Case Number1300588/2016
1302645/2016

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EMPLOYMENT TRIBUNALS
BETWEEN

Claimant		**Respondents**
Mrs P Panton	AND	Birmingham City Council (1)
		The Governing Body of Holte School (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham ON 10 11 12 13 14 17 18 19 20 21 July 2017 and 24 25 26 July and 18 August 2017 (in Chambers)

EMPLOYMENT JUDGE Woffenden
MEMBERS: Mr T Liburd
Mrs I Fox
Representation:
For the Claimant: Mr J Sykes Advocate
For the Respondents: Ms R Dickinson of Counsel

RESERVED JUDGMENT

1 The claimant's claims of direct discrimination because of race under section 13 Equality Act 2010 fail and are dismissed.
2 The claimant's claims of harassment related to race under section 23 Equality Act 2010 fail and are dismissed.
3 The claimant's claims of victimisation under section 27 Equality Act 2010 fail and are dismissed.
4 The claimant's claims of detriment under section 47 B (1) Employment Rights Act 1996 fail and are dismissed.

REASONS

1On 31 March 2016 the claimant (who is black Caribbean by colour and ethnic origin and employed as a teacher) presented a complaint to the tribunal in which she complained of race and religious discrimination and detriment under section 47 B (1) Employment Rights Act 1996 ('ERA'). The claim of religious discrimination was subsequently withdrawn. On 14 October 2016 the claimant presented to the tribunal another complaint of race discrimination. The claimant's representative in both claims by Mr Sykes of Frontline Advice and (latterly) Legal Advice Services. He described himself in the course of this hearing as having done 'this job' for about 22 years.

2 On 13 December 2016 there was a Preliminary Hearing (case management) before Employment Judge Butler who ordered the claims be heard together. He listed the final hearing (to include liability and remedy) to be heard over 10 days beginning on 10 July 2016 and gave detailed orders to enable the parties to prepare for the hearing including the agreement of a bundle of documents by 10 March 2017 the mutual exchange of witness statements by 31 March 2017 and the agreement of a cast list and chronology by 3 July 2017.He also ordered that each witness statement was to contain all the evidence the witness wanted to give and no witness was to be permitted to give evidence (without leave) unless a witness statement had been prepared and exchanged in accordance with his order. Notwithstanding his clear directions trial preparations did not run smoothly.

3 On 28 April 2017 the parties had to apply for a variation to some of the directions in particular that there be disclosure by 5 May 2017 agreement of the bundle by 12 May 2017 (a copy of which was to be sent to the claimant by 19 May 2017) and exchange of witness statements by 19 June 2017.

4 On11 May 2017 Employment Judge Woffenden informed the parties that the proposed variation was agreed and ordered the parties to confirm in writing to the tribunal that the directions had been complied with, the claim was ready for hearing and to provide an agreed timetable for the hearing to include initial clarification of the issues reading time for essential documents and statements cross-examination panel questions re-examination submissions tribunal deliberations judgement and remedy. Neither party complied with that order. No explanation has been provided by either party for this non-compliance.

5 Despite the agreed variation to the date of disclosure the respondent provided disclosure on 19 May 2017.

6 On 22 June 2017 Mr Sykes applied to amend the particulars of claim and agreed list of issues and strike out the responses because of the respondent's unreasonable conduct.

7 The respondent opposed those applications and applied for an order that the parties exchange witness statements by 27 June 2017.

8 On 29 June 2017 Employment Judge Broughton refused the claimant's application for strike out and ordered the respondent to confirm by 30 June 2017 whether there were any substantive objections to the application to amend by 30 June 2017. He did not address the issue of exchange of witness statements.

9 On 3 July 2017 the respondent disclosed additional documents (98 pages).Mr Sykes has set great store on the respondent's late disclosure and its (adverse) consequences for his client .We observe however that the first late disclosure was some 7 weeks before the first day of the hearing and in relation to the second, if Mr Sykes had felt his client was thereby prejudiced in her ability to prepare for the hearing, he could have made (but did not make) an application to postpone it.

10 The respondent did not comply with Employment Judge Broughton's order until 9 July 2017 when it was confirmed by email there were no objections to the application to amend. That same day under cover of an email timed at 00.35 Mr Sykes sent to the tribunal the claimant's re-amended list of issues. It appears (though we have seen no correspondence to confirm this) that the parties agreed (without first seeking the approval of the tribunal) to exchange witness statements on 7 July 2017 with supplementary statements to be served on 10 July 2017.

11 The first five days of the hearing were taken up with tribunal pre-reading and wholly avoidable case management issues. Such an extraordinary length of time demands a detailed chronology which is set out below.

10 July 2017

12 It had been intended by Employment Judge Butler that the first day of the hearing would be for tribunal reading. Before we could begin that task a number of matters had to be addressed including but by no means limited to the approval of list of issues and the timetable. The parties confirmed that (in breach of the extant order that this be done by 19 June 2017) witness statements had now been exchanged but not until 7 July 2017.The claimant had served a brief witness statement of Reverend Desmond Jadoo on 10 July 2017 but Mr Sykes said he was seeking a second statement from him and might have to apply for leave to serve the same. The claimant's application to amend was granted in the absence of any objections and the respondent was given until 11 July 2017 to prepare and serve an amended response in consequence. We observed in view of the size of the agreed bundle (see below) and the number of the respondent's witness statements (8) and the length of the claimant's witness statement (42 pages and 148 paragraphs) it was unlikely that one day would be sufficient for its reading and the parties were required to prepare and provide to us an agreed

timetable (as had been ordered on 11 May 2017) and prepare a reading list if there were any documents which the parties wanted us to read not referred to in witness statements. The claimant sought and was granted leave to rely on a recording of an Occupational Health appointment a transcript of which was contained in the agreed bundle. The parties were released to attend to the above matters while we began our reading. The parties returned to the tribunal with an agreed timetable. However it omitted remedy and the provision for tribunal reading remained one day which (given the time which had already been taken up on case management issues) was inadequate. The parties were informed it required amendment. They confirmed that no additional reading was required and that the cast list and chronology had now been agreed and would be sent to the tribunal by email. We considered the contents of the claimant's 're-amended' list of issues. It was not consistent with the claimant's pleaded case .It also omitted any issues relating to remedy and inadequately and inaccurately addressed time points. Mr Sykes conceded that the claimant's witness statement did not contain any evidence addressing either issue and he might have to apply for leave to serve a supplementary statement to include these matters. The respondent conceded that the claimant's pleaded grievances were protected acts for the purposes of the claimant's victimisation claim. We sought clarification of several incorrect page numbers referred to in the claimant's witness statement .It was pointed out to the parties that the identity of the respondent had changed from Holte School to Birmingham City Council during the course of the proceedings and the parties were asked to explain the basis on which the latter was the correct respondent to these claims. Mr Sykes said he considered that both entities should be respondents but was unable to explain why. The parties were asked to provide an amended time estimate by 1.00pm and attend to the amendment of the agreed list of issues as soon as possible and confirm the identity of the respondent(s). The parties were again released to attend to the above matters while we continued its reading. The parties provided an amended agreed timetable for our approval. In a discussion of the time needed to determine remedy Mr Sykes accepted that the claimant's witness statement did not contain any evidence about injury to feelings (the only head of loss in relation to her claims of discrimination and/or detriment under section 47 B ERA).The parties confirmed there were not one but two respondents namely the Governing Body of Holte School (and not Holte School) and Birmingham City Council .We said this must be clearly addressed in the amended list of issues and continued reading.

13 At 15.41 the respondent sent to the tribunal and Mr Sykes an amended response.

14 At 19.21 Mr Sykes sent to the tribunal an email to which was attached an agreed re-amended list of issues which Mr Sykes said that addressed the matters raised at the hearing and 'clarifies' the 'protected acts PIDs relied on'.

11 July 2017

15 At 10.54 Mr Sykes sent to the tribunal an email to which was attached an undated and unsigned 'final 'witness statement of Reverend Jaddoo which he said had been served on the respondent. The tribunal informed Mr Sykes by email that the agreed re-amended list of issues was unfit for purpose .Manuscript amendments were made upon it (which among other matters asked the claimant to show where in the particulars of claim 2 new alleged protected acts /PIDs set out in that list were to be found) and it was returned to him for amendment by return .The parties were informed hearing would not commence until the list of issues was in a form approved by the tribunal. The admissibility of Reverend Jaddoo's statement would be considered at the commencement of the hearing.

16 At 13.07 Mr Sykes sent to the tribunal an email in which said he would amend the list of issues and return it to the tribunal. He said he was 'grateful' the list of issues was 'marked up on only some of the pages and the markings are principally concerned with technical legal and jurisdictional matters rather than with the bulk of the substantive factual allegations for determination at trial.'

17 However by 15.01 Mr Sykes had sent to the tribunal an email in which he advised the amendments to the list of issues were unlikely to be concluded before 4-4.30 pm because they required a substantial amount of 'detailed work 'in particular the identification of pleading and witness statement paragraphs throughout. The 'technical legal/jurisdictional amendments to the List of Issues force consequential amendments to the 1st and 2nd Particulars of Claim, so far noted to reflect the need for fuller particularisation of the historic grievances relied on as PIDs and protected acts'; and a supplementary witness statement for the claimant dealing with the 'time issue raised by the learned Judge 'on 10 July 2017 subject to leave as 'noted by the learned Judge in para. 10 of the list of Issues.' The documents would be filed and served overnight so they could be reviewed at 10.00 am on 12 July. The tribunal informed Mr Sykes that it was noted the amendments were not to be completed until 4 to 4.30 and the tribunal awaited receipt. Mr Sykes was reminded of the procedure to be followed if he intended to amend the claimant's pleadings or to serve any supplementary witness statements since no leave had been granted.

18 At 16.17 Mr Sykes sent to the tribunal an email clarifying he had said the amendments to the list of issues would not be completed before 4.00 to 4.30pm ; the work was continuing and was expected to be completed 'after hours today'. The consequentially amended pleading and supplementary witness statement would be accompanied by an application to amend.

19 At 19.52 Mr Sykes sent to the tribunal an email attaching a further amended list of issues an application to amend the claim with 'amendments consequential on and related to the amendment of the list of issues (as to details of PIDs and protected acts).'

20 At 21.44 Mr Sykes sent to the tribunal an email to which was attached a supplementary witness statement of the claimant 'dealing with the time point raised by the learned judge' on 10 July 2017 for which she sought leave to rely which had been 'settled on advice'.

12 July 2017

21 At 12.13 the respondents sent to the tribunal an email in which they applied in to rely on the minutes of a meeting of the Board of governors of the second respondent held on 9 July 2014.

22 At 12.33 the tribunal sent Mr Sykes an email acknowledging his emails of 11 July (at 19.53 and 21.44) in which he was asked to confirm by return compliance with Rule 30 (2) in relation to the application to amend and serve a further witness statement of the claimant .On receipt the tribunal would consider whether they could be dealt with in writing or at a hearing. It was noted no application had been made to serve Reverend Jaddoo's witness statement attached to Mr Sykes' email timed at 10.54 on 11 July 2017.If the claimant wished to rely on it she should set out in writing the basis on which she said she was entitled to do so and if so advised apply for leave. It was pointed out the parties had failed to address the issue of the correct respondent to the claims in Further Amended list of issues which was again amended in manuscript and returned for amendment by return signed by both advocates to show agreement. The tribunal would then consider whether it was approved.

23 The respondents' application timed at 12.13 was opposed in an email from Mr Sykes timed at 12.34 in which he also said a witness statement would be filed and served concerning the admissibility of Reverend Jaddoo's 'amended' statement served on 11 July 2017.

24 At 13.24 Mr Sykes sent to the tribunal an email in which he said he was working on the changes to the agreed list of issues which would be sent to the respondents 'when finished 'and applied for reconsideration of the order admitting the above minutes.

25 The tribunal sent the parties an email in which it granted the respondents' application to rely on the above minutes. The parties were informed they had until 4.00 pm that day to agree and send the redrafted List of issues to the tribunal .Mr Sykes was to confirm that the application to serve a further witness statement had been made in compliance with rule 30(2).

26 The tribunal having concluded its reading the parties were instructed to attend at 9.45 am on 13 July 2017.

27 At 16.37 Mr Sykes sent to the tribunal an email in which he said that the list of issues was 'almost complete' and would be sent to the respondents and referred

to a second supplementary witness statement having been completed regarding the 'public interest requirement.'

28 At 17.24 Mr Sykes sent to the tribunal an email to which he attached an amended list of issues sent to the respondents for their approval together with a note he had prepared which purported to set out the claimant's position on legal issues 'excised' from the amended list of issues by the judge together with a second supplementary witness statement for the claimant said to address the public interest requirement 'required ' by the judge's manuscript amendments to the list of issues for which leave was sought to file and serve.

29 At 17.47 the tribunal sent to Mr Sykes an email informing him the redraft was not being dealt with expeditiously; the amendments were not substantial. His application for reconsideration was refused. He was reminded he had already been made aware how to go about seeking leave to amend his pleadings and to serve a supplementary witness statement. As far as a second supplementary witness statement for the claimant to address the public interest requirement was concerned he had not been required to prepare such a statement or sought leave to serve the same. If an application was made it must explain in full why its contents were not included in the claimant's original witness statement.

30 At 17.47 Mr Sykes sent to the tribunal an email to which was attached the claimant's third supplementary witness statement addressing the grounds of the application for admission of the 'revised statement of Reverend Jaddoo'.

31 At 18.33 Mr Sykes sent to the tribunal an email in which he did not accept that the redraft of the amended list of issues had not been done expeditiously and contending that the omission of the 'technical' material contained in the claimant's second supplementary witness statement had been 'by oversight' attributed to 'late disclosure ' by the respondents. He complained the work on amending the list of issues was 'time-consuming ad complicated 'and 'the burden of which had fallen principally on one party'. He vehemently denied any allegation of having caused delay at trial (we observe there had been no such allegation).He identified the remaining procedural matters as including the finalisation of the list of issues leave for the claimant to adduce her first second and third supplementary witness statements and for a fourth supplementary witness statement and to amend her pleadings to address the minutes of the meeting of the Board of governors of the second respondent held on 9 July 2014 and for a fifth supplementary witness statement for the claimant to address injury to feelings (neither of which had been drafted but he said would take three hours to prepare). He said it would have to be a liability only hearing.

32 At 19.15 Mr Sykes sent the tribunal an email in which he confirmed the claimant would not after all be seeking to amend her pleadings of the amended list of issues to address the above minutes but would deal with the matter in cross-examination.

33 At 20.00 Mr Sykes sent the tribunal an email to which was attached a fourth supplementary witness statement of the claimant in support of her application to amend her pleadings (also attached) in which it was submitted inter alia that the amended pleadings remedied the omission of 'certain of the technical aspects identified by the learned judge, particularly in relation to the grievances relied on and protected disclosures (PIDS) and protected acts 'which 'forced the pleading amendments.'

34 At 20.44 Mr Sykes sent the tribunal an email to which was attached what was said to be a final amended Agreed list of issues dated 12 July 2017 (now 22 pages) and signed by both advocates in accordance with our instruction.

35 At 21.06 the respondents sent the tribunal an email to which was attached an application by the respondents to amend its response together with a draft amended response.

13 July 2017

36 The above correspondence from the parties was put before us at 9.45 am and it took until 11.15 am to consider their contents and devise a timetable to address the points raised. When the hearing commenced we informed Mr Sykes that no note was to be attached to any agreed list of issues. Such a note could be used by him for the purpose of the claimant's submissions if he so wished. It had become apparent to us from our perusal of the agreed bundle that the claimant was a diabetic so Mr Sykes was asked to take her instructions on whether reasonable adjustments were required. He did not subsequently inform us that there were any. We informed Mr Sykes that if he wanted to adduce evidence about injury to feelings he would have to prepare a draft supplementary witness statement for the claimant and make an application for leave to serve in accordance with Rule 30(2) of the Employment Tribunal Rules of Procedure 2013. We informed Mr Sykes that the witness statement of the claimant in support of her application for leave to serve the second witness statement of Reverend Desmond Jadoo was not signed or dated and if the respondent wanted to cross-examine her on its contents she must attend to give evidence. We informed Mr Sykes that in relation to the minutes we would permit supplementary questions to be put to the claimant prior to cross –examination and the cross-examination of the respondents' witnesses as indicated in his email timed at 19.15 .We drew to Mr Sykes' attention that the schedule of loss he had served included an award under section 38 Employment Act 2002 but this was not referred to in the claimant's witness statement or the list of issues .He said he would apply to amend this omission but we declined to hear any such application at this stage. The claimant's application to amend the Particulars of Claim was opposed and after argument we refused it for the reasons given at the time. The claimant's application to serve a supplementary witness statement concerning time points was unopposed and therefore granted. The claimant's application to

serve a supplementary witness statement concerning the reasonableness of her belief that her disclosures were in the public interest was opposed and after argument we granted it for the reasons given at the time.

14 July 2017

37 At the commencement of the hearing Mr Sykes applied for a postponement so that he could take the claimant's instructions (she was not in attendance at 9.45 am when the hearing was to begin) on whether she wanted to proceed with her application for leave to serve the second witness statement of Reverend Jaddoo in the latter's absence due to a hospital appointment .We decided the respondents' application to amend their response (which Mr Sykes opposed) should be heard in the meantime. After argument we refused it (save in relation to paragraph 13 and 14 of the response) for the reasons given at the time. Mr Sykes then applied for the claimant's application for leave to serve the second witness statement of Reverend Jaddoo to be stood over until 17 July 2017.We decided that we would hear the claimant's evidence in support of the application first and then review the position. Although Mr Sykes thereafter submitted that it was necessary to hear from Reverend Jaddoo in order to determine the application we decided that it was not and after further argument for the reasons we gave at the time granted the application subject to receipt by the respondents by 4pm on 17 July 2017 of a witness statement of Reverend Jaddoo signed and dated by him in the form already served on the respondents on 11 July 2017. The parties were each asked to prepare a document which comprehensively set out their clients' pleaded case as amended. The respondent was to prepare an amended agreed list of issues which set out the issues in relation to section 38 Employment Act 2002 and in relation to what claims were pursued against which respondent and why. The parties were to prepare agreed proposed alternative timetables, one for liability only and one for liability and remedy to be discussed and approved if possible on 17 July 2017.

