Case Numbers: 3202444/2018
3202446/2018

EMPLOYMENT TRIBUNALS

Claimant:	**(1) Mr A. Blondell** **(2) Mr F. Katamba**
Respondent:	**Newham College of Further Education**
Heard at:	**East London Hearing Centre**
On:	**28-30 January, 4-5 February, 15 September 2020, and 16 September and 13 October 2020 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mrs G. Everett** **Mrs C. Baggs**
Representation	
Claimants:	**In person**
Respondent:	**Mr L. Harris (Counsel)**

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **Mr Blondell's claim of direct race discrimination at Sch. A, Issue 7.2, is not well-founded, and is dismissed;**

2. **Mr Blondell's claims of harassment related to race, at Sch. A, Issue 11.1 and 11.4, are not well-founded, and are dismissed;**

3. **the Tribunal lacks jurisdiction to hear Mr Blondell's remaining claims of harassment related to race, because they were presented out of time, and it is not just and equitable to extend time;**

4. **the Tribunal lacks jurisdiction to hear Mr Katamba's claims of harassment related to race and direct race discrimination, in relation to acts/omissions prior to his dismissal, because they were presented out of time, and it is not just and equitable to extend time;**

5. **the Tribunal lacks jurisdiction to hear Mr Katamba's claims of pre-dismissal detriment on the grounds of having made public interest disclosures, because they were presented out of time, in circumstances where it was reasonably practicable to present them in time;**

6. **Mr Blondell's claim of victimisation in relation to his dismissal is not well-founded, and is dismissed;**

7. **the Claimants' claims of direct race discrimination in relation to their dismissal are not well-founded, and are dismissed;**

8. **the Claimants' claims of automatically unfair dismissal are not well-founded, and are dismissed;**

9. **Mr Katamba's claim of ordinary unfair dismissal is not well-founded, and is dismissed.**

REASONS

Procedural history

1. The First Claimant, Mr Antony Blondell, presented his claim on 1 December 2018, after an ACAS early conciliation procedure between 9 and 25 October 2018. After a process of clarification (referred to below) it was established that he raised complaints of automatically unfair dismissal (whistleblowing); direct race discrimination; harassment related to race; and victimisation.

2. The Second Claimant, Mr Faham Katamba, presented his claim on 30 November 2018, after an ACAS early conciliation period between 9 and 25 October 2018. He raised complaints of ordinary unfair dismissal; automatically unfair dismissal (whistleblowing); detriment on the grounds of making a protected disclosure; direct race discrimination; and harassment related to race.

3. The Respondent in its ET3 denied the claims, and contended that the Claimants were dismissed by reason of redundancy.

4. A case management order was sent to the parties on 6 March 2019, requiring the Claimants to provide further information about their whistleblowing and discrimination claims. A preliminary hearing for case management took place on 18 March 2019 before REJ Taylor, at which the claims were consolidated. The Judge also gave further directions for clarification of the case, and permitted the Respondent to amend its ET3.

5. As insufficient progress had been made in complying with REJ Taylor's orders, in particular with regard to further information and the agreement of a final list of issues, a further preliminary hearing took place before EJ Burgher on 19 November 2019. At that hearing, a final schedule of issues was prepared in relation to each of the Claimant's claims (see the Appendix to this judgment); disclosure issues were also resolved. EJ Burgher told the parties that, unless there were exceptional circumstances, no further documentation would be considered as part of the hearing bundle.

6. Notwithstanding this, further extensive correspondence was sent to the Tribunal about disclosure issues; these were the subject of further interlocutory orders, in the last of which EJ Burgher pointed out that the Tribunal could not order the Respondent to disclose what it does not have.

The Hearing

7. The Tribunal was unable to sit for one of the six days allocated for the case (31 January 2020). It was agreed that the parties would aim to complete evidence and submissions within the days available. Judgment would be reserved, and remedy dealt with separately, if appropriate. In the event, at the end of the five days, there remained one witness to be heard. A further day was listed on 28 April 2020, to complete evidence and submissions. That hearing was postponed because of the Covid-19 pandemic. A telephone preliminary hearing took place instead, to discuss arrangements for a resumed hearing, which took place in person at the East London Hearing Centre on 15 September 2020. The Tribunal took two further days to deliberate.

8. We had an agreed bundle of documents, running to over 1000 pages. At the start of the hearing, the Claimants raised concerns about being sent additional documents late in the day. The Respondent pointed out that the majority of these were documents disclosed by the Claimants, which they wished to include in the bundle; in the circumstances, the Claimants must have been familiar with their content. The Claimants complained that they were having difficulty locating where the documents had been inserted in the bundle. Mr Harris (Counsel for the Respondent) provided a helpful list of relevant page references. The Tribunal reminded the parties of their duty to cooperate with each other.

9. The rest of the first day was taken up by the Tribunal reading witness statements, and some documents identified in an essential reading list provided by the parties. On the second day, the Tribunal spent some time clarifying the Claimants' whistleblowing claims: the location of the documents in which the disclosures were recorded; and what the legal obligations were, which they believed were being breached. The Tribunal also clarified with the Respondent what its defence was in relation to the various elements of the whistleblowing claim, and whether any concessions were made. The Respondent set these out in a schedule.

10. We heard evidence from Mr Blondell and Mr Katamba. Because they had not led evidence on the issue, the Tribunal clarified with each of them, by supplementary questions in chief, whether they believed that the disclosures were in the public interest and, if so, why.

11. For the Respondent we heard evidence from Mr Clive Ansell (who was Director of Student Services, until he left the Respondent's employment in October 2018); Mr Paul Stephen (Principal and Chief Executive); and Ms Olivia Besly (Director of Human Resources and Legal Services at the material time).

12. The Claimants both made oral closing submissions; Mr Katamba also produced a short document. Mr Harris produced concise written submissions, and supplemented them orally.

13. The Tribunal apologises to the parties for the delay in promulgating this judgment. This was caused by increased pressure on judicial resources, and the competing demands of other cases.

Findings of fact

14. The Respondent is a college of further education, running a wide range of courses for students from two locations in East London: East Ham and Stratford. The academic year was divided into three terms: Term A ran from September to December; Term B from January to April; Term C from April to July.

15. Mr Blondell describes himself as Black; Mr Katamba as Black-African. Both were employed by the Respondent as Learning Mentors: Mr Katamba commenced employment on 5 April 2016; Mr Blondell on 3 January 2017. Mr Blondell lacked the two-year qualifying period needed to bring a claim of ordinary unfair dismissal.

16. The Learning Mentor posts were established to support learners, encourage motivation and participation, and provide guidance on non-academic areas, such as personal development and well-being. Part of their role was to lead group tutorials for up to eighteen hours a week on various topics, including anti-bullying and the government's Prevent initiative. They also held one-to-one meetings with students. Learning Mentors were part of the student engagement team, which fell within the Respondent's Support Services directorate. Teaching staff came under the Curriculum directorate; the English for Speakers of Other Languages ('ESOL') department also came within the Curriculum directorate.

17. Mr Ansell was employed as Director of Student Services. He had responsibility for a number of different teams, including the student engagement team. The Claimant's line managers (variously described as Learning Services Managers and Student Experience Managers) reported to him. During the relevant period, there was a high turnover of line managers. The substantive post holder was Ms Abida Umarji; when she went on maternity leave in August 2016, a maternity cover, Ms Bianca Holman, took on the role; Ms Umarji returned from leave in May 2017, but left in August of that year; Ms Angelina Ikeako held the post on an interim basis between September and December 2017; thereafter Ms Loraine Laurent covered the role.

18. There was tension between the Learning Mentors and the Curriculum directorate, which predated the Claimants' employment. The lack of stability within the line management of the Learning Mentors also aggravated the situation. In the past, Learning Mentors were responsible for monitoring attendance. The preference of the Curriculum team was to deal with attendance issues themselves. This was in part because one of the ways by which the Learning Mentors monitored attendance was to carry out 'attendance walks', which led to the Curriculum team feeling that they themselves were being monitored. In 2017 the Learning Mentors stopped being responsible for attendance, although they remained responsible for taking their own registers at group tutorials.

<u>The provision of training to Mr Blondell (Sch. A, Issue 7.2)</u>

19. A number of general allegations were raised by the Claimants, which are dealt with at the most chronologically appropriate point. The first of these is an allegation by Mr Blondell that, between January 2017 and September 2018, Mr Ansell failed to provide him with the training required for the role, and that this was direct race discrimination.

20. Mr Blondell accepted in oral evidence that his training record confirmed that he had been given the specific training required for his role. For that reason alone, this claim fails on its facts.

21. For completeness, we record his explanation in cross-examination that the training he considered he ought to have been given was teacher training; other individuals were given that training. However, he accepted that he was not employed as a teacher, and a teaching qualification was not required for his role as a Learning Mentor. He further accepted that other employees in his position, who were not black, also did not receive this form of training. The comparator, on whom the Claimant relied, and who he said was given a high level of training, was Asian.

Mr Ansell's interactions with Mr Blondell (Sch. A, Issue 11.1)

22. Mr Blondell also alleged that Mr Ansell 'rarely spoke directly to the Claimant'. In cross-examination, he accepted that Mr Ansell interacted with him on a professional level on many occasions.

23. Mr Blondell stated that what he missed was the more informal interaction, which he observed Mr Ansell having with others; he alleged that Mr Ansell would talk and joke with them, but not with him. In his oral evidence, Mr Blondell relied on a comparison between Mr Ansell's interactions with him, and Mr Ansell's interactions with Mr Katamba, which he described as much closer: Mr Katamba and Mr Ansell had private meetings, at which Mr Ansell sought Mr Katamba's views, and asked his opinions. We accept Mr Blondell's evidence that Mr Ansell interacted less frequently with him than with some others, but we are not satisfied that he 'rarely' spoke to him.

Mr Blondell's disclosure at a meeting with Mr Ansell in July 2017 (Sch. A, Issue 1.1)

24. We come to the first of the alleged protected disclosures. Mr Blondell alleged that he disclosed to Mr Ansell, in a meeting around July 2017, that registers had been falsified.

25. An attendance register was created online for each tutorial held. Learning Mentors were responsible for completing the register at their own group tutorials. The following code was used: a slash meant present in class; W meant work experience; O meant absent; A meant authorised absent; E meant excused late.

26. Although no date was given for a one-to-one meeting between the Claimant and Mr Ansell in July 2017, we find that such a meeting did take place. At that meeting, Mr Blondell told Mr Ansell that students had been marked on his registers as being present, when they were absent, and that students had been marked as 'authorised absent', when he himself had not marked them as such.

27. We consider whether this amounted to a public interest disclosure in our conclusions below.

28. Mr Blondell also alleged that he made disclosures about the 'falsification of consent forms and records'. There is no evidence to support that; we find that he did not do so.

Mr Katamba's allegations of harassment related to race by Mr Ansell in Term A, 2017 (Sch. B, Issues 18.2, 18.3, 18.7 and 18.8)

29. Mr Katamba made a number of allegations that Mr Ansell made racially offensive comments, the majority of which he dated to Term A in 2017.

30. The first of these (Sch. B, Issue 18.3) was that Mr Ansell said 'black women have attention seeking bodies'. In his witness statement Mr Katamba did not deal with the occasion on which the comment was allegedly made; he dealt only which an occasion in April 2018, when he challenged Mr Ansell about it. He stated:

> 'I spoke about micro aggressions and unconscious bias, I also explained that many malicious and hurtful [*sic*] for example when he said 'black women have attention seeking bodies' on why he asked a black member of staff to retake their ID picture.'

31. Mr Katamba alleged during cross-examination that Mr Ansell made the remark in September/October 2017. Mr Katamba raised this allegation in his grievance. In the grievance outcome letter, where it was recorded in different terms, as: 'black women attract attention due to what they are wearing'. Mr Katamba accepted that he had not challenged that formulation of the allegation, either by way of an appeal or a simple correction.

32. Mr Katamba also alleged that Mr Ansell had said 'It's hard to tell black women apart' in Term A, 2017 (Sch. B, Issue 18.7); and 'black women all look alike' in June 2018 (Sch. B, Issue 18.2).

33. In his witness statement, Mr Katamba described a meeting in which the following exchange took place:

> 'Clive went on to make the comments 'it's hard to tell black women apart' when I highlighted to him he often mis-identifies staff and they have noticed. When I challenged him regarding this Clive said 'your people are trouble'. After a period of silence where I was quite taken aback by the comments, Clive then told me the Head of Student Services role would be appearing and that he would like me to apply for it – which I did whilst abroad on an international project'.

34. According to the witness statement that was an exchange which took place in late 2017, although no specific date was given; there is no contemporaneous record of the conversation.

35. According to Mr Katamba's witness statement, he raised this issue again in around March/April 2018:

> 'I raised the fact he had made several distressing comments and gave the example of 'all black women look alike', he said he didn't mean to offend.'

