to race (Equality Act 2010 section 26)

13. Did the Respondent do the things referred to in paragraphs 6 and 7 above?
14. If so, was that unwanted conduct?
15. Did it relate to race?
16. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

17. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Remedy for discrimination or harassment

18. The Tribunal proceeded on the basis that it would consider liability only at this hearing. If the Claimant were to succeed in either of her claims, a further hearing would take place to consider the issues below.

19. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

20. What financial losses has the discrimination caused the Claimant?

21. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

22. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

23. Did the Respondent or the Claimant unreasonably fail to comply with it by, in the case of the Claimant, fail to exercise her right to appeal, and in the case of the Respondent to [*Claimant to insert in advance of any remedy hearing*]?

24. If so, is it just and equitable to increase or decrease any award payable to the Claimant?

25. By what proportion, up to 25%?

26. Should interest be awarded? How much?

Applications in proceedings

27. At the commencement of the second day of the hearing the Claimant made two applications:

27.1. An application to amend her claim to substitute date of July 2022 for the date of October 2022 in the allegation in paragraph 6.6 above. The Respondent objected to the application. The Tribunal had regard to the principles set out in Selkent Bus Co v Moore 1996 ICR 836. Given the Respondent's ability to address the issue in defence of the claim, the balance of prejudice fell in the Claimant's favour and the application was granted.

27.2. An application to amend her claim to add a new cause of action, namely victimisation. The Respondent objected to the application. The Tribunal had regard to the Selkent principles. The Claimant was seeking to introduce a completely new cause of action on the second day of the hearing which would require the Respondent to prepare and call further evidence. It was a claim which the Respondent was wholly unprepared

to defend. The balance of prejudice fell firmly in the Respondent's favour. The application was refused.

28. At the conclusion of the Claimant's evidence on the morning of the second day, the Respondent made a submission of no case to answer. Mr Withers made an application for the Claimant's claims to be dismissed in their entirety because she had adduced no evidence to show that she had been subjected to detriment because of race or related to race. Mr Withers referred to Wiggan v Wooler and Company Ltd EAT 052/06 and submitted that this was one of those exceptional cases in which dismissal of the claim at this stage was appropriate. He also submitted that, if dismissed, costs would be saved which was in accordance with the overriding objective.
29. The Claimant objected to the application and said she had shown evidence of detriment and that there were comparators about whom she wished to question the Respondent's witnesses.
30. The Tribunal refused the application. Despite there being much force in Mr Withers' application, the Tribunal was mindful of the guidance in the case law, in particular that relating to discrimination claims. Given the substance of the Claimant's objection, the Tribunal preferred to hear the Respondent's evidence before finally determining the merits of the case. As to costs, the Tribunal noted that they had mostly been spent already.

Findings of fact

31. The Respondent is a multi-academy trust comprising 31 schools. Following an interview before a panel which included Mr Shepherd and Ms Collins, the Claimant commenced employment as a Teacher of English on 1 July 2021 at the Respondent's Leigh Academy in Dartford.
32. On 7 February 2022, Ms Collins met with the Claimant to discuss a number of concerns which had been brought to her attention by students, parents and staff. These concerns were about the Claimant's punctuality, the Claimant marking students' work during class time, the Claimant discussing in class the content of an email with a parent, and the Claimant's relationships with students including an allegation that she had told a student of African ancestry to "go back to Africa". These issues were resolved informally at the time.
33. By email dated 20 May 2022, the Claimant handed in her notice to end upon the conclusion of the academic year because she had been offered a more favourable position elsewhere. Ms Collins wished the Claimant all the best for the future.
34. On 17 June 2022, a Year 7 student ["Student A"] reported to a teacher about the way he had been treated by the Claimant.
35. On the same day, the Respondent received an email complaint from Student A's mother. The email includes the following:

[Student A] has come home from school quite upset and angry today. He explained that while in English with [the Claimant], he witnessed her being

rude to another child, [Student A] then questioned her about this by saying "that's rude" to which she replied S1, he said "alright but that's still rude" she then responded with "that's an S2, get out of my class right now, I don't care where you go" he started to walk out, she then said "I will tell you what's rude, you're a tramp".