17 July 2017

38 Mr Sykes had sent an email to the tribunal at 12.10 on 16 July 2017 attaching a final amended list of issues (again signed by both advocates in accordance with our instruction) which we approved. It was apparent from the alternative proposed timetables provided by the parties that the remaining five days would be insufficient to address liability and remedy. In any event the claimant had not applied for leave to prepare and serve an additional witness statement addressing injury to feelings. With the upmost reluctance we acceded to the parties' request that the hearing be confined to evidence on liability only and approved the parties' agreed proposed timetable which provided that submissions be made on the afternoon of Friday 21 July 2017 and the tribunal reserve its judgment. Further errors and incorrect page numbers in the claimant's witness statement were pointed out to Mr Sykes and he had to have an

adjournment so he could take her instructions on them. Evidence finally began at 11.05 a.m.

39 During the course of the hearing further time was taken up establishing whether and if so when Reverend Jaddoo was going to attend the hearing and as a precautionary step preparing a witness order to secure his attendance. On 20 July 2017 proceedings concluded at lunchtime because although the timetable had provided for a day of cross-examination of Mrs Walters Mr Sykes had completed this by 12.30 a.m. and in reliance on the time estimate the respondent had no other witnesses available. The hearing of evidence concluded on 21 July 2017 at 3.15 pm, Mr Sykes' cross –examination of witnesses having ended by 1.00pm that day.

The Agreed List of Issues

Claims

40 The Claimant brings the following claims in two Claims and Particulars of Claim against the 1st Respondent ('R1') and/or the 2nd Respondent ('R2'):

40.1 Direct race discrimination causing detriment and/or racial harassment and/or victimisation on the ground of race pursuant to s9 (1), 13 (1), 26 (1), 27 (1), 39 (2)(d), (4)(d), 40 (1) Equality Act 2010.

40.2 Detriment under s47B (1) Employment Rights Act 1996.

Jurisdictional matters

41 The Claimant is black Caribbean by colour and ethnic origin. Her comparator is a hypothetical non-black, non-Caribbean teacher at Holte School. The Claimant asserts the relevant circumstances for comparison pursuant to s23 (1) Equality Act 2010 are with a non-black non-Caribbean teacher of ethnic minority, learning disabled children in Years 7 – 9 at Holte School.

42 In the protected disclosure detriment claim, the Claimant relies on her grievances dated:

(i) 16th June 2014 against the Headteacher Ms Walters;

(ii) 8th December 2014 against Ms Walters, as sent to the Board of Governors;

(iii) 9th May 2016 against Ms Christine Hardy.

43 In the victimisation claim, the Claimant relies on the following as her protected acts:

(i) 16th June 2014 against the Headteacher Ms Walters;

(ii) 8th December 2014 against Ms Walters, as sent to the Board of Governors;

(iii) 9th May 2016 against Ms Christine Hardy.

Time

44 The issues as to time are:

(i) In the race discrimination and victimisation claims whether the pleaded acts and/or omissions were presented in time,
(a) because the acts were conduct extending over a period pursuant to s123 (3)(a) Equality Act 2010,
(b) and the omissions are treated as occurring when the person in question decided on it pursuant to s123 (3)(b) Equality Act 2010, or in the absence of evidence to the contrary in accordance with section 123 (4)(a)(b) Equality Act 2010,

(ii) or whether it is just and equitable to extend time, pursuant to s 123 (1) Equality Act 2010;

(iii) In the PIDA claim, whether the pleaded acts and/or omissions were presented in time,
(a) because of an act extending over a period, pursuant to s48 (4)(a) Employment Rights Act 1996,
(b) and the deliberate failures to act, the failures are treated as done when they were decided on, and in the absence of evidence establishing the contrary shall be taken to have decided on a failure to act when he does an act inconsistent with doing the failed act, or if he has done no inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done,

(iv) or 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, beginning with the date of the act or failure to act to which the complaint related or where that act or failure is part of a similar series of acts or failures, the last of them.

Jurisdiction regarding Respondents

45 As to jurisdiction to sue:

Equality Act 2010 claims

(1) R1 is sued as the employer pursuant to s39 (1) Equality Act 2010, as R1 employed the Claimant under a contract of employment pursuant to s35 (2) Education Act 2002, s83 (1) Equality Act 2002.

(2) R2 is sued as R1's agent pursuant to s109 (2), 110 (1) Equality Act 2010, as at all material times R2's Headteacher and staff were paid by R1, and R2's Governing Body exercised powers delegated by R1.

Section 48 ERA 1996 claims

(1) R1 is sued as the worker's employer pursuant to s47B (1) Employment Rights Act 1996;

(2) R2 is sued as R1's agent pursuant to s47B (1A) ERA 1996 as at all material times R2's Headteacher and staff and its Governing Body were agents of R1 exercising functions of R1 as employer.

Direct race discrimination

46 The issue in direct race discrimination is whether R1 and/or R2 its servants and/or agents treated the Claimant less favourably than the hypothetical comparator because of her colour and ethnic origin, in the following acts and/or omissions:

46.1 A history of R2 teachers and administrators subjecting the Claimant to racial harassment and intimidation including criticisms of her clothes, ethnic characteristics, and style of speech.
46.2 On 12th June 2014 Ms Walters and/or R1 and/or R2 commenced a first disciplinary investigation into the Claimant, without good reason, without advising a reasonable schedule, and concealing the outcome in Hayley Boden's report dated in October 2014 until disclosed in mid-May 2017.
46.3 Ms Walters allocated the Claimant's teaching slots to other teachers during the prolonged suspension.
46.4 Ms Walters criticized the Claimant's teaching standards, although those followed statutory standards as provided by the Department of Education and Ofsted.
46.5 When the Claimant approached her in the premises, she turned her back on the Claimant.
46.6 Ms Walters refused to implement an Occupational Health request that the Claimant be permitted to take a snack at 11am if not teaching.
46.7 Ms Walters refused to permit the Claimant to teach Key Stage 4.
46.8 She concealed from the Claimant the fact of there being a second post in the SEN Department in December 2013.
46.9 She allocated the Claimant's reading projects with SEN pupils in Year 7 to another member of senior staff.

46.10 Ms Walters or R1 and/or R2 did not hear the Claimant's complaint dated 16th June 2014 against her.
46.11 On 25th September 2014 Ms Walters criticized the Claimant for carrying a hot drink on the stairs, and subjected her to abuse accusing her of speaking 'nonsense', of being 'sensitive', and of being 'paranoid.'
46.12 On 28th November 2014 at a staff meeting Ms Walters made an openly racially discriminatory remark about 'Black Friday.'
46.12A From 16th October 2014 R1 and/or R2 failed to disclose the Boden report dismissing the first disciplinary investigation.
46.12B On 18th November 2014 R2 sought to amend and interfere with the independence of the Boden report by requesting she consider inter alia prejudicial matters against the Claimant.
46.13 Ms Walters caused and/or permitted staff to speak in a derogatory way about ethnic minority students including the following incidents:
46.13.1 Jennifer James, a white teacher, said openly at a history session for teachers that she wanted 'that black boy' removed from the school and sent abroad
46.13.2 Kerensa Neal, another white teacher, said openly at an after-school meeting that she wanted to send a black Jamaican student 'to the zoo.'
46.14A On and after 1st December 2014 R1 and/or R2 failed to disclose Ms Boden's revised report, submitted by email at 8.04am.
46.14 B On 1st December 2014 Ms Walters R2 commenced a second disciplinary investigation into the Claimant, following the failure of the first disciplinary investigation to recommend disciplinary proceedings, relying on vague and unfounded allegations of 'breach of teaching standards.'
46.15 On and after 8th December 2014 R1 and/or R2 failed to hear the Claimant's grievance served that day in which she summarized their mistreatment (other than to hold a preliminary hearing as to the issues on 26th February 2015), until 30th June 2015 .
46.16 On 11th March 2015 R2 instructed the Claimant to attend a disciplinary hearing on 15th April 2015 relating to her handling of two PGCE students and complaints arising in June 2014 despite the Boden report's dismissal of the substance of the same charges.
46.17 On, before and after 11th March 2015 R2 did not hear or progress the Claimant's racial complaint dated 16th April 2014 or hear first the in part overlapping grievance dated 8th December 2014, in breach of the ACAS Code of Practice on disciplinary and grievance procedures, 2015
(The pleading refers inaccurately to the complaint dated 26th June 2014. The complaint was dated 16th June 2014).
46.17A On 24th March 2015 Harry Fowler, grievance officer appointed by R1, disclosed the Claimant's emotional distress at a grievance hearing on 23rd March 2015 to R1 and/or R2, in breach of confidentiality, without seeking or obtaining her consent .
46.18 On 26th March 2015 the Chair of R2's Board of Governors, Errol Robinson, medically suspended the Claimant, subjecting her to verbal abuse

accusing her of being ‘a schizophrenic’ and ‘a danger to herself and others’, without medical evidence and when the Claimant was fit to work .
46.19 On and after 26th March 2015 R1 and/or R2 failed to determine the grounds of suspension, or to lift the suspension, or to obtain a medical report by a suitably qualified psychologist or psychiatrist as to the Claimant’s alleged unfitness to work based on her mental health.
46.20 On 7th May 2015 R2 wrote to the Claimant continuing the medical suspension without appropriate medical evidence in the form of a psychological or psychiatric assessment by a suitably qualified psychologist or psychiatrist .
46.21 On 7th May 2015 R2 requested the Claimant attend an appointment with the occupational health provider Medigold, without a reason, and without ensuring the examination and subsequent report would be provided by a suitably qualified psychologist or psychiatrist.
46.22 Following the Claimant communicating she was fit to work and would shortly be returning to work R1 and/or R2 failed to confirm whether they still required her to attend at Medigold and if so why .
46.23 Further R2 threatened it would proceed itself to determine her fitness to teach if it did not receive a Medigold report despite R1 and/or R2 being a local authority running a school, neither of which institution was qualified to provide, or provided, in-house psychological or psychiatric examination and assessment services .
46.24 A On and after 6th May 2015 R1 and/or R2 failed to disclose the grievance report of Harry Fowler available that date, until disclosed before trial in mid-May 2017 .
46.25 On and after 7th May 2015, continuing to date, R1 and/or R2 failed to lift the suspension or provide the medical basis relying on examination and report by a suitably qualified psychologist or psychiatrist for the suspension, by a continuing omission.
46.26 On and after 12th May 2015 R2 failed to respond to the Claimant’s request by letter that day to return and to confirm if it wished her to attend an OH appointment once she had a GP fit note.
46.27 On and after 12th May 2015 and at all material times R1 and/or R2 failed to confirm that it had the approval of the Board of Governors by way of written resolution signed by the Board or delegated committee for its conduct in suspending the Claimant without grounds based on examination and subsequent report would be provided by a suitably qualified psychologist or psychiatrist, continuing an investigation begun in 2014 without disclosing its outcome by report of October 2014, and threatening to determine her fitness to work itself .
46.27A On and after 25th June 2015 R1 and/or R2 relied on the opinion of an OH physician that the Claimant was psychologically unfit to teach on the slim basis that during one meeting she uttered a laugh he found inappropriate.
46.27B On 30th June 2015 R2 held a grievance outcome meeting as to the Claimant’s grievance dated 8th December 2014 in which it refused to disclose Mr Fowler’s report dated 6th May 2015, instead reading out only his conclusions.

46.27 C On 2nd July 2015 R2 restated Mr Fowler's conclusions by letter, but did not disclose his report, thereby frustrating the Claimant's drafting of full appeal grounds against those conclusions.
46.28 On and after 13th July 2015 R2 failed to hear the Claimant's grievance appeal of that date against Mr Fowler's conclusions, by a continuing omission.
46.28A On 2nd December 2015 R1 and/or R2 sought to influence another third party contractor, Assured Health, by completing a management referral form that exaggerated the Claimant's conduct and featured prejudicially selected comments made by her out of context, including racial complaints made by her.
46.28 B On 28th March 2016 R1 and/or R2 accepted Stephen Kearsley's report that inter alia considered the Claimant laughing once in the OH physician's meeting gave rise to 'concerns about her cognitive responses.'
46.29 On and after 12th June 2014, continuing to date of presentation of the 2nd Claim on 14th October 2016, R1 and/or R2 continued to omit to disclose Hayley Boden's determination of the disciplinary investigation begun 12th June 2014, to hear the Claimant's grievance appeal dated 13th July 2015, or to end the medically and psychologically/psychiatrically unfounded 'medical suspension'.
46.30 On and after 1st April 2016 continuing to date of presentation of the 2nd Claim on 14th October 2016, by way of continuing omission, R1 and/or R2 failed to determine the grounds of suspension, or to lift the suspension, or to provide a medical basis for the supposed 'medical suspension.' .
46.31 On and after 1st April 2016 continuing to date of presentation of the 2nd Claim on 14th October 2016 R1 and/or R2 failed to confirm that it had the approval of the Board of Governors by way of written resolution signed by the Board or delegated committee for its conduct in suspending the Claimant without grounds, continuing an investigation begun in 2014 without outcome, and threatening to determine her fitness to work itself.
46.32 On and after 1st April 2016 continuing to date of presentation of the 2nd Claim on 14th October 2016 R2 failed to respond to the Claimant's request by letter dated 12th May 2015 she be returned to work and the school should advise if it wished her to attend an OH appointment once it had a fit note from the GP.
46.33 On and after 1st April 2016 continuing to date of presentation of the 2nd Claim on 14th October 2016 R1 and/or R2 failed to hear the Claimant's grievance appeal dated 13th July 2015, or to disclose dated in October 2014 of the investigation begun 12th June 2014.
46.34 On 21st April 2016, at a feedback session held under R1 and/or R2's Dignity at Work Procedure, in response to questions from the Claimant's union representative Reverend Desmond Jaddoo (black Caribbean), a white Caucasian investigator appointed by R1, Christine Hardy, why the race discrimination complaints had not been addressed, Ms Hardy laughed out loud in their faces, insulting them on the ground of race and causing them offence.
46.34.1 Mrs Hardy contended she understood discrimination being a female Engineer, thereby causing the Claimant and her representative further offence.
46.34.2 Ms Hardy failed to respond when Rev. Jaddoo advised her she should therefore know better than to laugh when race discrimination is mentioned.

46.34.3 Mrs Hardy criticised Rev Jaddoo, who is loud spoken, for speaking loudly as if that was an ethnic characteristic.
46.34.4 Mrs Hardy further indicated she intended to hold a hearing to dismiss the Claimant. Ms Hardy failed to explain the basis of the prospective dismissal, as to what allegations were relied on (if any). The declaration of a pending dismissal was in the circumstances a clear act of victimisation on the ground of race, further and alternatively a detriment arising from having served protected disclosures.
46.35 By letter dated 25th April 2016, served 28th April 2016, Mrs Hardy confirmed her intention to recommend the Board of Governors hold a hearing to dismiss.
46.36 On and after 9th May 2016 and to date of presentation of the 2nd Claim on 14th October 2016 R1 and/or R2 failed to respond to the Claimant's race discrimination complaint against Mrs Hardy dated that day.
46.37 On and after 9th May 2016 and to date of presentation of the 2nd Claim on 14th October 2016 R1 and/or R2 failed to hold a grievance appeal following receipt of the Claimant's appeal dated that day.
46.37 A On 12th May 2016 R1 and/or R2 issued a letter to the Claimant as to a prospective disciplinary hearing entitled 'Dismissal for some other substantial reason', attaching a document entitled 'Procedure for Dismissal Hearing – May 2016.'
46.38 On and after 7th June until or about 19th July 2016, R1 and/or R2 failed to respond to the Claimant's written request dated on or about 7th June 2016 that Mrs Hardy's proposed disciplinary hearing should not proceed and instead it should hold the hearing of the race discrimination grievance dated 9th May 2016.
46.39 On or about 19th July 2016 Mrs Hardy held a disciplinary hearing, despite the Claimant's written request dated 7th June 2016. She adjourned it only after further representations from Rev Jaddoo that the grievance against her dated 9th May 2016 be heard first.
46.40 On and after 20th July 2016 to date R1 and/or R2 failed to hold the grievance hearing.
46.41 On 3rd August 2016 R1 and/or R2's solicitors at Birmingham City Council responded to the Claimant's email of 1st August 2016 requesting the grievance against Mrs Hardy be heard, by claiming they had no knowledge of Mrs Hardy. In support of their lack of knowledge, they advised the Claimant was Ms Panton, not Mrs Hardy.

46.42 In the premises R1 and/or R2 its servants and/or agents subjected the Claimant to acts of direct discrimination because of race, and/or harassment related to race.

Harassment

47 The issue in the racial harassment claim, in the alternative to the direct discrimination claim, is whether R1 and/or R2 its servants and/or agents engaged in unwanted conduct related to race which had the purpose or effect of violating

her dignity or creating an intimidating hostile degrading humiliating or offensive environment for the Claimant and in deciding whether the conduct had the effect the tribunal must take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

48 The Claimant relies on the acts and/or omissions set out above (at paragraphs 46.1 – 46.41).

Victimisation

49 The issue in the victimisation claim is whether, as a result of the Claimant having raised the issue of race in written complaints dated 16th June 2014 and 8th December 2014 concerning the Head Teacher Ms Patricia Walters, white Caucasian, and in the Claimant's further grievance dated 9th May 2016, R1 and/or R2 subjected her to acts and/or omissions causing her detriment. The Claimant relies on the acts and/or omissions set out above (at paragraphs 46.5 – 46.41).

PIDA claim

50 The issue in the protected disclosure claim is whether, in the alternative to the racial victimisation claim, R1 and/or R2 subjected her to detriment on the ground the Claimant had made protected disclosures by her written complaints dated 16th June 2014 and 8th December 2014 concerning the Head Teacher, and in the Claimant's further grievance dated 9th May 2016.
That breaks down into a number of sub-issues:-

Grievance 16th June 2014

50.1 Did the grievance dated 16th June 2014 disclose information which tended to show R1 and/or R2 had failed to comply with a legal obligation to which they were subject (that being breach of the implied torts of race discrimination, harassment related to race and victimization on the ground of race) pursuant to s43B (1)(b) ERA?

