EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Muzinguzi	**v**	**The Elstree UTE**
Heard at: Watford		**On**: 25, 26, 27, 28 & 29 March 2019

Before: Employment Judge Bartlett, Mr Leslie and Ms Duncan

Appearances

For the Claimant: Ms Kerr, of Counsel
For the Respondent: Mr Shah, Solicitor

JUDGMENT

1. The Claimant's claims that he was directly discriminated by being treated less favourably because of his race (section 13 Equality Act 2010) fail and are dismissed.

2. The Claimant's claims that he was harassed for a reason related to his race (section 26 Equality Act 2010) fail and are dismissed.

3. The claimant's claim that he suffered detriments (section 47B ERA 1996) fail and are dismissed.

4. The tribunal finds that it has no jurisdiction to consider the following claims as they are out of time and they are dismissed:
   4.1 any claims relating to ventilation;
   4.2 the alleged search of the claimant's personal effects on 11 November 2016.

5. The claimant's claim that he suffered a breach of contract fails and is dismissed.

6. The claimant's claim that he was constructively unfairly dismissed fails and is dismissed.

WRITTEN REASONS

Case Management

7. At the start of the first day of the full merits hearing, 25 March 2019, the parties raised various issues concerning the bundle, exchange of witness statements, a covert recording of the 11 July 2017 meeting and similar issues relating to case preparation.

8. Ms Kerr raised complaints that Mr Shah had refused to correspond with her and refused to send her some documents and witness statements when requested which resulted in her receiving the bundle, documents and witness statements at a late stage.

9. Mr Shah responded that the claimant had been acting in person and that Ms Kerr had come on record on 12 March for some without prejudice discussions. He said she did not confirm that she was on the record and therefore Mr Shah asked the claimant directly to exchange witness statements and the claimant chose the date and time for exchange, which was 4:30 PM on the Tuesday before the hearing. The bundle had been provided to the claimant in September 2017.

10. Ms Kerr indicated that she considered this a serious conduct issue.

11. Having read the file before the start of the hearing the tribunal was aware that the claimant had acted in person in some respects of his claim such as his claim form and his further and better particulars, that Ms Kerr had acted for the claimant at a preliminary hearing and that Ms Kerr was not on record on the tribunal's file. Therefore Judge Bartlett said to Ms Kerr that she was not on record. This appeared to cause Ms Kerr some exasperation.

12. Judge Bartlett then confirmed with the parties whether the bundle was agreed, whether the additional documents were agreed to be added by the parties and whether the transcript of the July 2017 meeting was agreed. Both parties affirmed that these were all agreed. The Tribunal were concerned to know whether or not the case was ready for hearing. The answers from the parties clearly indicated that the case was ready for hearing.

13. No application was made for an adjournment on the basis that a party had been unable to prepare the case or for any other reason.

14. These issues were not raised again until the end of Ms Kerr's submissions when she stated that the claimant's position was that the respondent had acted unreasonably in not corresponding with her directly. Ms Kerr went on to say that the tribunal having indicated that Mr Shah's conduct was not a serious issue was concerning.

15. At this point Mr Shah expressed his concern that the claimant's representative was approaching the issues in this manner as they were serious conduct issues.

16. Judge Bartlett reminded Ms Kerr that:

16.1 no judgement had been made about any party's conduct;

16.2 in relation to the allegations about corresponding the tribunal had not received any evidence - no documents concerning instructions or requests for instructions - and no oral evidence from either party;

16.3 the tribunal was not the body to determine professional conduct issues.

17. In response to Judge Bartlett's statement that Ms Kerr was not on record on the tribunal's file, which was said in the context of to whom to send the written judgement, Ms Kerr responded that she was not a litigator but it was not inappropriate for the respondent to send her documents.

18. During the course of Ms Kerr's cross examination of Mr Mitchell, following an objection by Mr Shah that was upheld, Ms Kerr stated "*I will assume that every objection will be upheld.*" To which Judge Bartlett responded "*You should not make that assumption.*"

Issues

19. The issues were as set out in the preliminary hearing which took place on 11 April 2018. At the preliminary hearing the claimant was required to set out more detail about his claims in further and better particulars. The list of issues below has been constructed from the issues at the preliminary hearing and the claimant's further and better particulars. However the tribunal notes that the claimant has raised some issues a number of times, it considers that some of the issues are essentially the same and where appropriate they have been considered together.

Time Limits

19.1 Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") and/or 111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA")?

19.2 The claim form was presented on 2 November 2017 following a period of early conciliation from 4 September 2017 to 4 October 2017. A complaint about something which happened before 5 June 2017 is potentially out of time and outside the Employment Tribunal's jurisdiction.

Constructive dismissal

20. Was the claimant dismissed, i.e. (a) was there a fundamental breach of the contract of employment, and/or did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?

21. The claimant relies on the respondent extending his probation.

Public interest disclosure (PID)

22. Did the claimant make one or more protected disclosures (ERA sections 43B) as set out below:

23. the alleged disclosures the claimant relies on are as follows:
    - 23.1 raising concerns about ventilation in his teaching room. In further and better particulars the claimant stated that he complained to Ms Le Roux often and then around between March and June 2017. He also complained to his line manager. He raised these concerns to Mr Mitchell on 8 February 2017;
    - 23.2 complaints about the extension of his probationary period;
    - 23.3 complaints about racially stereotypical comments.

24. the alleged detriments relied on by the claimant are:
    - 24.1 extensions of his probationary period; and
    - 24.2 failure by the respondent to provide the claimant with a permanent contract of employment.

Direct discrimination because of race

25. The claimant claims that he was subject to the following less favourable treatment:

    - 25.1 demoting him: the removal of duty team leader tasks;
    - 25.2 removing him from the well-being committee which included removing him from the email group and his photograph from the website;
    - 25.3 failing to provide management support and acknowledge the claimant's professional abilities and skills. This included the following:
        - 25.3.1 no teaching assistant was provided though one was available to the English and maths departments who taught the same cohort as the science department;
        - 25.3.2 the science department was understaffed;
            - 25.3.2.1. the claimant had been left in a room with over 60 pupils for up to 5 hours;
            - 25.3.2.2. the claimant's teaching hours were overloaded;
        - 25.3.3 key equipment/resources were not made available despite requests from the claimant;
        - 25.3.4 refusal of permission for a high altitude balloon project in British science week on March 2017 and refusal of requests to run educational trips;
        - 25.3.5 timetabling - the claimant was split between the maths and science departments in 2 different buildings;
        - 25.3.6 pupil behaviour - an incident in December 2016 in which the claimant felt that he was not supported with enforcing the behaviour policy;

25.3.7 health and safety - the claimant raised concerns over hydrogen sulphide leaking into the claimant's teaching room and lack of ventilation.