36. That gives rise to two inconsistencies. Firstly, according to the list of issues (Issue 18.2), Mr Katamba was alleging that Mr Ansell repeated the offensive remark in 2018. However, it is plain from Mr Katamba's account in his statement that on that occasion it was he, not Mr Ansell, who raised the issue, repeating back to Mr Ansell a remark that the latter had allegedly made the previous year. Secondly, the list of issues identifies this conversation as occurring in June 2018, not March/April 2018 (Issue 18.7).

37. When these disparities were put to him in cross-examination, Mr Katamba was unable to be any more specific, observing only that 'several comments were made over the course of a year'. When asked whether he had taken a note of the original incident, Mr Katamba said that he had probably made a note on his phone, but that his phone had been wiped.

38. Even more significantly, Mr Katamba cross-examined Mr Ansell on the basis that the original remark was made not to him, but to others, and that he had merely challenged Mr Ansell about it. In cross-examination, Mr Katamba identified those individuals (for the first time) as Ms Smith and Ms Azonga, and said that they challenged Mr Ansell about it at a meeting in 2017.

39. As for the allegation that Mr Ansell said to Mr Katamba 'your people are trouble' (Sch. B, Issue 18.8), again the date of the meeting is unspecified; the closest Mr Katamba could place it (in an answer given by him in cross-examination) was 'September/October 2017'. Again, this is unsupported by any contemporaneous note or complaint; Mr Katamba agreed in cross-examination that he made no reference to this incident in his grievance. When cross-examining Mr Ansell, Mr Katamba gave some context for the alleged remark, linking it to a discussion about the fact that the majority of the team in Stratford were black, while the majority of the team in East Ham were Asian. That context had never previously been given.

40. We found Mr Katamba's evidence as to these allegations to be inconsistent and unsatisfactory.

<u>Disclosures allegedly made by both Claimants at a meeting on 24 November 2017 (Sch. A, Issue 1.2 and Sch. B, Issue 5.1)</u>

41. A meeting took place on 24 November 2017 between Mr Ansell and the Learning Mentors. Both Claimants attended this meeting. The Learning Mentors had asked to meet Mr Stopford (Deputy Principal), but Mr Stopford asked Mr Ansell to conduct the meeting.

42. The notes of the meeting record one of the other Learning Mentors, Ms Nadina Smith, raising issues about incorrect registers, specifically the fact that she had seen student names appearing on three different registers at the same time; this gave rise to a situation whereby they might be attending a class, and marked present at it, but also appearing on other registers, and marked absent.

43. Both Mr Blondell and Mr Katamba maintained that they disclosed information about falsification of 'registers, consent forms and records' at this meeting.

There is nothing in these notes relating to consent forms, or to records other than registers. We find that no information was disclosed by either Claimant about such documents.

44. In the course of his oral evidence, Mr Ansell accepted (and we find) that Mr Blondell raised issues about alleged falsification of registers, including whether absences marked as 'authorised' on the registers had indeed been authorised. We find that Mr Katamba raised issues about the inaccuracy of registers, as opposed to their falsification.

45. Mr Katamba also alleged that he disclosed information about 'serious failings with regard to student and staff safety.' In his oral evidence, Mr Katamba accepted that was no reference to safety concerns in the notes of this meeting; the reference in the notes to students being 'at risk' in this context referred to the risk of their dropping out of their courses. We find that he did not disclose information about student and staff safety.

46. Both Claimants accepted that Mr Ansell did not respond in a negative way to the fact that these issues were raised by the Learning Mentors. Mr Katamba stated in his witness statement that Mr Ansell's reaction was that he was extremely concerned, and that he diligently took notes of the information which the Learning Mentors were providing. We find that Mr Ansell took the issues the Claimants had raised seriously, and showed no resentment in response to the fact that they had done so.

<u>The proposal to change the role of Learning Mentors</u>

47. On 4 January 2018 Mr Stopford held a meeting with the Curriculum directors about the strategy and future models of their team. An email summarising the content of that discussion was circulated later in the day. Among other matters the following was recorded:

> 'Curriculum Models
>
> Group tutorials to cease and become curriculum tutorials by curriculum staff.
>
> Learning Mentors to work within curriculum areas.'

48. Mr Ansell was away from the college on annual leave during the first week of January, and was not present at this meeting. In an email of 8 January 2018, he raised concerns about moving the group tutorials into the Curriculum team, to be led by curriculum staff. As a result of his intervention, the Learning Mentors continued to lead group tutorials for the remainder of the academic year. Mr Blondell accepted that, even though he had made two disclosures by this point, it did not appear to have caused Mr Ansell to take against him. Indeed, he accepted that in this email Mr Ansell was fighting the Learning Mentors' corner. There was no evidence of Mr Ansell singling out Mr Blondell or Mr Katamba, or indicating to anyone that he regarded them as trouble-makers. We find that Mr Ansell did not react adversely to either Claimant's raising issues of concern with him.

<u>Disclosures allegedly made by both Claimants at a meeting on 9 January 2018 (Sch. A, Issue 1.3 and Sch. B, Issue 5.2)</u>

49. On 9 January 2018 the Learning Mentors had a meeting with Mr Stopford. The discussion was wide-ranging, and included discussion of concerns about equality and diversity, and poor communication between the Learning Mentors and the Curriculum team. Mr Ansell took notes and summarised the content of the meeting in an email of 1 February 2018. We were satisfied that this was a true record; neither Claimant produced their own notes of this meeting.

50. The Claimants contend that they made further protected disclosures of information at this meeting: in Mr Blondell's case, about 'the falsification of registers, records and consent forms'; in Mr Katamba's case 'about learners not being registered; flagging safeguarding concerns about learners in own community that were not being reported; young people who were not part of the college entering without being identified; members of the public breaking into the college; threats of violence to learners, and the falsification of registers, records and consent forms.'

51. The only reference which might relate to registers (as opposed to timetables) is 'information is not being shared e.g. … attendance'; however, there is no reference to falsification. Nor is there any reference to consent forms. There is a reference to records, but no suggestion of wrongdoing which might amount to a breach of a legal obligation. We find that neither Claimant made protected disclosures of information in relation to these matters at this meeting.

52. As for the additional matters said to have been disclosed by Mr Katamba, there is no reference to learners not being registered, and we find that he did not raise this. The Respondent accepted (and we find) that Mr Katamba did disclose that there was a lack of student searches being undertaken. The notes record the following actions in response:

> 'Random searches are taking place and temporary arches to be explored and piloted […] The safety of students and staff is paramount and the role of the Campus Offices extends to both students and staff – Deputy Principal is looking into communication following concerning events.'

53. As for the other safety/security issues, we find that these were raised, but there is no evidence that they were raised by Mr Katamba; in his own witness statement, he refers only to these mattes being raised by 'the team'.

<u>The alleged disclosure by Mr Blondell in an email of 9 February 2018 (Sch. A, Issue 1.4)</u>

54. A disagreement arose between Mr Blondell and his managers in relation to a class which he was scheduled to teach in February 2018. Mr Blondell's original case in relation to this matter was that he was assigned to teach two classes at the same time; this suggested to him that one of the classes was a 'ghost class', and that there was some form of (unspecified) impropriety. In response to a request for clarification from the Tribunal, Mr Blondell gave a different explanation: he accepted that these were genuine classes, but the students were not attending them.

55. Mr Blondell raised this matter in an email of 9 February 2018, which is said to contain protected disclosures, and which Mr Blondell sent to Ms Laurent and Mr Mcalmont. The email reads:

> 'Using our new EBS system, I once again show you clearly why I have previously refused to mark this register, and have also asked you to remove it completely from being under my name.
>
> If you look at the screenshot below, you should clearly be able to see that at 11:20 a.m. on a Tuesday, I am actively teaching a GT class register key: 422384.
>
> I have been telling you for some time, that the register you keep chasing about is not one I teach, but is assigned to me, at the same time on the same day.
>
> So until further notice, I will not be marking this register anymore, as it doesn't exist as far as I'm concerned, and no students have ever attended it. Please see the screenshot below Of [*sic*] the attendance for this class.
>
> Can I have this register completely removed from my name, my attendance statistics readjusted, as they must be badly affected by the non-attendance of the students.'

56. The Respondent's explanation was that this was a simple misunderstanding: two classes had been merged into one, but both the original registers had been retained. On 28 February 2018 Mr Mcalmont wrote to Ms Laurent:

> 'The reg[ister] for 422613 is motor vehicle level 3 GT on Tuesday 11:20 and is assigned to Tony. The class only has three learners hence the merge. Because it is merging with another class he will have more than one register.'

57. On the same day, Ms Laurent forwarded that email to Mr Blondell, and asked him whether he was aware of the merger of classes; he replied that he was not. We find that these emails support the Respondent's explanation, which we accept. Indeed, in oral evidence, Mr Blondell accepted that the classes were merged, that he started with one group, and that some other students joined.

58. Further, the request that Mr Blondell made in his original email was that he wished to have his attendance statistics readjusted 'as they must be badly affected by the non-attendance of the students'. There is no reference in his email to his being concerned about a breach of a legal obligation. We find that this email contained no protected disclosure of information.

59. For completeness, we note that the concerns raised by the Claimant in relation to this matter were not ignored by the Respondent. Ms Laurent wrote to Mr Surinder Matharoo on 14 February 2018, asking him to remove duplicated registers.

<u>Mr Katamba's allegations against Mr Ansell of racial harassment in Term B, 2018 (Sch. B, Issues 18.4, 18.5 and 18.6)</u>

60. Mr Katamba makes three allegations of racial harassment in relation to comments allegedly made by Mr Ansell in Term B, 2018.

61. The first of these (Sch. B, Issue 18.4) is that Mr Ansell allegedly said: 'I recently suffered homophobia, so I know what it's like to be black'. Asked when that

comment was made, Mr Katamba was only able to say that it was 'in around March 2018'. He made no contemporaneous complaint, and took no note of the incident. Mr Ansell accepts that a conversation of some sort took place, but gave a very different account, stating that he and Mr Katamba had shared their experiences of discrimination, in the course of which he said to Mr Katamba that, although he did not know what it was like to be black, he had suffered discrimination because he is gay.

62. The second of these (Sch. B, Issue 18.5) is that Mr Ansell allegedly told the Claimant that: 'you don't fit the profile, you just don't look like a manager here'. Again, Mr Katamba gave no date or context, took no contemporaneous note and made no complaint at the time. Mr Ansell categorically denied making the remark. It was put to Mr Katamba in cross-examination that there were a number of black managers within the organisation, including Ms Laurent, Ms Ikeoko, and Mr Edwards, who was the CEO of the Respondent's technology subsidiary.

63. The third of these (Sch. B, Issue 18.6) is an allegation that Mr Ansell told the Claimant that 'black people don't help themselves'. Mr Ansell denied making the statement. Mr Katamba made no reference to this allegation in his witness statement. Again, in oral evidence he was unable to identify the date of the alleged incident. In the course of cross-examination, Mr Katamba articulated the context in which he alleged it was made: 'I brought up black history month and commented about why do black people rely on white people to do it, I put that to Mr Ansell, who replied black people don't help themselves in relation to black history month'. That context, which on any view is highly relevant to a claim of racial harassment, had been omitted from any previous account given by Mr Katamba.

<u>The events of 21 and 22 March 2018 concerning Mr Katamba</u>

64. On 20 and 21 March 2018 Ms Galyna Galpchak (head of school for ESOL) sent emails to some members of staff, including Mr Katamba, concerning changes to the timetable because of interviews which were taking place to recruit an ESOL lecturer. Addressing Mr Katamba in an email on 21 March 2018, concerning his classes the following day, she wrote:

> 'Faham, please look after E2/gp1 at 1120 Room A112 instead of E1/gp1B'.

65. Mr Katamba replied within an hour:

> 'If they're not actually my timetabled group then I won't be having them for a session, that's not really how it works. Unless I'm mistaken and I misunderstood your proposal – you'll have to make alternative arrangements. Please could you confirm whether they will be available for the tutorial in A101 at 1120 tomorrow.'

66. Ms Galpchak replied later the same morning:

> 'your group tutorial is at 1120-1220 with Entry 1/gp 1B starters. This group will be used for interviews on Thursday. I am asking you to look after E2 gp 1 at the same time instead because the teacher will be engaged with other sts.'

67. Mr Katamba forwarded that email to Ms Laurent later the same morning, who replied:

> 'are you able to deliver this week's GT to the E2 G1 in the morning, instead of the afternoon and then deliver the E1 G1 in the afternoon instead of the morning? Both registers would still be marked for the day based on the students who attended your GTs. Would this work?'

68. What Ms Laurent was effectively asking him to do was to mark the students on the register as attending in the morning, even though the register showed them attending the afternoon, and vice versa. There is no reply from Mr Katamba that day, but it is plain from the emails below that he and Ms Laurent spoke later in the afternoon on 21 March 2018.

