EMPLOYMENT TRIBUNALS

Claimant: **Ms K Kaur**

Respondent: **The Urswick School**

Heard at: **East London Hearing Centre (in public)**

On: **19, 20, 21, 22 and 26 November 2024**

Before: **Employment Judge Gordon Walker (sitting alone)**

Appearances

For the claimant: Mr N Kennan, counsel

For the respondent: Mr M Magee, counsel

JUDGMENT having been sent to the parties on 3 December 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These reasons do not seek to address every point about which the parties have disagreed. I only deal with the points that are relevant to the issues that the Tribunal must consider to decide if the claim succeeds or fails. If I have not mentioned a point, it does not mean that I have overlooked it. It simply means it is not relevant to these issues.

Issues

2. The issues were agreed and amended by consent during the course of the hearing. The final list of issues was as follows:

Maternity discrimination

1. *Did the respondent treat the claimant unfavourably because she was exercising or had exercised or sought to exercise her right to ordinary*

or additional maternity leave? The claimant alleges the following unfavourable treatment:

a. *Failing to advise the claimant of the head of art vacancy;*

b. *Expecting the claimant to undertake admin work for another staff member during her kit days;*

c. *Providing the claimant with a timetable involving an excessive workload;*

d. *Providing the claimant with a timetable with no examination classes.*

2. *If so what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?*

3. *[Withdrawn]*

4. *[Withdrawn]*

Victimisation

5. *The following are agreed protected acts:*

a. *On 20 July 2022 the claimants' email to the headteacher Richard Brown;*

b. *On 7 September 2022, the claimant's grievance;*

c. *The claimant's interview pursuant to her grievance, in November 2022;*

d. *On 19 January 2023 the claimant's ET1.*

6. *If so did the respondent subject the claimant to the following detriments because of one or more of the protected acts above?*

I. *The response of Mr. Brown dated 21 July 2022;*

II. *The refusal of Mr. Brown to address the claimant's workload concerns over the summer holidays as detailed in the e-mail of 21 July 2022;*

III. *The further e-mail from Richard Brown on 1 September 2022;*

IV. *The continuing refusal of Mr. Brown to address the claimant's workload concerns at the start of term;*

V. *The failure to investigate the claimant's grievance dated 7 September 2022;*

VI. *The respondent refused to investigate the claimant's workload issues during the claimant's grievance received on 20 December 2022 upon finding there were not discriminatory;*

VII. *The failure to provide the claimant with a copy of the grievance outcome;*

VIII. *The respondent's description in the grievance outcome report of the claimant's e-mail of 20 July 2022 as rude and insulting;*

IX. *Deleting the claimant's emails from her work inbox;*

X. *The respondent's failure to comply with the claimant's request for data submitted on 9 January 2023;*

XI. *The respondent's failure to enable the claimant to return to work until 26 April 2023, despite her being able to do so from 20 February 2023;*

XII. *The respondent failed to make any permanent amendments to the claimant's timetable following her return from sick leave on 26 April 2023;*

XIII. *The respondent's conduct during the claimant's appeal hearing on 12 May 2023 and in particular the comment "I asked myself if I received that as the CEO if you like of an organisation how would those phrases react on me they could be ill advised";*

XIV. *The respondent's conduct during the claimant's appeal hearing on 12 May 2023 and in particular the question to the head teacher "what affect did that have on you?"*

Direct discrimination

7. *Did the respondent subject the claimant to the less favourable treatment at paragraphs 4(h)(m) and (n) above?*

8. *Was the conduct because of the claimant sex?*

9. *The claimant relies on a hypothetical male comparator raising concerns about discrimination.*

Time limits

10. *Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010] The Tribunal will decide:*

    a. *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*

b. If not, was there conduct extending over a period?

c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
i. Why were the complaints not made to the Tribunal in time?
ii. In any event, is it just and equitable in all the circumstances to extend time?

Procedure, documents, and evidence heard

3. The parties produced an agreed bundle of 599 pages. On the second day an extra document (a letter dated 2 June 2022) was produced.

4. The Tribunal heard evidence from four witnesses, who provided signed witness statements:

4.1 The claimant;

4.2 For the respondent:
4.2.1 Mr R Brown, Headteacher;
4.2.2 Mr D Wood, Director of Finance and Resources;
4.2.3 Ms A Pugh, Head of English.

5. The claim of indirect discrimination was withdrawn on first day of the hearing.

6. An uncontested oral application to amend the response to defend the amended claims was allowed on the second day.

7. Adjustments were made as requested by the parties: additional breaks were offered to accommodate Ms Pugh's pregnancy.

Findings of facts

8. On 1 September 2019 the claimant commenced employment with the respondent secondary school. She was employed as an art and photography teacher on the M5 pay scale.

9. In February 2021 the claimant discovered that she was pregnant and disclosed that to the respondent. The claimant disclosed her pregnancy at an early stage due to her severe pregnancy related sickness. She was signed off work for approximately eight teaching weeks from February to March 2021 with pregnancy related sickness.

10. The claimant initially found the school (specifically Mr. Brown and Mr Wood) to be supportive about her pregnancy. They made adjustments to allow her to access work and maintain her health. They referred her to occupational health, and conducted a risk assessment.

11. On 24 September 2021 the claimant commenced her maternity leave. The claimant's daughter was born on 3 October 2021. The claimant returned from maternity leave on 5 July 2022.

12. Given the dates of her maternity leave, the claimant was absent for almost the entire academic year 2021/22. This was an exceptionally challenging year for the school, due to the impact of covid and the Department for Education's changing requirements to minimise covid infection. Mr Brown described it as the worst year of his professional career.