25.4 overloading the claimant's timetable and/or attributing additional cover work;

25.4.1 he had the highest number of SEND pupils in the school;

25.4.2 he had the highest teaching hours in the school;

25.4.3 he contained the year 11 cohort for 3 hours on 23 May 2017 without support;

25.4.4 attributing additional cover work;

25.5 making racially charged comments:

25.5.1 on 8 February 2017 and 11 July 2017 Mr Mitchell referred to the dab dance as a strength in his teaching;

25.5.2 on 20 June 2017 Mr Mitchell stated he still kept the claimant on because he could dab;

25.5.3 on 11 June 2017 Mr Mitchell and Ms Le Roux described the claimant's line manager, the head of science as "*she's crazy and I do not understand what she is saying*";

25.6 searching his personal effects without good reason;

25.7 extending his probationary period and/or declined to make his contract permanent;

25.8 ascribing student and parent complaints to the claimant which had not been made against him:

25.8.1 the claimant was not informed about any complaints made against him.

26. If the claimant was unfavourably treated, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

27. Comparator: the Claimant's further and better particulars describe hypothetical comparator as: a white male of 37 years with an upper 2nd class honours degree in engineering successful and proven track record of improving pupils outcomes in science and mathematics. The tribunal considers that the comparator is a white male of 37 years with an upper 2nd class honours degree in engineering

Harassment

28. The claimant claimed that all of the above in paragraph 25 were also acts of harassment.

Breach of contract

29. Did the respondent breach the contract of employment by extending his probationary period?

Remedies

30. What loss did the claimant sustain as a result of the respondent breach of contract?

31. Did the respondent unreasonably fail to comply with the relevant ACAS code of practice?

Background

32. The claimant was employed by the respondent between 1 September 2016 and 31 August 2017 on a salary of £40,626 per annum on a leadership pay scale of LS2 outer London. The respondent was a relatively new school having been opened in 2013. It was a small school taking pupils in the age-groups 14 to 19. In the GCSE years there were 50 to 60 pupils in each year group. There were 28 teaching staff, 1 teaching assistant and in total 40 staff.

33. The claimant was employed as a science and maths teacher. The claimant expressed dissatisfaction with the maths teacher aspect of his role as he had agreed to join as a science teacher but he signed a statement of the main terms of employment on 07 March 2017 setting out that he was a science and maths teacher and he carried out those duties.

34. When the claimant joined the respondent there were 3 teachers in the science Department, including the claimant. The head of science was Ms A who was also the claimant's line manager. She was of African descent. The claimant claimed that the chemistry teacher who left around Christmas time worked full-time. The respondent disputed this and asserted that for the majority of the term before departure the chemistry teacher had worked on a 0.6 position.

35. The respondent had been rated as requires improvement since it was established and OFSTED carried out a number of monitoring visits.

36. The following facts were largely undisputed:

    36.1 The respondent's science Department suffered from legacy problems. These were historic problems preceding the period the claimant was employed at the respondent. They related to the science Department as a whole. OFSTED had previously identified issues with the performance of the Science Department. No one witness clearly identified what the legacy problems were but it was generally accepted that they related to the functioning of the science department as a whole, its organisation and operation and teaching of the children in the sense of teaching to the curriculum and to the exams as required.

    36.2 The respondent's staff handbook had a section on probationary period which sets out:

> *"you join us on an initial probationary period of 6 months. During this period, your work performance and general suitability will be assessed and, if it is satisfactory, the appointment will continue. However, if your work performance is not up to the required standard, or you are considered to be generally unsuitable, we may either take remedial action (which may include the extension of your probationary period) , or terminate your employment at any time."*

36.3 The claimant's probation was extended twice: once on 23 February 2017 following a meeting which took place on 18 February 2017; and again on 24 July 2017 following a meeting which took place on 11 July 2017;

36.4 The claimant resigned by email on 14 August 2017. He gave notice and was paid his notice;

36.5 Mr Mitchell was the headteacher of the respondent at all times during the claimant's employment. He carried out the probation meetings which took place in 8 February 2017 and 11 July 2017. Ms Le Roux also attended these meetings;

36.6 Ms Le Roux joined the respondent at the same time as the claimant. She was deputy head and operations manager.

Evidence

37. The evidence of the parties took two days and what is set out here is only a brief summary of the evidence heard.

The Claimant

38. At the hearing, the claimant adopted his witness statement and was asked a number of questions by Ms Kerr, Mr Shah and a few questions by Judge Bartlett.

39. Near the start of the claimant's evidence it was put to him in cross-examination that he was aware from the 8 February 2017 meeting (8 February meeting) that there were concerns about his performance. The claimant responded that his performance was not discussed on 8 February. The claimant was then asked if no items of his performance were discussed on 8 February to which he responded no in the sense that no items of his performance were discussed.

40. Later in cross-examination the points were again put to the claimant and it was put to the claimant that his further and better particulars stated that he had been told that the dab showed that he could positively engage with students and that it was believed there was more to his delivery than had been seen so far therefore some of the claimant performance issues were discussed in the 8 February meeting. The claimant maintained that there was no discussion about him in particular.

41. Paragraph 3 of the transcript of the 11 July meeting 2017 (11 July meeting) was read out to the claimant. The claimant's evidence was that he did not find the dab comment a compliment and he felt that he should have been recognised for his exemplary teaching record, having an overloaded timetable, having designed the physics A-level course and done these things in circumstances where the head of science had not attended school for weeks. His evidence was that those matters identified in paragraph 3 were

matters for the head of science and he did not have the leadership gravitas to do those things. He felt that stepping on the head of science's toes would have potentially been a disaster.

42. It was put to the claimant in paragraph 10 of the transcript that Mr Mitchell said to the claimant: "*but I have really thought about it and I do think the current circumstance in science is unique [yeah] and I think your circumstances unique because I don't feel like the landscape has been stable enough to make a decent judgement of you*." and that this statement was acceptance by Mr Mitchell that there were had been management problems but the respondent wanted to give the claimant a fair chance to demonstrate himself. The claimant's evidence was that Mr Mitchell and Ms Le Roux knew that there were leadership problems and they knew that children had historically not turned up for lessons and that was not related to his lesson style instead they were leadership failings.

Ventilation/hydrogen sulphide

43. The claimant's evidence was that he raised concerns about ventilation in October/November 2016 then in February/March/April he noticed a very strong smell of hydrogen sulphide. He confirmed that before February 2017 the only issue was ventilation not hydrogen sulphide. The tribunal therefore finds that any claims relating to ventilation are out of time and they do not form a continuing act or course of conduct. The tribunal finds that it is not just and equitable to extend time in these circumstances.