50.1.1 The material information in the grievance is:
i) An account of the conduct on 9th June 2014 of two PGCE teachers in the Claimant's class, where they arrived late, and 'the English student' (a reference to English nationality, impliedly white) gave the Claimant orders to 'log on';
(ii) An account of the PGCE students' subsequent complaint that the Claimant did not assist them with pupil behavior;
(iii) An account of the Headteacher deciding to discipline the Claimant and attempting to give her a letter, then posting it to her home;
(iv) The statement 'The Head Teacher is always quick to defend white teachers who feel threatened by me';

(v) The statement ‘Please understand that I was born in this country and I spent my teacher training sitting beside a cupboard. My very presence at Holte School is abhorrent to Pat Walters. I represent a ‘race’ that is wrenched of the earth, ethnic minorities, sensitive and paranoid.’
(vi) The statement ‘I will never assimilate to this culture that hates me, although since I was a child I was used by teachers to show Government Ministers (now OfSTED) how well I can spell and write good English, perhaps that means I am assimilated’;
(vii) I intend to sue the two students who treated me like an inferior black woman and like an infidel.’

50.2 Did the Claimant have a reasonable belief that the disclosure of information tended to show the above?

50.3 Did the Claimant reasonably believe the disclosure was made in the public interest, and, if so, why?

50.4 To whom does the Claimant say the disclosure was made and what category within s43C – H ERA does that person fall within, so as to make the disclosure protected?

50.5 If the disclosure was qualifying and protected, was the Claimant subjected the Claimant to any detriment by R1 and/or R2 on the ground of the disclosure?

50.6 The Claimant relies on the detriments set out above (at paragraphs 46.14 – 46.41).

50.7 Did the grievance dated 8th December 2014 disclose information which tended to show R1 and/or R2 had failed to comply with a legal obligation to which they were subject (that being breach of the implied torts of race discrimination, harassment related to race and victimization on the ground of race) pursuant to s43B (1)(b) ERA?

Grievance 8th December 2014

50.7.1 The material information in the grievance, which contains 23 specific allegations against the Headteacher Ms Walters, is:
(i) Express complaints relating to Ms Walters’ open racial prejudice against black Afro-Caribbeans, expressed directly to the Claimant and in the way she treated her, at:

(a) Paragraph 9: Making a disrespectful reference to Black Friday in a staff briefing on 28th November 2014;

(b) Paragraph 14: that the Council cannot help a black female employee;

(c) Paragraph 19: allowing staff to speak in a derogatory manner to ethnic minority pupils in the Claimant's presence; and

(ii) Complaints relating to Ms Walters' prejudicial treatment of the Claimant, by implication because the Claimant is black Afro-Caribbean, at:
(a) Paragraph 1: not concluding the student teacher issue (following Ms Boden's report in October 2014);
(b) Paragraph 8: turning her back on the Claimant when the latter approached Ms Walters to speak to her;
(c) Paragraph 11: on 25th September 2014 complaining to the Claimant she had carried a hot drink on the stairs;
(d) Paragraph 12: that the Claimant does 'speak nonsense' and is 'paranoid';
(e) Paragraph 13: rejection of the Occupational Health request that the Claimant eat something at 11 am if not teaching;
(f) Paragraph 22: allocating the Claimant's Year 7 reading projects with SEN pupils;
(g) Paragraph 23: accusing the Claimant of intimidating staff.

50.8 Did the Claimant have a reasonable belief that the disclosure of information tended to show the above?

50.9 Did the Claimant reasonably believe the disclosure was made in the public interest, and, if so, why?

50.10 To whom does the Claimant say the disclosure was made and what category within s43C – H ERA does that person fall within, so as to make the disclosure protected?

50.11 If the disclosure was qualifying and protected, was the Claimant subjected the Claimant to any detriment by R1 and/or R2 on the ground of the disclosure?

50.12 The Claimant relies on the detriments set out above (at paragraphs 46.14 – 46.41).

Grievance 9th May 2016

50.13 Did the grievance dated 9th May 2016 disclose information which tended to show R1 and/or R2 had failed to comply with a legal obligation to which they were subject (that being breach of the implied torts of race discrimination, harassment related to race and victimization on the ground of race) pursuant to s43B (1)(b) ERA?

50.13.1 The material information in the grievance, a complaint of race discrimination and victimisation against Mrs Hardy, is:

(i)During a meeting on 21st April 2016 at Lancaster Circus, when the Claimant's union representative Reverend Jaddoo asked Mrs Hardy four times why racial discrimination had not been addressed, Mrs Hardy laughed to the point both Claimant and representative were offended.

(ii) During that meeting, following those allegations, an HR Officer accused Reverend Jaddoo of raising his voice, although the representative spoke loudly in any event.

(iii) During the meeting, and by letter dated 25th April 2016, Mrs Hardy indicated she would arrange for the Claimant's dismissal.

50.14 Did the Claimant have a reasonable belief that the disclosure of information tended to show the above?

50.15 Did the Claimant reasonably believe the disclosure was made in the public interest, and, if so, why?

50.16 To whom does the Claimant say the disclosure was made and what category within s43C – H ERA does that person fall within, so as to make the disclosure protected?

50.17 If the disclosure was qualifying and protected, was the Claimant subjected the Claimant to any detriment by R1 and/or R2 on the ground of the disclosure?

50.18 The Claimant relies on the detriments set out above (at paragraphs 46.14 – 46.41).

Documents and Evidence

51 For the claimant we had witness statements and heard from evidence from Ms Panton and Reverend Desmond Jadoo (President of Equal Justice Union and the claimant's representative at Dignity at Work proceedings).

52 For the respondents we had witness statements and heard evidence from Karen Hollick (Strategic Business manager and Head of HR at the second respondent); Christine Hardy (current Chair of Governors at the second respondent) ;Stephen Kearsley (Investigating Officer Dignity at Work February 2016 and Presenting Officer Dignity at Work Appeal) ;Jennifer James (current acting Head of Pupil Premium at the second respondent (history); Kerensa Neal (Current Deputy Head Teacher (curriculum) and teacher (geography) at the second respondent) ;Harry Fowler (Investigating Officer grievance 2014);Patricia Walters (former Head Teacher at the second respondent 2001 to July 2015) and Errol Robinson (former Chair of Governors at the second respondent (2014 - 2015) and Commissioning Officer ,Grievance December 2014).

53 There was an agreed cast list and chronology. There was a trial bundle of 1099 pages to which was added on 20 July 2017 at pages 142 a) to g) a copy of the minutes of the meeting of the governing body of the 2nd respondent on 9 July 2014 signed by Mr A Jenkins on 12 November 2014 and of the second respondent's disciplinary procedure at pages 856a) to 856o). We had regard only to those documents to which the parties referred in their witness statements or under cross-examination.

54 On 19 July 2017 we heard the recording of part of the Occupational health appointment of the claimant with Dr Mikuliszyn on 23 June 2015 surreptitiously made by the claimant on her phone.

55 We turn first to the claimant's credibility. Her first lengthy witness statement contained obvious inaccuracies (for example that the PGCE students were both white when one was Asian; that Charlene Whittingham was white when she is black; that Mrs Hardy had held a disciplinary hearing on 19 July 2016 when no such hearing took place) was selective (for example it omitted any account of the steps she took to obtain a fit note or advice from her GP or any explanation of any failure to do so although she had informed the respondent that she would be getting such information) and made assertions and posed 'questions' which were then left unanswered. Indeed under cross-examination she displayed a marked lack of familiarity with its contents and the contents of the agreed bundle and the factual bases on which her case had been put. For example she denied in evidence that she told Mr Fowler she was suicidal but in her witness statement she stated that she said Ms Walters and her group were driving her to suicide; she denied in evidence that Mr Robinson told her she was medically suspended at their meeting but her statement suggested he said that if she refused ,he would suspend her on medical grounds; she denied in evidence that she had accused Mr Fowler of trying to get her suspended but her statement said that she telephoned him and said he had intended to get her suspended ;under cross-examination she denied that she had ever seen the management referral form to Health Assured but in her statement complained at length about and quoted from it. It was necessary throughout cross-examination for questions to be put to her several times .She purported to be able to remember some details of events and meetings with clarity but was unable to recall other equally significant matters. She embellished her oral evidence under cross –examination (for example the account she gave of her meeting with Mr Robinson on 26 March 2015 that there was shouting and he had put a foot on the settee and leaned forward in her face) which were omitted from her witness statement. The inconsistencies inaccuracies and omissions are so numerous as to be incapable of being wholly explained by exceptionally poor recollection .We are forced to conclude that she is not a truthful witness and her evidence is therefore of little persuasive value. In the event of a conflict between it and the evidence of the respondent's witnesses (which was for the most part entirely consistent with the contemporaneous documents) we have unhesitatingly preferred the latter.

56 From the evidence we saw and heard we make the following findings of fact:

56.1 On 1 September 2002 the claimant began working as a teacher at the second respondent having been encouraged by Mrs Walters to apply for the post. The claimant was offered employment by a letter dated 23 September 2002 from the Chief Education Officer which enclosed a Statement of Particulars of employment together with a copy of the National Conditions of Employment for School Teachers. She accepted under cross-examination that when she had started working at the second respondent she had received a contract with a statement of terms and conditions.

56.2 As described by Mr Sykes in his written submissions the claimant is a 'striking black Caribbean person with a flamboyant personal style'. It is common ground that her dress and hairstyle did not change throughout the time the claimant worked at the second respondent.

56.3 The second respondent is a community school with over 1000 secondary school pupils aged 11 and upwards (90% BAME). It has a Board of Governors and Ms Hardy is its current chair.

56.4 The claimant was appointed 3rd in Special Educational Needs (SEN) and Ethnic Minority Achievement (EMA) Department on 13 November 2008. Her duties included teaching Religious Education at Key Stage 4.She accepted under cross-examination she was given a contract when she was promoted.
There were no concerns about the claimant until 2012 when (before and after the claimant's lengthy absence from work due to ill-health) tensions arose between the claimant and the then head of Humanities Department and the Head of History (Jennifer James) and other fellow teachers in the Humanities Department and on occasion Mrs Walters had to intervene. The claimant's work performance also gave cause for concern.

56.5 In December 2013 a second post in SEN was advertised internally (the internal advert was attached to Mr Fowler's report) and externally. The claimant did not apply for it although she knew the incumbent was retiring.

56.6 The second respondent provides placements for PGCE students from Birmingham University. On 9 June 2014 two PGCE students (FD who is Asian and SH who is white) complained about the claimant's 'lack of support' and 'acting in an inappropriate and uncooperative manner' during a lesson. Ms Wright (Head of Humanities) informed the claimant about those concerns on 10 June 2014.

56.7 Ms Walters asked Ms Hollick to commence an investigation into the complaint. On 12 June 2014 Mrs Walters saw the claimant in her office and tried to give her a letter signed by her informing her of a disciplinary investigation into her conduct with the PGCE students ('the PGCE incident') and asking her not to

discuss the matter with any work colleagues unless to ask them to be her witness in the investigation. The claimant declined to accept it and was told that it would be sent to her home. The claimant said she did not want a letter to be sent to her home. The letter was sent to the claimant's home and received by her.

56.8 On 13 June 2014 the claimant contacted Russell Manning of Birmingham University Education Department by telephone to complain about the PGCE students. She did not attend for work on 16 June 2014 and left two messages to the effect she was going to take legal advice about Mrs Walter's letter of 12 June 2014.She rang Mr Robinson (whom she considered a friend and who is black) and he advised her to put any complaints in writing to him.

56.9 The claimant wrote a letter to Mr Robinson dated 16 June 2014 in which she told him she was under investigation by Mrs Walters. She set out her version of events in relation to the PGCE incident .She complained that she had been disciplined by Mrs Walters in the presence of other teachers on 12 June 2014 and gave her account of the incident with the letter of that date which she had not opened. She said:

'The Head Teacher is always quick to defend white teachers who feel threatened by me.
I have spoken with Department of Education in London. I intend to meet with the Education Secretary and the Prime Minister; this is being arranged for me. I want my school file to take with me so that I can burn it outside 10 Downing Street. It is made up of collected lies of my working school life.

Please understand that I was born in this country and I spent my teacher training sitting beside a cupboard. My very presence at Holte School is abhorrent to Pat Walters. I represent a "race" that is the wrenched (sic) of the earth, ethnic minorities, sensitive and paranoid. Behind closed school doors I'm reminded of these things.

I write this letter because I intend to investigate my own teaching and celebrate my achievements, I'm not a white teacher, I do not stand and bark over the pupils as I'm expected to do to show that I am assimilated. I will never assimilate to this culture that hates me, although since I was a child I was used by teachers to show Government Ministers (now OfTED) how well I can spell and write good English, perhaps that means I am assimilated.

I will not come to any meetings with the Governors or anyone else. If I am forced then 100 million letters must be sent to the names of my ancestors lying at the bottom of the Atlantic Ocean, murdered by the British.

I had turned the other cheek so many times to get the same result. I have made up my mind that I will take no more. I am a learned woman. I intend to sue the

two students who have treated me like an inferior black woman and like an infidel. '

56.10 The claimant returned to work on 17 June 2014 and on 20 June 2014 Mr Robinson wrote to her acknowledging receipt of her letter of 16 June 2014 and informing her that her comments and concerns had been investigated as part of the disciplinary investigation under paragraph 1.3 of the 2nd respondent's disciplinary procedure ("the Disciplinary Procedure") a copy of which he enclosed. Paragraph 1.3 of that procedure states:
"If an employee makes a complaint relating to a disciplinary issue the separate grievance procedure which the governing body has established in accordance with paragraph 6 of the School Staffing (England) Regulations will not apply and the complaint will be dealt with through the disciplinary procedures."

56.11 As part of the disciplinary investigation into the PGCE incident Ms Hollick met with and prepared statements for FD and SH.

56.12 Mr Manning had complained to Mrs Walters about the telephone call he received from the claimant and on 23 June 2014 (having taken advice from the 1st respondents HR service) Mrs Walters wrote to the claimant and informed her of Mr Manning's complaint and that she had become aware the claimant had approached staff members directly about the issue and that she had had a period of unauthorised absence. She told the claimant that four other allegations would now have to be investigated: i.e. unauthorised absence on 16 June; contact with and comments made to Mr Manning; approaching colleagues in an intimidating manner in relation to the PGCE incident; and acting unprofessionally by discussing the PGCE incident with a pupil. She was told that if any of the above allegations were proven "this would be deemed as breaching the trust and confidence placed in you as an employee of the school and could be viewed as Gross Misconduct." She was reminded that her letter of 16 June was also to be investigated under the Disciplinary Procedure and informed that because of the nature of her letter it had been decided the investigation would be carried out by an external investigator and was likely to last for about 4 weeks.
The claimant accepted under cross-examination that if a complaint was raised by someone outside the second respondent it had to be investigated.

56.13 On 1 July 2014 the claimant was informed in writing that Hayley Boden of Workforce HR matters had been appointed by the 1st and 2nd respondent as Investigating Officer.

56.14 On 2 July 2014 SH asked Ms Hollick to make some changes to the draft statement which the latter had prepared which were made in full and without demur and an amended statement was sent to SH for her approval.

56.15 Under the Disciplinary Procedure (Paragraph 4.1) it is said that
"Suspension is normally only considered in cases which, on preliminary

investigation, appear to involve alleged gross misconduct or in which suspension is necessary to protect the integrity of the investigation." Paragraph 4.2 provides that "Under the Regulations the governing body and the headteacher of the school with the delegated budget both have the power to suspend any person employed or engaged otherwise than under a contract of employment to work at the school where, in the opinion of the governing body or (as the case may be) of the headteacher, the suspension of that person is required. The governing body recognises that a decision to suspend is normally a management decision for the headteacher and that in the event of the governing body or (when there is not time to convene a special meeting of the governing body) chair of governors contemplating such a decision the governing body, or its chair as the case may be, will take advice from the Employee Relations Team in conjunction with Schools Management Support before taking action. The governing body notes that, although under paragraph 4 of the Staffing Regulations it cannot delegate its functions of suspension or ending suspension, the authority has received legal advice that the School Governance (Procedures) Regulations 2003 do permit such delegation to a single governor or a committee. The governing body will therefore decide whether or not to delegate the power to suspend all suspension to the chair of governors, and the vice chair of governors in the absence of the chair of governors, or to its disciplinary and appeals committees, subject to any action taken being reported to the governing body and subject to annual review of any such delegation."

56. 16 We find on the balance of probabilities that Ms Hollick had asked Mr Robinson to suspend the claimant in June 2014 but he had declined to do so because he did not believe that he had the requisite authority.

56.17 On 9 July 2014 there was a meeting of the governing body of the 2nd respondent (which meets approximately once a term) which was attended by 12 people including Mrs Walters Ms Hardy and Mr Robinson. It was minuted that " Mr Robinson informed the Governing Body that he had recently been asked to suspend a member of staff pending an investigation however was unable to as he had not been delegated the appropriate powers by the Governing Body. Mrs Walters advised it is usual practice for a Chair of Governors to suspend the Headteacher if required. However in some circumstances it may not be appropriate for the Headteacher to suspend the member of staff due to the nature of the concern. Mrs Walters asked Governors to cast a vote for the Chair of Governors to be delegated the duties to suspend a member of staff if considered necessary."

56.18 Following a vote the governing body agreed to delegate the relevant power to the Chair of Governors. At the same meeting Mrs Walters told the Governing Body of her intention to retire at the end of the next academic year. She asked staff governors not to discuss her decision outside meeting as she would like to inform staff on the training day at the beginning of September.

56.19 On 19 and 28 August 2014 Hayley Boden carried out investigation interviews with the claimant. Among other matters she told Ms Boden that she had never taught Key Stage 4 and had spoken to Jennifer James about it .She believed that Ms Walters had told Jennifer James to allow her to teach key stage 4 but it never happened and she had not approached Ms Walters with her concern. At the meeting on 28 August 2014 the claimant confirmed that she wanted to formally withdraw her letter of 16 June 2016 which she had not intended to be a complaint.