Head of art position

13. Prior to the claimant's maternity leave, the head of the art department was Mr J Beasley. He planned to take the 2022 spring term as shared parental leave. He then decided to resign his post at the end of the spring term rather than resume his role of head of art.

14. Around the same time, another art teacher (Ms F Cooper), who had been at the school for around 19 years, resigned and left at the end of the autumn 2021/22 term.

15. This meant that from the start of 2022 the two most senior members of the art department had resigned.

16. In August 2021 Ms R Rai was appointed as the claimant's maternity cover teacher, to begin after the October 2021 half term. The claimant accepted under cross examination that, given the departure of Mr Beasley and Ms Cooper and her own period of maternity leave, the only experienced teacher in the art department from the spring term of 2022 was Ms Rai. The claimant accepted that Ms Rai had been a teacher for 19 years and that she had been head of art 15 years prior and that she had also been a key stage 3 and key stage 4 art coordinator.

17. Key Stage 3 ("KS3") covers years 7, 8 and 9. Art is a compulsory subject in KS3. Key stage 4 ("KS4") is GCSEs: years 10 and 11. Key stage 5 ("KS5") is A-level: years 12 and 13. For KS4 and KS5 art is an optional subject. Photography is not taught at KS3. It is an optional subject for KS4 and KS5.

18. On 19 November 2021 by WhatsApp message from the claimant to Ms Rai, the claimant stated "*Rita I really think you would make a great HoD… I would be interested in sharing the TLR with you it would mean less pressure and more support*".

19. The reference to sharing the teaching and learning responsibility ("TLR") was a potential proposal by the claimant to job share the permanent head of art role with Ms Rai on the claimant's return from maternity leave. I accept and find that the claimant was interested in applying for the permanent head of art role.

20. On 25 November 2021 Mr. Brown offered the role of acting head of art to Ms Rai on a fixed term from 1 January 2022 to 31 August 2022. Ms Rai told the claimant about this by WhatsApp message on the same day. The claimant

assumed that the permanent head of art role starting in the 2022/23 academic year would be advertised, giving her an opportunity to apply.

21. There was an OFSTED inspection of the school on 5 and 6 July 2022. Mr Brown was absent during this time. I accept his evidence that he offered Ms Rai the permanent head of art role after the OFSTED inspection in early July 2022. This is consistent with the claimant having overhead Ms Rai on 8 July 2022 informing new members of staff at the garden party that she was looking forward to continuing as head of the art department the following year.

22. On 2 June 2022 Ms Rai was sent a letter confirming a change in her hours to 0.8 FTE. This letter does not state anything about Ms Rai's appointment to the role of permanent head of art. I therefore reject the claimant's submission that this letter is evidence that Ms Rai was appointed to the permanent role in June 2022.

23. The respondent did not inform the claimant of the permanent head of art vacancy or give her an opportunity to apply.

24. Mr. Brown said that this was because of the acute pressure that the art department was under at the time of the claimant's maternity leave, given the resignation of two senior members of staff. He said that he did not inform the claimant of the permanent vacancy because he did not realise that she would be interested in the role, and that that was an oversight on his part.

25. The claimant had only expressed an interest in pastoral roles to Mr Brown. She had not expressed an interest in the head of art role. I accept the claimant's oral evidence that this was because, prior to her maternity leave, Mr Beasley was in post, and she respected him and "*she did not want to climb over his head to get that role*".

<u>KIT days</u>

26. On 10 March 2022 the claimant emailed Mr. Brown about her KIT days. She said that she thought it might be worth her coming in to assist with the department moderation in late May, and then to help with the exhibiting of work for the external moderation after the May half term.

27. On 26 April 2022 the claimant emailed Mr. Brown again about her KIT days. She proposed dates in May and June to revise and finalise GCSE, AS and A level grades and to mount and hang GCSE AS/A level work for external moderation.

28. On 4 May 2022 Ms Rai sent a WhatsApp message to the claimant informing her that the GCSE moderator would come on 14 June 2022 and suggesting that she came in on the 10 and 13 June to help present the work. She also suggested that the claimant come in on 23 May, before the marks had to be submitted by the school on the 25 May. The claimant responded saying that she could do 10 June, she could not do the 23 May, but she could still do the 24 May.

29. The claimant attended six KIT days between April and June 2022. Four of those KIT days took place in June (page 203-206). On her KIT days the claimant assisted with work to prepare the GCSE coursework for moderation. The students' work was in a disorganised state. The claimant was left to organise other teachers' work. She was not given a designated desk and had to work on the floor in the staff room. There were no discussions about her well-being or her return from maternity leave.

30. On her penultimate KIT Day, the claimant raised issues with Ms Rai about the KIT days. She asked if Ms Rai knew what a KIT Day was and Ms Rai said she did not. The claimant raised concerns that the department appeared quite chaotic. Ms Rai said she did not feel comfortable and wanted a mediator; the claimant agreed. They went to Mr Brown's office, but he was not there. The claimant then emailed to see if Ms Rai and she could go and see Mr Brown. Ms Rai went to speak with Mr. Brown alone.

31. On her final KIT Day, on 28 June 2022, the claimant met Mr. Brown. During this conversation Mr. Brown asked the claimant if she would be willing to change her contract from a teacher contract to a part time teacher / part time art display technician contract. The claimant accepted under cross examination that it was inevitable that, by declining to do technician work, this would mean that she would do more teaching hours compared with her colleagues who were doing technician work.