I'm sorry but this is completely out of order, I am so angry about this, I have complained about this teacher from day one and she is still speaking to children this way!

I understand [Student A] should not have pulled her up on her behaviour, but disagree that he should attend the detention as nothing seems to be being done about this woman.

...

I would like to know what is going to be done about this teacher as this isn't the first time she has called [Student A] names or done something to try and intimidate him, we have complained before about her picking on some of his classmates, but she still continues to do it, I would like to know what you intend to do about it.

36. The Respondent received a further email from Student A's mother on 20 June 2022 saying that neither parent wanted Student A attending any lessons being taught or supervised by the Claimant.
37. On 21 June 2022, the Claimant emailed Claire Grimes, Vice Principal, setting out her version of events; namely, that student A had shouted at her saying "that's rude/you are rude" and that she had told him "you look like a tramp, that's rude" but that it was an example of a rude comment, not a comment directed at Student A.
38. On 22 June 2022, Mr Lee Forcella-Burton, Director of Post-16 and IBCoordinator, gave a briefing to members of staff about Pride Week and the presentation of slides to be made to students.
39. On 24 June 2022, Claire Grimes (Vice Principal) intervened in an incident between the Claimant and a Year 7 student ("Student B"). Ms Grimes informed Ms Collins of the matter who then spoke to the Claimant asking for her version of events to be put in writing.
40. By email the same day, 24 June 2022, the Claimant emailed Ms Collins describing inappropriate behaviour on the part of Student B. She said she did not believe she had spoken inappropriately.
41. On 28 June 2022, Ms Grimes emailed Ms Collins describing her version of events as follows:

During last lesson on Friday, I was over in the English department and as I was walking along the corridor I heard [the Claimant] shouting at a student. I stopped at the classroom to see what was happening and [the Claimant] was shouting aggressively at [Student B] in her Year 7 class. He

had not got his reading book out. I asked him to get it and he did. Whilst I was trying to de-escalate the situation, [the Claimant] started saying to [Student B] "Oh, no problem now everyone's here" and similar statements repeatedly. Her manner and tone were unprofessional and not appropriate for communicating with a student.

At this point I asked [Student B] to step out for a few minutes time out and stood him in the corridor. I went into the classroom opposite where EMC and AMI were marking exams and asked if they had heard any of that. They said [the Claimant] always speaks to the class like that and this has been going on all year. I then sat [Student B] down in the classroom so I could hear from him what happened. As he started to explain, [the Claimant] started shouting from her desk across the corridor, "Talking about me? Why are you saying she?" And repeated this several times. It was not clear whether she was directing this at me or [Student B].

I did not feel comfortable with [Student B] returning to the lesson and so took him to get his things and told [the Claimant] that he would be spending the rest of the lesson with me to which she just turned away.

[Student B] Has not wanted to return to English since this incident but I do not have a class to move him to. Regardless of his behaviour (in this instance playing with a tissue instead of getting his book out) he should not have been spoken to with such aggression and unprofessionalism.

42. On 29 June 2022, students in the Claimant's class announced the titles of their proposed Speaking and Listening topics.
43. On the same day, Matt Piggott, teacher and Head of College, together with others who were copied in, received an email from a parent complaining that the Claimant had failed to support their son ("Student C") as follows:

Good afternoon

I've just spoken to [Student C] and he has told me what happened in English today. He said he was not supported by his teacher in regards to his speech topic. He was going to talk about American gun laws compared to the rights of the LGBT+ community. He was then challenged by a pupil who laughed at him and said he's going to talk about how drag queens turn children gay, as a result other pupils laughed along with him and humiliated [Student C].

[Student C] has always said to me he felt supported at school by pupils and teachers but today he has felt very let down, as have I.

Please could I request an urgent follow up to this, I would have expected any teacher who heard a child disrespecting another person to be questioned!