56.20 On an induction day in September 2014 (one of the second respondent's busiest days of the school year) the claimant and her Nurture Group class were late coming down for lunch in the cafeteria and got caught up in the queues for lunch. The pupils within the Nurture Group are not good at getting around the building. When Mrs Walters saw her she asked her not to do it again. The claimant provided an explanation to her that the clock in her class room was wrong. It being a busy day Mrs Walters then went off to do something else. The clock was later checked and found not to be wrong.

56.21 On 26 September 2014 Mrs Walters sent the claimant (who has Type 2 diabetes) a letter about carrying a hot drink (soup) in a common walkway on the stairs. A member of staff had reported to her that the claimant had been observed carrying a hot drink up the stairs. She had spoken to the claimant about this. Ms Walters accepted under cross –examination that she may have described the claimant in their conversation about the hot drink as being 'sensitive' but denied having subjected the claimant to abuse as alleged. We find on the balance of probabilities that Ms Walters did describe the claimant as being sensitive on this occasion. She reminded the claimant in the letter that at a staff briefing on 24 September attended by the claimant she had issued an instruction to all staff that hot drinks should not be carried around the school due to health and safety concerns. She asked the claimant to refrain from carrying liquids of any nature in walkways and areas again and to use the staffing facilities. She was reminded refreshments could only be obtained during the scheduled break periods of 11:05 to 11:20 and 12: 20 to 13:05.

56.22 On 16 October 2014 Hayley Boden completed a draft report which she sent to Ms Hollick on 17 October 2014. It contained 18 appendices and Ms Boden interviewed 9 witnesses (the claimant twice) and reached conclusions on each of the 5 allegations. Ms Boden asked Ms Hollick to review it and make contact with her to confirm if she wished to "see any additions/amendments to the report? Also, it would be useful to understand where you wish to go from here." Her overall conclusions were in section 6. In relation to PGCE incident she concluded that "As the pupil behaviour could not be fully established, it is unclear from the evidence if Miss Panton should have intervened during this lesson. It is important to note here that the complaint raised by the 2 PGCE students was based on their "perceptions", and therefore this should not be totally dismissed." As far as the other allegations were concerned Ms Boden concluded that there

was insufficient information to substantiate two of them and in relation to the remainder set out potentially exculpatory or mitigating circumstances.

56.23 On 18 November 2014 a member of the first respondent's HR team sent an email to Hayley Boden following a meeting with Ms Hollick in which she set out some suggested changes to the draft report in relation to the investigation findings concerning 4 of the allegations and the conclusions because Ms Hollick considered they lacked detail. It was said that it had been explained to Ms Hollick that Ms Boden might be able to fulfil her requests but she was asked to let the team member know what she thought.

56.24 On 27 November 2014 Ms Hollick sent an email to her HR contact at the first respondent which said:
'Hayley seems to be taking a while in feeding back and this has added even more delay to this process. The other concerns that we have been discussing can no longer wait and we want to begin a disciplinary investigation into the attached allegations. WE (sic) are also about to begin the capability process and are just checking we have enough evidence to move into the formal process. Could you confirm you are happy with the allegations and also chase up Hayley please. I think the length of time it has taken has severely damaged the ability to move the matter forward without challenge."

56.25 On Friday 28 November 2014 Mrs Walters referred to 'Black Friday' during a staff meeting. She said staff should go home and take advantage of the bargains. She conducted such meetings every morning. They lasted about five minutes and used to pass on information such as urgent notices to staff before the school day begins. They are attended by about 200 people. In the light of the time of year we accept her evidence that she has no knowledge of any meaning of the phrase' Black Friday 'other than with reference to a day on which pre – Christmas retail bargains are available. It was the claimant's evidence in her witness statement that the origin of the phrase was the Friday after Thanksgiving when slaves were sold at a discount to plantation owners.

56.26 On 1 December 2014 Hayley Boden sent an email to the 1st respondent enclosing a slightly amended version of her report.

56.27 On 2 December 2014 while Mrs Walters was in her office she tried unsuccessfully to give the claimant a letter dated 1 December 2014 informing her of a disciplinary investigation to be carried out by Mr Sohal (the then Deputy Head) about allegations she had breached the Teachers' Standards following complaints made to Ms Walters by pupils and concerns raised by managers. These related to excluding and not interacting with pupils ;failing to account for an absent pupil and refusing to have him back; creating an unpleasant and difficult work environment for pupils; not providing accurate assessment data on pupils ; and failing to develop effective professional relationships with colleagues. The claimant refused to accept it and left the office. The claimant accepted under

cross-examination that there had been informal discussions between her and Mrs Walters about her performance in September 2014 because complaints had been received and that if Mrs Walters had such concerns she had to speak to her about it.

56.28 On 4 December 2014 a letter was written to the claimant adding to the investigation into the alleged breach of Teaching Standards the following allegation:
'That you refused to accept a letter from the Headteacher during a private meeting on 2 December 2014 informing you of the investigation process. That you then returned and spoke to the Headteacher in public and in front of other staff members telling her that you would not be accepting any letters at school or at home. This caused embarrassment to those present and could potentially undermine the authority of the Headteacher and the ability of your employer to communicate with you."

56.29 Hayley Boden's amended report was sent to Ms Hollick by the 1st respondent on 8 December 2014.

56.30 On 8 December 2014 the claimant raised a grievance against Mrs Walters raising 24 issues.

56.31 On 15 December 2014 Ms Hollick wrote to the 1st respondent stating "The report is still not as we would have wanted it. Mrs Panton has now raised a grievance against the Headteacher and one of the points is the lateness of this report. WE (sic) are very dissatisfied with the service and do not intend paying the invoice. WE (sic) will need to use the report as it stands however it is and of little use to the school."

56.32 On 15 December 2014 Ms Walters wrote to the claimant regarding performance concerns raised by the claimant's line manager and her head of Department and by pupils. Ms Walters said she had asked Mr Farmer to carry out an assessment of the support needed for her to improve her performance and avoid a formal competency procedure. He would be contacting her to arrange a meeting.

56. 33 On 17 December 2014 the claimant attended an investigatory interview with Mr Sohal in relation to the alleged breach of Teachers' Standards.
On 18 December 2014 Mr Robinson acknowledged receipt of the claimant's letter of 8 December and said that it would not be practicable to convene a preliminary meeting within 10 working days as provided by the grievance procedure because of the intervening holidays but he would arrange a date early in the new term.

56.34 On 18 December 2014 Mr Middleton of the 1st respondent's HR Department sent an email to a colleague indicating he thought the report prepared by Ms Boden had no quality issues whatsoever and that the delay was

because the school had requested that further alterations .Ms Boden could not be compelled to change or rule on findings if she had been unable to evidence it and an employee was always entitled to raise a grievance which was commonplace when there were allegations made against an individual. He copied this to Mrs Walters same day opining that on this occasion the 1st respondent had provided “a highest quality" product to the 2nd respondent.

56.35 On 19 December 2014 Ms Walters wrote to the first respondent’s HR team complaining about the lack of support offered to the second respondent in relation to the Hayley Boden report.

56.36 On 30 December 2014 the claimant added the names of 10 other employees of the second respondent to her grievance of 8 December 2014. These included Mrs Neal and Mrs James. She also asked for a copy of Ms Boden’s final investigation report to be put in her pigeonhole by 5 January 2015.

56.37 Mr Robinson wrote to the claimant on 6 January 2015 acknowledging receipt of her letter of 30 December (received on 5 January 2015) and asking her to provide further particulars about what she was alleging against whom with dates. He also told her that the final investigation report had not yet been issued (which was what he had been told by Ms Hollick).

56.38 The claimant replied on 8 January 2014 and said that the final report had been issued otherwise she would not have asked for it. Mr Robinson replied the next day that he had been informed that the final report had not been issued and if she believed otherwise could she state the basis for this.

56.39 Ms Hollick who works full time was the sole employee providing local HR support for the second respondent (which had 180 employees of which 95 were teaching staff) and for two other smaller primary schools. She was absent from work during January and February 2015 following the unexpected death of her mother. There was no-one else at the second respondent who could make progress so far as the claimant was concerned so matters were left in abeyance until Ms Hollick’s return.

56.40 On 3 February 2015 the claimant wrote to Mr Robinson to complain that Mr Robinson had not shown the ‘slightest care towards’ her and that she had been advised not to attend a meeting with him as ‘the first investigation of 12 June 2014 has not been issued and my grievance stems from that investigation.’ Mr Robinson who had already postponed several meetings hitherto at her request was taken aback by this novel objection and wrote to her the next day repeating the report had not been issued (though he was making inquiries with the first respondent to discuss the delay) and asking her to let him know by 11 February 2015 if she wanted to engage with the grievance process.

56.41 The claimant had been absent from work having suffered 3 bereavements but returned to work on 23 February 2015 .On 26 February 2015 there was an informal grievance meeting with her and Mr Robinson. The day before she had written to him to ask for a third person to attend the meeting; she explained 'I have to request this so that you do not feel disturbed, threatened or intimidated by my presence'. The Clerk to the Governors attended to take notes. Some of the claimant's grievances were discussed. The claimant raised a new grievance about an alleged incident on 16 December 2015 when the car driven by Ms Walters went 'bumper to bumper with her for around two minutes before passing' at the gate to the school car park which she considered 'an act of intimidation.' Mr Robinson asked her if she would like more Occupational health appointments but the notes record that the claimant responded that 'it was too late now and she has learned to manage. It is out of place now as she has not been offered it before.' Mr Robinson explained that as he had been chair of the governors for 10 years and a governor before that he did not feel it appropriate for him to carry out the investigation and would be appointing an independent investigator.

56.42 On 5 March 2015 the claimant provided in writing more information about her grievances against the 10 other employees. Ms Wright had "belittled and ridiculed" her. She was not sure why Ms Wright hated her; "I don't care why". Ms Bashir gave the claimant "dirty looks and accused" her of not putting the correct marks of the year 9 groups and reported her straight to Ms Walters. Mrs Neal told a lie about her putting a child out of her class. Ms Bashir was not able to have a meeting with the claimant by herself as "my presence frightens her". She said "these complaints may sound trivial but they are real, they stem from people who are abusive and bigots in my presence. The some reason they step out of their closets and have appeared in their true form. They don't want me in their meetings or their school. I have no freedom of thought in their meetings, they do not respond to any of my suggestions. They don't ask me about any of my classes or pupils behaviour. I am not a colleague. This does not bother me as I was never in the collective league. I am just a pretend teacher trespassing on their profession." She alleged that Mr Sohal "intends to grind me "into the ground" and did not speak to her in school. Mr Oliver and Mr Farmer "just see straight through me, they have no respect for me and they have spoken to me harshly because they have been told to do so." Mr Holder resented her being in special educational needs and was a "notorious liar." Mrs Hollick and Ms Bowen had shown the claimant no respect; "they have provoked me and found it funny. I suppose they have to do their bit for the cause." She concluded by saying that Mrs James was "the author of many of the things I have been accused of at Holte School" and had "worked tirelessly" to remove her from the history department. Neither of the specific complaints of face discrimination now alleged against Ms Neal and Mrs James were raised.

56.43 Despite Ms Hollick's dissatisfaction with the report it was decided that the decision about whether the allegations were proven or not should be put before a disciplinary panel and by a letter dated 11 March 2015 the claimant was required

to attend a disciplinary hearing on 15 April 2015 before the committee of the second respondent's Governing Body responsible for disciplinary hearings in connection with the PGCE incident and the four other matters. The letter of invite enclosed the documentation which had been submitted to the committee. We find on the balance of probabilities that this included the first version of Hayley Boden's investigation report. We accept the evidence of Ms Hollick that she put the documentation in a pack for Ms Bowen to send to the claimant. The letter was sent to the claimant and copied to her representative. Had that investigation report not been included we have no doubt that one or both of them would have immediately complained about its omission given the preceding correspondence about it. There is no correspondence from the claimant or her representative(s) after 11 March 2015 inquiring as to its whereabouts.

56.44 On 12 March 2015 Mr Robinson told the claimant in a letter of that date that he would be asking the independent investigator to deal with the matters she raised her letter of 30 December 2014 and 5 March 2015. He enclosed a copy of the minutes of his meeting with her on 26 February 2015.

56.45 Mr Fowler was appointed as the independent investigator and on 16 March 2015 invited the claimant to an interview with him as the investigating officer on 23 March 2015 to discuss her concerns and seek ways of resolving the issues. He made it clear in the letter that at the end of the interview notes would be produced and would be an appendix to his report to be submitted to the board of governors. . On 23 March 2015 Mr Fowler interviewed her as part of the investigation into her grievances. Among other things she told Mr Fowler that she had received by hand two reports to do with the 'June complaint' about two weeks previously and that it was about the hearing on 15 April before the Governors. She told him that jokes were made about children and in the context of a school trip to the zoo that one of the staff (not named by her) had made a comment about taking one of the children (also not named) and leaving him there.

56.46 On 24 March 2015 Mr Fowler emailed Ms Hollick because he was concerned about the claimant's behaviour at their meeting. It is common ground he did not seek the claimant's permission before doing so. He said he was not making a judgement at this stage about the validity of her grievances against Ms Walters and the 10 other members of staff and would continue with his investigation but the claimant had made a number of comments and displayed behaviour that gave him cause for concern about both her attitude to her current teaching role and her ability to effectively teach and educate the pupils at the school. He contacted her at this stage because "She stated at one point in the interview that she was "stressed and worried, but nobody cares", and told me that she had "asked for help", but nobody had listened. I am sure that this is not the case, but she clearly believes it to be true.

She talked about a referral to Occupational Health, and when I questioned her about tit (sic), she said that it was because of stress in her mental health. As I understand that she later declined the opportunity to attend an OH appointment. She was in tears, or close to tears, on a number of occasions, and talked about a colleague friend who had committed suicide. She told me that if she was not stronger, she could have gone the same way". her (sic) manner suggested someone who is very low, feeling extremely isolated and negative about her job and the school she works in.
I am not a qualified psychologist, and have no training in mental health issues, but I do have many years of managing people who work with young people, often in stressful situations, and I would be concerned about her ability to undertake an effective teaching role in her current state of mind.
Again, I'm not an expert in mental health, but my layman's view is that she is not a suicide risk, but her reference to it did, in my opinion, indicate a worryingly high level of upset and distress.
Similarly, I'm not a teacher but I do have many years of experience of working in managing services that work with young people, particularly vulnerable young people, and her behaviour and language suggest to me that she may not be operating effectively given the current situation in state of mind.
She did say to me in response to a question that she was not an educator, and was not able to teach the children in her charge. I am not sure whether or not she was being sarcastic, or ironic at that point, but she did not seem to be very positive about her ability to teach effectively.
I was struck by her defeatist attitude, and her often stated view during the interview that nobody likes, nobody talks to her, never listens to her, nobody values her contribution, and nobody cares about her. I have no doubt that this is not the case, but she clearly believes it, and I felt that I could not hear those comments from her without making senior staff in the school aware of them now rather than in the final report of the investigation." He concluded by apologising for not following the normal process with his investigation but that he had felt sufficiently concerned about her to raise this with her at this stage. He said he was not recommending any particular course of action, but he did want to raise the fact with her and the head teacher that she displayed sufficient attitudes and behaviours to suggest that an assessment ought to be considered of her ability to effectively undertake a role as a teacher at present, and her ability to function as part of the teaching team, 'particularly given the fact that she works with young people who have special educational needs, and pupils who may have other vulnerabilities." The claimant's own evidence in chief was that she had told him about a colleague who had committed suicide and told Mr Fowler that Ms Walters and her group were driving her to suicide. Mr Fowler had conducted 60 investigations previously but had not previously encountered such a situation. He had not been sure what to do but had decided to raise it with the second respondent.

56.47 Under the 2nd respondent Managing Attendance Procedure (first sentence paragraph 25.1 it is said "Whilst the vast majority of cases considered under this

procedure will relate to attendance, there may be rare cases of employees who are attending work but who appear to be unfit because of a particular medical condition."
Paragraph 25.2 goes on to say:
"If a school or academy becomes aware of erratic behaviour which appears to be linked to a medical condition, urgent advice should be sought from a HR Consultant. Depending on the circumstances, it may be advisable for the employee to be asked to go home and make an appointment with his or her GP as soon as possible. However, if the employee refuses and/or their health or the health, safety and welfare of others in the school or academy may be at risk, suspension may prove necessary and a HR Consultant will advise accordingly. It is likely that an urgent referral to occupational health will also be necessary. Discussions with the trade union representative may be helpful in the circumstances."

56.48 We conclude on the balance of probabilities that on receipt of Mr Fowler's email Ms Hollick took advice from Charlene Whittingham at the first respondent's Employment Relations team and spoke to Mr Robinson in order to arrange a meeting with the claimant the following day and to explain to him his options which she summarised to him as being support, suspend or do nothing and wait and see. We find on the balance of probabilities that it was she who made for Mr Robinson a typed note of the Employment Relations advice she had received because it contains the distinctive typo WE which was found in other emails typed by her. Mr Robinson's and Ms Hollick's recollections that it was not her but Mr Robinson's secretary who typed the note and that it was Mr Robinson who obtained advice from Ms Whittingham are mistaken. We accept Mr Robinson's evidence that that it was he who subsequently amended that note in manuscript to change its heading from 'Advice from ER' from to 'Advice from HR'. We find he did so to reflect it was HR advice given to him.

56.49 The note recorded that Mr Robinson was the commissioning officer and concerns had been reported to him and he had to meet the claimant to whom the second respondent had a duty of care as employer. The note continued in the form of an aide memoire for the conduct of such a meeting. He was to tell her the comments made by her during her meeting with Mr Fowler meant he was asking her to seek medical assistance by visiting her GP and attending an Occupational Health appointment to be arranged by the second respondent. Because of the nature of the comments she had made during this time she was to refrain from working at the second respondent and would remain on full pay while she sought help to ascertain her fitness to work and obtained any support.

56.50 On 25 March 2015 Ms Bowen (the clerk to the Governing Body) wrote to the claimant to invite her to meet with Mr Robinson to discuss some issues raised by Mr Fowler and 'offer further support' to her.