32. On 29 June 2022 the claimant sent an e-mail to Mr. Brown stating "*I have had a think about your suggestion to take on some technician duties, and feel I would be best placed to continue as a full time art teacher at present*".

Timetable

33. On 5 July 2022 the claimant's maternity leave ended and she returned to work full time, mainly providing support to other lessons, given the proximity to the end of the academic year.

34. On 19 July 2022 Ms Rai showed the claimant her provisional timetable for September 2022.

35. The art and photography department for the 2022/23 academic year was made up as follows:

    35.1 Ms Rai, head of department 0.8 FTE and working five hours per week as a technician;
    35.2 Ms Atkinson, art teacher, working full time but with five hours per week as a technician;
    35.3 Mr P Rodwell, a newly recruited photography teacher who was not an art teacher. He therefore only taught KS4 and KS5 photography;
    35.4 The claimant, working full time as an art teacher.

36. Ms N Dewes was the teacher responsible for timetabling. The claimant accepted under cross examination that the process of timetabling was particularly difficult at this time, given the restrictions put in place by the

Department for Education to minimise COVID infection: such as staggered arrivals and break times.

37. Initially there was an administrative error on the claimant's timetable which resulted in her having more than the maximum 20 hours of teaching per week. That error was rectified, and she was never required to teach more than 20 hours per week.

38. The claimant does not object to the number of teaching hours, or the fact that Ms Rai and Ms Atkinson worked fewer hours given their choice to take on technician duties.

39. The claimant considers that the timetable was excessive because she had a larger number of groups and students than her peers. The reason for this was that she was given more KS3 groups, for which art is a compulsory subject. The claimant was timetabled to teach 17 of the 19 KS3 groups and two thirds of the students taught across the department.

40. The claimant says that having more students creates more work because of the respondent's marking policy and also because of the contact time required in supporting students and interacting with their parents and carers. The respondent denies this. It says that the preparatory work for KS3 is less than for KS4 and KS5 as it is at a more basic level and the lessons can be duplicated across all classes in the year group. As KS4 and KS5 are exam years, the level of teacher input is greater.

41. The claimant raised concerns with Ms Rai and asked what to do about the imbalance with marking. She was told that she would have to follow the school's three-week marking policy.

42. The claimant was disappointed that, except for one year 10 class, she was not given KS4 and KS5 classes. The claimant enjoyed the level of creativity at this teaching level. She also wanted to teach examination years for her career development. She asked Ms Rai to reconsider and give her at least one KS5 group. Ms Rai's reply was that, as head of department, she wanted to teach more KS4 and KS5. To ensure continuity of teaching over the two-year GCSE or A level periods, the same teacher will teach a class for both year 10 and 11, and for year 12 and 13.

43. The claimant felt that the timetable was a punishment for having had maternity leave. The claimant said in oral evidence that she came to this conclusion following the respondent's actions or inactions on this issue. She said that she felt the link with her maternity leave was because, by being absent on maternity leave, she was not able to have the same level of input into her timetable through discussion.

44. On 19 July 2022 the claimant emailed Ms Rai about her timetable. Ms Rai replied the following day, which was the last day of the academic year, and a non-teaching day. She said "*thank you for your e-mail regarding your timetable. I understand your concerns and, as you are aware, I had no say in the timetables given. I'm happy to have a meeting on our return to discuss*

this further. Thank you for all your help yesterday and have a lovely summer too".

20 July 2022 email from the claimant and Mr Brown's response

45. Later on 20 July 2022 at 18:08 the claimant emailed Mr. Brown cc'ing in Ms Rai and her trade union representative. She raised concerns about her timetable and stated "*I am writing to you with renewed concerns about my treatment on return from maternity leave, and what feels like increasingly unfair and discriminatory practice…. In the absence of a professional explanation, I have been forced to ponder why I am being treated differently. The only clear difference I can identify is that I have recently returned from maternity leave and that during my KIT days, I raised concerns with my line manager about the lack of preparation within the department for external moderations. This is therefore why I'm raising concerns about possible discriminatory practices*".

46. Mr. Brown was upset to receive this e-mail which he took as an accusation against him of discrimination. This was compounded by the timing of the e-mail and the excessively difficult academic year he had just had. He says in his witness statement at paragraph 38 that he was exasperated by the claimant's e-mail sent at the end of term, and shocked and saddened by her allegations which he regarded as deliberately damaging towards him.

47. Mr Brown's response on 21 July 2022 begins by saying "*I write in response to your e-mail which I find to be completely unacceptable. At best you're accusing me of lack of integrity and at worst of sexual discrimination which if correct would amount to gross misconduct*". The letter goes on to explain the timetable and the impact that the claimant's decision to be a full-time art teacher, rather than an art teacher and technician, had on her timetable. The letter ends "*please withdraw your unfounded allegations of discrimination or confirm you do not wish to do so in which case it will be referred to the chair of governors who will follow the school's grievance procedure, as regards complaints against the headteacher*".

48. The school's grievance procedure sets out an informal process through which grievances may be resolved without recourse to any subsequent stage, and a formal procedure to be invoked when the informal resolution stage has failed or is inappropriate due to the serious nature of the complaint. It says "*if the complaint is against the headteacher, the employee may request an interview with a member of the governing body under the informal stage. In the first instance the employee should contact the chair who will nominate a suitable governor to look into the matter*". The grievance procedure does not state that grievances against the head teacher must immediately move to the formal stage. Neither does it say that allegations of discrimination must move directly to the formal stage.