44. Student C himself reported the matter to a teacher, Mr McGarvey, who then informed Mr Forcella-Burton. According to Mr McGarvey: "Obviously, in a democracy, the freedom of ideas is important – but not at the expense of a student's mental health in a classroom".

45. On 29 June 2022, Mr Forcella-Burton emailed Ms Collins and Mr Shepherd to inform them that he was horrified about what had happened with Student C and horrified that the Claimant had made no intervention. He asked Mr Shepherd for the matter to be investigated from a safeguarding perspective and suggested to Ms Collins that this surely must be a disciplinary matter.
46. Mr Forcella-Burton added that when he was giving his briefing for Pride Week, the Claimant was heard to say loud and clear by several members of staff that she would not be delivering the Pride slides as she does not believe that LGBT+ people should be afforded equal rights and does not believe the topic should be taught in schools.
47. Ms Collins, having taken HR advice and determined the complaints raised safeguarding issues, decided that she and Mr Shepherd should speak to the Claimant about the matters referred to above first thing the following morning. Cover was arranged for the Claimant's class.
48. On 30 June 2022, at 7.33 AM, Matt Piggott emailed the Claimant stating his understanding that a fellow student had allegedly made an unkind homophobic comment which was heard by the class which ridiculed Student C. Mr Piggott asked the Claimant to explain how she challenged it.
49. On 30 June 2022, Mr Shepherd and Ms Collins waited for the Claimant at the entrance to the school building. In the event, the Claimant was found with her class on the basketball court. Mr Shepherd asked the Claimant to accompany him and Ms Collins to a private room for a meeting. Mr Shepherd was a wholly credible witness. The Tribunal accepts that he spoke to the Claimant discretely and when she was no longer engaged with the students.
50. At the meeting, Ms Collins told the Claimant that allegations had been made and she had to investigate them. Ms Collins took her own notes of the meeting which she typed up in narrative form shortly afterwards. There was no evidence before the Tribunal to suggest that Ms Collins' typed notes were anything other than an honest and accurate account. The four allegations described to the Claimant were as follows:
 - 50.1. Making homophobic comments.
 - 50.2. Not stopping students from being homophobic in your class.
 - 50.3. Used inappropriate language to students.
 - 50.4. Shouted aggressively at children.
51. With regard to the alleged homophobic comments, the notes record the Claimant as saying "I don't think I did".
52. With regard to the allegation that she had failed to stop students making homophobic comments, the Claimant said that there were just little jokes in the classroom and she did not think they were serious.
53. With regard to the alleged inappropriate language, the Claimant said that the issue about her allegedly calling a student a tramp had been resolved after the student had been moved to a different class.

54. With regard to the allegation that she had shouted aggressively at children, the Claimant denied shouting. She also spoke of conflict between her and Mr McGarvey.
55. Having given her verbal responses to the allegations, the Claimant was given the opportunity to put her responses in writing. She did so by sending two emails to Ms Collins immediately after the meeting.
56. Immediately following the meeting, the Claimant typed two emails to Ms Collins providing further responses.
57. The Claimant was thereafter placed on paid leave.
58. On 1 July 2022, the Claimant presented a formal grievance complaining that she was being bullied and harassed by Julia Collins. The Claimant did not include a complaint that she was being discriminated against or harassed in relation to race.
59. On 6 July 2022, Ms Collins emailed a letter to the Claimant as follows:

Notification of investigation

Further to our recent conversations last week, I'm writing to confirm that an investigation is to be carried out in line with Trusts disciplinary policy.

The investigation will look into the allegations regarding your conduct. The allegations are:

- 1 You have made homophobic comments*
- 2 You have not stopped students from being homophobic in your classes*
- 3 You have used inappropriate language to students*
- 4 You have shouted aggressively at children*

Frank Lawrence [HR Business Partner] has been commissioned to undertake the investigation on behalf of the school. He will contact you shortly to arrange to interview you. This will give you the opportunity to participate in the investigation process and respond to the concerns raised. The role of the investigating officer is to establish the facts surrounding the allegations. At the end of the investigation they will produce a written report detailing their findings. You will be given advanced notice of the arrangements for the meeting and you will have the right to be accompanied by your Trade Union representative or a workplace colleague.