44. The claimant's evidence was that Mr Mitchell was aware of a problem with ventilation. The claimant said that he had raised it with his line manager, Ms A, the head of science and he expected that she would raise it with Mr Mitchell. Later in his evidence he said that he had repeatedly raised the issue with Ms Le Roux and that Mr Mitchell came to his teaching room for chats about the department and at every opportunity he raised the ventilation issue with him.

45. It was put to the claimant that after his email dated 5 July 2017 the service company which managed the ventilation had been contacted so that the issue could be looked into straightaway. The claimant maintained that he had raised issues before that email. The claimant's evidence was that he was told that the service company would investigate the issue but he had investigated it with the caretaker. The claimant accepted that the caretaker had informed him that the air conditioning filters were changed but the claimant had not seen them do it.

Student complaints

46. The claimant's evidence was that he was only aware of one student complaint which concerned the December 2016 issue. The claimant accepted that some pupils in year 10 and 11 did not get to his lessons after lunch but that if a child did not arrive to his room he could not account for where they were. The claimant maintained that he raised pupils not turning up with his line manager and that students not attending classes were a problem with science as a

whole. It was put to the claimant that he could use the one call system to contact the SLT or send a student to student services but he did not do this. He said that he told his line manager and she would frequently round them up herself. He maintained this was not a frequent occurrence.

Dab/racially charged comments/no acknowledgement of the Claimant's skills

47. The claimant's evidence was that in addition to 8 February, 23 February and 11 July 2017 meeting Mr Mitchell had mentioned the dab in an informal chat. He had said in this informal chat that this was not a fair comment. The claimant could not remember when this conversation took place.

48. The claimant's evidence was that the dab was linked to rappers. He was disheartened that Mr Mitchell use this as an example of his ability to connect with students when he played table tennis with them at lunchtime, spoke to pupils in corridors and promised year 11 is if they turned up to his lessons and were willing to learn he would get them a grade.

49. The claimant was asked why he believed that the dab was to do with his race because it was a part of popular culture. He said it was because he was the only black member of staff. It was put to him that there were 2 other black staff members but he said he had never met them.

50. The claimant was asked if the claimant had performed another dance move, such as the cha-cha-cha, and Mr Mitchell had kept referring to it would the claimant have been offended in the same way and he responded that he would.

51. It was put to the claimant that paragraphs 27 to 33 of the transcript of the 11 July meeting set out the reasoning for the respondent's opinion of the claimant's performance which included the detailed spreadsheet the claimant had created about the pupils performance and gaps in their knowledge. The claimant maintained that the dab was the only thing consistently raised with him and the main feature of the respondent's reasoning. He went on to say despite Mr Mitchell stating in the meeting that the claimant's references were good but he was not given the opportunity to demonstrate this.

52. The Claimant's evidence was that the good examples from his observations were not mentioned.

53. The claimant's evidence was that there was a belief that students would not take instruction from a black teacher and this pervaded the respondent's thinking. He said that he believed this from the context. The claimant was asked what the context was and he referred to the extension of his probation in July 2017.

Line management

54. The claimant maintained that various issues that he was blamed for were not his responsibility. In particular in relation to the mock exams his evidence was

that he was "*shocked Ms A had not managed them well*". His evidence was that his line manager reacted to what Ms Le Roux asked, there was no strategy or long-term plan and things kept changing in the science Department because Ms Le Roux and Ms A could not see eye to eye.

55. The claimant's evidence was he could not carry out practicals because of the problems with the ventilation in the science rooms.

56. The claimant's evidence was that the AQA required certain practice in how practical results were recorded and that his line manager had not looked at how they should be recorded. The claimant said that he identified that they need to track the skills gained to submit them to the AQA but that this was not within his remit.

Duty team leader

57. The claimant did not accept that duty was rotated between staff members. He considered that duty team leader was part of his leadership duties which link to why he was paid a leadership salary and that this role was an opportunity to demonstrate his leadership qualities. The claimant's evidence was that nobody except for him was dropped down in their duty roles. An email of 18 April 2017 sent by Ms Le Roux which states *"please note new duty rota - some staff (Kizza, Helen, Josephine have had their days changed and others their duty area. Please read the notes as to your role in an area on the day…"* The claimant's evidence was that his line manager and him suffered the most duty changes.

Well-being committee

58. The claimant's evidence was that he was deselected from the well-being committee in March/April 2017. He said that he attended meetings whenever they were called but that Ms Le Roux did not attend all meetings. The claimant was replaced by a white man and he was probably removed from the email list. The claimant maintained that he was the only individual removed. It was put to him that Mr M, a white man, was also removed and his name was on the email list. The claimant did not remember him being on the committee. It was put to the claimant that Ms B was removed from the committee. The claimant accepted Ms B had attended meetings. The claimant was asked why he thought his removal was because of his race and he said that on the staff training. He was always allocated the same table of black and Asian teachers. The maths department is staffed by an Asian lady and a mixed-race individual and the science department is staffed by 2 Africans and at one time an Asian. He said that he was not told why he would be removed so he thought that his race might be the reason why.

Failing to provide management, support and acknowledge the claimant's professional abilities and skills. (i) lack of provision of the teaching assistant

59. The claimant accepted that he engaged with a staff member called Lydia who gave advice on dealing with children with additional needs. Lydia was part of

the safeguarding team. It was put to the claimant that there was a teaching assistant in maths and English, because these were core subjects and there were constraints on the respondent's finances as a publicly funded school. The claimant maintained that science was a core subject like maths and English though he was not sure if pupils who failed the exams had to retake them.

(ii) understaffing: the 22 February 2017 intervention day, cover, overloaded hours

60. The claimant's evidence was that he was left to carry out the intervention day alone with the pupils for 5 hours. He said he did not use the one call system to request help but told his line manager, the head of science. His evidence was that she had a breakaway group of the 60 students, of whom she was in charge, and that she came into his room regularly to check that he was okay. He accepted that Mr Mitchell came in at the start of the day and stayed for 20 minutes and Lydia also popped in.

61. The claimant's evidence felt that this was because of his race because himself and his line manager were of African descent and that the view of the respondent was, it is your department, your intervention day and for you to deal with it, but that others who ran intervention days who were not of African origin were provided with support.

62. The claimant accepted that Mr Mitchell sent an email on 23 February 2017 to the head of science and the claimant which said "*I have also spoken to Charlotte to ensure that neither of you are used for any more cover.*" The claimant's evidence was that shortly after that he was used to cover.

63. The claimant's evidence was that Mr Mitchell was a good salesman who said the next term things would be better but that events had "*spiralled in the Department*". The claimant was asked what caused the spiralling and he responded that Ms Le Roux and Mr Mitchell did not know what the science department needed and had just let them get on with it. It was put to claimant that it was partly due to problems with the head of science. The claimant's response was that she was blamed for a lot but things started to decline when Ms Le Roux joined. The claimant stated that the head of science found it hard to get systems in place to manage the Department that he felt there was a lack of support from the SLT which was needed to push things through.