49. Mr. Brown did not take any action in relation to the claimant's 20 July 2022 e-mail during the summer holiday. This was because he needed the summer to rest and recuperate after the difficult year. In his witness statement at paragraph 41 he states: "*expecting me to look at her timetable during the summer holidays was unreasonable*".

50. On 1 September 2022 Mr. Brown sent the claimant an e-mail at 07:49 stating "*I hope you had a good break. You have yet to respond to this letter. Until you do so I am unable to meet with you informally and will not enter into any discussions about your timetable. I've advised Rita that your timetable is also not a matter for discussion at departmental meetings and is outside of Rita's remit*".

51. In oral evidence Mr. Brown explained how he would have done things differently if the claimant had not made allegations of discrimination in her e-mail of 20 July 2022. He said that the tone of his response would have been different. He would have tried to reassure the claimant: he would have gone through the impact of the technician duties. He would have explained potential variations on the marking policy and devised a schedule of when the claimant could mark what. He would have reminded her that subjects like art only set homework fortnightly at KS3. He said there were a number of things that he could have said to reassure her. He said that he may have made changes to the timetable and certainly would have discussed this with Ms Dewes on the teacher training days at the start of term. He said that he felt he could not have these conversations because, if he did that while the discrimination allegations were live, it would be like he was accepting that the allegations were valid. He also felt that having informal discussions without others being present would have left him vulnerable.

Grievance

52. On 7 September 2022 the claimant submitted a formal grievance. She made allegations of discrimination and victimisation.

53. The respondent appointed Mr Jarrett-Potts to investigate the grievance. Mr. Jarrett-Potts sent the claimant an e-mail on 31 October 2022 from his AOL account. In that e-mail he does not set out his qualifications or his status as grievance investigator. He just begins the e-mail by stating "*I have started the investigation*". There was a meeting with the claimant and Mr Jarrett-Potts on 10 November 2022. Mr Jarrett-Potts produced some notes of that meeting, which the claimant amended. Mr Jarrett-Potts accepted some but not all of those amendments.

54. The respondent says that Mr Jarrett-Potts is an HR professional appointed by the school and other schools in Hackney to conduct investigations and carry out other HR duties.

55. At some stage in November 2022 Mr Jarrett-Potts met with Mr. Brown. There are no notes of that meeting but a statement was written up following that meeting and signed by Mr Brown. It states "*I have not discriminated or victimised the claimant I do not do so and do take offence at such an accusation*".

56. On 20 December 2022 the chair of governors Mr R Pryce sent the claimant an outcome letter. This was barely more than one page and just set out the conclusions of Mr Jarrett-Potts. The claimant was not provided with the

report of Mr Jarrett-Potts, she did not receive that until a few days before the appeal meeting which took place on 12 May 2023.

57. The investigation report is five and half pages plus attachments. In addition to the interviews with the claimant and Mr. Brown, Mr Jarrett-Potts considered various emails and correspondence. He did not interview anyone else, such as Ms Dewes. He states "*importantly the timetable itself is not judged to be a matter for this investigation. This is an educational professional matter and debate. This grievance is quite specifically about the process that led to its creation and whether that process and its follow-up was a product of discrimination. It is that which is investigated*". The report refers to the claimant's e-mail of 20 July 2022 and says "*the e-mail effectively criticises Mr. Brown in questioning the lack of professional explanation. For what is claimed to be a constructive inquiry this can easily be received as rude and insulting*". The grievance was dismissed.

Deletion of emails

58. On 3 January 2023 the claimant noticed that emails between herself and Mr. Brown for the period 20 July 2022 to 1 September 2022 were missing from her inbox. The evidence from the respondent's witnesses Mr. Brown and Mr Wood was that emails are never deleted. Only in the event of a staff member being suspended, which was not the case for the claimant, would anyone be justified in accessing an employee's emails, and, in those circumstances, the e-mail account would be archived, and nothing would be deleted.

Request for data and documents

59. On 9 January 2023 the claimant sent Mr Wood an e-mail asking for personal data. She requested six categories including her personnel file and various emails and correspondence.

60. On 1 February 2023 Mr Wood wrote simply to acknowledge receipt of this e-mail and to inform her that the matter was being looked into.

61. On 10 February 2023 the claimant wrote to Mr Wood following up on the requests and he replied the same day referring to the letter that had been sent out on 1 February 2023.

62. On 19 April 2023 Mr Wood wrote regarding the request stating "*it does seem practical for you to consider your staff file next week and then review what you feel you still need to request. The school does not use any social media accounts. Much of what you request will already be on your school e-mail accounts so is easily accessible to you. Finally there are wider issues involved here… you are engaged in litigation with the school and therefore the school has to take a view of that process and consider the matter of data relative to that process*".

63. Mr Wood gave oral evidence about what was meant by this reference to litigation. He said that the data had to be looked at to see if it was relevant to the claimant's Tribunal claim. He accepted that if there was any data that

was damaging to the respondent's case for litigation, it would not be disclosed. But he said that all data was disclosed.

64. On 25 April 2023 the claimant's legal representative wrote to Mr Wood explaining what was required and asserting that denying the claimant her rights because of a discrimination claim was a further act of discrimination (victimisation).

65. Mr Wood replied on the 25 April 2023 acknowledging the e-mail and referring to further arrangements to be made for the claimant to review her file.

Return to work

66. The claimant was signed off work with sickness absence from 21 September 2022.

67. On 10 January 2023 the claimant e-mailed Mr Wood suggesting a return to work meeting. Mr Wood replied the following day saying the respondent would arrange a return to work interview after she returned to work.