56.51 On 26 March 2015 Ms Hollick and Mr Robinson saw Ms Walters and asked her if they could use her office for the meeting with the claimant to which Ms Walters agreed. Ms Walters was brought up to date by Ms Hollick about the advice she had received about the claimant and told her that the claimant was unfit to teach .We accept Ms Walters' evidence that she made no judgment about the claimant .

56.52 The claimant duly met with Mr Robinson about Mr Fowler's concerns and was placed upon medical suspension. Notes of the meeting were taken by Linda Whipps of the first respondent's HR team. We accept Mr Robinson's evidence of what happened at that meeting as corroborated by the contemporaneous notes taken by Ms Whipps. He was not someone who was temperamentally inclined simply to do what he was told or to shirk from difficult decisions .He explained to the claimant that Mr Fowler had reported a number of concerns. When they had last met he had offered and she had declined an Occupational health referral. Mr Fowler's report gave him sufficient concern to ask her to agree to be assessed. Failure to do so would involve other steps being taken in the interests of her health and safety and that of others. The claimant said that no one cared about her health and she moved to the beat of her own drum and the House of Lords had directed her course of action .Mr Robinson asked for her agreement to be assessed by Occupation health. If she agreed she would be placed on garden leave until the assessment. The claimant became angry and said she was about to leave the meeting to go to her lesson and had no intention of going on leave. Mr Robinson said without her agreement he would have to suspend her on medical grounds .She replied he could do what he had to do and asked if he thought she was a schizophrenic. Mr Robinson told her in the absence of her agreement he had to take the step of suspending her on medical grounds. The claimant became enraged despite Mr Robinson's attempts to calm her down and stood and strode around the room. He confirmed the grounds of her suspension would be set out in writing and that she was being asked to leave the building at which the claimant hurriedly left the room. The claimant rang Mr Fowler and left a message telling him that he had been successful in having her suspended from work. On that same day Mr Fowler sent the claimant a copy of the minutes of his meeting with her on 23 March 2015 for her to approve or amend by 10 April failing which he would assume they were approved.

56.53 Mr Robinson also wrote to the claimant 26 March 2015 to confirm that she had been medically suspended on full pay 'while a medical view was sought' and summarised her comments to Mr Fowler which caused concerns. He said she had left their meeting before he could tell her about other concerns which required him to take action relating to her interaction with colleagues and staff, members (not communicating or cooperating with colleagues and managers making management difficult). He confirmed she had been suspended in accordance with the second respondent's Managing Attendance Policy (paragraph 25.2) and in the interests of health and safety referring to the duty of care to her, her colleagues and pupils. A copy of the policy was attached. He

enclosed a consent form to enable a referral to Occupational health to be made to be returned by 1 April 2015.He said once in receipt of advice about her fitness to work a meeting with her would be arranged but she should not return to work until she had been told to do so. The disciplinary hearing on 15 April 2015 was postponed while Occupational Health advice was sought.

56.54 On 8 April 2015 Mr Sykes under the moniker 'Employment Law Centres' wrote to the second respondent complaining that the claimant's suspension was unlawful on the absence of a medical report indicating incapability and requiring it be lifted immediately.

56.55 On 15 April 2015 Mrs Panton wrote to Mr Fowler she was not happy with his minutes which she described as incorrect and said she was seeking legal advice. She gave them to Mr Sykes but did not retain a copy.

56.56 During the claimant's suspension her classes were reallocated to other teachers by Mr Sohal with the approval of Ms Walters. The claimant accepted under cross-examination that classes still needed to be taught in her absence.

56.57 On 29 April 2015 the claimant missed an Occupational Health appointment with Medigold.

56.58 On 7 May 2015 Mr Robinson wrote to the claimant referring to her current medical suspension and to inform her that she had failed to attend the occupational health appointment for which the school had incurred a fee of £384. A further appointment would be rearranged but he needed her reassurance that she would attend. If she did not intend to do so then the 2nd respondent would have no alternative but to make its determination without Occupational Health input. It was therefore in her best interests to engage with Occupational Health.

56.59 On 12 May 2015 Mr Sykes wrote to Mr Robinson under the moniker Employment Law Centres stating there was no medical basis for the claimant's suspension and required she be returned to work immediately. She was content to attend an appointment with Medigold but would shortly be serving a fit note from her GP. 'At that time' the 2nd respondent should confirm if it still wanted her to attend an occupational health appointment. Finally he asked Mr Robinson to confirm whether in suspending the claimant and writing to her on 7 May he had the approval of the Board of Governors by way of written resolution signed by the board or delegated committee. It is common ground that no fit note was ever provided nor did Mr Robinson provide the confirmation sought.

56.60 Mr Fowler had continued his investigation in April 2015 (interviewing 13 witnesses) and completed his report in early May. In May 2015 Mr Sohal produced an investigatory report which recommended a disciplinary panel be convened in relation to the allegations contained in his letter to the claimant of 4 December 2014.

56.61 On 22 May 2015 Mr Robinson wrote to the claimant to tell her that he had received Mr Fowler's report and invited her to a grievance hearing on 10 June 2015.He reminded her she had not yet attended an Occupational health appointment and that it was important that she do so as the second respondent needed to make a determination of her fitness to teach in order to review her suspension.. He also referred to Mr Sykes' correspondence and said he would be unable to respond because Employment Law Centres was not a recognised representative but would discuss the concerns raised when her medical suspension was reviewed.

56.62 The claimant asked for the hearing to be postponed because she had not secured representation for that date and on 10 June 2015 it was agreed it would be postponed until 30 June 2015.

56.63 On 17 June 2015 Mr Bunting (a Governor of the second respondent) wrote to the claimant updating her as to the present position. In a well-written and clear letter he confirmed that in relation to PGCE incident the disciplinary hearing due for 15 April was postponed following the decision to suspend on medical grounds. The disciplinary investigation into the breach of Teachers Standards been concluded but was also "" on hold" pending the outcome of the occupational health appointment. It was confirmed she was medically suspended pending a report from occupational health and that the occupational health appointment had to be rearranged because she had arrived late and would now take place on 23 June 2015. Mr Bunting invited her to attend a meeting on 30 June 2015 to review her medical suspension and discuss a grievance she had raised against Mr Robinson on 1 June 2015.As far as her grievance against Mrs Walters and 10 other members of staff concerned investigated by Mr Fowler Mr Bunting would chair the grievance hearing because Mr Robinson had decided to step aside due to a possible conflict with Reverend Jaddoo as her chosen representative. He proposed that that meeting also take place on 30 June 2015.

56.64 On 23 June 2015 the claimant (accompanied by her sister-in-law) attended an Occupational health appointment with Dr Mikuliszyn (a Consultant Occupational Physician) of Medigold Health Consultancy Limited ("Medigold"). Dr Mikuliszyn gave the claimant some simple numerical spelling and memory tests and told her she had some problems with her short and long term memory at which the claimant laughed. He told her that because of her cognitive issues it would be good for her to undergo a psychological assessment .She laughed again and when she was asked to explain what was funny she said that that was what she was there for :'They think I have a psychological problem .' Dr Mikuliszyn said he would tell the second respondent that the tests showed some issues which he would recommend were investigated and he would mention the work related problems (which had been discussed) in his report. He told her the psychological assessment could be with a psychologist or psychiatrist or there could be a whole range of tests of up to 6 hours and depending on the result 'we

will be going forward but for I know I think er er we are kind of suspended in in where we are currently'. She confirmed when asked that she understood.

56.65 Dr Mikuliszyn sent Ms Hollick his report on 25 June 2015. He explained that his advice had been sought in connection with the claimant's capability to undertake the current role performance deterioration and medical suspension. He confirmed that simple cognitive tests showed the claimant had short and long-term memory concentration impairment. He observed that she had initially displayed normal mood and behaviour. Although later on she was tearful "but then she reacted inappropriately, laughing without any reason for it. This was inappropriate in my opinion'. Smiling and laughing was more frequent later on during the consultation. His recommendation was that she undergo further psychological assessment to ascertain any possible reasons for her behaviour which should also shed some light on her cognitive impairment. He did not think she should return to work until the results were available. He did not think she was currently fit to teach pending a further psychological assessment. In his opinion she was well enough to undergo disciplinary and grievance processes but he could not currently advise that she was able to adequately safeguard pupils in her care. He concluded by saying that he recommended he write to her GP requesting further investigations and then would be able to advise further.

56.66 On 30 June 2015 the claimant (accompanied by Marcia Lawrence-Russell who was described as General Secretary of Equal Justice Union) attended a grievance meeting with Mr Bunting to discuss the outcome of her grievances which were not upheld. It was agreed that there would be a meeting to review the medical suspension on 16 July 2015. The claimant confirmed she did not want to talk about her grievance against Mr Robinson. She was told she was not allowed under the current procedure to have a copy of Mr Fowler's report only a summary of the findings in the form of a letter and the report would be provided at the point of appeal. We accept that this was in accordance with the first respondent's policy agreed with the recognised trade unions and, although Ms Hollick frankly expressed to us her dim view of it, it was applied to all employees.

56.67 The outcome of the meeting was confirmed in a letter to the claimant dated 2 July 2015.

56.68 On 13 July 2015 the claimant submitted a five page letter of appeal against the grievance outcome and asked for a full copy of Mr Fowler's report. A copy was provided to her and her representative under cover of a hand delivered letter dated16 July 2015 provided at a medical suspension review meeting on that date during which she disputed the findings of the Occupational health report dated 25 June 2015. It was agreed that she would seek written advice from her GP as soon as possible and the second respondent would check if Dr Mikuliszyn had also written to the GP. She was to remain on medical suspension until she had sought further advice. This was confirmed in a letter to the claimant of 21 July 2015.

56.69 Ms Walters retired at the end of that summer term in July 2015 and Mr Sohal was appointed Head teacher. In these proceedings the claimant makes no allegations against him.

56.70 Medigold chased the claimant's GP on 21 and 28 July 5 12 and 19 August 2015.The GP sent his report dated 3 September 2015 to Dr Mikuliszyn which recorded he found her "overall behaviour somehow inappropriate" and agreed further psychological assessment was necessary. There was no evidence before us on which we could find that either the first or second respondent ever saw this report; we accept Ms Hollick's evidence under cross –examination that she had never seen it before and it is apparent from the contents of the management referral form she prepared for Health Assured that she had not received any report from the claimant's GP at the time she prepared it (sometime after 15 October 2015).

56.71 On 25 September 2015 the claimant wrote to Charlene Whittingham to bring a grievance against Mr Robinson for suspending "and dismissing' her from her teaching post on 26 March 2015. She also said that she had reported Dr Mikuliszyn to Medigold. She accused Mr Robinson of having brought the 2nd respondent "into disrepute, he is not a doctor and he has conspired with others under the request of the then head teacher Miss Walters to defame my character."

56.72 A medical suspension review meeting was due to take place on 28 September 2015 but was postponed because the claimant said she had not had an update from her GP. At the next medical suspension review meeting on 15 October 2015 the claimant had still not provided a report from her GP (and provided no explanation for the delay) .She complained that Dr Mikulisyzyn was not qualified to make an assessment .It was agreed that there be a second Occupational health referral to a different provider (Health Assured –a division of Capita) which the notes of the meeting record 'needed to happen as soon as possible'.

56.73 On 2 December 2015 the second respondent chased the claimant's representative (Marcia Lawrence-Russell) for the claimant's consent to the second Occupational Health referral attaching a management referral form about the claimant for Health Assured prepared by Ms Hollick. Ms Lawrence- Russell replied on 4 December 2015 that she would make every attempt to process the documents in question. The management referral asked for a report on whether the claimant was fit for normal hours and duties required by her post and whether she was psychologically fit to teach. The form asks for a description of the issue which prompted the referral .Ms Hollick said the claimant was "currently suspended on the grounds of ill-health. The school took the difficult decision to medically suspend Ms Panton on 26 March 2015 following escalating difficulties in managing her behaviour both in terms of her colleagues and managers and in

terms of pupils. Ms Panton at the time had lodged separate grievances against 10 staff members and 23 grievances against the Headteacher." She said that following the independent investigators 1st meeting with the claimant he had raised concerns about the type of things the claimant was saying and that "in view of the concerns over the types of things being said by Ms Panton and the concerns of the investigator a decision to suspend pending an occupational health assessment was made." She also explained that the claimant had subsequently been seen by Dr Mikulisyzyn (described as a consultant occupational health physician) on 23 June 2015 who had recommended further psychological assessment and that report had been challenged by the claimant. Ms Hollick set out 8 remarks that had given concern about the claimant's mental health which included "if I am seen to be the Negro face of Britain, then I can't do anything" and "I will never assimilate to this culture that hates me." The claimant's evidence was that she had never seen the referral before but since she made accurate quotes from it in her witness statement we conclude that she had seen it and was familiar with its contents.

56.74 On 12 January 2016 Marcia Lawrence- Russell was chased again for a response but to no avail.

56.75 On 9 February 2016 the claimant raised a Dignity at Work complaint against Mr Robinson and Mr Fowler (11 months after the events complained of) and on 25 February 2016 Ms Hardy told Mr Robinson in writing that she had decided to commission an investigation into the allegations made.

56.76 On 31 March 2016 the claimant presented her first complaint to the tribunal. She had first sought advice in January 2015.

56.77 Mr Kearsley had been commissioned as an independent investigating officer by Ms Hardy and prepared an investigation report into the claimant's Dignity at Work complaint dated 28 March 2016.He had met with the claimant on 17 March 2016.She was accompanied by Reverend Jaddoo. Notes were made of that meeting .The claimant gave him the CD she had made of the Occupational health appointment with Dr Mikuliszyn and said it was evidence that she had not laughed throughout that assessment and that the report itself said she had. Mr Kearsley said he would listen to it. Under cross-examination the claimant confirmed unequivocally that she did not make any complaint of discrimination against Mr Kearsley and that she did not disagree with the notes of the meeting. We accept Mr Kearsley's evidence that he listened to the CD as part of his investigation. The claimant also confirmed to him that she had had a copy of Mr Fowler's report and said he had 'somehow twisted these things. Mr Kearsley concluded in his report (among other matters) that contrary to the claimant's assertion the report of Dr Mikuliszyn did not say she had laughed throughout. He said 'The medical report by the Investigating Officer does not suggest or state that (the claimant) laughed throughout the occupational assessment, as claimed by (the claimant. The report clearly states that the claimant) laughed when

responding towards the end giving rise to concerns about her cognitive responses."

56.78 On 4 April 2016 Ms Hardy prepared a written statement of the outcome of the claimant's grievance in which she concluded that neither the complaints against Mr Fowler or Mr Robinson were upheld and made recommendations that a meeting be convened by the second respondent's disciplinary committee under the policy adopted by it for 'Potential Dismissal for some Other Substantial Reason'('sosr') .It stated that the working relationship between the claimant and the second respondent had broken down beyond repair, The reasons she cited were:
"The Occupational Health report dated 25 June 2015 stated you are not fit to teach, pending further relevant assessments and stated they would not advise that you safeguard children. I find that Mr Robinson acted correctly in medically suspending you.
You have now been suspended since 26 March 2015 as the school has no subsequent medical evidence that you are now fit.
You raised a grievance against the Head Teacher on 8 December 2014. On 30 December 2014 you added a further 10 members of staff to the grievance. The outcome was that there was no case to answer.
On the 1st February 2016 you have raised a Dignity at Work Complaint against the Chair of Governors, Errol Robinson, and the independent investigator, Harry Fowler. The outcome is that there is no case to answer."
The statement went on to say that a 3rd party would now be asked to prepare a report for the 2nd respondent's Disciplinary Committee to consider the claimant's dismissal for 'sosr'.

56.79 There was a Dignity at Work feedback meeting on 21 April 2016 conducted by Ms Hardy. Nicola Johnson attended as note taker. The claimant was accompanied by Reverend Jaddoo.

56.80 At this point we consider Reverend Jaddoo's credibility. He was identified by the claimant as her only witness in the preliminary hearing on 13 December 2016 before Employment Judge Butler yet his witness statement served on 10 July 2017 was half a page of 9 short numbered paragraphs of the conclusions which (having represented her) he had reached about the claimant's treatment. It was of little evidential value. However his supplementary witness statement was similarly lacking .Its contents are for the most part a direct 'cut and paste' from the claimant's own statement even reproducing her address not his and without even changing the pronoun .They were not his words but hers. He took a cavalier approach to ensuring its accuracy having (on his account) made amendments to it but failing to spot and address the egregious inaccuracies above and, having made amendments, was then inconsistent in his evidence under cross-examination. He was inexplicably defensive and combative in his oral evidence. We found him was an unreliable witness. Neither the claimant nor Reverend Jaddoo have disclosed any notes they made of the meeting and under cross-

examination the claimant initially agreed with the contemporaneous notes of the meeting taken by Ms Johnson and only later changed her evidence giving an account of Ms Hardy having looked at her and laughed in her face and ignored her and that Ms Hardy had accused Reverend Jaddoo of raising his voice because he was black. These matters were not in the (brief) account she gave of this meeting in her witness statement. We have preferred the evidence of Mrs Hardy corroborated by the notes of the meeting taken by Ms Johnson.

56.81 Mrs Hardy began the meeting by saying it was a shame that the situation had gone on for so long and that it was of the utmost importance that a solution was found for both pupils and staff .This rather understated her feelings at this point; in fact she was horrified that the situation had been going on for 15 months.. She then began reading from her pre-prepared statement. Reverend Jaddoo asked questions about Mr Robinson's suspension of the claimant. Ms Hardy said she was not involved in that. He then asked whether safeguarding issues had been raised with her and she said 'No'. He then asked some questions about how Mr Robinson had come to get the information about the claimant. Ms Johnson told him it had come from Mr Fowler. Reverend Jaddoo then asked whether Mr Fowler was black or white .Mrs Hardy said 'Let's not go there'. He then said the second respondent was over 90% BME and asked for Mr Fowler's ethnic origin. Ms Hardy was shocked by the question and made a gesture with her hand. Reverend Jaddoo said he was concerned she had laughed which she denied .He went on to say that his question about Mr Fowler was justified because he had stereotyped the claimant based on her appearance and dress. We find on the balance of probabilities that he raised his voice as he did so. Ms Hardy found him intimidating .Ms Johnson told him that she was not prepared to accept his conduct towards Mrs Hardy and if there were further incidents of his raising his voice the meeting would end. Reverend Jaddoo said he spoke loudly and apologised for raising his voice and if Ms Hardy had found it offensive he had mentioned race he had found it offensive that she had laughed. Mrs Hardy said if he was offended she also apologised for what she described as a reactive gesture but also commented she had found his question offensive. She made this apology to keep the peace and get to the end of the meeting .The meeting did then move on and Ms Hardy informed the claimant was that her complaints were not upheld and that her recommended next steps were that the Disciplinary Committee convene a meeting for potential dismissal for 'some other substantial reason'. The notes record that she gave the reason as being the working relationship between the claimant and the second respondent had broken down 'beyond repair' because:
'The Occupational Health report dated 25th June 2015 stated that you are not fit to teach, pending further relevant assessments and stated they would not advise that you safeguard children. I find that Mr Robinson acted correctly in medically suspending you.
You have now been suspended since 26th March 2015 as the school has no subsequent medical evidence that you are now fit.