64. It was put to the claimant that he had accepted that there were management issues and issues about resources but how did he consider they related to his race. He said that this was because of the comparison with other departments, that nothing that he raised was ever taken seriously. The claimant also asserted that requests for equipment had been refused, he stated that the head of science had filled in the purchase orders. It was put to him that he did not know whether they had been refused.

(iii) educational visits, trips and high-altitude balloon at British science week

65. It was put to the claimant that he did not make the request to have this event rather the head of science did. The claimant said that he stuck to hierarchy and that it was the head of science's job to push it with senior leaders. The claimant was asked if he was aware that the high altitude balloon had to go through the operations and planning team. His evidence was that he assumed the head of science was the one to do all of that. He thought that even if the project had not been planned in advance, it could go ahead at the last minute.

(iv) timetabling, SEND students

66. The claimant's evidence was that after he came out of the probationary meeting where he had been told his performance was unsatisfactory but then at the end of February his timetable was overloaded and therefore he was not given support to improve.

67. The claimant maintained that he had to teach the highest proportion of SEND students. It was put to the claimant that his evidence was that the English and maths teachers had to teach the same cohort and the claimant maintained that there were more teachers in those departments. It was put to the claimant that the head of science also taught the same pupils. The claimant stated that he considered that Mr Mitchell did not believe that children would take instruction from a person of his colour or from an Asian. He held this belief from the context which was that he was told termination of employment could come from either side. It was put to the claimant that he did not consider he had suffered from racism at the time. The claimant said it had taken him a long time to come to that view and after talking to other staff in the maths Department of African and Asian background who were all going through the same: being told that they were underperforming.

(v) managing without support on OFSTED visit/ he contained the year 11 cohort for 3 hours on 23 May 2017 without support;

68. The claimant's evidence was that the day before the OFSED visit he was required to contain the year 11 cohort with support but that the head of maths had done so earlier in the day with support. He claimed that other (unspecified) teachers should have come in but did not.

Pupil behaviour

69. The claimant's evidence was that he felt unsupported by management following the meeting held between a pupil who had made an allegation of racism about him, the pupil's mother, the claimant and Ms Le Roux. Ms Le Roux had let the child off the sanction imposed by the claimant and the claimant felt undermined. It was put to the claimant that Ms Le Roux might have been trying to ensure that no complaint was made against the claimant and therefore was trying to alleviate the situation. The claimant said that as the staff member he should have been spoken to first and he did not believe that Ms Le Roux's intentions were to alleviate the situation. The claimant accepted that if a complaint of race discrimination had been raised against

him there would have been serious safeguarding concerns and he might have been suspended pending an investigation.

The claimant's personal effects were searched on 11 November 2016

70. The claimant's evidence was that he walked into his classroom and people were searching behind the teacher's desk. His bag was on the table and his laptop was open. His evidence was that his laptop locks in 15 seconds and that he was around the area coming back to his classroom within 10 minutes. The claimant's evidence was that he believed they thought he had taken it and the least they could do in the circumstances was to say let's go to your room. The claimant was asked if anyone had said that it was suspected that he took it. To which the claimant said it was the way the search was carried out. The claimant could not recall if anybody spoke during the search. The claimant was asked if he was aware that pupils had previously moved equipment within the school to hide it and later removed it to which he responded no. The claimant was asked if he knew whether other classrooms had been searched and he said he did not believe they had as they did not search next door or the head of sciences room when he was there.

71. The tribunal finds that this claim is out of time. It does not accept that this is a continuing act. Rather this is a discreet act which substantially predates the date of claim. In these circumstances it is not just and equitable to extend time.

Extension of probationary period/declining to make the claimant's contract, permanent

72. The claimant's evidence was that he expected to have a conversation concerning how he could demonstrate success to the senior leaders. He considered that the overloaded hours he worked were overlooked and that that was unfair. It was put to the claimant that the extension of probation was in his contract. The claimant did not answer this question directly.

Student complaints

73. The claimant's view was that the complaints were probably about the management of science at the respondent but they were ascribed to him because he was an easy target.

Mr Mitchell

74. Mr Mitchell appeared as a witness where he adopted his witness statement and was asked a number of questions.

75. Mr Mitchell's evidence can be briefly summarised as follows:

    75.1 He only became aware of issues about hydrogen sulphide in the summer of 2017 in preparation for this tribunal;

75.2 a whole number of issues were discussed at the claimant's probation meetings including his performance and issues in science and its leadership in general;

75.3 all rooms in the entire school were searched because in the past, students had taken 5 cameras by hiding them within the school prior to taking off the premises. Staff had been told about the search in advance by email;

75.4 internal truancy happened disproportionately in science. If pupils were internally truanting in his class, he would have used the one call system so that the SLT could get the pupils as it is a safeguarding issue if the school does not know where they are;

75.5 he was aware of the well-being committee through Ms Le Roux;

75.6 the roles in duty teams changed all the time. His role had changed 4 times this year and reasons for the changes included timetable changes. The claimant was not demoted and duties had not been taken away from him;

75.7 he confirmed that he had had concerns about the claimant's practice in the classroom, which crossed over with concerns with science in general. Concerns had been raised with the claimant in the probation meeting and with the claimant's line manager. The claimant claimed that the SLT had said things to his line manager which she did not pass on and vice versa;

75.8 he did not accept that a person on probation was more vulnerable than a permanent employee because he did not seek to get rid of people on probation. However, if there was a problem he would respond to it with procedure;

75.9 it was put to him that Ms Le Roux's opinion of the claimant may be distorted because of difficulties in her relationship with the head of science. Mr Mitchell did not accept this. He said that he had line management meetings with Ms Le Roux and he was satisfied that she had a good insight into what was concerning in science;

75.10 it was put to Mr Mitchell that paragraph 23 and 24 of the 11 July transcript demonstrate that Ms Le Roux do not have full information about all issues. Mr Mitchell stated that this issue was about something that had happened hours before the July meeting and that Ms Le Roux did know what was going on in science;

75.11 he accepted that there were mitigating issues relating to science leadership that led to the extension of the claimant's probation rather than dismissal because they wanted to deal with those issues before deciding on his permanent status;

75.12 it was put to Mr Mitchell that it was assumed that the claimant was at fault when he may not have been. Mr Mitchell said that concerns had

been identified about the claimant's performance in relation to lesson engagement, planning and structure but the reason not to dismiss for poor performance was a recognition of poor operational management. Mr Mitchell did not believe that he had seen enough consistently good evidence to move the claimant to a permanent contract and that it is why it was decided to extend his probation;