68. On 2 February 2023 the claimant e-mailed the respondent advising that she had met with her consultant at St Thomas's hospital. She advised that she was seeking to return to work and requested an occupational health appointment.

69. Mr Wood wrote an occupational health referral around this time, which states "*we would like the following question asked; due to her work issues not being resolved to her position, how will this affect her fitness for work given she is currently in dispute with us and litigation is ongoing?*"

70. The claimant was seen by occupational health on 9 February 2023. The report dated 16 February 2023 states that the claimant is keen to return to work and would like to do so after the half term break (which would be 20 February 2023). The advice was to return to work on a phased basis starting with two half days a week and increasing working hours by half a day per week every following week depending on the claimant's ability to cope. All being well, this would mean a return to full time hours within 16 weeks.

71. On 17 February 2023 Mr. Brown wrote to the claimant stating that he had not received a medical certificate or notification that she was planning to return to work on the 20 February 2023. The letter states: "*should you be fit and able to return on Monday I will find a time to meet with you for a return to work interview*".

72. The claimant sent an e-mail the same day to Mr Wood asking how he wished to proceed, presuming the first step would be to organise a meeting and stating that she was available to meet from Monday onwards.

73. On 20 February 2023 the claimant responded to Mr. Brown stating she was happy to meet at a convenient time, but it would be good to have advanced notice so that she could be accompanied by Mr Davies or Ms Macey from her union.

74. On 17 March 2023 the claimant wrote to Mr. Brown again for a follow up stating *"it would be great if we could meet this week regarding my phased return, please advise on when will be suitable so I can confirm with Dave Davies about his availability"*.

75. On 17 April 2023 the claimant wrote to Mr. Brown thanking him for his invitation to a return to work meeting on the Friday, saying that she would be able to attend with Mr Davies to accompany her.

76. The return to work meeting took place on the 21 April 2023.The claimant, Mr. Brown, Mr Jarrett-Potts and Mr Davies attended.

77. The claimant was sent a letter following that meeting on 25 April 2023 saying that her return to school would be on the 26 of April 2023.

78. The respondent says that it was not practicable to arrange a return to work meeting at an earlier date given the unavailability of the claimant's union representative and the Easter holidays. The claimant's union representative was in charge of the borough of Hackney and, at this time, there was industrial action taking place which affected his availability to attend meetings with the claimant.

79. The claimant remained on full pay throughout this period; she was not on sick pay.

Timetable changes

80. The respondent's letter of 25 April 2023 sets out the claimant's timetabled lessons for the week of Wednesday 26th of April 2023. A further letter of 11 May 2023 set out agreed changes to her timetable. It is common ground that these were temporary rather than permanent changes to the timetable.

81. Mr Brown explained that, given that it was now the final term of the academic year, and with the proximity of the exams, it was not in the interest of the pupils to make permanent changes to the claimant's timetable such as giving her examination classes.

Appeal

82. On 15 January 2023 the claimant submitted an appeal against the grievance outcome.

83. On 2 May 2023 the claimant contacted the chair of governors asking for an update about her appeal and requesting the full report from the grievance.

84. On 3 May 2023 the claimant received a letter inviting her to an appeal hearing, which attached the full grievance report. That was the first time that she had seen it. She had requested it on a number of occasions since January 2023.

85. The grievance appeal meeting took place on 12 May 2023. Mr Jarrett-Potts attended to present the grievance outcome.

86. In the respondent's minutes of the grievance appeal hearing Mr Jarrett-Potts is recorded as stating: "*I said in report some comments in the claimant's e-mail to Mr. Brown could be construed as rude. Not because I asked Mr. Brown. "I ask myself as CEO of an organisation how would those phrases react on me? I think they were ill advised*.""

87. The claimant also produced notes of the appeal meeting. Those notes record Mr Jarrett-Potts asking Mr. Brown the question *"what impact this comment had on him"*. This comment was a reference to the claimant's statement in her email of 20 July 2022 that there was a *"lack of professional explanation"*.

Time limits

88. The ACAS conciliation process was from 7 to 9 December 2022. The claimant presented her claim on 19 January 2023.

89. In June 2022 the claimant contacted ACAS on the advice of her friends. The advice she received from ACAS was that she could take action if she felt like she was being discriminated against and the matter was not resolved, but that she should attempt to resolve it through informal discussion to begin with.

90. The respondent accepts that it has not been prejudiced by the late presentation of claims.

Law

Pregnancy and maternity discrimination

91. Section 18 Equality Act 2010 ("EqA") provides so far as is relevant:

Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2)A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a)because of the pregnancy, or

(b)because of illness suffered by her in that protected period as a result of the pregnancy.

(3)A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave or on equivalent compulsory maternity leave.

(4)A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave or a right to equivalent maternity leave.

92. It is common ground that a claimant can bring a claim under section 18(4) about events after the end of the protected period.

93. The parties referred me to Johal v Commissioner for Equality [2010] AER 23 which concerned a failure by the respondent to notify a claimant of a job opportunity on maternity leave, which was held to be an administrative error and non discriminatory. This and other cases (South West Yorkshire Partnership NHS Foundation Trust v Jackson UKEAT/0090/18/BA Indigo Design Build & Management Ltd v Martinez [2014] UKEAT/0020/14/007 and Onu v Akwiwu and another [2014] EWCA Civ 279) demonstrate that the test for causation is not a "but for" test but a reason why test.