You raised a grievance against the Head Teacher on 8 December 2014. On 30 December 2014 you added a further 10 members of staff to the grievance. The outcome was that there was no case to answer.
On 1 February 2016 you have raised a Dignity at Work Complaint against the Chair of Governors, Errol Robinson, and the independent investigator, Harry Fowler. The outcome is that there is no case to answer."

It is accepted that Mrs Hardy had commented during this meeting that she understood discrimination being a female engineer.

56.82 A letter confirming the outcome of the above meeting was sent to the claimant on 25 April 2015 (including the reasons for the recommended next steps). A report was prepared by Laura Hackett for the 2nd respondent's Disciplinary Committee in readiness for a hearing on 6 May 2016.On 9 May 2016 the claimant submitted an appeal against the outcome of her Dignity at Work complaint and raised a grievance against Christine Hardy complaining of racism in her conduct of the meeting on 21 April 2016 and of 'a decision has been made to sack me without any formal hearing or allegation, which is victimisation as I class myself as a whistleblower by raising concerns about matters which in my view are not right.' She complained she had been subject to a witch-hunt and clear discrimination which was 'self evident.'

56.83 On 12 May 2016 a letter was sent to the claimant inviting her to a rescheduled sosr hearing which was then postponed from 26 May 2016 when Reverend Jaddoo was not available to represent the claimant and again from 9 June 2016 because the claimant's appeal against the outcome of her Dignity at Work complaint had not been heard and again from 19 July 2016 to give the claimant the opportunity to contribute to the report of Ms Hackett.

56.84 On 14 October 2016 the claimant presented her second complaint to the tribunal.

56.85 The claimant accepted under cross-examination in clear and unequivocal terms that she was not considering any wider concerns when raising any of her grievances of 16 June 2014 8 December 2014 and 9 May 2016; she was concerned solely about herself.

The Law

57 Under section 13 (2) (a) and (4) EqA 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. One of those protected characteristics is race (Section 10 EqA).

58 Under section 26 (1) EqA
'(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."

59 Under section 26 (4) EqA
' (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. '
The relevant protected characteristics include race and religion or belief (section 4 EqA).

60 A complainant is entitled to complain to the Tribunal that a person has committed an unlawful act of discrimination, but it is the act of which complaint is made and no other that the Tribunal must consider and rule upon. It the act of which complaint is made is found to be not proven, it is not for the tribunal to find another act of discrimination of which complaint has not been made to give a remedy in respect of that other act (Chapman -v- Simon [1994] IRLR 124).

61 Under section 212 (1) EqA 'detriment 'does not, subject to subsection (5), include conduct which amounts to harassment.

62 In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL** it was held that in order for a disadvantage to qualify as a 'detriment', it must arise in the employment field in that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. Paragraph 9.8 of the Equa lity and Human Rights Commission: Code of Practice on Employment (2011) states ""Detriment" in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards."

63 Section 23 (1) EqA states that "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.".

64 Under section 27 EqA

(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—
……
making an allegation (whether or not express) that A or another person has contravened this Act'.

65 The courts in approaching discrimination claims have taken account of the fact that it is difficult for a Claimant to establish discrimination. It is accepted that primary evidence that directly indicates discrimination may often not be available and that it is usually necessary for the Tribunal to draw appropriate inferences from the primary findings of fact they make.

66 Section 136 EqA reverses the burden of proof if there is a prima facie case of discrimination. The courts have provided detailed guidance on the circumstances in which the burden reverses1 but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred. The two-stage test reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.2

67 The explanation for the less favourable treatment does not have to be a reasonable one.3 In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation.4If the employer fails to provide a non-discriminatory

[1] Barton v Investec [2003] IRIR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA

[2] By reference to Igen
[3] By reference to Zafar v Glasgow City Council [1998] IRLR 36 HL
[4] By reference to Bahl v Law Society [2004] IRLR 799 CA

explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

68 It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.5

69 It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.6

70 It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was.7 However, as the EAT noted (in **Ladele**) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.8

71 If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they

[5] By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA
[6] By reference to Anya v University of Oxford [2001] IRLR 377 CA
[7] By reference to Shamoon
[8] By reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT

must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).9

72 Tribunals are urged to take an over view of the totality of the evidence before making findings in respect of individual allegations made by a Claimant. The necessity of setting out chronological findings of fact should not lead to the assumption that they have been made piecemeal. In looking at this case we looked at the totality of the evidence before reaching our findings of fact as set out above and before reaching the conclusions which follow.

73 Complaints to employment tribunals relating to a contravention of Part 5 (Work) of the EqA may not be brought after the end of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable (section 123 (1). Under section 123 (3) EqA conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as a occurring when the person in question decides on it. 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 that 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 (section123 (4).

74 The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal's enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs rather than a series of isolated or specific acts (**Commissioner of the Metropolis v Hendricks 2003 ICR 530**). **In Secretary of State for Work and Pensions v Jamil UKEAT /0097/13/BA EAT** Langstaff P, said in relation to a failure to comply with the duty to make reasonable adjustments 'if there is such a duty it requires to be fulfilled on each day that it remains a duty' (at para 25). In that case it was held that where an employer refused to make a particular adjustment but agreed to keep it under review rather than making a 'once and for all' refusal ,the failure to make that reasonable adjustment was capable of amounting to a continuing act ,although the refusal to make the reasonable adjustment had occurred more than three months prior to

[9] See for example Shamoon and Nagarajan v London Regional Transport[199] IRLR 572 HL

the presentation of the claim. In **Viridor Waste v Edge UKEAT 0393/14/DM t**he EAT distinguished **Jamil** and held each case was to be decided on its facts. In that instance it was a refusal and that it might be reconsidered was irrelevant .It was not a case of a policy to review as in **Jamil**.

75 If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In discrimination cases the test is whether it is just and equitable to allow the claims to be brought.

76 When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule.10

77 Under paragraph 46 of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 (which code employment tribunals must take into account when considering relevant cases) 'Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance .Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.'

78 Under section 43A ERA a protected disclosure is defined as
'a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.'
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—
' that a person has failed ,is failing or is likely to fail to comply with any legal obligation to which he is subject,'(Section 43B (1) (a) ERA).

79 In **Chesterton Global v Nurmohamed 2017 EWCA Civ 979** the Court of Appeal considered the meaning of the phrase 'in the public interest.' At paragraph 27 Lord Justice Underhill said" The tribunal thus has to ask a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest and b) whether, if so , that belief was reasonable.' He went to say at paragraph 29 and 30:
"29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify after the event by reference to specific matters which the tribunal finds were not in his head at

[10] Robertson v Bexley Community Centre [2003] IRLR 434

the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believes the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable."

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest that does not have to be his or her predominant motive in making it:"

He commented that the question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case but the following factors were identified as being a useful tool:
'(a) the numbers in the group whose interest the disclosure served;-see above

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed-a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed-disclosure of deliberate wrongdoing is more likely to be in the public interest and the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoing as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"-though he goes on to say that this should not be taken too far.""

80 Under section 47B ERA:

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

81 Under section 47 (3) ERA '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, and

(b)a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.'

The test for 'Reasonably practicable' was explained in the words of Lady Smith in **Asda Stores Ltd v Kauser EAT 0165/07** as 'not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found ,it was reasonable to expect that which was possible to have been done.'

82 In **NHS Manchester v Fecitt &Ors [2011] EWCA Civ 1190** it was said that "s47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

83 Under section 38 Employment Act 2002 (which applies to proceedings before an employment tribunal relating to a claim by an employee under the EqA) if the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of ERA the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead. Where the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of ERA the tribunal must, unless there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable ,increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

84 Both parties provided lengthy written submissions and made oral submissions. In view of the former the latter were limited to 35 minutes for each party.

Conclusions

85 We first address the claimant's claims under section 47B (1) Employment Rights Act 1996. Ms Dickinson submitted that the claimant's grievances set out in paragraph 50 above do not amount to qualifying disclosures within the meaning of section 43 B Employment Rights Act 1996 because the claimant did not have belief (reasonable or otherwise) that they were made in the public interest. Mr Sykes submitted that she had such a belief and that the disclosures were in the public interest as they concerned race discrimination and/or met the tests set out in Chesterton Global. However as we found in paragraph 56.85 in evidence which was uncharacteristically clear and unequivocal the claimant did not consider the public interest at all in relation to any of the grievances at the time she raised them. She had no belief that that any of them were made in the public interest. The public interest simply did not enter her mind. She made no qualifying disclosures and therefore her claim under section 47B (1) Employment rights Act 1996 fails and is dismissed.

86 Turning now to the jurisdiction regarding the respondents in relation to the remaining claims of race discrimination Ms Dickinson did not condescend to address the issue in submissions but Mr Sykes submitted that the first respondent was the claimant's employer under 'section 35 (2) Education Act 2002 ,section 83 (1) Equality Act 2002' and that the second respondent was sued as its agent under section 109 (2) ,110(1) Equality Act 2010, the first respondent having 'permitted' the second respondent (which he submitted did not have a delegated budget) to exercise powers delegated by it to the second respondent as its agent. He did not refer us to any evidence whatsoever about how and when any such agency relationship was created. We are not satisfied that the tribunal has any jurisdiction in relation to the allegations of race discrimination as far as the second respondent is concerned.

87 Nonetheless in the event we are wrong in our conclusions at paragraph 86 above we now consider the allegations set out at 46.1 to 46.41 inclusive against both respondents .

A history of R2 teachers and administrators subjecting the Claimant to racial harassment and intimidation including criticisms of her clothes, ethnic characteristics, and style of speech

88 Mr Sykes submitted that the above was 'summary' and needed to be read with the specific examples given at issues 46.4 to 46.9.We note however the latter lie only against Mrs Walker and no other teacher or administrator nor do the allegations made therein have anything whatsoever to do with criticisms of or

indeed any reference to the claimant's clothes ethnic characteristics and style of speech. The claimant has worked with Mrs Walker at the second respondent since 2002 and her mode of dress and hairstyle has not changed yet the claimant never raised a complaint about Mrs Walker (or any other staff member) criticising her as alleged The claimant has amply demonstrated that she is by no means inhibited from raising complaints .She has provided no telling details of even one such occasion such as (even an approximate) date what was said by whom or the context. The claimant has failed to prove that there was a history of any such treatment as alleged.

On 12th June 2014 Ms Walters and/or R1 and/or R2 commenced a first disciplinary investigation into the Claimant, without good reason, without advising a reasonable schedule, and concealing the outcome in Hayley Boden's report dated in October 2014 until disclosed in mid-May 2017

89 We conclude that the respondent had good reason on 12 June 2014 for commencing a disciplinary investigation against the claimant i.e. the complaint made about her conduct during a lesson by two PGCE students from Birmingham University. The claimant herself accepted under cross-examination that if a complaint was raised by someone outside the second respondent it had to be investigated.

90 The claimant was not advised of a schedule (reasonable or otherwise) but there was no evidence before us that a hypothetical non-black, non-Caribbean teacher at Holte School faced with a disciplinary investigation would have been advised of such a schedule.

91 It is convenient at this stage to consider the burden of proof. Mr Sykes had submitted that the burden of proof should shift to the respondents because a prima facie case of discrimination because of race had arisen. He first referred to the claimant being 'a striking black Caribbean person with a flamboyant personal style '.However there has been no change in the claimant's appearance and style since she began working at the school and no explanation was put forward to account for any change in attitude towards the claimant. He further submitted that she was effectively side lined into teaching years 7 to 9 dealing with learning disabled pupils mostly from ethnic minorities. In our judgment given the role to which she was appointed and that the school's pupils are 90% BAME the make-up of her pupils is hardly surprising and having been promoted to 3rd SEN she did not thereafter apply for promotion. Mr Sykes submitted her promotion had been forced on her but there was no evidence to support this. He then referred to her lacking teaching opportunity for Key Stage 4 that teaching privileges had been removed and that the 2nd SEN vacancy was not advertised as being examples of less favourable treatment. We did not find any of those matters proven .He submitted that it was 'clear 'from Ms Walters' evidence that she did not like the claimant but we did not find any evidence of personal antipathy towards the claimant. He then referred to the allegations set out at 46.12 and

46.13 as being part of a culture of 'casual jokey racism' tolerated by Ms Walters. We found only that Ms Walters used the phrase 'Black Friday' and that in our judgment is not sufficient in itself for the tribunal to conclude the burden of proof has shifted. Mr Sykes further submitted (to summarise) that Ms Walters wanted to have the claimant's employment terminated before she retired and in essence the PGCE complaint and then Mr Fowler's email (described by Mr Sykes as 'the smoking gun') was utilised to effect her wish and after the claimant's (unjustified) suspension her employment went 'downhill' and that had she been Caucasian she would not have been treated to such adverse acts or omissions; she was treated less favourably than a hypothetical non-black history teacher because she 'stood out ethnically'. However he produced no evidence whatsoever about the ethnic make-up of the school's teachers or its culture and on the evidence before us the hierarchy at the school was ethnically diverse. Any material circumstances relating to the hypothetical comparator other than a difference in race were conspicuously lacking. Such a hypothetical comparator was of little assistance to the tribunal. We have not found that Ms Walters et al were engaged in any concerted effort of unfavourable treatment of the claimant such that an inference of discrimination can be drawn. There are no facts from which we could conclude or infer a prima facie case of discrimination has arisen.

92 We found that Hayley Boden's report dated in October 2014 was provided to the claimant on 11 March 2015.There was no evidence before us that Ms Walters or either of the respondents concealed the outcome in the Hayley Boden report as alleged. The claimant has failed to prove that she was treated by Ms Walters or by the first or second respondent as alleged.

<u>Ms Walters allocated the Claimant's teaching slots to other teachers during the prolonged suspension</u>

93 We have found that it was Mr Sohal (not Ms Walters) who reallocated her classes to other teachers during the claimant's suspension. The claimant makes no complaint of race discrimination against him. The claimant has failed to prove that Ms Walters treated her in the way alleged. There was in any event no evidence before us that the classes of a suspended hypothetical non-black, non-Caribbean teacher at the school would not have had their teaching slots reallocated during a prolonged suspension. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted to the respondents the reason for the reallocation was that her classes needed to be taught while she was absent. Further there was no evidence from the claimant about why the reallocation of her classes during such a period amounted to a detriment.

<u>Ms Walters criticised the Claimant's teaching standards, although those followed statutory standards as provided by the Department of Education and Ofsted</u>

94 There is no evidence before us that Ms Walters criticised the claimant's teaching standards or that the claimant's teaching standards followed the

relevant statutory standards. Ms Walters received complaints about the claimant's teaching which she spoke to her about it in September 2014 and then in December 2014 she initiated a disciplinary investigation (which was carried out not by her but by Mr Sohal against whom the claimant makes no complaint of race discrimination) and a programme of informal capability support was provided (via Mr Farmer against whom the claimant makes no complaint of race discrimination) to address areas where her performance was of concern. The claimant accepted under cross-examination that there had been informal discussions between her and Mrs Walters about her performance in September 2014 because complaints had been received and that if Mrs Walters had such concerns she had to speak to her about it. The claimant has failed to prove that she was treated as alleged.

When the Claimant approached her in the premises, she turned her back on the Claimant

95 The claimant's witness statements were silent as to any of the relevant circumstances (such as date or the context). She simply alleged that when she approached her while walking down a corridor Ms Walters turned her back on her. Mr Sykes submitted that having delivered a rebuke to the claimant she turned away and did not give the claimant time to respond matters which were not pleaded by the claimant or supported by her witness statements. We have found at paragraph 56.20 above that the claimant gave an explanation to Ms Walters for her late attendance in the cafeteria and Ms Walters then went off to do something else. The claimant has failed to prove that Ms Walters treated her in the way alleged.

Ms Walters refused to implement an Occupational Health request that the Claimant be permitted to take a snack at 11am if not teaching

96 There is no corroborative evidence that any such Occupational health request was made. The claimant provided no details of it in any of her witness statements. It is clear from Ms Walters' letter to the claimant of 26 September 2014 that staff members were permitted to take snacks at break times which ran from 11.05 am to 11.20 am .The claimant has failed to prove that Ms Walters treated her in the way alleged.

Ms Walters refused to permit the Claimant to teach Key Stage 4

97 The claimant's witness statements did not support her pleaded case .She does not allege in any of them that Mrs Walters refused to permit her to teach key Stage 4 but rather than she 'failed to authorise' it, and once again no details whatsoever are provided. In the investigation interview with Mr Boden (which must have taken place much closer in time to the alleged events) the claimant's complaint lay against Ms James for not actioning Ms Walters ' express

authorisation. The claimant has failed to prove that Ms Walters treated her in the way alleged.

She concealed from the Claimant the fact of there being a second post in the SEN Department in December 2013

98 There is no evidence to support the allegation of concealment by Ms Walters. Mr Sykes submitted there was no contemporaneous evidence of the post being advertised in any way. We found at paragraph 56.5 (contrary to that submission) that it was advertised internally. The claimant has failed to prove that Ms Walters treated her in the way alleged.