I wish to assure you that this matter will be dealt with as sensitively, fairly and confidentially as possible. The investigation is confidential, and you should not discuss or approach anyone about this allegation other than your representative or the investigating officer.

I would advise that throughout the investigation you have the right to be accompanied at all formal meetings held under this procedure by a Trade Union representative or workplace colleague and I would encourage you to exercise this right.

Case No: 2303549/2022

You have been placed on paid leave for the duration of the investigation and therefore are not required to attend the Academy unless you are specifically requested to. You may be asked during this time to complete work from home during your normal working hours.

Mark Shepherd will continue to be your named contact, please do not hesitate to contact him if you have any questions.

Possible outcomes of the investigation include:

- (i) No case to answer and the matter is dropped*
- (ii) A minor concern identified, and the matter is dealt with through informal action or*
- (iii) a case of misconduct which warrants consideration of formal disciplinary action.*

At the conclusion of the investigation a decision will be taken as to whether it is appropriate to proceed further under the disciplinary procedure. You will be notified of this outcome in writing of the decision being made. I must also forewarn you that this investigation could result in disciplinary action being taken against you in line with the sanctions specified in the Trusts Disciplinary Policy.

The Trusts disciplinary policy can be found: ...

I appreciate that this is a stressful time for you, and I hope that the investigation will be concluded very shortly.

You may wish to access the Education Support Partnership, which offers free access to all people working in education, on ...

60. By email dated 7 July 2022 (marked without prejudice, the parties having waived privilege), the Claimant's union representative asked the Respondent whether it would be prepared to drop the disciplinary allegations in return for the Claimant withdrawing her grievance. Naomi Mercer, HR People Partner, replied saying that the allegations were serious and could not be ignored.
61. By email dated 14 July 2022 (marked without prejudice but the parties having waived privilege), Ms Mercer informed the Claimant's union representative that Mr Lawrence had made his initial findings and that despite evidence of misconduct, it would not constitute gross misconduct and asked if the Claimant might wish to revisit her previous proposal.
62. Mr Lawrence interviewed the Claimant as part of disciplinary investigation. She alleged, for the first time that, with regard to the allegation she had shouted aggressively at children, she was being stereotyped as an aggressive black woman for telling a student to read during silent reading. She asked "What about the other teacher I share the class with who was telling students 'to shut it' has she been escorted out?"

63. During the interview Mr Lawrence held with the Claimant when investigating her grievance, the Claimant made no complaint that she was being discriminated against because of race.
64. On 25 August 2022, the Claimant attended the school to return equipment and see her students' GCSE results. It was reported to Ms Collins that the Claimant had been seen at the school and she asked the Deputy Principal if she was there and, if so, to remind her that she was on paid leave. The Deputy Principal located the Claimant and asked her to leave.
65. The Claimant's employment ended on 31 August 2022.
66. Notwithstanding the indication in Ms Mercer's email of 14 July 2022 that Mr Lawrence had made his initial findings, Mr Lawrence did not conclude the disciplinary or grievance investigations until 20 September 2022 and 22 September 2022 respectively. The evidence before the Tribunal showed that Mr Lawrence worked a three day week and that the school term ended on 21 July 2022 before long summer break.
67. With regard to the disciplinary allegations, he concluded:
- 67.1. There was insufficient evidence to show that Claimant had made homophobic comments in relation to Pride Week training.
 - 67.2. The Claimant failed adequately to manage a classroom situation in which a student was made to feel uncomfortable by the reactions of other students.
 - 67.3. The Claimant's explanation as to why she used the word "tramp", whilst not credible, was plausible. The Claimant's reaction seems to have been more related to proving a point than in resolving an escalating situation in her classroom.
 - 67.4. There was credible evidence that a senior member of staff felt the need to intervene in a situation which, to an objective observer, would have seemed aggressive and unprofessional. Although the Claimant referred to the student in question as one of the worst behaved in the year group, he was still only a Year 7 child.
 - 67.5. Mr Lawrence did not believe that any racial stereotype was being applied in this situation and that it is reasonable for an experienced teacher and member of the senior leadership team to describe what she heard, and then observed, as aggressive behaviour towards a student. Especially in light of the fact that this was a Year 7 class.
68. As the Claimant was no longer employed, there were no recommendations for further action.
69. As to the grievance outcome, Mr Lawrence decided that it should not be upheld and recommended that the grievance be dismissed.