Direct discrimination

94. Section 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.*

95. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question about their reasons for acting as they did. The test is subjective (Nagarajan v London Regional Transport [1999] ICR 877 at 884; Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 at 29.

96. 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 at 886).

97. 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 then going on to consider whether that treatment is because of the protected characteristic.

98. Tribunals are also encouraged to address both stages by considering a single question: the '*reason why*' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: Martin v Devonshires Solicitors [2011] ICR 352 at 30.

99. In Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 at 36, the Court of Appeal confirmed that the employee who did the act complained of must themself have been motivated by the protected characteristic.

100. The less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if '*a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment'* (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 at 35). An unjustified sense of grievance does not fall into that category.

The burden of proof in discrimination cases

101. The burden of proof provisions are contained in s.136 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.*

102. The operation of the burden of proof provisions was explained in Base Childrenswear Ltd v Otshudi [2019] EWCA Civ 1648 at 18:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
>
> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"*
>
> *(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58* (p. 879D). As Mummery LJ continues:
>
> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

103. As for the 'something more' required to shift the burden, Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279 at 19:

> *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred*.'

Victimisation

104. As to victimisation, section 27 provides that:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because– (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act. (2) Each of the following is a protected act– (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the

purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act. (3) Giving information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

105. The Tribunal must determine 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 s/he did (West Yorkshire Police v Khan [2001] IRLR 830).

106. The Court of Appeal emphasised the importance of focusing on motivation, rather than 'but for' causation in Dunn v Secretary of State for Justice [2019] IRLR 298 at [44]: 'In the context of direct discrimination, if a claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. […] There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.'

Time limits

107. Section 123(1) EqA states:

(1) …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. …

108. Section 140B EqA states:

(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

109. As to conduct which 'extends over a period' the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96, sets out that the burden is on the Claimant to prove, either by direct evidence or inference, that the numerous alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.

110. In Jones v The Secretary of State for Health and Social Care [2024] EAT 2 at paragraphs 30-37, HHJ Tayler reminded tribunals that they have a wide discretion on this issue, and there is no principle of law which dictates how generously or sparingly the power should be exercised.

111. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 194 at paragraphs 17-19 and 25, Leggatt LJ said that tribunals have the widest possible discretion. Tribunals are not required to go through a checklist of factors. The length of and reasons for delay, and whether the delay has prejudiced the respondent, are almost always relevant factors to consider. The tribunal does not need to be satisfied that there was a good reason, or any explanation, for the delay.

112. In Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, the Court of Appeal repeated a caution against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980 and said at paragraph 37 that *'The best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay"*'.

Conclusions

Maternity discrimination

Head of art vacancy

113. The factual allegation is proven: the claimant was not advised of the head of art vacancy.

114. Not advising the claimant of the vacancy was a detriment, as it precluded her from applying to a role that she was interested in. Although the claimant knew that there would be a vacancy from the start of the 2022/23 academic year (Ms Rai having told her this by WhatsApp message of 25 November 2021) she reasonably assumed that this vacancy would be advertised so that she could apply for it.

115. The claimant was not informed of the vacancy because Mr Brown wrongly assumed that this was not a role she was interested in and that therefore there was only one potential candidate for the role: Ms Rai. Mr Brown made that assumption because the claimant had not expressed an interest in the role either prior to maternity leave, or at any stage after 25 November 2021 when she became aware of the forthcoming vacancy. His assumption was a

reasonable one, although it would have been better if Mr Brown had checked this with the claimant. It was an oversight on his part not to have done so. That oversight was because of the acute pressure that he and the school were under in the 2021/22 academic year.

116. I reject the claimant's claim that her maternity leave was a reason for the detrimental treatment. At its highest, the claimant has given evidence that things may have been different if she was physically at work, as she would have been less easy to overlook. I do not accept that submission. After all, she was at work when the appointment was made. But, even if the claimant's evidence was accepted, that would only show that, "but for" her maternity leave, she would have been informed of the vacancy. It would not show that the reason why she was not informed of the vacancy was because of her maternity leave.

117. The reason why has not been established and the claim therefore fails.

KIT days

118. The claimant agreed and expressed a desire to use her KIT days to assist with the examination and moderation work. I accept that it was a detriment to her that she was left to do this alone, navigating disorganised work, and without a proper working space. I also accept that it was a detriment to her that there was no enquiry about her wellbeing and plans to return to work.

119. The reason for the detrimental treatment was (1) Ms Rai's ignorance of the purpose of KIT days; and (2) the acute pressure that the school was under at this time, and in particular the art department who had lost three experienced members of staff (including the claimant whilst on maternity leave). The pressure on the department was heightened by the proximity of the GCSE and A-level mark submissions and moderation processes.

120. I reject the claimant's claim that her maternity leave was a reason for the detrimental treatment. If the claimant had not had maternity leave, she would not have had KIT days. But that only shows that "but for" her maternity leave, the detrimental treatment would not have occurred.

121. The reason why has not been established and the claim fails.

Timetable

122. The claimant's case is that she had an excessive workload and no examination classes. The claimant's factual case is not proven.

123. The claimant was timetabled to teach 20 hours, which was within the agreed limits. The claimant was timetabled to teach more KS3 classes, which meant that she taught two thirds of the students in the department. However, I accept the respondent's evidence that an increased number of students does not create an excessively heavy workload. This is because the preparatory work can be duplicated, and the level of teacher engagement is lower than at KS4 and KS5. It is logical that at a more senior level and in examination classes, the level of teacher input with students and their

parents and carers will be higher, as there is more riding on their performance than at KS3.