She allocated the Claimant's reading projects with SEN pupils in Year 7 to another member of senior staff

100 The claimant's witness statements were silent as to any of the relevant circumstances (such as the date or the identity of the senior staff member in question). The claimant has failed to prove that Ms Walters treated her in the way alleged. There was no evidence from the claimant about why (if the projects were reallocated as alleged) this amounted to a detriment of any sort.

Ms Walters or R1 and/or R2 did not hear the Claimant's complaint dated 16th June 2014 against her

101 It is common ground that the said complaint was not heard. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted to the respondents the reason for this was because the claimant (as she admitted under cross-examination) withdrew it.

On 25th September 2014 Ms Walters criticized the Claimant for carrying a hot drink on the stairs, and subjected her to abuse accusing her of speaking 'nonsense', of being 'sensitive', and of being 'paranoid '

102 We have made our findings of fact in paragraph 56.21 above. Mr Sykes submitted that the issue at trial was Ms Walter's manner while speaking to the claimant which was said to be harsh (although the claimant's pleaded case was that she was abusive). We have found that she described the claimant as 'sensitive' .It is clear there was a policy and that it applied to all staff not just the claimant and the claimant was being told not to act in breach of it . In our judgment Ms Walters' use of the word 'sensitive' in this context was neither abusive nor harsh. The claimant has failed to prove that either that Ms Walters subjected her to abuse as alleged or (for the avoidance of doubt) was harsh.

From 16th October 2014 R1 and/or R2 failed to disclose the Boden report dismissing the first disciplinary investigation

103 We have already found that the report in question was provided to the claimant on 11 March 2015. The claimant was herself absent until 23 February 2015. We have set out in paragraph 56.22 above our findings in relation to the conclusions in the Boden report .Ms Boden did not dismiss the first disciplinary investigation as alleged. The claimant has failed to prove that she was treated in the way alleged. In any event the reason the report was not disclosed until 11 March 2015 was because the second respondent was dissatisfied with its quality and although by 15 December 2014 it had resolved to use it matters were then left in abeyance because of Ms Hollick's absence from work until February 2015.

On 18th November 2014 R2 sought to amend and interfere with the independence of the Boden report by requesting she consider inter alia prejudicial matters against the Claimant

104 Ms Boden was undoubtedly an independent investigator. There was obviously a difference of opinion between the 1st and 2nd respondent about the quality of her report but we have accepted Ms Hollick's evidence that she believed that the report had taken a long time to prepare and its quality was poor. Ms Boden had specifically asked Ms Hollick to review it and make contact if she wanted any amendments or additions. Ms Hollick did not try to interfere with the independence of the Boden report; she made suggestions via the 1st respondent's HR team because she wanted to improve its quality; in her opinion it lacked detail of its findings and conclusions. That Ms Boden might not be able to fulfil her requests was openly acknowledged in the email to Ms Boden dated 18 November 2014. In our judgement this does not amount to an attempt to amend and interfere with the independence of the report. Mr Sykes has submitted that "prejudicial interpolation" was very much Ms Hollick's style. He relies on her actions in relation to SH's statement. In our judgement this does not assist him in the least.SH wanted changes made to her statement; Ms Hollick made them. Mr Sykes moderated his approach in his written submissions as far as the nature of the requests were concerned from "prejudicial matters" (the claimant's pleaded case) to "potentially prejudicial findings." In either case he has not identified with any particularity what was 'prejudicial' about the suggestions made. The claimant has failed to prove that she was treated as alleged.

On 28th November 2014 at a staff meeting Ms Walters made an openly racially discriminatory remark about 'Black Friday.'

105 It is common ground that this phrase was used by Ms Walters .It was no part of the claimant's pleaded case or supported by her witness evidence that Ms Walters turned round to look at the claimant as the claimant alleged under cross-examination .Given the number of attendees and purpose of the staff meeting it is inherently unlikely that Ms Walters would have done so. No evidence was led by the claimant to corroborate any racist history to the phrase or about Ms Walters' knowledge of it. Mr Sykes did not address it in submissions. We have accepted Ms Walters' evidence that she knew only of its connotation to retail. If

we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted the reason why Ms Walters used the phrase was because she was making a topical jocular remark relating to retail.

Ms Walters caused and/or permitted staff to speak in a derogatory way about ethnic minority students including the following incidents:

Jennifer James, a white teacher, said openly at a history session for teachers that she wanted 'that black boy' removed from the school and sent abroad

Kerensa Neal, another white teacher, said openly at an after-school meeting that she wanted to send a black Jamaican student 'to the zoo.'

106 Both Mrs James and Ms Neal denied the allegations. The claimant's witness statement did no more than simply recite them. No additional details were provided save for the claimant identifying the children to which reference was made. Both Mrs James and Ms Neal deal with many children each school year. Under cross-examination Ms James only vaguely recognised the name of the child to which the allegation related. She accepted that there may have some discussion about him because there had been some difficulties with him which she could not now recall. Ms Neal did not recall the pupil in question until she had read the claimant's witness statement but did not remember any such trip. We find them both entirely credible witnesses. In the investigation interview with Mr Fowler (which must have taken place much closer in time to the alleged events) the claimant's recollection was that (whoever made the remark) it concerned leaving the child at the zoo not sending him to it as now alleged. Mr Sykes' lukewarm submissions were that the claimant had consistently pleaded and supported these allegations in evidence .We do not agree. She has been inconsistent and vague. There is no evidence whatsoever before us to support the allegation that Mrs Walters had caused and/or permitted staff to speak in the way alleged. Mr Sykes submitted it was part of a pattern as indicated in the other (but unidentified) allegations of race discrimination against her which should be considered in weighing the evidence but we have found none proven. The claimant has failed to prove that either Ms Walters Mrs James or Ms Neal acted as alleged.

On and after 1st December 2014 R1 and/or R2 failed to disclose Ms Boden's revised report, submitted by email at 8.04am

107 It is accepted the revised report was not disclosed to the claimant. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted to the respondents the reason was because it was not the version relied on by the second respondent.

On 1st December 2014 Ms Walters R2 commenced a second disciplinary investigation into the Claimant, following the failure of the first disciplinary

investigation to recommend disciplinary proceedings, relying on vague and unfounded allegations of 'breach of teaching standards.'

108 Although it is common ground that the second respondent commenced a second disciplinary investigation into the claimant on 1 December 2014 it was not following a failure of the first disciplinary investigation. There was no such failure. Complaints had been made about the claimant by pupils and staff which had to be investigated irrespective of the outcome of Ms Boden's disciplinary investigation and the second respondent wanted to progress them. No evidence was led to support the allegation that they were unfounded ;the claimant's witness statement complained only that they were vague but at the time the claimant did not challenge Ms Walters or Mr Sohal about any lack of details in relation to the allegations against her and cooperated with the investigation by attending meetings with Mr Sohal. Mr Sohal produced a report which recommended there be a disciplinary hearing in respect of the allegations which would tend to show that they were not unfounded and had merited investigation. The claimant has failed to prove that Ms Walters treated her in the way alleged.

On and after 8th December 2014 R1 and/or R2 failed to hear the Claimant's grievance served that day in which she summarized their mistreatment (other than to hold a preliminary hearing as to the issues on 26th February 2015), until 30th June 2015

109 It is common ground that the claimant's grievance was not heard until 30 June 2015.Having raised her grievance on 8 December 2014 she provided more details of it on 30 December 2014 .The claimant was then on bereavement leave and Mr Robinson was unable to meet with her until 26 February 2105.The claimant gave further particulars of her grievance on 5 March 2015 .By 16 March 2015 Mr Fowler had been appointed by Mr Robinson and contacted the claimant. He saw her on 23 March 2015 and saw numerous witnesses in April 2015 concluding his report in early May 2015. On 22 May 2015 a meeting was arranged for 10 June 2015 but rearranged for 30 June 2015 at the claimant's request. Mr Sykes submits that the delay was substantial and unwarranted and attributed the principal cause of the delay to Mr Robinson. If we are wrong in our conclusion at paragraph 91 above and the burden of proof does shift to the respondents we conclude that the reason for the delay was non-discriminatory; the process became protracted but (in the prevailing circumstances above) not unreasonably so.

On 11th March 2015 R2 instructed the Claimant to attend a disciplinary hearing on 15th April 2015 relating to her handling of two PGCE students and complaints arising in June 2014 despite the Boden report's dismissal of the substance of the same charges

110 It is common ground the claimant was required to attend a disciplinary hearing on 15 April 2015. We have set out in paragraph 56.22 above our findings

in relation to the conclusions in the Boden report .Ms Boden had not dismissed the substance of the charges. She had found two of the five allegations to be unsubstantiated but the second respondent was dissatisfied with the quality of her report and the decision was made to convene a disciplinary panel for it to decide whether the allegations were upheld. The claimant has failed to prove that the second respondent treated her in the way alleged

On, before and after 11th March 2015 R2 did not hear or progress the Claimant's racial complaint dated 16th June 2014 or hear first the in part overlapping grievance dated 8th December 2014, in breach of the ACAS Code of Practice on disciplinary and grievance procedures

111 As we have already concluded above the reason for the second respondent not hearing or progressing the claimant's grievance of 16 June 2014 was because the claimant (as she admitted under cross-examination) withdrew it. Paragraph 46 ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 is (as Ms Dickinson submitted) permissive not mandatory. In any event the grievance dated 8 December 2014 was heard by Mr Bunting in 2015 and the disciplinary allegations against the claimant remain undetermined. The claimant has failed to prove that the second respondent treated her in the way alleged.

On 24th March 2015 Harry Fowler, grievance officer appointed by R1, disclosed the Claimant's emotional distress at a grievance hearing on 23rd March 2015 to R1 and/or R2, in breach of confidentiality, without seeking or obtaining her consent

112 It is not in dispute that Mr Fowler did not seek or obtain the claimant's consent before emailing Ms Hollick on 24 March 2015.However in our judgment there was no breach of confidentiality by him. He was not subject to any duty of confidentiality to the claimant; he was conducting a grievance investigation meeting with the person raising the grievance and made it clear to the claimant that what she said would be utilised for the purpose of his report. Mr Sykes made no submission about the legal or factual basis for the existence of any such duty .The claimant may have believed she was speaking to him in confidence but did not explain why she held (nor do there appear to be any reasonable grounds for) such a belief. The claimant has failed to prove that the second respondent treated her in the way alleged. If however we are wrong in that conclusion and the burden of proof has shifted to the respondents Mr Fowler acted as he did because the claimant's comments and behaviour gave him cause for concern about both her attitude to her current teaching role and her ability to effectively teach and educate the pupils at the school.

On 26th March 2015 the Chair of R2's Board of Governors, Errol Robinson, medically suspended the Claimant, subjecting her to verbal abuse accusing her of being 'a schizophrenic' and 'a danger to herself and others', without medical evidence and when the Claimant was fit to work

113 It is not in dispute that Mr Robinson suspended the claimant on medical grounds without medical evidence. He did so only after he had asked the claimant to be assessed by Occupational health and she had refused. If she had agreed she would not have been suspended but placed on garden leave. Mr Robinson's actions were consistent with the second respondent's Managing Attendance Policy which makes provision for suspension by an employer when met with an employee's refusal and for an urgent referral to Occupational health to be made. Given Mr Fowler's concerns set out above and the claimant's lack of agreement to the course of action proposed it was entirely appropriate for Mr Robinson to suspend the claimant pending the obtaining of medical evidence. The claimant has led no evidence about her fitness to work at this time. That she was not subject to a GP certificate stating she was unfit to work does not indicate that the contrary was the case. She did not explain to Mr Robinson why she refused to be assessed nor has she explained in her witness statement why she behaved in this way. We did not find (see paragraph 56.52) that the claimant was subjected to verbal abuse as she alleged. If we are wrong in our conclusion at paragraph 91 above and the burden of proof does shift to the respondents the reason why Mr Robinson medically suspended the claimant was because of Mr Fowler's concerns and the claimant's refusal to agree to be assessed by OH.

<u>On and after 26th March 2015 R1 and/or R2 failed to determine the grounds of suspension, or to lift the suspension, or to obtain a medical report by a suitably qualified psychologist or psychiatrist as to the Claimant's alleged unfitness to work based on her mental health</u>

114 The grounds on which the claimant was suspended were made clear to her in Mr Robinson's letter to her of 26 March 2015.She may not have agreed with the contents but the grounds of the suspension had been determined as set out therein and the suspension was to continue until advice about her fitness to work had been obtained and she had been told to return to work. Dr Mikuliszyn was a Consultant Occupational Physician. The second respondent asked for his view on the claimant's fitness to teach .It was entirely appropriate for such a physician to be instructed. The claimant did not refuse to be examined by him because he was not a suitably qualified psychologist or psychiatrist. She underwent an examination without demur. He wanted her to undergo a further psychological assessment. It would appear that that was what her GP wanted as well. Although the claimant (later) considered Dr Mikuliszyn was not suitable she wholly failed to progress the referral to Assured Health which was as she well knew in order to obtain a psychological assessment. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted to the respondents the treatment complained in the latter part of the allegation was occasioned wholly by the unexplained recalcitrance of the claimant.

On 7th May 2015 R2 wrote to the Claimant continuing the medical suspension without appropriate medical evidence in the form of a psychological or psychiatric assessment by a suitably qualified psychologist or psychiatrist

115 In his letter of 7 May 2015 Mr Robinson did not write to the claimant continuing the medical suspension. He referred to it and clearly and concisely explained why the claimant should engage with Occupational health and the consequences if she did not do so and asked for confirmation of her attendance at an Occupational health appointment. The second respondent was making every reasonable effort during the claimant's suspension to obtain appropriate medical evidence and was encouraging the claimant to facilitate this. The claimant has failed to prove that the second respondent treated her as alleged.

On 7th May 2015 R2 requested the Claimant attend an appointment with the occupational health provider Medigold, without a reason, and without ensuring the examination and subsequent report would be provided by a suitably qualified psychologist or psychiatrist

116 The second respondent had a reason for the request which it could not have made clearer in its letter to the claimant of 26 March 2015. As we have already concluded a Consultant Occupational Physician was entirely appropriate to conduct such an appointment. The claimant has failed to prove that the second respondent treated her as alleged.

Following the Claimant communicating she was fit to work and would shortly be returning to work R1 and/or R2 failed to confirm whether they still required her to attend at Medigold and if so why

117 The claimant did not communicate to the second respondent that she was fit to work; the letter written on her behalf on 12 May 2015 said she would shortly serve a fit note to confirm she was fit (no such fit note was served). She did not say in that letter she would be returning to work shortly but required she be returned to work 'immediately'. Mr Robinson responded to that letter by writing to the claimant on 22 May 2015.Again its contents could not have been more clear in confirming both that she was required to attend an Occupational health assessment and why. The claimant has failed to prove that the second respondent treated her as alleged.

Further R2 threatened it would proceed itself to determine her fitness to teach if it did not receive a Medigold report despite R1 and/or R2 being a local authority running a school, neither of which institution was qualified to provide, or provided, in-house psychological or psychiatric examination and assessment services

118 This (according to Mr Sykes' submissions) refers to Mr Robinson's letter of 7 May 2015 to the claimant. Mr Robinson did not threaten the claimant but alerted her in measured terms to the course of action available to the second respondent

should she refuse to attend the occupational health assessment. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted to the respondents the reason for the treatment was to inform the claimant of the only course of action available if the claimant would not co-operate.

On and after 6th May 2015 R1 and/or R2 failed to disclose the grievance report of Harry Fowler available that date, until disclosed before trial in mid-May 2017

119 It is common ground that by 22 May 2015 if not before the second respondent was in receipt of Mr Fowler's report and the claimant was told on 30 June 2015 she was not allowed under the current procedure to have a copy of it (only a summary of the findings in the form of a letter) and the report would be provided at the point of appeal. It was then disclosed to her under cover of the letter dated 16 July 2015 (paragraph 56.68 above). The claimant has failed to prove that the second respondent treated her as alleged.

On and after 7th May 2015, continuing to date, R1 and/or R2 failed to lift the suspension or provide the medical basis relying on examination and report by a suitably qualified psychologist or psychiatrist for the suspension, by a continuing omission

120 It is evidently the case that the claimant remains suspended. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted to the respondents there was and is no examination and report on her by a suitably qualified psychologist or psychiatrist because despite the claimant having agreed while accompanied by her trade union representative that there be a second Occupational health referral to a different provider which 'needed to happen as soon as possible' and despite the consent form having been provided to her she has never given her consent. The respondents therefore had no reason to lift the medical suspension.

On and after 12th May 2015 R2 failed to respond to the Claimant's request by letter that day to return and to confirm if it wished her to attend an OH appointment once she had a GP fit note

121 We have already set out our conclusions under paragraph 117 above. The claimant made no request to return and the letter from Mr Sykes dated 12 May 2015 made it clear that it was once a fit note had been provided that the second respondent was to confirm if it still wanted the claimant to attend an OH appointment; however no fit note was provided. Having received Mr Sykes' letter Mr Robinson replied to the claimant on 22 May 2015. The claimant has failed to prove that the second respondent treated her as alleged.

On and after 12th May 2015 and at all material times R1 and/or R2 failed to confirm that it had the approval of the Board of Governors by way of written resolution signed by the Board or delegated committee for its conduct in

suspending the Claimant without grounds based on examination and subsequent report would be provided by a suitably qualified psychologist or psychiatrist, continuing an investigation begun in 2014 without disclosing its outcome by report of October 2014, and threatening to determine her fitness to work itself

122 It is conceded by the respondents that there was a failure to provide the confirmation sought in relation to the resolution. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted to the respondents the reason for not doing so was not because there was no such delegated authority (as Mr Sykes tentatively suggested was the case in his written submissions in which he referred to the 'purported' minute of the Governors' meeting 'mysteriously' signed in November 2014) but because it was overlooked.

On and after 25th June 2015 R1 and/or R2 relied on the opinion of an OH physician that the Claimant was psychologically unfit to teach on the slim basis that during one meeting she uttered a laugh he found inappropriate

123 It is conceded by the respondents that they relied on the opinion of Dr Mikuliszyn as set out in his report. He set out in the report the bases on which he reached his opinion following an examination of the claimant (see paragraph 56.65 above) which were not confined to the 'slim basis' of an inappropriate laugh as alleged. The respondents had no reason not to rely on his medical opinion. Mr Kearsley did not as was submitted by Mr Sykes endorse Dr Mikuliszyn's finding of inappropriate laughter. He dealt with the claimant's allegation which was that the report said she had laughed throughout and found she was not correct. The claimant has failed to prove that the second respondent treated her as alleged.