69. On 22 March 2018, Mr Katamba attended the class, confirmed that there was a disparity between the class which was present and the time on the register, and walked out of the class, leaving the students unsupervised.

70. At 11:32 (i.e. ten minutes after class ought to have started), Mr Katamba emailed Ms Laurent, stating that he would not take this class:

> 'as this was not done using the college procedures I can't, and will not willingly give false information on a register – therefore I am unable to take that group. We have to follow college policy and this goes against it, as well as being a potential safeguarding issue. Please could you communicate this with ESOL YADS'.

71. According to Ms Prendergast's evidence to Mr Edwards's investigation, Mr Katamba 'walked into the classroom and then left the students unattended and requested that [Ms Laurent] and [Ms Galpchak] resolve the situation'.

72. On 22 March 2018 at around 12:30, Ms Laurent met with Mr Katamba to discuss what had happened. Her account of what was said is contained in email timed later in the afternoon at 17:51.

> 'I am writing to confirm that I met with you today on 22nd March and our meeting was held in the safeguarding office in D003 at approximately 12:30 pm.
>
> I began this meeting by asking you what had happened this morning in the ESOL department. You replied that you went to class and your class was not there. You said that Jessica said that you should babysit another class. I asked you if he used the word babysit and you replied that she asked you to look after another class which is babysitting. I replied that you had agreed to deliver this week's sessions yesterday and I had agreed to sort the register this with Galyna. You replied that you would not mark the wrong register and that you were following college policy and procedure. I replied that I had told you that I would sort out the time switching registers with Galyna. I also told you that you knew that the class would not be there because they were in an interview which is why the class sessions were switched in the first place.
>
> You informed me that you told Jessica that she needs to go and talk to Lorraine about it and you also said to her that she needs to go and talk to

> Galyna about it. I asked you whether you had been talking to her in the ESOL office and you replied that you had been talking to her at the classroom where the students were. You said that you then left the class and went downstairs to talk to me. You said that you tried to call me and tried to contact Clive when you could not get through you sent an email to me and Clive.
>
> I informed you that Janet (Janet Prendergast) had contacted me and had requested a meeting. I informed you that Janet advised me that she does not wish for you to deliver any further GTs for ESOL for the remainder of the academic year because she thinks that you are disrespectful to staff and students. I advised you that I would therefore be looking at alternative GT cover for this group for the remainder of the academic year. You appeared to be upset. You then stood up, stated that you were going to speak to your union as he walked out of the safeguarding room and returned to the main office space.
>
> Please confirm that this is an accurate summary of our meeting once you've had an opportunity to read it.'

73. Mr Katamba immediately disputed the accuracy of this summary in an email reply at 1802. However, he did not record what exactly was inaccurate; instead he asked how to 'arrange a suitable time to discuss this where it can be recorded accurately'.

74. The Tribunal finds, on the balance of probabilities, that Ms Laurent's email was an accurate summary. Mr Katamba walked out of the class, leaving the students unsupervised.

<u>Mr Katamba's disclosure to Mr Stopford in the email of 22 March 2018 about a request by a senior manager to falsify a register (Sch. B, Issue 5.3)</u>

75. At 13:26 on 22 March 2018, Mr Katamba wrote to Mr Stopford, copying in Mr Blondell, Mr Peter Dacey, Ms Nadina Smith, and Ms Besly:

> 'Over the course of the academic year my team and I have continuously been asked to mark registers in a way that isn't wholly accurate. We've been asked to mark students present who are working, those who have travelled for leisure, those who have alternative arrangements just to name a few reasons. We've also had to have learners in our sessions who are not part of our caseload and not on the register. The authorised absence policy has not been used in any of these occasions, neither have timetabling or the campus administrator been informed. We have continually raised this with our line manager(s) and director but there has not been an acceptable response. The team continually feels pressured to record inaccurate information and to the point that the behaviour can be classed as bullying and harassment – which was reported but has never been escalated. Due to the relationship between the directorate in question and the team when we have provided important safeguard information, it wasn't acted on and on two occasions led to serious incidents within the college and externally. I have effectively now been suspended from working with the school I'm pastoral lead [for,] for raising several safeguarding points as well as the policy/procedures of the

college. It would be appreciated if this could be treated with utmost discretion as whenever we have previously highlighted things like this we have been faced [with] abuse or social exclusion within the college.'

76. Mr Ansell accepted in cross-examination that Mr Katamba was right not to sign a register which showed a time for a class in the morning, if that class took place in the afternoon, as he would effectively be indicating that the students were on site, when they may not have been. We accept that this was a disclosure of information.

77. However, he explained that, even if the times on the online register had not been updated before the class, Mr Katamba was not obliged to mark those registers. Instead, he could simply have completed a temporary register to show who had attended the group tutorials he had delivered and provided to the timetabling team, or to Ms Galpchak.

78. The Tribunal accepts that explanation. Although Mr Katamba's concern was legitimate, his actions were not: there was no justification for his decision to walk out of the class, leaving the students unsupervised; it was unprofessional conduct on his part.

Alleged detriments on 22 March 2018 (Sch. B, Issue 10.1, 10.2 and 10.3)

79. Mr Katamba alleged that he was subjected to three detriments on 22 March 2018, by reason of having made a protected disclosure.

80. Two of them are the same allegation put in two different ways: that 'Ms Laurent and Mr Ansell suspended him from carrying out his duties' (Issue 10.1); and that they 'changed the Claimant's workload without any reason' (Issue 10.3). It is not in dispute that Mr Katamba was relieved of his duties in relation to delivering group tutorials for the ESOL department.

81. The Tribunal notes that the meeting between Mr Katamba and Ms Laurent took place at 12.30 p.m., by which time the decision had already been taken to remove the duties. That decision preceded Mr Katamba's email to Mr Stopford, which contains the disclosures. It must follow that the duties were not removed because Mr Katamba complained to Stopford; on the contrary, Mr Katamba complained to Stopford, because the duties were removed. That is plain from the content of his email itself ('I have effectively now been suspended…').

82. Accordingly, Mr Katamba would have to persuade the Tribunal that he was subjected to these detriments because of his earlier pleaded disclosures, in November 2017 and January 2018.

83. There is a further difficulty: Mr Ansell's evidence, which we accept, was that Ms Galpchak asked her line manager, Ms Prendergast, to remove Mr Katamba from working with her team An email from Ms Laurent of 23 March 2018 confirms that Ms Prendergast told her that she did not wish Mr Katamba to undertake any further group tutorials. Thus the removal of the duties was as a decision taken by Ms Prendergast, not Ms Laurent or Mr Ansell, against whom the allegations are made.

84. The third allegation (Issue 10.3) is that Ms Laurent 'attempted to bully the Claimant to change the story and accept an alternative version of events.' This

related to the conversation which Mr Katamba had with Ms Laurent at 12:30 on the day itself, which she then described in her email set out above. As for Ms Laurent's alleged 'bullying', that was no more than a bare assertion on Mr Katamba's part. The email Ms Laurent sent him cannot sensibly be described as bullying. It is neutral in tone, and expressly offers Mr Katamba the opportunity to take issue with her summary of their discussion.

The whistleblowing investigation

85. By an email dated 26 March 2018, Ms Besly replied to the Claimant, informing him that she considered that he had raised issues under the Public Interest Disclosure Policy in his email to Mr Stopford. She said that she would now make appropriate arrangements to deal with the issues he had raised.

86. She arranged for Mr Pat Edwards, CEO of NEWTEC, a subsidiary of Newham College. On 25 April 2018, Mr Edwards sent his completed investigation report to Ms Besly and Mr Stopford. He concluded that Mr Katamba's allegations were unfounded, except in respect of two allegations which were partially upheld: he found that the Learning Mentors had raised issues about registers with their line managers and Mr Ansell; and that there existed 'an unhealthy tension between the Curriculum areas and the Directorate of Student Services, which could potentially lead to misunderstandings, safeguarding concerns and serious incidents'. He made a number of recommendations, including that 'interface meetings' should be held to reduce the tension between Curriculum and Student Services; that a mediation meeting should be held between Mr Katamba, Ms Laurent, Ms Prendergast and Ms Galpchak; that Mr Katamba should be given training in communication skills; and that he should have a mentor assigned to him.

Further PIDA detriments alleged by Mr Katamba in March and April 2018 (Sch. B, Issues 10.4 and 10.5)

87. Mr Katamba alleged (Issue 10.4) that, in March and April 2018, Clive Ansell denied the him training (on Safeguarding Courses by Newham Safeguarding Team, and Management Training) and told him that he would not be considered for promotion.

88. Mr Katamba accepted in cross-examination that, with regard to the safeguarding training, this was only available to those working in the safeguarding team. As for management training, it was put to him that such courses were not open to him, because it was not part of his role. He did not accept either proposition. Mr Ansell's evidence was that paid training opportunities were limited because of budgetary constraints, and were only offered when essential. We accept that evidence.

89. As for being told that he would not be considered for promotion, Mr Katamba was not able to identify the specific occasion on which Mr Ansell was alleged to have made the remark (which Mr Ansell denied making), not even whether it pre- or post-dated the events of 22 March 2018.

90. Mr Katamba further alleged (Issue 10.5) that, in April 2018, Mr Ansell advised the Claimant that he should not correct Directors on how to pronounce his name, criticised him for not greeting Directors, and for wearing trainers, and told him that these issues 'would be used against him.'

91. The only evidence which Mr Katamba gave in his witness statement in relation to being told by Mr Ansell not to correct directors on the pronunciation of his name was a generalised reference to 'micro-aggressions and unconscious bias'. In his oral evidence, however, he identified an email, in which he corrected Ms Prendergast's (Director of ESOL and Community Education) as to the spelling of his name. In an email of 6 Feburary 2018 to Ms Laurent (not copied to Mr Katamba), Ms Prendergast had spelt his first name 'Farham'. Ms Laurent then forwarded the email to him and he replied to Ms Prendergast, copying Ms Laurent in:

> 'Hi Janet – Firstly, it's Faham, as spelt on the intranet, on my ID card and when you type my name on outlook – I did correct you on this yesterday.'

92. This was a discourteous rebuke to a senior manager on a minor point, and we are unsurprised that Ms Prendergast responded with irritation:

> 'Faham, I was not aware of you correcting me on your name and I have had little occasion to use it at any time so would not have seen it on the intranet or your ID.'

93. We find that Mr Ansell became aware of this incident, and knew that Mr Katamba had a strained relationship with some of the Curriculum team. We find that he did advise Mr Katamba not to correct Ms Prendergast as to his name, at least not in the manner Mr Katamba had gone about it. We also find that he encouraged Mr Katamba to go to Ms Prendergast's office and try to get to know her better: Mr Katamba says as much in his own witness statement. However, we find that this advice cannot reasonably be regarded as threatening, or in any way adverse or detrimental; on the contrary, it must have been obvious to Mr Katamba that it was entirely supportive. Mr Ansell saw friction developing, and wanted to help Mr Katamba avoid it. That is consistent with the close working relationship between Mr Ansell and Mr Katamba, which both Claimants and Mr Ansell described.

<u>Mr Katamba's allegation of direct race discrimination (Sch. B, Issue 15) that in Term C, 2018, Mr Ansell denied him the role of Student Experience Manager</u>

94. The role of student experience manager was advertised in December 2017. Mr Katamba was interviewed, but scored third out of four. An external candidate was offered the role, but decided not to accept it. Ms Ikeoko, who is black, was then offered the role, but she also declined it. In the event Ms Laurent, who is also black, was put into the position on an interim basis. The role came up again in March 2018. Mr Katamba applied again, but the recruitment process did not go ahead; Ms Laurent remained in post.

<u>Mr Blondell's allegation of racial harassment in relation to the proposal to form a BME Committee (Sch. A, Issue 11.4)</u>

95. The Respondent has an Equality And Diversity Committee ('EDC'), which meets once every term. On 20 March 2018, Ms Besly sent an email to members of the EDC about arrangements for the next meeting. In the same email she asked the committee members to think about whether the college should form any subgroups, in addition to the existing LGBT committee. On the same day Mr Katamba replied, saying that there ought to be a subcommittee for people of colour.

96. After the EDC meeting on 30 April 2018, Mr Katamba wrote on 1 May 2018 to Ms Besly, stating that he was interested and keen to lead on a BME subcommittee for people of colour. On 4 May 2018 Ms Besly replied, thanking him for his interest and explaining that, in order for the group to be established, it required a dedicated purpose so that its impact could be measured. She asked him to outline what remit the group would have, the frequency of meetings, how it would feed into the wider Equality and Diversity Committee and the likely impact that the group would have.

97. On 11 May 2018 Mr Katamba provided a 4-page document entitled 'BME Committee Proposal'. Ms Besly intended that the proposal would be considered at the next EDC meeting.