124. The claimant had fewer examination classes than her colleagues in the art department. However, she did have one year 10 class. This is an examination class as this is the first year of the two-year GCSE course.

125. Even if the claimant had proven detrimental treatment, she would not have proven causation:

    125.1 The claimant's own evidence is that Ms Rai withheld KS4 and KS5 as it was her own preference to teach these years as head of art. That is a non-discriminatory reason;

    125.2 At its highest, she has proven that she would have had more examination classes if she had not been on maternity leave. This is because her physical absence from the school in the 2021/22 academic year, meant that she did not teach any year 10 or year 12 classes that year and, applying the respondent's policy about continuity of teaching, she was therefore not timetabled to have a year 11 or 13 class in the 2022/23 academic year. However, again, this only shows "but for" causation and not the reason why;

    125.3 I do not accept the claimant's submission that, if she had been physically present at school, she would have had more input into the timetable. Given the complexity of the timetabling process for the 2022/23 academic year, this was a task undertaken by Ms Dewes without input from heads of department;

    125.4 I reject any submission that there was a conscious decision on the part of the senior leadership team or Mr Brown to give the claimant an excessive or detrimental timetable to punish her for having taken maternity leave. The complex process of creating the timetables was performed by Ms Dewes. There is no evidence that she was influenced by the claimant's maternity leave.

126. This claim therefore also fails.

Time limits

127. The claims of maternity discrimination fail on the merits. I therefore did not consider the issue of time limits.

Victimisation

Response to 20 July 2022 email

128. Mr Brown's response to the Claimant's 20 July 2022 was unfavourable treatment:

128.1 His initial response of 21 July 2022 was detrimental in its tone. It described the claimant's email as "*unacceptable*". The last paragraph put pressure on the claimant to withdraw her allegations.

128.2 The 1 September 2022 email informed the claimant that there would be no discussions about her timetable, with Mr Brown or Ms Rai, until she had responded to Mr Brown's letter of 21 July 2022. This was effectively an ultimatum: withdraw your allegations or there will be no informal discussions.

128.3 Mr Brown refused to address the claimant's workload concerns at the start of term.

129. This detrimental treatment was because of the claimant's protected act of 20 July 2022. Mr Brown accepted as much in oral evidence. He stated that if the claimant had not made allegations of discrimination:

129.1 The tone of his 21 July 2022 letter would have been different. He would have tried to reassure her and look for solutions to alleviate her marking workload;

129.2 He may have made changes to the claimant's timetable;

129.3 He would certainly have discussed the timetable with Ms Dewes at the teacher training days at the start of the 2022/23 academic year.

130. I reject the respondent's submission that Mr Brown's statement in the letter of 21 July 2022: "*your email which I find to be completely unacceptable*" is a reference to the timing of the claimant's 20 July 2022 email. This is because the letter makes no reference to the timing of the claimant's email, and the following and only other sentence in the opening paragraph expressly refers to the allegations of discrimination.

131. I also reject any submission that the timing of the claimant's email was to blame or unacceptable. The claimant only received the timetable on 19 July 2022. The response from Ms Rai received on 20 July 2022 was unhelpful as it said she had no say in the timetables and, although she was happy to have a meeting about this, that would not be until the following academic year.

132. I reject the respondent's case that informal discussions could not take place because allegations of discrimination were made against the head teacher. This is inconsistent with the grievance policy. The respondent could have arranged for the claimant to meet informally with a school governor, as envisaged by the policy. In any event, as there is no objective justification defence to victimisation, Mr Brown's motives are irrelevant.

133. I conclude that detriments 6 (I); (III) and (IV) in the list of issues are proven and the reason for the detrimental treatment was the claimant's protected act of 20 July 2022.

134. The claim relating to detriment 6(II) fails. Even if I had concluded that Mr Brown's refusal to deal with the concerns over the summer was detrimental

to the claimant, the reason for this was not the claimant's protected act but Mr Brown's desire to rest and recuperate during the summer holiday following such a challenging academic year.

Grievance and appeal

135. The factual allegations at 6(V) and (VI) of the list of issues are proven.

136. The claimant clarified in closing submissions that these allegations relate to the same thing: the failure by Mr Jarrett-Potts to investigate the claimant's timetable.

137. It is clear from Mr Jarrett-Potts' own report that he did not investigate this.

138. Mr Jarrett-Potts says in the report that he investigated the process that led to the creation of the timetable. I reject that statement. Mr Jarrett-Potts did not question or interview Ms Dewes, who was (according to the respondent's case and as I have found) the person who single handedly created the timetable.

139. This was a detriment to the claimant. The timetable was the central part of her 20 July 2022 complaint which was formalised into a grievance. This should have been investigated as required by the respondent's own policy and the ACAS code of practice.

140. Detriment 6(VII) is proven. The claimant was not provided with the grievance outcome until days before the appeal hearing, despite making multiple requests. This was a detriment to her as she did not have access to this when drafting her grounds of appeal and had only limited opportunity to review and digest it before the appeal hearing.

141. Detriments 6(VIII) (XIII) and (XIV) are proven.

142. These statements of Mr Jarett-Potts are in the written documents:

    142.1.1 The first is in the grievance report which states that the claimant's 20 July 2022 complaint "*can easily be received as rude and insulting*". This is much the same as saying it is rude and insulting.