75.13 he was asked why the December 2016 complaint against the claimant was referred to in his witness statement. Mr Mitchell said that it was here as evidence of student complaints as the claimant had asserted the allegation of student complaints was fabricated. He did not say that this was why the claimant's probation was extended. His evidence was that the school used triangulation which involved observations, learning walks, outcomes and student feedback in assessing the claimant. Concerns about the claimant's practice arose from learning walks, pupils had come to the SLT saying they were not adequately prepared for exams and 60% of science students failed to meet the expected grade in terms of what they were capable of getting and that was very poor;

75.14 his evidence was that he responded to the head of sciences email about the high altitude balloon because it arrived 3 minutes after the claimant's and it was appropriate to respond to the head of science. He said he would have loved the project to go ahead, but it had to be risk assessed and should have gone through the project team;

75.15 it was put to him that the claimant's observations were good. Mr Mitchell said that they were mixed: a mixture of good and requires improvement. He said that some teachers received outstanding in all their observations;

75.16 it was put to him that he should have raised these points with the claimant directly, not his line manager. Mr Mitchell responded that it would be unusual for the principal to give detailed feedback on observations and middle managers have that role;

75.17 it was put to Mr Mitchell that the claimant was not responsible for the curriculum and that criticisms about the arrangement of classes in which one teacher taught biology and the other physics to the children moved between could not fairly be laid on the claimant. Mr Mitchell accepted that some of them were concerns with the head of science core teaching standards make clear that teachers are responsible for the children in their rooms and the claimant was therefore responsible for the curriculum;

75.18 he stated that he did distinguish between the claimant and the head of science, and that is why the claimant's probation was extended and he was not terminated;

75.19 he accepted that no formal report collating all the sources of feedback on the claimant had been prepared at any point;

75.20 he denied that it was unusual to extend staff members' probation. He currently had 8 staff on probation, 2 of which had had their probation extended and they were all white. He denied that extending probation was usually used on non-white staff;

75.21 he stated that he was not aware that the dab was performed by rappers. He said his daughters do it. He saw Prince Harry doing it. If he had known that the claimant had found the reference to the dab hurtful he would have apologised immediately and never used again. He stated that the respondent exists because pupils were in mainstream education but it did not work out for them. They do not have a traditional school structure and have a relational attitude. He felt that the dab was a nice moment of authentic connection between teacher and pupils and he used as a positive example in relation to the claimant;

75.22 he denied there was a stereotype of black men in all walks of life, excelling at dancing and sports. He denied that he had considered that the claimant conformed to this stereotype and this was why his probation was extended;

75.23 he denied that he had not dealt with the claimant's probation seriously and said that he had retained the claimant despite evidence that might have made them not extend;

75.24 he denied that the claimant had raised issues about the gas taps' effectiveness before July 2017 but not the other issues of the rotten egg smell and hydrogen dioxide. He felt that a number of issues about the air conditioning, the clay in the art room, waste pipes, which caused the hydrogen sulphide smell and the gas a system were being completed;

75.25 he denied that the claimant had too many hours instead he was at maximum loading which he thought every staff member should be on if a school was working well. His evidence was that the claimant would not have been prioritised for cover, but sometimes cover was still required. The national agreement with the teaching unions was that 10% of teaching hours should be available for PPA, as the respondent had 33 periods they were permitted by that to go up to 28 periods and the claimant only had 22. His evidence was that after his instruction to not use the claimant for cover he would have been removed from the top of the cover list (where he was due to his low hours in January and February);

75.26 his evidence was that in May and June year 11's and 13 leaves, so their classes remain on the timetable, but the teachers are effectively frame. The claimant had not said how much cover he was required to undertake;

75.27 the claimant said he was aware that reports had not been uploaded because Ms Le Roux ran a calendar which showed whether teachers were meeting targets and by May the claimant had not uploaded any reports. It was put to Mr Mitchell that the claimant was not asked to upload any documents. Mr Mitchell said this was not correct. The claimant

was trained in October with orientation and use including passwords and email sent out to each staff member. Each staff member was responsible for evidencing their own performance;

75.28 he maintained that the chemistry teacher who resigned was full-time in the previous academic year, but that for the majority of the first term in 2016-17 he was 0.6. He stated that the science department was overstaffed;

75.29 he accepted that there was pressure on the science and maths departments due to legacy issues but that other departments such as music also had legacy issues and therefore the science department were not under particular pressure;

75.30 he stated that the claimant did not teach any children with an ECHP and SEND students do not have an ECHP because all their needs should be dealt with through quality teaching;

75.31 English and maths were prioritised for having a teaching assistant because pupils are required to study those subjects until they are 18, unless they pass the GCSE. This creates problems for the school in terms of staffing for retakes and it limits the students options about what subjects they can take;

75.32 he thought it was highly unlikely that the claimant had been left alone for hours to teach 60 children on the intervention day. He said he was there for the first hour and then popped in and out, and he knew that Mr H had popped in and out. It was put to him that this was not providing support. His evidence was the entire science department was deployed on the intervention day, as would have been other year 11 teachers. You should have been having classes with the children and the claimant was not completely left alone. If he had felt alone. He could have used the one call system or send a pupil to reception;

75.33 he did not accept that the claimant was coping very well in an unknown situation and this was a positive. Instead, Mr Mitchell said this was too much of a leap and the claimant was not coping very well, he was making the most of a bad situation. He felt it did not have sufficient evidence to give the claimant permanent contract because the were underperforming children and there were performance concerns with him. He thought that with support and without science, leadership issues, the claimant might perform. He felt he had sufficient information to make the decision he made;

75.34 the reference to anecdotal in the 11 July meeting was that the claimant's good performance felt anecdotal, the claimant's spread sheet identified gaps in the children's knowledge and he planned an intervention which Mr Mitchell liked, but he did not feel it was implemented well and the claimant could make some connection to pupils but this was not seen consistently in his classes.

Ms Le Roux

75.35 Ms Le Roux appeared as a witness where she adopted her witness statement and was asked a number of questions. Her evidence can be briefly summarised as follows:

75.35.1 It was put to her that she had a difficult relationship with the head of science and was more inclined to criticise the claimant to implicitly criticise the head of science. Ms Le Roux denied this and said that the head of science had said there were behavioural issues with some of the claimant's lessons and she had followed her suggestions but the head of science did not know what to do. She dropped in and out of the claimant's lessons and therefore was aware what happened in them;

75.35.2 her evidence was that the well-being committee was voluntary and there was no reason for anybody to be on it. If they do not make suggestions volunteer and come to the meetings. She said that to her knowledge. The claimant had not attended the meeting and no ideas presented to her came from him. She agreed she had removed the email list as she did with 2 others and that she did not design the website and therefore was not party to his removal from it;

75.35.3 she changed the duty rota 6 times per year. There is no leadership role linked to any duty roles. The roles are rotated because some duties are easy and some are hard needs to be changed for fairness. She did not think the claimant was the only person dropped from the duty manager that she could not recall as it was 2 years ago;