98. Mr Blondell stated that he was part of the group that had contributed to the proposal which Mr Katamba had submitted. Ms Besly's evidence was that she was not aware of that. Mr Blondell accepted in oral evidence that the proposal was never rejected, observing only that 'we did not get the impression it was taken seriously and there was a delay in the reply'. Further findings in relation to this matter are made below (at para 110 onwards).

Mr Katamba's allegation in relation to the Seville trip in April 2018 (Sch. B, Issue 10.6)

99. A student trip to Seville was planned for the week commencing 21 May 2018. Mr Katamba signed up to accompany the trip. He alleges that Mr Ansell removed him from the trip at short notice, and that this was by reason of his having made protected disclosures.

100. When members of staff attend school trips, they accrue time off in lieu. Mr Katamba had already accrued TOIL from another trip to Seville in November/December 2017. When Mr Ansell learnt of Mr Katamba's proposed participation in the May trip (around the end of April/beginning of May), he was concerned that Mr Katamba would accrue further TOIL, and he would build up excessive accrued leave; furthermore, his tutorials would have to be covered by another member of staff. In the notes of the internal grievance evidence, Mr Katamba acknowledged that it was 'difficult to take annual leave'.

101. In the list of issues Mr Katamba alleged that Mr Ansell told him he would not be going 'with less than a few hours' notice'; in the internal grievance hearing he alleged that he was informed 'minutes before the trip' that he could not go. He stated that up until then he believed that he would be going. However, in cross-examination, his evidence was that, on the day of departure, he still did not know what time the flight was etc. We regarded that as inherently implausible. Mr Katamba's evidence on this issue was, we concluded, inconsistent and exaggerated.

102. Mr Ansell told Mr Katamba that he could not go on around 2 May 2018, but shortly before the trip, Mr Katamba asked him to confirm the decision in writing; he needed this because of his dependent responsibilities. In his evidence at the grievance, Mr Katamba accepted that 'if he is not going to the trip to send him a confirmation because it was inadequate'. He also stated that he 'asked for an email about this decision because he had responsibilities'.

103. In an email of Friday 18 May 2018, three days before the trip, Mr Ansell wrote to Mr Katamba: 'this is to confirm that you are not going on the Seville trip next

week or the week after'. Mr Katamba had already known for some time that he would not be going on the trip; this was merely a confirmatory email, which Mr Ansell provided at his request.

104. The detriment did not occur as alleged. In any event, the Tribunal accepts Mr Ansell's explanation for the decision.

Mr Blondell's allegations of race discrimination in relation to the delay in completing his probation report (Sch. A, Issue 7.1 and 11.3)

105. It was Mr Blondell's line manager's responsibility to complete his probation report. There had been a number of different managers in the course of the previous year. When Ms Ikeoko took over the role Mr Blondell told her that the report had not been completed; she immediately did the report in November 2017, and apologised to him. She told Mr Blondell that she would send it to Mr Ansell for approval. However, there is no evidence that she did so.

106. Mr Ansell was responsible for some 200 staff; his evidence was that he was not aware that the probation report had not been completed until Mr Blondell drew it to his attention around the beginning of June. On 8 June 2018 Mr Ansell sent Mr Blondell the report, asking him whether he would be able to sign it.

107. As soon as Mr Ansell knew about the failure, he took action. The situation arose because of an administrative error on Ms Ikeoko's part. Insofar as Mr Blondell made an allegation about the late completion of the report, he accepted in cross-examination that he was not alleging that Ms Ikeoko, who is black, was influenced by considerations of race.

Mr Katamba's allegation of racial harassment by Mr Ansell in June 2018 (Sch. B, Issue 18.1)

108. Mr Katamba alleged that, in June 2018, Mr Ansell said to him: 'You're big, black and scary, I mean look at you'. Mr Katamba elaborated on the context for this alleged remark in his witness statement (at paragraph 28):

> 'Clive said: "you're very difficult. It's not hard to get people to say bad things about you, Tracy, Gyalana, Janet, it wouldn't be hard at all". When I mentioned the rumours were circulating that I had been suspended for threatening and being menacing to Janet Prendergast, Clive replied with: "you're big, black and scary, I mean look at you… Who wouldn't believe that?"'

109. Mr Ansell denied saying this.

110. No precise date was given for this alleged incident. Mr Katamba lodged a grievance around this time, but there was no mention of this allegation. Mr Katamba said for the first time in cross-examination that he raised it with Ms Laurent and Ms Ikeako; he then resiled from that assertion almost immediately, and accepted that he had not raised it at the time. The Tribunal notes that in his witness statement, Mr Katamba recorded that his trade union advice had advised him to take notes of all his interactions with Mr Ansell. No such note was disclosed.

Mr Katamba's grievance

111. Before the next meeting of the EDC took place, Mr Katamba sent Ms Besly an email on 22 June 2018, in which he stated that he was withdrawing from the committee, because of discrimination which he alleged he and other BME colleagues had experienced. On 25 June 2018 Ms Besly replied, saying that she was sorry to see him stand down, and asking for further information about the discrimination he was referring to. On 26 June 2018, Mr Katamba replied at some length, but in general terms. In her reply of 27 June 2018, Ms Besly asked again that he provide details of any allegations of racism.

112. On 28 June 2018 Mr Katamba sent a grievance to Ms Besly. The grievance included allegations that he had been subjected to unfair treatment for making disclosures about registers; it contained no allegations of race discrimination.

113. Mr Anil Nagpal, Deputy Principal Finance And Infrastructure, was appointed to investigate the grievance. His investigation was confined to those matters which had not already been investigated by Mr Edwards. On 29 June 2018 Ms Besly invited Mr Katamba a grievance hearing, which was to take place on 11 July 2018. In her letter she identified the complaints which would be taken forward.

The restructure

114. During the first half of 2018, the Respondent needed to make financial savings: the further education sector has faced significant funding cuts since 2010. In the summer of 2018, the Respondent began a review of its staffing structure to determine where savings could be made. Mr Ansell was required to review the structure of the Student Services Directorate. All roles were reviewed to see where efficiency savings could be made. In June 2018, he attended a meeting with Ms Odette Carew (Director of Service Industries), Ms Joanna Swindells (Director of Curriculum) and Ms Prendergast, who were reviewing their own directorates.

115. At that meeting the deletion of the Learning Mentor role was proposed. A number of advantages were identified: qualified teachers were not spending enough time with students, and this was reflected in low pass rates within the curriculum teams; the change would enable the curriculum team to focus on exam preparation and technique, and would give the students one point of contact for academic and personal/social education. The senior management team concluded that spending more time with qualified teachers would help students improve their academic achievement.

116. Ms Besly drafted a consultation paper concerning the proposed restructure of Student Services. As well as the deletion of the Learning Mentor posts, there was a proposal to delete a number of other posts, including one of two English and Maths Support Tutors, one of six Learning Coaches, and one of three Enrichment Officers. The total savings of the restructure came to £338,288, of which £161,201 would be achieved by the deletion of the six Learning Mentor posts.

117. On 29 June 2018, a meeting took place with Trade Unions regarding the restructuring proposal. The final version of the consultation paper concerning the Learning Mentors was sent to them at 09:24 on 2 July 2018. In relation to the deletion of the Learning Mentor posts, the document states:

> 'This proposal is to delete the posts of Learning Mentor within the Student Services team. The posts were established a few years ago to support the curriculum in delivery of specific modules. They were timetabled to deliver up to 18 hours per week on a variety of topics including safeguarding, Prevent, drugs awareness and sexual health.
>
> There has been both some overlap with curriculum teams and a lack of clarity around target setting and this model is not proving to be as effective as was expected with the work of the two teams becoming increasingly separate. It has been proposed that the delivery of specific subject areas that were covered by Learning Mentors is transferred back for delivery with the curriculum teams with access to shared resources such as lesson plans and learning materials.
>
> The aim of the transfer of delivery back into the curriculum teams will be for students [to] have one point of contact and a single focus on increasing attendance and achievement. The transfer of hours back into the study program also provides an opportunity for cost savings to ensure a comprehensive and smarter way of managing the curriculum.'

118. The letter contained an invitation to a meeting on the same afternoon to discuss the paper, confirming that trade union representatives had been invited, and the paper discussed with them prior to its release. Both Mr Katamba and Mr Blondell attended the meeting.

<u>The first collective consultation meeting on 2 July 2018</u>

119. The consultation meeting on 2 July 2018 was attended by the Learning Mentors and their trade union representative. At that meeting the Learning Mentors, including Mr Katamba and Mr Blondell, vigorously contested the proposal. In particular, they queried how Curriculum would manage to absorb all the work currently being done by the Learning Mentors. In his final contribution, Mr Katamba spoke about their pastoral work with students and observed: 'when the Learning Mentors have presented the pastoral programme, all students were satisfied.'

120. After the first meeting, a document was sent to the Learning Mentors responding in detail to the issues they had raised at the meeting.

<u>Disclosures of information by Mr Blondell (Sch. A, Issue 1.5) and Mr Katamba (Sch. B, Issue 5.4) at the second consultation meeting on 6 July 2018</u>

121. A second consultation meeting took place on 6 July 2018. Ms Carew and Ms Swindells attended the meeting to address the Learning Mentors' concerns about how the curriculum team would cover all the work of the Learning Mentors. The Learning Mentors again explained that they were supporting learners, and asked who would be carrying out this work if they were not there.

122. Mr Blondell alleged that he made disclosures of information 'about the falsification of registers, records and consent forms'. In the course of that meeting the following exchange took place:

> 'AB: asks to explain what registers are and if it is a legal document.

> CA: confirms that it is a legal document and that it has to be signed by the directors.
>
> AB: states that they have raised many complaints and registers was one of them. Claims that registers have been changed.
>
> CA: explains that it is under investigation.'

123. Mr Ansell was cross-examined on this exchange by Mr Blondell: he said that he could not explain why he had said that registers were legal documents, and had to be signed by the directors.

124. The Tribunal is satisfied that Mr Blondell did make a disclosure of information at this meeting, in relation to the falsification of registers, but not in relation to other records or consent forms.

125. Mr Katamba alleges that he made disclosures of information 'about learners not being registered; flagging safeguarding concerns learners in own community that were not being reported; young people who were not part of the college entering without being identified; members of the public breaking into the college; threats of violence to learners the falsification of registers, records and consent forms and discriminatory comments and behaviour of Clive Ansell regarding black members of staff.'

126. Having examined the notes of that meeting, the Tribunal accepts that he again made disclosures about the alleged falsification of registers, but not other records or consent forms.

127. At the end of the meeting Mr Katamba is noted as standing up and making what appears to have been an impassioned statement. We find that, in the course of that statement, he made references to discrimination, only one of which amounted to a disclosure of information, as opposed to a generalised allegation, stating that Mr Ansell had said that 'all black women look alike and you can't tell the difference.'

128. Further Mr Katamba raised concerns about students not being searched, and referred to an incident where a member of the public had broken into the college, through a damaged gate, following which armed police entered the premises. We are satisfied that these amounted to disclosures of information relating to safeguarding concerns.

129. We are not satisfied that Mr Katamba made any other disclosures; he did mention 'high levels of aggression', but only by way of a generalised reference.

<u>Ms Swindells' intervention</u>

130. On the evening of Friday 6 July 2018, Ms Swindells wrote to Mr Ansell and Ms Besly about the deletion of the Learning Mentor posts:

> 'I am actually very concerned about the potential deletion of this role. I don't believe it had been working particularly effectively this year and I do believe that academic staff should deliver the group tutorials. However, I do believe also that the LM function has a crucial role to play in supporting at-risk learners on a 1:1 basis.

> […]
>
> I also have a huge concern that teaching staff would be expected to pick up any additional pastoral responsibilities on top of their existing extremely challenging workloads. Part of the reason for teachers taking on tutorials is to address the current under resourcing of curriculum and to increase achievement and high grades to meet distraction challenge gender – this resource was not meant to replace the LM function. I'm also anxious that other parts of the student support team are already at capacity and would struggle to pick up additional referrals and provide effective support to our most vulnerable students.
>
> I have not discussed this with anyone else but I'm afraid I cannot, with a clear conscience, advocate for a deletion of the LM role in the way it is proposed in the consultation paper. Perhaps it would be better if I do not attend any further consultation meetings. I will, of course, not discuss these views with anyone.'

131. Essentially, the concerns raised by Ms Swindells, in relation to pastoral responsibilities, echoed those raised by the Learning Mentors themselves at the consultation meetings.

132. On 9 July 2018, a discussion took place between Mr Ansell, Mr Stephen, Ms Besly, Ms Carew and Ms Swindells, in which they decided that the solution would be to create three new positions of term-time only Pastoral Workers, who would support the curriculum team with the pastoral care of at-risk learners.

133. It was put to the Claimants that, far from anything negative happening by reason of the disclosures on 6 July 2018, there was a positive development immediately afterwards. Mr Blondell refused to accept this and described it as 'a solution put in place to cover a mistake'.