    142.1.2 The second is in the respondent's minutes of the appeal meeting.

    142.1.3 The third is in the claimant's minutes of the appeal meeting, the veracity of which was not challenged.

    142.2 I accept that these statements by Mr Jarett-Potts were detrimental to the claimant as they described her genuine concerns in derogatory language and suggested a stronger regard for the feelings of Mr Brown than for her own.

143. I consider the reason why question. Mr Jarett Potts was not called as a witness and therefore I must make inferences from the documents:

    143.1 I have regard to Mr Jarrett-Potts' three statements at paragraph 142 above. I conclude that these statements demonstrate a disregard for the claimant's genuine concerns of potential discrimination, and a partisan sympathy for Mr Brown's feelings, over the claimant's. The first two statements read as a criticism of the clamant for raising allegations of discrimination, which have upset Mr Brown. There is no similar criticism of Mr Brown's 21 July 2022 letter which describe the claimant's genuine and serious concerns of potential discrimination as "*unacceptable*".

    143.2 The 21 July 2022 letter is, on the face of it, an act of victimisation. The claimant is openly reprimanded for making allegations of discrimination. However, Mr Jarrett-Potts dismisses the allegation of victimisation out of hand.

144. This conduct is surprising given Mr Jarrett-Potts' role as an independent HR professional.

145. These matters (paragraphs 143 and 144), which expressly relate to the protected act of 20 July 2022, shift the burden of proof.

146. It is for the respondent to prove that the protected acts were in no sense whatsoever the reason why. Mr Jarrett-Pots has not been called as a witness. The respondent has not explained why it failed to investigate the preparation of the timetable; why it failed to provide her with the outcome report until May 2024 and why derogatory statements were made in the grievance report and appeal meeting.

147. The respondent has not discharged its burden of proof and these claims succeed.

Deleting the claimant's emails

148. The claimant has not proven this factual allegation. I accept the evidence of Mr Brown and Mr Wood that her emails were not deleted. This claim therefore fails.

Request for documents and data

149. The claimant requested numerous documents and searches to be carried out. The respondent did not do all of this. That is evident by the fact that the grievance outcome report was not provided until May 2023 and as part of a separate process. The factual allegation is proven.

150. Save for the delay in providing the grievance outcome report, the failure to respond to the request was not detrimental to the claimant. The claimant was given full disclosure as part of the litigation process. The grievance outcome report detriment has already been upheld as an act of victimisation, so I do not consider it again.

151. The reason for the failure to provide documents was because of the respondent's lack of familiarity with the process. The evidence of Mr Wood was that the respondent checked documents against the claim form, to ensure that they did not disclose to the claimant anything harmful to the respondent. Whilst this seems slightly underhand, I remind myself that this was not a disclosure process for the purposes of the litigation, and I accept Mr Wood's evidence that nothing was withheld from the claimant on this basis.

152. I conclude that there was no detrimental treatment beyond the late provision of the grievance outcome report, which has been separately determined, and, even if there were, causation is not established.

153. The claim therefore fails.

Return to work

154. The claimant's return to work was delayed from 20 February to 26 April 2023. The claimant remained on full pay and was not using her sickness pay entitlement. Even without loss of pay or benefits, a delay in returning an employee to work from long term sickness absence when they are fit to do so and express a strong desire to do so, is detrimental as it increases their isolation from the workplace.

155. Mr Wood's question to the occupational health advisor was ill judged. However, I accept the respondent's submission that Mr Wood's intention was not to delay the claimant's return to work, but to obtain full advice from occupational health about her fitness to do so. That conclusion is consistent with the question that was asked.

156. Given my conclusion on that, there is no evidence that the delay in the claimant's return to work was because of the protected acts. The letters from Mr Brown demonstrate a desire for the claimant to return to the workplace from as early as 20 February 2023. The evidence shows that the claimant wanted her union representative present at the meeting, and I accept the respondent's evidence that this caused delay due to his unavailability. I also note the Easter holiday. It is regrettable that it took so long for the claimant to return to work, but I reject the claimant's case that this was because of her protected acts.

Temporary adjustments

157. The respondent made temporary adjustments to the claimant's timetable to facilitate her return to work. Given the stage of the academic year, and the few hours that the claimant was working each week, I accept that it was not practicable, or in accordance with the pupils' interests, to make permanent changes to the timetable that academic year. This was the reason why permanent adjustments were not made. Therefore, even if this was detrimental treatment, this was not because of the claimant's protected acts. The claim therefore fails.

Time limits

158. Detriments 6(I), 6(III) and 6(IV) are proven on the merits but are potentially out of time.

159. Given the dates of early conciliation, anything that occurred before 8 September 2022 is potentially out of time. Detriments 6(I) and 6(III) occurred before 8 September 2022. I conclude that detriment 6(IV) which refers to the start of term in September 2022 covers at least the first two weeks of September 2022 and is therefore in time.

160. I conclude that there is conduct extending over a period ending after 8 September 2022. These detriments were all about Mr Brown's response to the claimant's email of 20 July 2022.

161. Even if I were wrong about that, it would be just and equitable to extend time. The respondent concedes that they have not been prejudiced by the delay. The claimant acted on ACAS advice to complete the internal process first, which was precisely what she tried to do with her email of 20 July 2022. There was an inevitable six-week delay caused by the school holidays.

162. The claims were therefore presented in time.

Direct sex discrimination

163. This claim is about the three comments of Mr Jarett-Potts. The factual allegations are proven.

164. There is no evidence on which to conclude that a hypothetical male comparator would have been treated more favourably.

165. The claims are therefore dismissed.

Employment Judge Gordon Walker
10 December 2024