70. The Claimant was offered the opportunity to appeal but informed the Respondent *"I will not be attending a biased appeal hearing. See you at the Tribunal"*.

71. The Claimant contacted ACAS to commence early conciliation on 5 October 2022. ACAS issued an early conciliation certificate on 7 October 2022. The claimant presented her claim to the Employment Tribunal on 9 October 2022.

Applicable law

Time limits under the Equality Act 2010

72. Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable.

73. Under section 123(3)

- (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.

74. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:

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

75. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA.

Just and equitable extension

76. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a

complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

77. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA.

Direct discrimination

78. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting her to a detriment.

79. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others. *Causation*

80. The House of Lords has considered the test to be applied when determining whether a person discriminated “because of” a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.

81. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884. *Comparators*

82. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person’s abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

83. In constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as “evidential comparators”; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or “statutory”, comparators; see, Ahsan v Watt [2007] UKHL 51.
84. Whether there is a factual difference between the position of a claimant and a comparator is in truth a material difference is an issue which cannot be resolved without determining why the claimant was treated as he or she was; see: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

Harassment

85. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:
- (a) A engages in unwanted conduct related to a protected characteristic (race in this case); 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.
86. Section 26(4) provides that 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.
87. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant’s perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.
88. As set out in the Equality and Human rights Commission Code of Practice on Employment (2011):
- “Unwanted conduct “related to” a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic”*
89. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 relied upon the judgments of the House of Lords in James and Nagarajan and held that alleged discriminatory words must be considered in context. In Warby

the Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background. *The burden of proof*

90. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.
91. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, *"the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*.
92. If the Claimant does not prove such facts, his or her claim will fail.
93. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed.
94. In Laing v Manchester City Council [2006] ICR 1519, the EAT stated, among other things, that:

No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case... An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. ... The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"

95. The employee is not prejudiced by that approach because in effect the Tribunal is acting on the assumption that even if the first hurdle has been

crossed by the employee, the case fails because the employer has provided a convincing nondiscriminatory explanation for the less favourable treatment.

96. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in Zafar v Glasgow City Council [1997] IRLR 229:

'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Conclusion

Time limits

97. Given that the Claimant contacted ACAS on 5 October 2022, any act of discrimination taking place before 6 July 2022 falls outside the primary time limit set out in section 123 of the Equality Act 2010.
98. The allegation relating to delay in producing the outcome of the investigation process, and that relating to the Claimant being required to leave the school premises on 25 August 2022, fall within the primary time limit. These allegations are linked to those said to have taken place before 6 July 2022 and it can be said that the Respondent was responsible for an ongoing situation or state of affairs.
99. The Tribunal concludes that it has jurisdiction to consider all the allegations of discrimination and harassment.

Direct race discrimination

100. The Tribunal turns directly to consider the Respondent's explanation for the treatment alleged as permitted by Laing.
101. Notwithstanding the fact that it was Mr Shepherd who spoke to the Claimant while she was with students on the basketball court, asking her to attend a meeting, not Ms Collins as alleged, the reason was that sufficiently serious concerns had come to Ms Collins' attention which needed preliminary consideration by her and Mr Shepherd at a meeting with the Claimant. Ms Collins had thought that the Claimant would enter the school via the entrance in the usual way and she would be able to speak to her there. Although the Claimant was found on the basketball court, Mr Shepherd's interaction with the Claimant was appropriate. Potential safeguarding issues had clearly arisen.
102. The reason why Ms Collins raised the issue of the Claimant not dealing with homophobic behaviour in the classroom (in relation to Student C) is because complaints had been made that the Claimant had failed to support Student C who faced homophobic ridicule. Complaints came from the report of Mr McGarvey to whom Student C reported the matter

and from Student C's parent. The Tribunal notes, in particular, it was alleged that one of Student C's fellow students stated that he would speak about how drag queens turn children gay which, in the context of what Student C had announced, might well be deemed to be a homophobic comment. Ms Collins was duty bound to question the Claimant about it.