<u>The creation of the Pastoral Worker roles</u>

134. On 9 July 2018, Ms Besly sent an email to staff with a revised consultation paper, including a proposal for three Pastoral Worker roles to be created:

> 'Following the meeting this morning and the discussion around the current consultation on the proposal to delete the Learning Mentors, please find enclosed the revised consultation paper with the new proposal to have three TTO [Term Time Only] Pastoral Workers based in the curriculum and solely working with at-risk students.
>
> …
>
> I have already spoken in confidence to the TUs who are in support of this amendment.'

135. The three new posts were ring-fenced for the Learning Mentors; if fewer than three of them applied, they would be automatically slotted into the roles. If the purpose of the restructuring exercise was to remove Learning Mentors from the organisation, because they were regarded as whistleblowers or troublemakers, then this amended proposal plainly undermined that object.

136. Only one of the Learning Mentors, Sara Dudhia, asked to be considered for the pastoral worker role, and was assimilated. Three other Learning Mentors applied for voluntary severance, which was an option available to all the Learning Mentors.

Third collective consultation meeting on 10 July 2018

137. On 10 July 2018 a consultation meeting took place. Mr Katamba and Mr Blondell attended that meeting. Ms Besly explained that the Pastoral Worker positions would be term-time only. Mr Katamba and Mr Blondell repeatedly questioned in the course of this meeting how this new proposal would work in practice.

Mr Blondell's disclosure (Sch. A, Issue 1.6) at the meeting on 11 July 2018 as part of Mr Katamba's grievance

138. On 11 July 2018, a meeting took place, which was the first part of the hearing of Mr Katamba's grievance, at which Mr Blondell was a witness. No notes of that part of the hearing were disclosed. We accept the Respondent's explanation that this was because they could not be located. The second day of Mr Katamba's grievance hearing took place on 19 July 2018. There are notes of that meeting.

139. Mr Ansell accepted in cross-examination that Mr Blondell brought a lot of registers to the meeting, and that Mr Nagpal questioned him about them. Mr Ansell further agreed that because of what Mr Blondell disclosed at the meeting, Mr Nagpal decided that it warranted an investigation into falsification of registers. The main thrust of the investigation was into the use of authorised absences, and the alleged lack of evidence to support them, as well as registered marks being changed after the event.

140. We accept that Mr Blondell made a disclosure of information about the alleged falsification of registers (but not other records or consent forms) at that meeting.

Final consultation meeting on 18 July 2018

141. The day before, on 18 July 2018, the final consultation meeting took place. the Claimants again challenged the proposal, and reiterated their view that the Learning Monitors worked well.

The conclusion of the process and subsequent steps

142. On 20 July 2018, Ms Besly sent a further email, providing details of two other vacant positions, for which the Learning Mentors could apply (Pastoral Coordinator in Pre 16 and Learning Mentor in Pre 16). These were not like for like roles, because they involved working with a younger age group, and the Coordinator role was a more senior role.

143. On 22 July 2018, a document was prepared by Mr Ansell, giving the outcome of the consultation on the Learning Mentor role, summarising the consultation process which had occurred, and the amendments to the proposals which had resulted. The paper confirmed that the Learning Mentor role would be deleted from the current structure on 31 August 2018, which put at risk seven members of staff who currently carried out those roles.

144. The document revealed a further change, arising out of the consultation: the Pastoral Worker roles would be full-time, rather than term-time only. The role would carry the same salary and benefits as the Learning Mentor role.

145. On 24 July 2018, a letter was sent to Mr Katamba and Mr Blondell, informing them that, as they had not applied for the Pastoral Worker role, they were at risk of redundancy. The letter expressly invited them to engage in a process of considering alternative positions. It invited them to individual consultation meetings on 26 July 2018. The letter warned that, if they failed to engage in individual consultation process, this might result in the college not being able properly to consider suitable alternative positions, which increased the likelihood that they might leave the Respondent's employment on 31 August 2018, by reason of redundancy.

Mr Blondell's disclosure at the meeting of 26 July 2018 (Sch. A, Issue 1.7)

146. Because Ms Sara Dudhia was the only Learning Mentor to apply for the Pastoral Worker role, two other roles remained available.

147. On 26 July 2018 Mr Blondell attended an individual consultation meeting with Ms Pillai (Group HR Manager), at which he indicated that he did not wish to be considered for one of the Pastoral Worker roles.

148. The content of that meeting is recorded in an email which Ms Pillai sent to Mr Blondell following day. It records that Mr Blondell again disclosed information about alleged falsification of registers, including by reference to a student who was working 45/47 hours a week, but was marked as absent. We accept that he made a disclosure of information in relation to registers (but not to records or consent forms).

149. Mr Katamba attended a consultation meeting on 26 July 2018, at which he indicated that he did not wish to be considered for the role of Pastoral Worker. Mr Katamba expressed an interest in a role of Lecturer – Sports, Fitness and Public Service, and Ms Pillai sent him the job description, but he did not apply. He also indicated some interest in the role of Pre-16 Coordinator, but objected to having to apply for it, because he had helped write the job description for the role. Ms Pillai explained that that role was at a higher grade than the Learning Mentors, and was not considered suitable alternative employment; consequently, he would have to apply for the role; in the event, he did not.

150. On 1 August 2018 Mr Ansell wrote to Mr Katamba and Mr Blondell, giving them notice of redundancy. The letters set out three options for the Learning Mentors:

    150.1. they inform Mr Ansell that they wished to be placed into the Pastoral Worker role;

    150.2. they ask to be considered for redeployment, in which case they would remain employed until 30 September 2018, to ensure they had enough time to explore this option; they would have to submit a redeployment form, if they wished to pursue this option;

    150.3. they take no action, and their employment would terminate on 31 August 2018, with a statutory redundancy payment and a payment in respect of outstanding notice.

151. Mr Ansell also informed them of their right to appeal the dismissal. Neither Claimant replied. The Respondent wrote to the Claimants several time in July and August 2018, reminding them to complete the redeployment form. They were also advised to do so by their union. Neither of them did.

152. By contrast, Ms Nadina Smith engaged with the redeployment process. In September 2018 she was offered the post of Student Support Advisor, which she accepted, and she remained in the Respondent's employment. Both Mr Blondell and Mr Katamba accepted that Ms Smith had attended the same meetings as they had, taken part in the same discussions, and raised exactly the same concerns. Mr Blondell accepted that there was 'no difference between the three of us.'

The grievance outcome

153. On 8 August 2018, Mr Nagpil produced his outcome decision in relation to Mr Katamba's grievance. He partially upheld the element of the grievance which related to registers. He instructed that an investigation into the marking of registers and unauthorised absence take place. He concluded however that the decision that Mr Katamba would not go on the Seville trip and the deletion of the Learning Mentor roles were wholly unrelated to any allegations raised by Mr Katamba. In the outcome letter Mr Nagpal recorded the following:

> 'in your summing up you made it very clear that you had nothing against Clive or the college and that you work well with Clive and felt you had a good working relationship. Your main concern was the marking of the registers you just want to ensure that colleges protected with the college was subject to an OFSTED inspection. Clive was also complimentary about professional working relationship he has with you and the team.
>
> There was no evidence provided by you or your witnesses to substantiate cultural individual working practices impacting on service delivery, and intimidation leading to incidents of bullying and harassment to individuals and teams. These were serious allegations to make yet no evidence of particulars to substantiate was presented and the witness testimonies were based on hearsay, which I cannot take into account without the support of the evidence.'

154. On 10 August 2018 Mr Pieter Vermeulen was instructed to investigate the marking of registers, following Mr Nagpil's recommendation.

155. On 13 August 2018 Mr Katamba and Mr Blondell appealed against the notice of termination of their employment. They disputed that there was a genuine redundancy situation. They both alleged that in the course of their employment they had suffered discrimination and harassment and had made public interest disclosures.

Mr Blondell's alleged disclosure on 29 August 2018 (Sch. A, Issue 1.8)

156. Mr Blondell contends that he made a disclosure of information to Mr Vermeulen and Mr Pillai in an email of 29 August 2018 'about the falsification of registers, records and consent forms'.

157. In that email, Mr Blondell wrote to Mr Vermeulen, declining to meet him, and stating that he had already provided all his evidence and saw no point in having any further meetings. He wrote:

> 'I have actually given an account already about these register concerns to your boss Anil during my colleague's grievance. I have also provided evidence (twice), to support what I have said. Copies of this information have been given to Anil.
>
> …
>
> Your investigation should start there, looking at what I have provided, reading my statement, then looking for yourself at registers, not only in YADs but across new colleges as the problem is not specific to YADs. The term GHOST may also ring a bell to you.'

158. We find that this did not amount to a disclosure of information: it is merely a reference to disclosures previously made.

159. Both Claimants' employment terminated on 31 August 2018.

160. On 3 September 2018 they were both invited to (separate) appeal hearings, which took place on 13 September 2018. On 17 September 2018, the Claimants were informed that their appeals had been unsuccessful.

The law to be applied: Public interest disclosure claims

Time limits in PIDA detriment claims

161. With regard to time limits, s.48(3) and (4) ERA 1996 provide (as relevant):

> **(3) An employment Tribunal shall not consider a complaint under this section unless it is presented–**
>
> **(a) before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
>
> **(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection (3)**
>
> **(a) where an act extends over a period, the "date of the act" means the last day of that period**

162. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

163. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

164. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> **'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial Tribunal that he behaved reasonably in not making such enquiries.'**

Protected disclosures

165. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> **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, is made in the public interest and tends to show one or more of the following—**
>
> > **(a) that a criminal offence has been committed, is being committed o 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,**
> >
> > **…**

166. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> **'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. […]**
>
> **31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do**

> **so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.**
>
> **…**
>
> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.'**

167. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, the EAT held that two or more communications taken together may amount to a qualifying disclosure even if, taken on their own, each communication would not.

168. The requirement that the worker's belief that information tends to show a relevant failure must be 'reasonable' indicates that there can be a qualifying disclosure of information even if the worker is wrong. In *Darnton v University of Surrey* [2003] ICR 615, the EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the Tribunal.

169. In *Ibrahim v HCA International Limited* [2019] EWCA Civ. 2007, the Court of Appeal considered the 'public interest' test, referring back to the earlier Court of Appeal case of *Chesterton*. The following principles emerge.

169.1. There is a subjective element to the test: did the worker believe the disclosure was in the public interest? Para 29 of Chesterton suggests s/he may seek to justify the belief in the public interest after the event by reference to matters which were not in his/her mind at the time.

169.2. There is then an objective element: was his/her belief reasonable? Para 28 of Chesterton suggests this test is in essentially the same territory as the 'range of reasonable responses' test.

169.3. 'Motive' is different from belief and that language should be avoided.

169.4. 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker and those that serve a wider interest.

169.5. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest.

169.6. The ET is under an obligation to make sure that the employee has had a proper opportunity to explain his/her case on the public interest issue. If necessary the ET must ask directly whether, at the time he made the disclosure, he believed he was acting in the public interest.

<u>PIDA detriment claims</u>

170. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a

trivial influence on) the employer's treatment of the whistleblower (*per* Elias LJ in *Fecitt v NHS* Manchester [2012] IRLR 64).

PIDA dismissal

171. S.103A ERA provides:

> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

172. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor, and dismissal cases, where it must be the sole or principal reason.

The law to be applied: claims under the Equality Act 2010

Time Limits in discrimination claims

173. S.123(1)(a) EqA provides as follows:

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

174. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

175. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint

that the employer was responsible for an ongoing situation, or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

176. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA, where it considers it just and equitable to do so. That is a very broad discretion. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his rights to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

177. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more difficult, and more likely that memory fade will have an impact on the cogency of the evidence (*Redhead v London Borough of Hounslow* UKEAT/0086/13/LA *per* Simler J at [70]).

The burden of proof

178. The burden of proof provisions are contained in s.136(1)-(3) EqA:

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

179. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Harassment related to race

180. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **[…]**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—
…
race
…

181. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

Direct discrimination because of race

182. S.13(1) EqA provides:

> **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.**

183. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, *per* Lord Nicholls at 511). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

184. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan per* Lord Nicholls at 513).

185. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

186. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [11-12], Lord Nicholls questioned the need for a two-stage approach, particularly in cases where no actual comparator was identified:

> **'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed**

ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.
The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

Victimisation

187. S.27 Equality Act 2010 ('EqA') provides as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

[…]

188. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

Unfair dismissal

Redundancy

189. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

190. S.98 ERA provides so far as relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

> **…**
>
> **(c) is that the employee is redundant …**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

191. A redundancy situation is defined by s.139 ERA.

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—**
>
> **(a) the fact that his employer has ceased or intends to cease—**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
>
> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(b) the fact that the requirements of that business—**
>
> **(i) for employees to carry out work of a particular kind, or**
>
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
>
> **have ceased or diminished or are expected to cease or diminish.**

192. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason) the dismissal was nevertheless unreasonable under S.98(4) ERA.