On 30th June 2015 R2 held a grievance outcome meeting as to the Claimant's grievance dated 8th December 2014 in which it refused to disclose Mr Fowler's report dated 6th May 2015, instead reading out only his conclusions

124 It is conceded by the respondents that the claimant was only provided with Mr Fowler's recommendations. That was the procedure in place at the time and was applied to all employees. There was no evidence before us on which we could conclude that a hypothetical non-black, non-Caribbean teacher at Holte School would not also have been given only the recommendations.

On 2nd July 2015 R2 restated Mr Fowler's conclusions by letter, but did not disclose his report, thereby frustrating the Claimant's drafting of full appeal grounds against those conclusions

125 The failure to disclose the report is conceded by the respondents and again was in accordance with the procedure in place at that time applied to all employees. There was no evidence before us on which we could conclude that a hypothetical non-black, non-Caribbean teacher at Holte School would not have

been treated in exactly the same way. Further there was no evidence before us that the claimant's drafting of her 'full' appeal grounds was in any way frustrated as alleged. The report was provided to her by 16 July 2015 and thereafter she expanded on the grounds of appeal she had set out in her letter of 13 July 2015.The claimant has failed to prove the second respondent treated her as alleged.

On and after 13th July 2015 R2 failed to hear the Claimant's grievance appeal of that date against Mr Fowler's conclusions, by a continuing omission

126 This too is conceded by the second respondent but there was no evidence before us on which we could conclude that a hypothetical non-black, non-Caribbean teacher at the school would not have been treated in exactly the same way.

On 2nd December 2015 R1 and/or R2 sought to influence another third party contractor, Assured Health, by completing a management referral form that exaggerated the Claimant's conduct and featured prejudicially selected comments made by her out of context, including racial complaints made by her

127 The management referral form was completed by Ms Hollick. Mr Sykes submitted there was a failure by Ms Hollick to state the suspension on ill heath was made without a medical report giving the false impression that the ill health was properly identified. Not only is that not the allegation made by the claimant but it is not a fair reading of the form. Ms Hollick clearly explained the decision to suspend had been made pending an occupational health assessment. Further Mr Sykes submitted that Ms Hollick admitted under cross examination that the quotes made from the claimant's words (which included race discrimination complaints) were set down without context and that the reference to reports being available at the end of the referral was not specifically linked back to those quotes. However in relation to the remarks cited by Ms Hollick the claimant complained in her evidence about only the two quotes set out in paragraph 56. 73 above which she described as complaints of race discrimination which were treated as if indicative of mental illness indicating the second respondent was racially prejudiced against her for complaining of discrimination. She does not dispute that she made the comments in question. There appears little correlation between Mr Sykes' submission and the claimant's evidence. The comments were made and were not the only remarks cited which gave rise to concern about the claimant's mental health. There is no evidence on which we could conclude they were prejudicially selected. The claimant has failed to prove that the respondents treated her as alleged.

On 28th March 2016 R1 and/or R2 accepted Stephen Kearsley's report that inter alia considered the Claimant laughing once in the OH physician's meeting gave rise to 'concerns about her cognitive responses.'

128 In our judgment this is not a fair reading of Mr Kearsley's report; he was summarising what the medical report said, not agreeing with it and he did so only to address the claimant's allegation that it had said she had laughed throughout. In any event the claimant accepted under cross-examination she had no complaint of discrimination against Mr Kearsley. His report was accepted by the respondents; there was no evidence before us of any material reason for them not to do so.

On and after 12th June 2014, continuing to date of presentation of the 2nd Claim on 14th October 2016, R1 and/or R2 continued to omit to disclose Hayley Boden's determination of the disciplinary investigation begun 12th June 2014, to hear the Claimant's grievance appeal dated 13th July 2015, or to end the medically and psychologically/psychiatrically unfounded 'medical suspension'

129 We have already set out our conclusions in relation to the constituent parts of the above compendium of allegations under paragraphs 103 120 and 126 above.

On and after 1st April 2016 continuing to date of presentation of the 2nd Claim on 14th October 2016, by way of continuing omission, R1 and/or R2 failed to determine the grounds of suspension, or to lift the suspension, or to provide a medical basis for the supposed 'medical suspension

130 We have already set out our conclusions in relation to the above allegations under paragraphs 114 above.

On and after 1st April 2016 continuing to date of presentation of the 2nd Claim on 14th October 2016 R1 and/or R2 failed to confirm that it had the approval of the Board of Governors by way of written resolution signed by the Board or delegated committee for its conduct in suspending the Claimant without grounds, continuing an investigation begun in 2014 without outcome, and threatening to determine her fitness to work itself.

131 We have already set out our conclusions in relation to first and third parts of the above compendium allegation under paragraphs 122 and 118 above. In relation to the second part the investigation was not continued but concluded by 16 October 2014 (see paragraph 56.22 above).

On and after 1st April 2016 continuing to date of presentation of the 2nd Claim on 14th October 2016 R2 failed to respond to the Claimant's request by letter dated 12th May 2015 she be returned to work and the school should advise if it wished her to attend an OH appointment once it had a fit note from the GP

132 We have already set out our conclusions in relation to the above compendium allegation under paragraphs 117 and 121 above.

On and after 1st April 2016 continuing to date of presentation of the 2nd Claim on 14th October 2016 R1 and/or R2 failed to hear the Claimant's grievance appeal dated 13th July 2015, or to disclose dated in October 2014 of the investigation begun 12 June 2014

133 The claimant's case as far as the latter part of this compendium allegation is concerned is unclear but we have already set out our conclusions above in relation to the failure to hear the claimant's grievance appeal dated 13 July 2015 at paragraph 126 above and any failure to disclose any investigation report at paragraphs 92 and 103 above.

Comment [WEJ1]:

Comment [WEJ2]:

On 21st April 2016, at a feedback session held under R1 and/or R2's Dignity at Work Procedure, in response to questions from the Claimant's union representative Reverend Desmond Jaddoo (black Caribbean), a white Caucasian investigator appointed by R1, Christine Hardy, why the race discrimination complaints had not been addressed, Ms Hardy laughed out loud in their faces, insulting them on the ground of race and causing them offence.

134 We did not find that Reverend Jaddoo questioned why the race discrimination complaints had not been addressed or that Ms Hardy laughed in the faces of the claimant or Reverend Jaddoo; having been told Mr Fowler was the source of the information on which Mr Robinson based his decision to suspend the claimant Reverend Jaddoo asked some questions about Mr Fowler's ethnic origin which shocked Ms Hardy who reacted by making a gesture. The claimant has failed to prove that Ms Hardy treated her in the way alleged.

Mrs Hardy contended she understood discrimination being a female Engineer, thereby causing the Claimant and her representative further offence.

135 It is accepted that Ms Hardy made the remark alleged and that the comment was unwelcome to the claimant. Mr Sykes submitted that this was a reference to sex discrimination and that Ms Hardy was being patronising and irrelevant .The claimant's evidence was that she was offended because being female was not the issue in a race complaint. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted Ms Hardy made the remark in because she was sharing with the claimant her experience of discrimination in the workplace and was not in any way motivated by the claimant's race.

Ms Hardy failed to respond when Rev. Jaddoo advised her she should therefore know better than to laugh when race discrimination is mentioned.

136 We did not find that Ms Hardy had laughed as alleged or that Reverend Jaddoo advised her she should know better than to laugh when race discrimination was mentioned. He told her he found it offensive that she had

laughed. The claimant has failed to prove that Ms Hardy behaved in the way alleged.

Mrs Hardy criticised Rev Jaddoo, who is loud spoken, for speaking loudly as if that was an ethnic characteristic.

137 We found that during the meeting Reverend Jaddoo raised his voice and that it was Ms Johnson not Ms Hardy who took issue with him about it. The claimant has failed to prove that Ms Hardy behaved in the way alleged.

Mrs Hardy further indicated she intended to hold a hearing to dismiss the Claimant. Ms Hardy failed to explain the basis of the prospective dismissal, as to what allegations were relied on (if any). The declaration of a pending dismissal was in the circumstances a clear act of victimisation on the ground of race, further and alternatively a detriment arising from having served protected disclosures.

138 Ms Hardy did not indicate that she intended to hold a meeting to dismiss the claimant. She indicated that she was recommending the Disciplinary Committee convene a meeting for potential (our emphasis) dismissal for some other substantial reason and she clearly explained at the meeting her reasons for making that recommendation. The claimant has failed to prove that Ms Hardy behaved as alleged .Further the reason why Mrs Hardy made the indication above was because she had formed the view the working relationship between the claimant and the second respondent had broken down .One of the reasons she formed that view was both the grievances to which she referred in her statement of 4 April (one of which was a protected act) were ‘unfounded’. It was this (and not the making of the grievances themselves) which combined with the other matters she set out resulted in the conclusion that the working relationship had broken down and the recommendation she made.

By letter dated 25th April 2016, served 28th April 2016, Mrs Hardy confirmed her intention to recommend the Board of Governors hold a hearing to dismiss.

139 It was clear that the letter of 25 April 2016 confirmed in writing what the claimant had already been told by Ms Hardy namely that she was recommending a meeting be held so that dismissal could be considered. The claimant has failed to prove that Ms Hardy behaved as alleged.

On and after 9th May 2016 and to date of presentation of the 2nd Claim on 14th October 2016 R1 and/or R2 failed to respond to the Claimant’s race discrimination complaint against Mrs Hardy dated that day.

On and after 20th July 2016 to date R1 and/or R2 failed to hold the grievance hearing.

140 The respondents accept that the claimant's race discrimination complaint has not been responded to. Ms Dickinson submitted that it 'seemed' it was overlooked but that was an oversight and not discriminatory. There was no evidence in that regard but there are no facts whatsoever from which we could conclude or infer that any such failure was because of the claimant's race.

On and after 9th May 2016 and to date of presentation of the 2nd Claim on 14th October 2016 R1 and/or R2 failed to hold a grievance appeal following receipt of the Claimant's appeal dated that day.

141 The respondents accept that they failed to hold a grievance appeal prior to the presentation of the second claim although such an appeal has now been determined. Ms Dickinson submitted that the delay in concluding the appeal process was accounted for by the invitation issued to the claimant on 20 June 2016 to attend a meeting on 11 July 2016 which did not take place at the claimant's request and the school holidays intervened and it would take time to assemble a panel of three governors. The fact that the appeal has now been concluded tends in our judgment to support a finding that the omission was inadvertent rather than deliberate but in any event there are no facts whatsoever from which we could conclude or infer that any such failure was because of the claimant's race.

On 12th May 2016 R1 and/or R2 issued a letter to the Claimant as to a prospective disciplinary hearing entitled 'Dismissal for some other substantial reason', attaching a document entitled 'Procedure for Dismissal Hearing – May 2016.'

142 The respondents accept that such a letter was sent to the claimant. If we are wrong in our conclusion at paragraph 91 above and the burden of proof has shifted the reason the letter was issued was for those reasons given by Ms Hardy to the claimant at the meeting on 21 April 2016.

On and after 7th June until or about 19th July 2016, R1 and/or R2 failed to respond to the Claimant's written request dated on or about 7th June 2016 that Mrs Hardy's proposed disciplinary hearing should not proceed and instead it should hold the hearing of the race discrimination grievance dated 9th May 2016.

143 Neither party has disclosed such a request from the claimant. The claimant's witness statement provided no salient details of it, not even what the request said or to whom or how it was sent whether she chased it up subsequently with either respondent and if not why she failed to do so. The claimant has failed to prove that any such request was made.

On or about 19th July 2016 Mrs Hardy held a disciplinary hearing, despite the Claimant's written request dated 7th June 2016. She adjourned it only after

further representations from Rev Jaddoo that the grievance against her dated 9th May 2016 be heard first.

144 There was no disciplinary hearing held by Mrs Hardy on 19 July 2016. It is common ground that there was an adjournment of a hearing on 9 June 2016 but it was not held by Mrs Hardy. The claimant has failed to prove that Mrs Hardy behaved as alleged.

On 3rd August 2016 R1 and/or R2's solicitors at Birmingham City Council responded to the Claimant's email of 1st August 2016 requesting the grievance against Mrs Hardy be heard, by claiming they had no knowledge of Mrs Hardy. In support of their lack of knowledge, they advised the Claimant was Ms Panton, not Mrs Hardy.

145 There is no documentary evidence of either email in the agreed bundle. The claimant's witness statement provided no salient details about the exchange; she did not say to whom her email was sent nor did she allude at all to the specific detail contained in the second sentence of this allegation. The claimant has failed to prove that any such email was sent or that a reply was received.

146 The claimant's claims of direct race discrimination therefore fail and are dismissed.

147 The claimant relies on the same allegations of direct race discrimination as allegations of harassment related to race. In relation to those factual allegations which we found proven there was no evidence before us from which we could conclude or infer that the conduct in question related to race. It was alleged by the claimant in relation to the remark about 'Black Friday' made by Ms Walters on 28 November 2014 that it was 'openly racially discriminatory.' For the avoidance of doubt in our judgment that phrase has no overt racially discriminatory connotation. If we are wrong in that conclusion Ms Walter's conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her; she had no knowledge of any connotation other that in relation to retail. Further the conduct did not have that effect on the claimant taking into account her perception. She produced no supporting evidence about the racial history which she attributes to the phrase nor was there any evidence she was unaware of the retail connotation. We are not satisfied that she genuinely perceived it to be racially discriminatory. The remark was made on a Friday at the end of November talking about bargains in a staff meeting. It was not reasonable for the conduct to have the effect set out above. The claimant's claims of harassment related to race fail and are dismissed.

148 Turning now to the claimant's claim of victimisation in a terse written submission Mr Sykes asserted the detriments relied on arose 'more likely than not 'because of the protected acts, particularly the first two.' He did cite any facts

or evidence in support of this in either his written or oral submissions. Ms Dickinson submitted that the respondents were not influenced to any extent by the claimant's grievances; the reasons for the treatment were those relied on in relation to the claims of direct discrimination. In relation to those factual allegations which we found proven we have carefully considered whether but have not found there was any evidence before us on which we could conclude or infer on the balance of probabilities that the decision makers in question were influenced by the protected acts in their treatment of the claimant to any extent whatsoever. The claimant's claim of victimisation fail and are dismissed.

149 The tribunal having not determined any claims in favour of the claimant no award can be made under section 38 Employment Act 2002.

149 Although we have dismissed the claimant's claims we have nonetheless considered the issue of jurisdiction in relation to time. Turning first to the claims under the Equality Act 2010 again Mr Sykes' written submissions were again terse. He submitted that an omission could be a continuing act in reliance on **Jamil** in that it had changed the definition of 'omission' from something not done at a particular time, to something not done on each day it was not done and due to be done. The relevant acts were 'linked' (though he did not explain why or refer us to any evidence)'in a continuing state of affairs' and the continuing omissions were 'intertwined with them.' Time did not therefore need to be extended. Ms Dickinson submitted that given the number of different people involved in decision making and the number of discrete allegations the allegations were not a continuing act and that in relation to omissions the acts which were said to be omissions were denied or, in relation to omissions which were failures to do something (deal with grievances /respond to letters), the tribunal should apply section 123 (4) (b) Equality Act 2010.

150 We do not accept Mr Sykes' submission concerning the application of **Jamil**. There was no policy to review decisions in this case nor did it concern a failure to make reasonable adjustments. In relation to those omissions which we found proven in our judgment they occurred either when the person in question decided on it for example when on 30 June 2015 Mr Bunting did not provide the claimant with a copy of Mr Fowler's report or ,in relation for example to the respondents' failure to confirm the approval of the Board of Governors by way of written resolution signed by the Board or delegated committee, when (in the absence of any act inconsistent with dealing with it) the respondents could reasonably be expected to have done so. In the latter case we accept Ms Dickinson's submission that a period of four weeks to do so would be sufficient (which in the case of her grievances would be to acknowledge and take steps to commission an investigation, not to conclude the process). There were no 'continuing' omissions as alleged.

151 Further the claimant has failed to discharge the burden of proof on her to prove the acts were linked to each other. As Ms Dickinson submitted there were

many individuals involved in decision making in relation to the claimant over several years (Ms Walters Ms Hollick Mr Robinson Mr Bunting Mr Fowler Ms Hardy). Ms Walters retired in July 2015 and there is no evidence she played any further part in events thereafter. We found Mr Robinson as chair of governors a man of independent thought and the claimant had regarded him as a friend to whom she could take her concerns .The main thrust of Mr Sykes' cross examination was that Ms Walters Ms Hollick Mr Robinson and Ms Hardy were engaged in some sort of orchestrated or joint effort over a lengthy period to remove the claimant from her employment but there were no facts from which we could conclude or infer any such shared motive or complicity. In our judgment any proven acts or omissions were each discrete carried out by different individuals and were not in any way linked to each other. It follows that there was no conduct extending over a period and any such acts which took place more than three months before the date on which either claim was presented (allowing for the effect of early conciliation) is out of time.

152 For the same reasons the claims of detriment under section 47 B (1) ERA are also out of time. The acts or failures were not part of a series of similar acts or failures.

153 The claimant has not put forward any evidence nor did Mr Sykes advance a single argument about why it would be just and equitable for time to be extended in her favour in relation to those claims of race discrimination which were out of time or why it was not reasonably practicable for her claims of detriment which were out of time to have been presented in time. We note Mr Sykes has been representing her since at least 8 April 2015 and she has received representation from a trade union since June 2015. In our judgment it is not just and equitable for time to be extended in relation to any complaints which were out of time nor are we satisfied it was not reasonably practicable for the claimant's claims of detriment to have been presented in time.

152 As Ms Dickinson submitted the claimant perceives every piece of treatment which she does not like through the prism of race. Far from there having been any sinister action (or inaction) on the part of the respondents in our judgment it has become ingrained behaviour for the claimant to respond to those management decisions or interventions to which she objects by raising baseless complaints that they are tainted by racism.

Employment Judge Woffenden
9 November 2017