75.35.4 she agreed no formal report had been prepared on the claimant before the probationary meeting but there had been learning walks, data drops and observations to assess his performance. Her evidence was that in the 8 February meeting they talked about data entry into SIMS. The claimant's data entry was missing for drop one and on the 2nd drop errant data had been entered. She said that positive comments from the observations had been read out. She said that the spreadsheet the claimant had prepared was fantastic and that she did give positive praise;

75.35.5 in relation to the reference to the dab she said that Mr Mitchell tries to make awkward meetings comfortable and he tried to make a connection with the claimant which was positive. She was not aware the dab was a black rapper move and she did not accept that there was a stereotype that black men excel in sports and dancing;

75.35.6 she did not accept that the claimant was criticised as part of criticisms of the science Department generally. The head of science's role was to change science, but the claimant did not comply with basic things like having a topic list on the front of books. She said that she used triangulation to assess the claimant's performance, she looked at books she spoke to students, on many occasions pupils had

been let out of the claimant's lessons. She stated she had difficulties because the head of science and the claimant told her different things;

75.35.7 it was put to her that she had not investigated the claimant's performance fully and if she had the role may have been made permanent. She responded that his data entry was incorrect, she had to write late reports and they were given an inset day to do it, but there was still late and he did not enter targets on blue sky, which was his responsibility;

75.35.8 she denied the science department was understaffed. She did not believe that the claimant was overworked and did not understand how he could be in the context of the small school without many practical's with 50 to 60 children in the year;

75.35.9 her evidence was that in relation to the December 2016 complaint she had called a meeting to make it go away. So the parent and claimant felt supported and the pupil could go back to the lesson. She stated that she did not feel she had to investigate claimant. Further, because this was only one allegation, but if there had been more than further thought would be needed. She did not believe that she undermined the claimant but accepted that she made leadership decisions which not everybody agreed with. She stated that this was linked to why the claimant's probation was extended;

75.35.10 she said she had seen pupils sitting on tables in his class on many occasions and stated that there are various reasons for pupils behaving like that and not all the blame would be laid at the claimant's door;

75.35.11 she said that her style was to deal with things immediately and there is a helpdesk for the services, such as the ventilation and that is why she sent the emails in July 2017;

75.35.12 she did not accept that there was a perception in the respondent that teachers of African descent could not control a class and she was offended by the suggestion that that was why the claimant was not offered a permanent contract;

75.35.13 her evidence was the claimant had failed to write the science reports as required. This delayed the reports, going out for several weeks for the entire year. In the end she had had to do them herself on 2 occasions.

Findings of fact

General

76. The findings of the tribunal have been taken in the context of the evidence of a whole. This includes the background undisputed findings which are set out above. The tribunal finds that all the witnesses recognised that there were some legacy problems with the science Department and that there were some difficulties with the organisation and running of the science Department and with the head of science. These background factors meant that the claimant felt his performance was unfairly not recognised as it should have been and instead he was blamed for wider issues. The tribunal finds that the claimant did not raise concerns or issues with the SLT despite it having become obvious that what he was saying to the head of science was not being communicated to the SLT and possibly vice versa.

Duty team leader

77. There was no evidence about what a duty team leader role involved and the claimant merely seemed to assume that it was a leadership role. In these circumstances the tribunal does not accept that it was a leadership role. The tribunal accepts that the duty rota changed every half term and teachers' duties changed. The tribunal does not accept that this is less favourable treatment as the claimant was treated the same as all other teachers. The tribunal does not accept that the claimant was demoted. The tribunal finds that some of the duty roles may have been more desirable than others and that the claimant may have started with a more desirable duty (reception) and was then moved to a less appealing duty. However, this was an inherent part of the rota changes which affected all staff.

Wellbeing Committee

78. This was a voluntary body open to all staff set up by Ms Le Roux. The claimant attended initially but after the elapse of some months Ms Le Roux was keen to ensure the committee remained active and removed those members who were not forthcoming with proactive suggestions and actions. This included a number of other staff, Mr M and Ms B and an other individual who were all white as well as the claimant. The Tribunal does not accept that the claimant's removal was because of the claimant's race and was instead a result of his lack of active participation beyond attending some meetings.

Failing to provide management support and acknowledge the claimant's professional abilities and skills. This included the following:
No teaching assistant was provided though one was available to the English and maths departments who taught the same cohort as the science Department;

79. We accept the respondent's evidence that maths and English were core subjects which students are required to take until they pass at GCSE level. This meant that they were a high priority for the school and allocating extra resource to them was done accordingly. This is not the case for science. We accept that the school prioritised these departments for teaching assistant support for this reason alone over and above science and all other subjects.

The science Department was understaffed;

80. We accept that prior to February 2017 the science department had 3 teachers but that the chemistry teacher left and was not replaced. This resulted in the claimant working at the maximum session loading adopted by the school for March to June 2017. During those 4 months he had the highest loading of the teachers in absolute terms but from the table of hours it is clear that some teachers had other duties or worked part time such that a lower absolute maximum was applicable to them. He did not have the highest absolute loading during other months or on average. For these reasons, we find the claimant has not established he suffered less favourable treatment. We also accept that the respondent was permitted to maximise the claimant's loading and the decision made was based on reasons about effective allocation of resource and had no connection to the claimant's race. The Tribunal accepts Mr Mitchell's evidence that in a well run school ideally all teachers would work to maximum load as this was an efficient use of resources.

The claimant had been left in a room with over 60 pupils for up to 5 hours;

81. We accept the claimant's evidence that during the intervention day he was largely left alone with the pupils. The claimant tried to attribute his being largely left alone for the majority of the day at senior leadership level. However this was partially inconsistent with his evidence that the head of the science organised the intervention. We find that it was the head of science's responsibility to organise the distribution of students between the two of them and organise staffing. There is no evidence that she sought additional support or help or that this was refused. In relation to the other teachers, who should have attended as they were normally timetabled to teach at those times, it is regrettable they did not but to assert that this is discrimination involves a claim (that the claimant has not brought) that a significant number of teachers were directly discriminatory in a conspiracy against him. The Tribunal finds that this was an example of poor planning by the head of science and not discriminatory action.

The claimant's teaching hours were overloaded;

82. See above

Key equipment/resources were not made available despite requests from the claimant;

83. The claimant has failed to establish any requests were made for equipment that were refused. The claimant did not write the purchase orders, he did not give evidence that he had seen them and his evidence was that he assumed the head of science had made them: he did not know when the requests were made. The claimant has failed to discharge the prima facie burden of proof which lies on him in relation to this allegation.