193. In *Murray v Foyle Meats Ltd* [1999] ICR 827, Lord Irvine approved of the ruling in *Safeway Stores plc v Burrell* [1997] ICR 523 and held that s.139 ERA asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

194. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation (*McCrea v Cullen and Davison Ltd* [1988] IRLR 30). Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

195. It is not for Tribunals to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

196. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with equity and the substantial merits of the case.

197. In many redundancy dismissals, the starting-point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at para 18 onwards).

> **'19. In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt […]**
>
> **1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.**
>
> **2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**
>
> **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
>
> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**
>
> **5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.'**

198. If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: *Virgin Media Ltd v Seddington and Eland* UKEAT/0539/08/DM.

Conclusions: Mr Blondell's allegations of race discrimination

Claims which fail on their facts

Direct race discrimination (Sch. A, Issue 7.2): 'between January 2017 and September 2018, Mr Ansell failed to provide the Claimant with training required for the role'.

199. Mr Blondell accepted in cross-examination that his training record demonstrated that he had been given the specific training required for his role.

Harassment related to race (Sch. A, Issue 11.4): 'on 27 June 2018, Clive Ansell and Olivia Besly rejected the possibility of forming a BME Committee'

200. Mr Blondell accepted in the course of cross-examination that the proposal to form a BME Committee was never rejected by the Respondent.

201. Both claims fail on their facts.

202. Both claims are also out of time. As for his complaint about the alleged failure to provide him with training (Sch. A, Issue 7.1), the date given, January 2017 to September 2018, might suggest that this allegation could also be in time. However, where an allegation relates, as this one does, to an alleged failure to act, it is taken to have been done 'on the expiry of the period in which P might reasonably have been expected to do it' (s.123(4)(b) EqA). Even if were suggested (generously) that Mr Ansell might reasonably have been expected to provide training to Mr Blondell to perform his role within a year of his starting (i.e. January 2018), the claim is still long out of time.

Claims which are in time

203. Any act or omission which occurred before 9 July 2018 is *prima facie* out of time.

204. Mr Blondell makes three allegations of discrimination which are in time.

205. We are prepared to treat his allegation that, throughout 2017 and 2018, Mr Ansell rarely spoke directly to him (Sch. A, Issue 11.1), as an allegation that this was conduct which recurred on a series of occasions, up to the termination of Mr Blondell's employment.

206. His allegations that his dismissal was an act of direct race discrimination, and also of victimisation (Sch. A, Issues 6 and 18), are plainly in time.

207. We deal with the in-time harassment and victimisation allegations first.

Harassment related to race (Sch. A, Issue 11.1): 'throughout 2017 and 2018, Clive Ansell rarely spoke directly to the Claimant'

208. As we have recorded above (at paras 21-22), Mr Blondell accepted that Mr Ansell interacted with him on a professional level on many occasions. Strictly speaking, the pleaded allegation (that Mr Ansell 'rarely spoke' to him) fails at that stage; it is factually incorrect.

209. For completeness, we went on to consider the narrower allegation, that Mr Ansell did not interact with him on a more social level. This allegation was barely particularised. The Claimant mentioned two comparators in his statement ('Lucy (SSO)' and 'Jackie (Councillor)'). However, no specific occasions were identified when the alleged treatment took place.

210. We have recorded Mr Blondell's evidence about Mr Ansell's closer relationship with Mr Katamba. Mr Blondell volunteered that this difference was because Mr

Katamba was a very different kind of person: 'I am quiet and private; Mr Katamba is an extremely intelligent man and very knowledgeable'.

211. Firstly, this evidence suggested to us, that, insofar as Mr Blondell was treated unfavourably, race was not a factor, since Mr Katamba appears to have been something of a confidant of Mr Ansell's. Secondly, Mr Blondell's own explanation proposes a non-discriminatory reason for any difference in treatment: his and Mr Katamba's different characters.

212. Thirdly, Mr Ansell explained that there were approximately two hundred members of staff in his department, and that it was not possible for him to interact with all of them to the same extent, except when they raised specific queries with him. We accept that explanation.

213. We conclude that the reason for any difference in treatment was two-fold: the fact that Mr Ansell could not interact to the same extent with all employees; and Mr Blondell's more reserved character; it was unrelated to race. This claim is not well-founded, and is dismissed.

Victimisation (Sch. A, Issue 18): 'Did Mr Blondell do a protected act in a meeting in March/April 2018 by stating to Mr Ansell that he was racist'; if so, was he dismissed, in part at least, because he did so?

214. Mr Blondell contends that he did a protected act, by calling Mr Ansell a racist at a meeting, at which others were present.

215. There was a marked lack of clarity about when this was alleged to have taken place. Mr Blondell's case changed over time: at the preliminary hearing in November 2019, he said that it occurred at a meeting in March/April 2018, and that is how the allegation is recorded in the list of issues; at the beginning of the final hearing, he said that it occurred in May 2018, at a general team meeting; in cross-examination, he said initially that it happened at a consultation meeting in July 2018; when it was pointed out to him that he had previously referred to a team meeting in May, he reverted to the May date.

216. There was also a lack of consistency in Mr Blondell's accounts of what happened. He was challenged in cross-examination that he did not say in his witness statement that he called Mr Ansell a racist. Mr Blondell said that he did, specifically by reference to Mr Ansell's failure to complete the probation report. The relevant passage in the Claimant's witness statement, dealing with that meeting, refers to:

> 'things [getting] heated in regards to the college and its blatant institutional racism'.

It also contains the following passage:

> 'it was only after I accused Clive to his face during a heated meeting that he always marginalised and completely ignored me whilst in my office, but stood there laughing and joking with other colleagues who so happened to NOT be people of colour. I asked Clive what do you actually know about me, and I think he mumbled something about he has to see a lot of people every day and can't be expected to remember them all.'

217. It is striking that Mr Blondell makes no reference to the issue of the probation report in this account. Rather, he links his sense of marginalisation to a different issue: Mr Ansell's alleged tendency to converse with others, but not with him (i.e., Sch. A, Issue 11.1). Moreover, he does not record in this passage that he accused Mr Ansell in terms of being racist.

218. Mr Ansell denies that he did. He notes that, if that accusation had been made at a group meeting in front of other employees, he would have referred the matter to Ms Besly.

219. Although we accept that a number of these meetings were heated, given the inconsistencies in Mr Blondell's account, the Tribunal is not satisfied, on the balance of probabilities, that he called Mr Ansell a racist at any of the meetings to which he referred.

220. As there was no protected act, the claim that Mr Blondell's dismissal was an act of victimisation must fail.

Extension of time: Sch. A, Issues 7.1, 7.2, 11.2 and 11.3

221. We consider whether the dismissal was an act of direct race discrimination below, and conclude that it was not. Because we have concluded that none of Mr Blondell's discrimination claims, which were brought in time, are well-founded, there is no in-time act, to which earlier alleged acts of discrimination could be linked to form 'conduct extending over a period'. Therefore, he requires an extension of time.

222. The Tribunal asked Mr Blondell why he did not issue his claims earlier. He explained that that he initially tried to resolve his concerns internally, by speaking to managers. He stated that, when the redundancy situation arose, his suspicions were aroused and 'we instantly said we know why they are doing this'. He had access to trade union advice throughout. He stated that he knew that he could bring a claim to an Employment Tribunal, but did not know about time limits until the first day of the final hearing.

223. Mr Blondell did not raise a grievance, alleging race discrimination. He learnt of the redundancy proposals on 2 July 2018. His claim was presented out of time, by reference to that date. The length of the delay in presenting his earlier claims, which predate the dismissal, is substantial: between a month and a year.

224. The Tribunal concludes that Mr Blondell has not provided a good explanation for the delay in presenting those complaints. He had access to trade union advice throughout the material period. We reject his evidence that he was not aware of time limits until the first day of the hearing as implausible: we have no doubt that his union would have advised him about time limits; we note that the claim was issued in time by reference to the effective date of termination. Although there is prejudice to him if the claims do not proceed, there is also prejudice to the Respondent, if the claims are allowed to proceed, owing to the passage of time, and its effect on memory.

225. This is particularly so in relation to Sch A., Issue 11.2, the allegation that the Claimant 'had to work in a harassing environment relating to race as a result of becoming aware of statements that Clive Ansell and Galyna Galynchak had

allegedly made to others about Nadina Smith, Azi Azonga and Faham Katamba'. For reasons we will go on to explain when dealing with Mr Katamba's case, there is a remarkable lack of clarity and specificity about these allegations. That is compounded in Mr Blondell's case because, not only does he not identify the dates and details of the statements allegedly made by Mr Ansell and Ms Galynchak 'to others', he was able to provide only the most general evidence about the circumstances in which he learnt of them.

226. By way of example, Mr Blondell said in oral evidence that Ms Smith had told him that Mr Ansell said that he had not recognised her because she changed her hair. No date was identified. In relation to Ms Galynchak Mr Blondell relied on the fact that she asked Ms Azonga whether she had mental health problems. He confirmed that there was no racial aspects to this alleged remark. He was unable to recall anything specific Ms Galynchak said in relation to Ms Smith. He alleged that she described Mr Katamba in derogatory ways, but was unable to be specific.

227. Given the highly generalised nature of the evidence, the Respondent is severely prejudiced in conducting even the most rudimentary forensic enquiries as part of its defence.

228. Taking into account the delay, the absence of a good explanation, and our observations as to the balance of prejudice, we have concluded that it is not just and equitable to extend time in relation to Sch. A, Issues 7.1, 7.2, 11.2 and 11.3. Accordingly, the Tribunal lacks jurisdiction in respect of them, and they are dismissed.

Conclusions: Mr Katamba's pre-dismissal allegations of race discrimination

229. Mr Katamba's claim that the dismissal was an act of direct race discrimination was presented in time and we consider it below. All his other allegations of race discrimination are out of time, some by many months.

230. Mr Katamba said that he first became aware of his right to bring a Tribunal claim in May/June 2018. Such rights are now a matter of general knowledge; we find it implausible that an employee who is as alive to issues of discrimination as Mr Katamba could be unaware of them.

231. We were particularly struck by his evidence that his trade union advised him to keep a note of his interactions with Mr Ansell, when he raised his concerns with them. Firstly, this indicates that he was seeking advice from his union in relation to his concerns from an early date; and secondly, we consider it highly likely that his union advised him at that point as to his rights.

232. As for the balance of prejudice, plainly if time is not extended, Mr Katamba will be deprived of a potential remedy in respect of these claims. However, we conclude that the prejudice to the Respondent if time is extended, outweighs the prejudice to Mr Katamba.

233. There are no notes of Mr Katamba's interactions with Mr Ansell in the bundle. His evidence in cross-examination was that he may have kept some of these notes on his phone, which has now been wiped clean. We did not find that to be credible. The absence of any contemporaneous records causes real difficulty to the Respondent in seeking to defend these allegations.

234. In relation to the majority of the allegations, no specific date could be given; Mr Katamba could only give the term in which most of them took place, sometimes the month. This deprived the Respondent, and specifically Mr Ansell, of the opportunity to make even the most basic forensic enquiries.

235. The absence of such information, in turn, goes to the underlying merits of the claims: the Tribunal would find it difficult to uphold serious allegations of race discrimination in circumstances where it could not even be satisfied when the alleged incidents took place. We have already recorded a number of other concerns about this group of allegations:

235.1. in relation to Sch. B, Issue 18.3, Mr Katamba's formulation of what Mr Ansell was alleged to have said changed between his grievance ('black women attract attention due to what they are wearing') and his Tribunal claim ('black women have attention seeking bodies');

235.2. in relation to Sch. B, Issue 18.2 and 18.7, it emerged in the course of evidence, that these were not comments made directly to him, or observed by him; they related to matters which had been reported to him and which he then raised with Mr Ansell;

235.3. in relation to Sch. B, Issue 18.7, Mr Katamba gave contradictory dates;

235.4. in relation to Sch. B, Issues 18.4 to 18.6, Mr Katamba made no contemporaneous complaint and, in the case of 18.6, did not even repeat the allegation in his witness statement for these proceedings;

235.5. in relation to Sch. B, Issue 18.5 the alleged remark ('You don't fit the profile, you just don't look like a manager here') is difficult to reconcile with the fact that two of Mr Katamba's own line managers were black;

235.6. in relation to Sch. B, Issue 15, the fact that two black women were offered the role of Student Experience Manager, and one accepted it, undermines the suggestion that Mr Katamba was not appointed because he was black;

235.7. in relation to Sch. B, Issue 18.1, Mr Katamba did not raise the allegation in a grievance presented around the same time, and gave contradictory oral evidence as to whether he raised it verbally with his managers;

235.8. more generally, we note that Mr Katamba was recorded as having spoken warmly of his working relationship with Mr Ansell to Mr Nagpil, as late as July 2018 (see above at para 152).