103. As to the allegation that Ms Collins brought out a file of paperwork regarding alleged racism against Africans, the Tribunal prefers Ms Collins' evidence that she did not do so. The Tribunal finds it more likely that the Claimant was remembering the fact that Ms Collins had with her, on the morning of 30 June 2022, a blue daybook into which she had inserted copies of the emails relating to the relevant matters and that Ms Collins told the Claimant that this was not the first time she had to speak to her about her use of language. There was no credible evidence before the Tribunal to suggest Ms Collins was seeking to resurrect matters which had been informally resolved in February 2022.
104. The Claimant was put on paid leave on 30 June 2022. The reason was the concerns of Ms Collins and Mr Shepherd that the issues raised safeguarding concerns and that it was preferable for the Claimant not to have engagement with students until an investigation had been concluded. The Tribunal accepts that this was a neutral act on the Respondent's part. Regardless of the question as to whether paid suspension in this case was akin to suspension as described in the Respondent's Disciplinary Policy or the Department of Education's guidance for Keeping Children Safe in Education, the reason was because of the Respondent's genuine concerns for students and other members of staff.
105. Notwithstanding that it was the Deputy-Principal who asked the Claimant to leave the school on 25 August 2022, the Respondent had good reason to do so. The Claimant remained on paid leave and had been required not to attend the school for the reasons described above.
106. Notwithstanding that Ms Collins does not have access to the Claimant's personnel file and could not have placed allegations on file, the reason why HR might do so is because the allegations were subject to investigation and properly formed part of the Claimant's personnel record. The allegations were allegations – as yet undecided and unproven.
107. The Tribunal prefers the evidence of the Respondent's witnesses that Mr Shepherd did not escort the Claimant off the school premises and that Ms Collins did not give an instruction that Mr Shepherd should do so. Even if she had, in the Tribunal's view it would not have been inappropriate.
108. As to the allegation that the Claimant was questioned about making homophobic comments under her breath, the Claimant did not challenge Ms Collins about this. However, even if Ms Collins' had asked such a question, perhaps to seek clarification as to whether only colleagues

standing close to the Claimant at Mr Forcella-Burton's presentation might have overheard, the Tribunal is unable to conclude that it would have been an improper question.

109. The Tribunal does not accept that Ms Collins used discriminatory language at the meeting of 30 June 2022 or the letter dated 6 July 2022. The Claimant's case was that simply making the allegation of using aggressive language was making stereotypical assumptions of an aggressive black woman. The Tribunal does not agree. The allegation of shouting aggressively was made by Ms Grimes, not Ms Collins. In any event, regardless of a teacher's race or ethnicity there must be appropriate and professional standards relating to the manner in which teachers speak to students.
110. There was no evidence to suggest that Ms Mercer intentionally delayed the investigation into the Claimant's alleged misconduct or her grievance. Any responsibility for delay must surely be attributed to Mr Lawrence who, as the facts show, worked only three days a week and was on the summer break for much of the period in question.
111. In respect of the Tribunal's conclusions above, none of the reasons for the Respondent's conduct had anything whatsoever to do with race. There was simply no evidence to suggest that either Ms Collins or Ms Mercer was motivated, consciously or unconsciously, by race or by the stereotypical assumption alleged.

Harassment related to race

112. Whilst mindful that "related to" has a broad meaning in that the conduct does not have to be because of the protected characteristic, for the same reasons the Tribunal concludes the Respondent's conduct was not related to race in any way.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date: 6 March 2024

JUDGMENT AND REASONS SENT TO THE

PARTIES ON

23rd April 2024

P Wing

Case No: 2303549/2022

FOR THE TRIBUNAL OFFICE