Refusal of permission for a high altitude balloon project in British Science Week on March 2017 and refusal of request to run educational trips;

84. The Tribunal accepts the evidence set out in the email of 8 December 2016 that the head of science was informed by Mr Mitchell that the planning of this project had to go through the operations and planning team. There is no evidence this was done by the claimant or Ms A. The claimant's evidence was that he assumed the head of science was organising it. The Tribunal finds that this project did not happen because the respondent's procedures were not complied with rather than for any other reason. The claimant's claim that it could have gone ahead at the last minute is not tenable and he cannot establish that he has suffered less favourable treatment or that this is because of his race.

85. The claimant has failed to give evidence about when requests were made, to whom requests were made or even if requests were made. He has failed to discharge the prima facie burden of proof.

Timetabling - the claimant was split between the maths and science departments in 2 different buildings;

86. The need to travel between classrooms is inherent in teaching in two departments and this requirement of the claimant's work was not for a discriminatory reason. Further, the school is a small school and the tribunal finds that the claimant exaggerated the length of time it took to move between departments.

Pupil behaviour - an incident in December 2016 about which the claimant felt that he was not supported with enforcing the behaviour policy;

87. The accounts of the claimant and Ms Le Roux about this event were quite consistent except for who had responsibility for the apology and resolving the situation. The Tribunal found that Ms Le Roux made a reasonable management decision which was open to her. The claimant may have, understandably to some extent, felt undermined. However the Tribunal does not accept that there was any motivation on Ms Le Roux's part other than to resolve the situation and it does not accept that her actions were less favourable treatment or for a reason related to the claimant's race. If Ms Le Roux had wanted to cause problems for the claimant she could have escalated the complaint, which was one of racism, which would have raised safeguarding issues and potentially triggered an investigation. She did not do this.

Health and safety - the claimant raised concerns over hydrogen sulphide leaking into the claimant's teaching room and lack of ventilation.

88. As set out above the ventilation issue is out of time. The claimant claimed that he had repeatedly raised the hydrogen sulphide smell with Mr Mitchell before the 5 July 2017 email. However the Claimant did not give any evidence about when this was or if it was significantly in advance of 5 July 2017. The email chain involving the service provider and Ms Le Roux around 5 July 2017 demonstrates that when Ms Le Roux was aware of the issue the respondent took prompt action to resolve the problem. It may well have taken the service

provider some time to resolve the problem but no fault or lack of action can be identified on the respondent's part. Therefore the tribunal finds that the respondent when aware of the problem took action and the claimant cannot establish unfavourable treatment or that the respondent's actions were discriminatory.

Overloading the claimant's timetable and/or attributing additional cover work;

89. The Staff Handbook states "*F) Job Flexibility IT is an express condition of employment that you are prepared, whenever necessary, to transfer to alternative departments or duties within our Academy. During holiday periods etc. it may be necessary for you to take some duties normally performed by colleagues. This flexibility is essential for operational efficiency as the type and volume of work is always subject to change."*

90. The claimant failed to quantify the amount of cover hours he worked. He also failed to quantify the cover hours worked by any other teacher. We accept that the claimant carried out cover duties but we find that it was an express contractual duty to undertake cover. In these circumstances, he has not established unfavourable treatment.

The claimant had the highest number of SEND pupils in the school;

91. The Tribunal finds that the claimant taught the same cohort of students as the maths and English department below A-level standard. As the science department had less teachers than English and Maths the Tribunal accepts that the claimant had a higher number of SEND students. However this was a result of the teacher numbers in the departments and the Tribunal does not accept that this was because of his race.

92. Further the OFSTED Inspection Report dated 24-25 May 2017 states "*The proportion of students who have special educational needs and/or disabilities is below average. The proportion of students with a statement of special educational needs or an education, health and care plan is below average."* This demonstrates that the claimant did not have particularly onerous responsibilities for SEND pupils.

The claimant had the highest teaching hours in the school;

93. See above

The claimant contained the year 11 cohort for 3 hours on 23 May 2017 without support;

94. We accept that the claimant was left largely alone with the Year 11 cohort for 3 hours on 23 May 2017. However the Claimant had the option of using the one call system or sending a pupil to reception to pass a message for assistance. He did not do so. The claimant did not use the proper channels to request assistance, assistance was not refused by the SLT and in the circumstances the claimant cannot establish that the respondent's actions were due to his race. The tribunal recognises that the claimant's line

manager, who is of African descent, may have failed to provide the support that the claimant requested. However, as the claimant does not claim that Ms A discriminated against him, he cannot establish that the he suffered less favourable treatment by the respondent because of his race.

Attributing additional cover work;
95. See above

Making racially charged comments:
On 8 February 2017 and 11 July 2017 Mr Mitchell referred to the dab dance as a strength in his teaching;
On 20 June 2017 Mr Mitchell stated he still kept the claimant on because he could dab;

96. The Tribunal considers that these two issues are so similar that they should be dealt with together.

97. We find the comments made by Mr Mitchell about the dab to be ill considered and have sympathy with the claimant's view that Mr Mitchell mentioning this as a positive part of his performance came across as lazy and demotivating. We accept Ms Le Roux's evidence that it was an ill considered attempt to soften the blow of a difficult meeting. From the evidence the tribunal heard it was obvious that Mr Mitchell had a slightly informal way of speaking which was quite different from the claimant who had a formal manner. This is no criticism of either party but it is understandable that people with very different communication styles could take different views of what the other was expressing. We also find that the claimant did not genuinely consider this a racist comment as his evidence was that he would have taken offence in the same way if he had performed a different dance move such as the cha cha (which did not have a connection with black culture) and this was referred to by Mr Mitchell. The claimant was offended by this being used as a positive example of his abilities rather than other qualities and actions he had undertaken such as setting up the physics A-Level. The claimant believed that this indicated that his performance had not been fully or fairly assessed. The tribunal does not accept this criticism, both Mr Mitchell and Ms Le Roux's evidence set out specific and numerous concerns about the claimant. The claimant may well not have agreed with them but the tribunal finds that these concerns were used in the decisions about the claimant's probation. The Tribunal finds that it must also consider the context of these comments which is that they were examples of the claimant connecting with students, that this was a school environment and the school adopted a relational approach which valued teacher connections with pupils. Further, the Tribunal recognises that by the time the comments were made to the claimant the dab was a part of popular culture and as such would have been of relevance to pupils no matter their colour. The Tribunal does not accept the claimant suffered less favourable treatment than the comparator would have experienced.

On 11 June 2017 Mr Mitchell and Ms Le Roux described the claimant's line manager, the head of science as "she's crazy and I do not understand what she is saying";

98. The tribunal finds that the transcript of the 11 July 2017 meeting discloses that no such statement was made. In re-examination the claimant agreed that they may have made this statement at another time but could not identify when. It is unclear if the reference to 11 June 2017 was a typo which should have been 11 July 2017 as there has been no other mention of 11 June 2017. The tribunal finds that this allegation is not adequately particularised and the claimant has failed to discharge the prima facie burden of proof which lies on him as to what was said or when.