236. The initial burden in relation to each of these allegations is on Mr Katamba to establish that these incidents occurred, as described by him or at all. These factors plainly affect the underlying merits of his claims, in relation to even such basic factual issues.

237. Taking into account the length of the delay, the absence of a good explanation for it, our conclusions as to the balance of prejudice, and our observations as to the underlying merits of the claims, the Tribunal concludes that it is not just and equitable to extend time in relation to Mr Katamba's pre-termination allegations of discrimination. Consequently, the Tribunal lacks jurisdiction to determine them, and they are dismissed.

Mr Blondell's protected disclosures

238. The Tribunal has already found that a number of the disclosures said to have been made by Mr Blondell were not, in fact, made:

238.1. Sch. A, Issue 1.3, at the meeting of 9 January 2018; and

238.2. Sch. A, Issue 1.4, in the email of 9 February 2018.

Disclosures made by Mr Blondell in relation to the alleged falsification of registers

239. The conclusions below relate to the following disclosures of information, which the Tribunal has accepted Mr Blondell did make:

239.1. Sch. A, Issue 1.1: at the meeting with Mr Ansell in July 2017;

239.2. Sch. A, Issue 1.2: at the meeting on 24 November 2017;

239.3. Sch. A, Issue 1.5: at the second collective consultation meeting on 6 July 2018;

239.4. Sch. A, Issue 1.6: at the grievance meeting on 11 July 2018;

239.5. Sch. A, Issue 1.7: at the individual consultation meeting on 26 July 2018

240. In relation to these disclosures, Mr Blondell contended that he was disclosing information which tended to suggest a breach of a legal obligation: the information that he was disclosing was that his register had been changed by someone other than him, and that that information was either false, or had not been properly verified.

241. The Tribunal has no hesitation in finding that Mr Blondell subjectively believed that inserting false information into a register of attendance was a breach of a legal obligation.

242. He gave a number of accounts as to what precisely that legal obligation was, including an initial statement that it might simply be a breach of the Respondent's internal rules (which would not amount to a breach of a legal obligation). However, he also explained that part of his concern throughout the material period related to the Respondent's duty of care to students, in relation to their safety and well-being; he believed that falsely completing the register would be a breach of that duty. He further explained that he believed that an incorrect register might give rise to a situation, in which a publicly-funded institution received funding in respect of a student who was not actually in attendance.

243. We then considered whether those beliefs were reasonable, and concluded that they were. We had regard to the fact that Mr Blondell was not alone in believing that the registers were, to use his words 'legal documents'. When Mr Ansell was specifically asked this question at a meeting on 6 July 2018, he said that they were (see above at paras 121-122). He later resiled from that in his oral evidence, but if a senior manager held that belief at the time, it is difficult to see how it would be unreasonable for a more junior employee to hold it.

244. Further in an email of 22 March 2018, Ms Loraine Laurent expressed a similar belief:

> 'I gave Galyana the example that if one of our students was involved in an incident and we then needed to check the register to see if they were in class then it might reflect that they were in college when they were not because we have not changed the times. I explained to her that this is a legal document in the event of any of our students being involved in an incident this information would be closely inspected and interrogated.'

245. Mr Blondell may or may not have been right in respect of the funding issue; Mr Ansell stated in oral evidence that funding was not linked to attendance. Nonetheless, we consider that it was a reasonable belief.

246. In all the circumstances, we find that it was reasonable for Mr Blondell to believe that a wrong/false entry in a register would amount to a breach of a legal obligation.

247. We had no hesitation in concluding that Mr Blondell reasonably believed that the disclosure of the information was in the public interest: he believed it related to the accuracy of an important record and/or to the safety and well-being of students, and/or to the financial probity of the institution.

Mr Katamba's protected disclosures

248. The Tribunal has already found that a number of the disclosures said to have been made by Mr Katamba were not, in fact, made:

248.1. Sch. B, Issue 5.1: the disclosures about student and staff safety at the meeting on 24 November 2017;

248.2. the disclosures at Sch. B, Issue 5.2, other than that in relation to a lack of student searches.

<u>Mr Katamba's disclosure in relation to the alleged inaccuracy / falsification of registers</u>

249. In relation to the disclosures at Sch. B, Issue 5.1, 5.3 and 5.4, Mr Katamba stated that he believed that there was a legal obligation on him to record attendance accurately; further, or alternatively, that inaccurate records might lead to the college receiving funding to which it was no entitled; he also stated that it might lead to false information which might be used in an immigration context. We disregarded this last factor, as Mr Katamba did not explain to our satisfaction what he meant by this.

250. For the same reasons as we have given in relation to Mr Blondell above, we are satisfied that, in relation to his disclosures about registers, Mr Katamba believed that there was a breach of a legal obligation, and that belief was a reasonable one; further that he reasonably believed that the disclosure of the information was in the public interest.

<u>Mr Katamba's disclosure (Sch. B, Issue 5.2) at the meeting of 9 January 2018 that there was a lack of student searches being undertaken</u>

251. The Respondent concedes that this disclosure related to the duty of care owed by the Respondent to its staff and students. The Respondent also concedes that Mr Katamba reasonably believed that it was in the public interest to disclose this information. Accordingly, the Tribunal concludes that this was a protected disclosure.

Mr Katamba's disclosure (Sch. B, Issue 5.4) on 6 July 2018 'to Olivia Besly and Sobhana Pillai in a redundancy consultation meeting about learners not being registered; flagging safeguarding concerns learners in own community that were not being reported; young people who were not part of the college entering without being identified; members of the public breaking into the college; threats of violence to learners the falsification of registers, records and consent forms and discriminatory comments and behaviour of Clive Ansell regarding black members of staff'

252. The Tribunal has set out above (at paras 120-128) the extent to which Mr Katamba did/did not make the alleged disclosures. We are satisfied that, in relation to the disclosures about falsification of registers, poor safeguarding and the alleged discriminatory statement, Mr Katamba believed that there was a breach of a legal obligation, and that belief was a reasonable one; further that he reasonably believed that the disclosures of the information were in the public interest.

Conclusion: Mr Katamba's allegations of (pre-termination) PIDA detriment

253. The last allegation which Mr Katamba makes of detriment by reason of his having made a protected disclosure is the decision not to permit him to go to Seville. That occurred on 2 May 2018. All his claims of pre-termination PIDA detriment are out of time.

254. The Tribunal is not satisfied that the alleged detriments constituted 'a series of similar acts'. The acts complained of are dissimilar in their nature: the removal of duties, alleged bullying, denial of training, advice on behaviour, removal from an international trip.

255. Given our conclusion below that Mr Katamba's disclosures played no part in his dismissal, the pre-termination detriments cannot constitute 'an act extending over a period', culminating in the dismissal (which is in time).

256. The Tribunal has set out above Mr Katamba's evidence as to why he issued proceedings when he did, and our assessment of that evidence. The Tribunal has no doubt that Mr Katamba was aware of his right to bring a claim in relation to whistleblowing detriment: all the evidence suggests that he was alive to issues concerning public interest disclosure, and vigilant as to the potential for breaches of legal obligations by the Respondent. His email to Mr Stopford contains complaints of whistleblowing detriment, and was treated as such by Ms Besly. By the time Mr Edwards was brought in to conduct an investigation under the Public Interest Disclosure Policy, we find it inconceivable that Mr Katamba would not have sought and received advice from his union, both as to his rights and as to time limits. If he had not received such advice, we find that he acted unreasonably in not requesting it.

257. The Tribunal concludes that it was reasonably practicable (i.e. reasonably feasible) for Mr Katamba to issue proceedings in relation to the pre-termination PIDA detriments in time. Consequently, the Tribunal has no jurisdiction in relation to these claims, and they must be dismissed.

The Claimant's claims in relation to their dismissal

Was the sole or principal reason for the Claimants' dismissal the fact that they had made public interest disclosures?

258. The Tribunal is satisfied that there was a genuine redundancy situation: the Learning Mentor role was deleted, with a view to making substantial cost savings, and with the specific purpose of transferring some responsibilities to the Curriculum team.

259. At the heart of both Claimants' case is their belief that the redundancy exercise was targeted at them, to remove them, either because they are black, because they made protected disclosures, or (in Mr Blondell's case) because he did a protected act under the Equality Act.

260. The difficulty which the Claimants immediately face is that, in the course of the redundancy exercise, the role of Pastoral Worker was created and offered to the Claimants which, had they accepted it, would have guaranteed their continued employment with the Respondent, notwithstanding their race and/or the fact that they had made protected disclosures/acts. It is difficult to sustain a theory that the Respondent was determined to dismiss the Claimants for an unlawful reason, in circumstances where the Respondent also created a situation, in which they could so easily have avoided dismissal.

261. Similarly, they were strongly encouraged by the Respondent, and by their own union, to complete the redeployment form, and to engage with that process. Again, they declined to do so. Their colleague, Ms Nadina Smith, who had been equally vocal in raising concerns, did engage with the process and was successfully redeployed. That would tend to suggest that the Respondent did not regard the making of protected disclosures as a bar to future employment.

262. We considered whether there was any evidence that the disclosures made by the Claimants were the sole or principal reason for their dismissal (unlike in PIDA detriment claims, it is not enough that the disclosures played a material part in the dismissal).

263. Mr Ansell responded positively, and with concern, when the Claimants raised the issue of registers with him in July and November 2017. He continued to be supportive of the Learning Mentors thereafter, speaking up on their behalf when changes to their roles were mooted in January 2018.

264. When Mr Katamba raised the issue of student searches at the meeting on 9 January 2018, there was no evidence that management reacted in any way adversely to his raising this issue. On the contrary, concern was expressed and a specific action identified in response.

265. There is no evidence, other than bare assertions by the Claimants, that these disclosures played any part in the Respondent's decision to delete the Learning Mentor roles, made at least five months later.

266. Mr Blondell made no further protected disclosures until 6 July 2018, at the second consultation meeting, after the proposal to delete the Learning Mentor roles had been formulated and communicated to them on 2 July 2018. Logically, his disclosures which post-dated those decisions (Sch. A, Issues 1.5, 1.6, 1.7 and 1.8) cannot have been the reason for them. Accordingly, Mr Blondell's claim that the sole or principal reason for his dismissal was the making of protected disclosures must fail: his dismissal was not automatically unfair.

267. As for Mr Katamba, the same must apply to the disclosures made him at the meeting of 6 July 2018: indeed, he accepted in cross-examination that anything disclosed by him at this meeting cannot have influenced the decision to restructure, which had been taken in June.

268. Mr Katamba made only one other disclosure, which predated the restructuring exercise: in his letter to Mr Stopford on 22 March 2018. There was simply no evidence to suggest that there was any adverse reaction by management to his raising these concerns. On the contrary, Ms Besly replied to the Claimant, informing him that she considered that he had raised issues under the Public Interest Disclosure Policy. She made arrangements for an appropriate investigation to take place, which Mr Edwards concluded by the end of April 2018. Mr Katamba did not appeal those conclusions.

269. There is no evidence whatsoever that there was any causative link between Mr Katamba's making the March protected disclosure and his dismissal. In the Tribunal's judgment, the two events were entirely unconnected.

270. The Tribunal concludes that Mr Katamba's protected disclosures were not the sole or principal reason for his dismissal, and accordingly his dismissal was not automatically unfair.

Discriminatory dismissal

271. We then turned to consider whether the Claimants' race played any part in the decision to dismiss them.

272. Again, the Claimants face an immediate difficulty: Ms Smith, who is black, was also put at risk of redundancy. She engaged with the redeployment process, as they did not and, in September 2018, she was offered the post of Student Support Advisor.

273. We have already recorded that Ms Sara Dudhia asked to be considered for one of the Pastoral Worker roles, and was slotted into it, because she was the only applicant from among the Learning Mentors. Mr Blondell accepted that if he had applied for a support worker role it was 'most likely I would have had a fair chance if I had had training'. In response to a question from the Tribunal, he confirmed that he did not need training for that role, as he had extensive experience of discharging those responsibilities.

274. Both confirmed at trial that they were not interested in the Pastoral Worker role. This surprised the Tribunal, given the emphasis that they put on the importance of pastoral work at the collective consultation meeting (before the new roles were created). Mr Blondell went further and asserted that the Pastoral Worker role was a 'sham'. We regarded that assertion as fanciful: these were full-time roles, with significant responsibilities.

275. We conclude that, had Mr Blondell and Mr Katamba expressed an interest in the Pastoral Worker role, and given the fact that no one else applied for them apart from Ms Dudhia, they would certainly have been slotted into them, and may well still have been in the Respondent's employment.

276. Consequently, the reason why they were dismissed was because there was a genuine redundancy situation, and both Claimants refused to take steps, which

would undoubtedly have avoided the dismissal. Their race played no part whatsoever in their dismissal.

277. Consequently, the Tribunal is satisfied that the sole reason for the dismissal of both Claimants was redundancy, which is a potentially fair reason.

Mr Katamba's claim of ordinary unfair dismissal

278. Issues of fairness in relation to the dismissal do not arise in Mr Blondell's case, because he lacks the necessary qualifying period to bring a claim of ordinary unfair dismissal. Having found that there was a potentially fair reason for Mr Katamba's dismissal, we considered the issue of fairness.

279. There were three collective consultation meetings, between 2 and 22 July 2018. We conclude that sufficient warning was given to enable both the union and the affected employees time to consider the proposal; they had ample opportunity to challenge it in detail, and took full advantage of those opportunities.

280. We further conclude that the consultation meetings were genuine, and that the Respondent listened to objections, raised by affected employees at the consultation meetings, in particular that the Learning Mentors' pastoral functions could not properly be discharged by the Curriculum team. The Respondent acted on those concerns, and the Pastoral Worker roles were created, and ring-fenced for the Learning Mentors. By way of a further change, in response to objections raised at the third consultation meeting, those roles (which were initially to be term-time only) were made full-time.

281. We are satisfied that the Respondent acted reasonably in seeking to identify alternative employment for Mr Katamba: had he expressed an interest in the Pastoral Worker role, he would have been slotted into it, and his employment would not have terminated.

282. Having regard to the band of reasonable responses, we conclude that Mr Katamba's dismissal was fair, both procedurally and substantively.

Credibility

283. Finally, we make some brief observations as to credibility. Generally, we found the Respondent's witnesses to be careful and considered. We found Mr Blondell to be a thoughtful and reflective witness, who was willing to make reasonable concessions, even if they were against his own interest. It will be apparent from our findings above, that we had some concerns about Mr Katamba's reliability as a witness.

284. We had no doubt that both Claimants had a passionate commitment to their roles and to their students, and an unshakeable belief in the rightness of their cause. However, the Tribunal has concluded that that belief was misplaced: the mere fact that the dismissal was preceded by the making of protected disclosures does not show that it was caused by them.

285. We thank both Claimants for the diligent and courteous manner in which they presented their cases, and Mr Harris for his calm and focussed presentation of the Respondent's case.

Employment Judge Massarella
Date: 29 December 2020

SCHEDULE A
Issues
MR ANTONY BLONDELL, Case No. 3202444/2018

Automatically unfair dismissal (whistleblowing)

1. Did the Claimant disclose information? The Claimant alleges that he disclosed information:

    1.1 to Clive Ansell in a meeting around July 2017 about the falsification of registers, records and consent forms;

    1.2 to Clive Ansell and Angeline Ikeako in a meeting on 24 November 2017 about the falsification of registers, records and consent forms;

    1.3 to Clive Ansell in a meeting on 9 January 2018 about the falsification of registers, records and consent forms;

    1.4 to Lorraine Laurent and Anthony McCalmont in an email on 9 February 2018 in which the Claimant refused to mark a register in his name from October 2017;

    1.5 to Olivia Besly, Clive Ansell, Sobhana Pillai and Joanna Swindells in a meeting on 6 July 2018 about the falsification of registers, records and consent forms

    1.6 to Anil Nagpal and Clive Ansell in a meeting on 11 July 2018 about the falsification of registers, records and consent forms;

    1.7 to Sobhana Pillai in a meeting on 26 July 2018 about the falsification of registers, records and consent forms;

    1.8 to Pieter Vermeulen and Sobhana Pillai in a written response to an internal investigation on 29 August 2018 about the falsification of registers, records and consent forms.

2. Did the Claimant reasonably believe the information disclosed tended to show that a criminal offence had been, was being or was likely to be committed or deliberately concealed; the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject or deliberately conceal such failure.

3. Did the Claimant reasonably believe it was in the public interest to make the disclosure?

4. Was the disclosure made in accordance with section 43C of the Employment Rights Act 1996? In particular was the qualifying disclosure made to the Respondent or to any person falling within section 43C(1)(a), (1)(b) or (2).

5. If the Claimant made a protected disclosure, was that the principal reason for dismissal?

Claims under Equality Act 2010

Race discrimination

Protected characteristic

6. In relation to the race claims, the Claimant's case is that he was dismissed/subjected to a detriment because of his race, he identifies as black.

Direct discrimination: Equality Act 2010 s13

7. The Claimant alleges that following acts constituted direct race discrimination under s13 of the Equality Act 2010:

    7.1 Clive Ansell did not complete the Claimant's probation until the Claimant challenged about it on 4 May 2018; and

    7.2 between January 2017 and September 2018, Mr Ansell failed to provide the Claimant with training required for the role.

8. Did the above acts occur?

9. If yes, did the Respondent treat the Claimant less favourably than it treated or would have treated others?

10. If the Respondent treated the Claimant less favourably, was this because of race?

Harassment: Equality Act 2010 s26

11. The Claimant alleges that the Respondent engaged in the following conduct which constituted race related harassment under s26(1) of the Equality Act 2010:

    11.1 throughout 2017 and 2018, Clive Ansell rarely spoke directly to the Claimant;

11.2 The Claimant alleges that he had to work in a harassing environment relating to race as a result of becoming aware of statements that Clive Ansel and Galyna Galynchak had allegedly made to others about Nadina Smith, Azi Azonga and Faham Katamba;

11.3 Clive Ansell did not complete the Claimant's probation until the Claimant challenged about it on 4 May 2018;

11.4 on 27 June 2018, Clive Ansell and Olivia Besly rejected the possibility of forming a BME Committee.

12. Did the above conduct take place?

13. Was the conduct in question related to the Claimant's race?

14. Was the conduct in question unwanted?

15. Did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

16. Did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect.

Victimisation: Equality Act 2010 s27

17. Did the Claimant do a protected act in a meeting in March/April 2018 by stating to Mr Ansell that he was racist.

18. Did the Respondent dismiss the Claimant because the Claimant had done a protected act or because the Respondent believed the Claimant had done or may do a protected act?

Remedy

19. If the Claimant was dismissed unfairly, what remedy or remedies is/are the Claimant entitled to as a result?

20. Was any qualifying disclosure made by the Claimant in good faith? If not, is it just and equitable to reduce any compensatory award and to what extent?

21. In the event that the Respondent is found to have unfairly dismissed the Claimant, should compensation be reduced to reflect that the Claimant contributed to his own dismissal; and/or the chance that the Claimant would have been dismissed in any event (in accordance with *Polkey v AE Dayton Services Ltd* [1987] IRLR 503)?

22. What amount of compensation would put the Claimant in the position he would have been in but for the contravention of the Equality Act 2010?

23. Did the Claimant cause or contribute to the treatment to which the complaint relates? If so, to what extent should any compensation be reduced?

24. Has the Claimant taken reasonable steps to mitigate his loss?

SCHEDULE B
Issues
MR FAHAM KATAMBA, Case No. 3202446/2018

Unfair Dismissal

'*Ordinary' unfair dismissal claim*

1. Was there a redundancy situation?

2. If so, was the Claimant's dismissal wholly or mainly attributable to that fact?

3. If not, was the principal reason for the Claimant's dismissal a business reorganisation and, if so, was this a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?

4. In the circumstances, did the Respondent act reasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case?

Automatically unfair dismissal (whistleblowing)

5. Did the Claimant disclose information? The Claimant alleges that he disclosed information:

    5.1 to Clive Ansell in person on 24 November 2017 about the falsification of registers, records and consent forms as well as serious failings with regards to student and staff safety;

    5.2 to Clive Ansell, Paul Stopford and Lorraine Laurant in a meeting in January 2018 about learners not being registered; flagging safeguarding concerns **about** learners in own community that were

not being reported; young people who were not part of the college entering without being identified; members of the public breaking into the college; threats of violence to learners, and the falsification of registers, records and consent forms;

5.3 to Paul Stopford in an email sent on 22 March 2018 about a request by a senior manager to falsify a register; and

5.4 to Olivia Besly and Sobhana Pillai in a redundancy consultation meeting about learners not being registered; flagging safeguarding concerns learners in own community that were not being reported; young people who were not part of the college entering without being identified; members of the public breaking into the college; threats of violence to learners the falsification of registers, records and consent forms and discriminatory comments and behaviour of Clive Ansell regarding black members of staff.

6. Did the Claimant reasonably believe the information disclosed tended to show that a criminal offence had been, was being or was likely to be committed or deliberately concealed; the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject or deliberately conceal such failure; the health and safety of any individual had been, was being or was likely to be endangered or such endangerment had been or was likely to be deliberately concealed.

7. Did the Claimant reasonably believe it was in the public interest to make the disclosure?

8. Was the disclosure made in accordance with section 43C of the Employment Rights Act 1996? In particular was the qualifying disclosure made to the Respondent or to any person falling within section 43C(1)(a), (1)(b) or (2).

9. If the Claimant made a protected disclosure, was that the principal reason for dismissal?

Detriment: protected disclosure

10 The Claimant alleges that the Respondent subjected him to a detriment, in contravention of section 47B of the Employment Rights Act 1996, by doing the following things:

10.1 On 22 March 2018, Lorraine Laurent and Clive Ansell suspended the Claimant from carrying out his duties;

10.2 On 22 March 2018, Lorraine Laurent attempted to bully the Claimant to change the story and accept an alternative version of events;

10.3 On 22 March 2018, Lorraine Laurent & Clive Ansell changed the Claimant's workload without any reason;

10.4 In March and April 2018, Clive Ansell denied the Claimant training on

Safeguarding Courses by Newham Safeguarding Team and Management Training and told the Claimant that he would not be considered for promotion;

10.5 In April 2018, Clive Ansell highlighted that the Claimant should not correct Directors on how to pronounce his name, that the Claimant was not greeting Directors and that the Claimant was wearing trainers and told the Claimant that these issues would be used against him;

10.6 In April 2018, Clive Ansell removed the Claimant from an international project to Seville with less than a few hours' notice.

11. Did the above acts take place?

12. Was the Claimant subjected to a detriment by the acts complained of?

13. If the Claimant made a protected disclosure, as set out in numbers 5 to 8 above, was this the reason for the treatment complained of?

Claims under Equality Act 2010

Race discrimination

Protected characteristic

14. In relation to the race claims, the Claimant's case is that he was dismissed/subjected to a detriment because of his race, he identifies as Black African.

Direct discrimination: Equality Act 2010 s13

15. In Term C 2018, did Clive Ansell deny the Claimant the role of Student Experience Manager?

16. If yes, did the Respondent treat the Claimant less favourably than it treated or would have treated others?

17. If the Respondent treated the Claimant less favourably, was this because of race?

Harassment: Equality Act 2010 s26

18. The Claimant alleges that the Respondent engaged in the following conduct which constituted race related harassment under s26(1) of the Equality Act 2010:

18.1 In June 2018, Clive Ansell said "You're big, black and scary, I mean look at you";

18.2 In June 2018, Clive Ansell said "Black Women all look alike";

18.3 In Term A 2017, Clive Ansell said “Black women have attention seeking bodies”;

18.4 In Term B 2018, Clive Ansell said “I recently suffered homophobia so I know what it’s like to be black”;

18.5 In Term B 2018, Clive Ansell said “You don’t fit the profile, you just don’t look like a manager here”;

18.6 In Term B 2018, Clive Ansell said “Black people don’t help themselves”;

18.7 In Term A 2017, Clive Ansell said “It’s hard to tell black women apart”; and

18.8 In Term A 2017, Clive Ansell said “Your people are trouble".

19. Did the above conduct take place?

20 Was the conduct in question related to the Claimant’s race?

21. Was the conduct in question unwanted?

22. Did the conduct in question have the purpose of violating the Claimant’s dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

23. Did the conduct in question have the effect of violating the Claimant’s dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant’s perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect.

Remedy

24. If the Claimant was dismissed unfairly, what remedy or remedies is/are the Claimant entitled to as a result?

25. In the event that the Respondent is found to have unfairly dismissed the Claimant, should compensation be reduced to reflect that the Claimant contributed to his own dismissal; and/or the chance that the Claimant would have been dismissed in any event (in accordance with Polkey v AE Dayton Services Ltd [1987] IRLR 503)?

26. If the Claimant was discriminated against or subjected to a detriment because of having made a protected disclosure, is it just and equitable to award compensation?

27. What loss has the Claimant sustained in consequence of the treatment complained of?

28. What amount of compensation would put the Claimant in the position he would have been in but for the contravention of the Equality Act 2010?

29. Was any qualifying disclosure made by the Claimant in good faith? If not, is it just and equitable to reduce any compensatory award and to what extent?

30. Did the Claimant cause or contribute to the treatment to which the complaint relates? If so, to what extent should any compensation be reduced?

31. Has the Claimant taken reasonable steps to mitigate his loss?