Searching his personal effects without good reason;

99. The tribunal finds that the claimant's oral evidence was that his personal effects were not searched but his work area i.e. around his desk was searched. The claimant did not enquire as to whether other classrooms were searched and relied on not having seen neighbouring classrooms searched. We accept Mr Mitchel's evidence that students had previously stolen equipment by moving it internally within the school before removing it from the premises and therefore searches were made across the school. The Tribunal finds that this is the reason why the claimant's work area was searched and he did not suffer unfavourable treatment and/or it was not because of his race.

Extending his probationary period and/or declined to make his contract permanent;

100. The Tribunal finds that it was a term of the claimant's contract that probation could be extended and there was no limit to the number of times or duration of extension. The Tribunal also finds that the respondent held concerns about the claimant's performance and that these were the reason for extending his probation and not making the contract permanent. The Tribunal does not accept that race discrimination or stereotypical views of black men played a part in their decision making. The concerns held by the respondent were formed from learning walks, data drops and observations. The concerns included that he had a good relationship with some students but not others, students were let out early, he had not completed his performance targets despite attending an INSET day for training on it or student reports. The Tribunal recognises that the claimant felt that his performance had not been fully or fairly assessed. The respondent's witnesses accepted that the situation was made more difficult because of the issues about the head of science and the science department generally and partly because of these issues the decision was made to extend the claimant's probation.

Ascribing student and parent complaints to the claimant which had not been made against him:
The claimant was not informed about any complaints made against him.

101. The tribunal considers that these issues are so similar that they can be dealt with together.

102. Ms Le Roux said that complaints had been received in informal discussions with pupils. Mr Mitchell said that students who were worried that they were not prepared for science exams had approached him with their concerns. The respondent did not document these concerns and they were not formal complaints. The respondent did not notify the claimant about these concerns except in the probationary meetings. This is poor management practice and prevented the claimant from addressing these concerns. However we do not consider that this was because of his race. The Tribunal accept the respondent's evidence that students made informal comments about being underprepared for their exams and this is to what the "complaints referred". The respondent should have made this much clearer to the claimant and the use of the term complaint was confusing in these circumstances. However the Tribunal finds that this was one of numerous reasons that concerns were held about the claimant's performance and that giving some weight to them was not less favourable treatment or because of his race. Again what the claimant felt was unfairness that they had been given weight without recognition, in his opinion, that gaps in student knowledge were historic and related to the science department organisation/structure and ascribing them to him was unfair. Even if this were the case it is not unfavourable treatment.

The Law

S13 of the Equality Act 2010 sets out:

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.

S26 of the Equality Act 2010 sets out:

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.

(2)A also harasses B if—
(a)A engages in unwanted conduct of a sexual nature, and
(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—
(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b)the conduct has the purpose or effect referred to in subsection (1)(b), and
(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

(5)The relevant protected characteristics are…race…

Protected Disclosures

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following--

(a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered,
Case No: 2500613/2017 2500617/2017
32

(e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory. (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it. (4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice. (5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith--

(a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to-- (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

47B Protected disclosures

(1) A worker has the right not be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not be subjected to any detriment by any act or any deliberate failure to act, done-

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purpose of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

Breach of Contract

Did the respondent fundamentally breach the contract of employment?

Constructive Unfair Dismissal

The applicable considerations are set out in the list of issues.

Conclusions

Whistleblowing

103. Even if the claimant's claim is taken at its highest (that he had made disclosures falling with in s43B ERA 1996) the tribunal finds that the claimant has not satisfied s47B ERA 1996: the claimant has failed to establish that he has suffered any detriment as a result of such disclosures.

As set out in the Findings of Fact section the tribunal has found that the respondent has established reasons entirely independent from any protected disclosures for its conduct in relation to the claimant. He cannot establish a causal link between disclosures and alleged detriment.

Breach of contract

104. The claimant's claim for breach of contract fails. The Tribunal finds that the Respondent had the contractual right to extend the claimant's probationary period as it did as a result of the express terms in the Staff Handbook. It finds no bad faith has been exercised.

Constructive Dismissal

105. The claimant has not established that there was a fundamental breach of the contract of employment: the tribunal finds that the respondent has not breached the so-called trust and confidence term.

106. The tribunal finds that the respondent used triangulation to assess the claimant's performance: it used learning walks, observations, student comments, reviews of data drops and the blue sky system. The respondent therefore used a number of sources from which to obtain information about the claimant. It used this information to inform their view about the claimant's performance. The tribunal has accepted the evidence from the respondent's witnesses that there was evidence that the claimant's performance was inconsistent and taking all of the circumstances into account they decided not to dismiss the claimant and instead to continue his probation. The situation was complex because of the background situation and the head of science but these factors were taken into account by the respondent when it made its decisions about the claimant's probation.

107. Therefore the tribunal finds that the respondent behaved with reasonable and proper cause, and did not conduct itself in a matter that was likely to destroy or seriously damaged the trust and confidence between it and the claimant.

Discrimination

108. The question is not whether the claimant was unfairly treated it is whether he was treated less favourably.

109. As set out above the tribunal recognises that the claimant feels that the difficult circumstances in which he found himself were laid at his door and affected him adversely in an unfair manner. No party has disputed that there were background circumstances. These factors have no relevance to the claimant's race. The tribunal has found that the respondent took account of the background circumstances and used these in favour of the claimant in that his probation was extended rather than his employment terminated. There are aspects about the process that the respondent's witnesses accepted could be improved but the tribunal does not accept that any

shortcomings were due to the claimant's race. It is noted that the claimant's claim includes many more complaints than the probationary process. The tribunal concludes that the comparator would have been treated in the same way as the claimant.

110. The tribunal finds that the claimant has not discharged the prima facie burden of proof in relation to all of the allegations except those relating to the dab and the student complaints.

111. In relation to all of the allegations of direct discrimination the tribunal finds that the respondent has established non-discriminatory reasons for its actions.

Harassment

112. The Tribunal finds that none of the acts identified by the claimant either individually or collectively relate to his race. The tribunal accepts that from the claimant's point of view the conduct was unwanted. The tribunal considers that any offence caused to the claimant was unintended. The tribunal does not accept that in the wider context in which these events took place (including the relational approach of the school to its students and that the comments about the dab were made to the claimant in meetings about his probation and they were used as positive examples of connecting with students) that it was reasonable for the conduct to create an intimidating, hostile, degrading or offensive environment or that it violated the claimant's dignity.

_____
Employment Judge Bartlett

Date: 3 April 2019

Sent to the parties on: 12 April 2019

.....
For the Tribunal Office