Case Number:- 3321225/2019.

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs V Kamala Devi A Vythilingam **v** (1) Wokingham Borough Council; and
(2) LDBS Frays Academy Trust

Heard at: Cambridge

On: 22 – 26 November 2021
5 October 2023 (no parties in attendance)
9 – 17 October 2023
18 and 19 October (no parties in attendance)

Before: Employment Judge M Ord
Members: Ms S Allen and Mr A Kapur

Appearances
For the Claimants: Mr N Rajoo, Lay Representative
For the First Respondent: Ms D Gilbert, Counsel
For the Second Respondent: Mr G Graham, Counsel

RESERVED JUDGMENT

1. It is the unanimous decision of the Employment Tribunal that the Claimant's complaints that she was:-

   1.1. The victim of unlawful discrimination, relying on the protected characteristic of race; and
   1.2. Unfairly dismissed;

   Are not well founded.

2. The Claim is dismissed.

REASONS

Background

1. This case has an unfortunately lengthy history before reaching its conclusion.

2. The Claimant was employed by the First Respondent and then the Second Respondent from 1 March 2010, continuously until 27 March 2020, as an Attendance Officer at Beechwood Primary School ("the School").

3. On 27 March 2020 she was dismissed on the stated ground of redundancy.

4. Her employment had transferred from the First Respondent to the Second Respondent in September 2019.

5. The Claimant commenced Early Conciliation against the First Respondent on 27 May 2019. Her Early Conciliation Certificate is dated 10 July 2019. On 8 August 2019, she presented a Claim Form to the Employment Tribunal against the First Respondent.

6. In that Claim Form the Claimant complained of Race Discrimination. Her employment was at that time continuing.

7. On 21 February 2020, by consent, the Second Respondent was added to the proceedings and the claim was stayed pending the outcome of the Claimant's six Grievances and the conclusion of the redundancy process begun by the First Respondent and being concluded by the Second Respondent.

8. On 18 May 2020, the stay was lifted.

9. It was not, however, until 1 March 2021 that an Order was made for service of the claim against the Second Respondent. The Response from the Second Respondent was filed and served on 24 March 2021.

10. On 29 March 2021, a Case Management Hearing was held before Employment Judge Gumbiti-Zimuto. At that Hearing a list of issues for determination by the Tribunal was agreed and they are set out below. The complaint of unfair dismissal was added to the claim and directions were given in respect of all interlocutory matters.

11. The Final Hearing was listed for five days commencing 22 November 2021 at the Tribunal Office in Reading. The Hearing was converted to a remote Hearing using the Tribunal's Cloud Video Platform (CVP).

12. In May 2021, each Respondent presented amended Grounds of Resistance in accordance with the Tribunal's directions.

13. The Respondents both maintained that the reason for the Claimant's dismissal was redundancy and that that dismissal was fair, but pleaded in the alternative that the dismissal was fair for some other substantial reason being a reorganisation of the administration team at the School. All claims of discrimination were denied on their facts and jurisdictional issues were raised as to time limits.

14. The Final Hearing commenced on 22 November 2021. It was listed for 5 days. By the conclusion of those five days the Claimant's evidence and cross examination had been completed and Mr Rajoo's evidence had been taken as read (dealing as it did with matters relevant only to remedy and the hearing being to consider liability only).

15. Due to various difficulties in re-listing, the case did not resume until 9 October 2023. The Tribunal met on 5 October 2023 to read back into the case.

16. During the resumed hearing evidence was heard from the following Witnesses on behalf of the Respondents:-

    16.1. Alison Cowen, Business Manager at the School since November 2016;
    16.2. Lester Dennis, the Chair of Governors at the School;
    16.3. Kate Simpson, the School's HR Manager employed by the Second Respondent;
    16.4. Richard Skegg, Parent Governor at the School;
    16.5. David Williams, former Governor at the School; and
    16.6. Sally Hunter, Head Teacher the School since 1 September 2019.

17. Mr Dennis heard the Claimant's Grievances at Stage 1, Mr Skegg heard the Stage 2 Grievance Appeals and Mr Williams heard the Stage 3 Grievance Appeals.

18. Ms Cowen led the School in relation to the reorganisation of the administration team of which the Claimant was part. Ms Simpson provided Human Resources support to the School and was employed by the First Respondent throughout. Ms Hunter was Head Teacher of the School from 1 September 2019.

19. All Witnesses gave evidence by reference to prepared Witness Statements. There was an extensive Bundle of documents, a Supplementary Bundle and two documents which were added during the course of the Hearing.

20. On behalf of both Respondents, Ms Gilbert made written submissions to which she added orally and Mr Graham adopted those submissions on behalf of the Second Respondent. Mr Rajoo presented written submissions on behalf of the Claimant, to which he added orally.

21. The Tribunal expresses its gratitude to all advocates for the helpful way they have presented their cases, including Mr Rajoo who assisted his wife, the Claimant, in a helpful and appropriate way.

The Issues

22. On the Preliminary Hearing on 29 March 2021, the issues for determination by the Tribunal were set out by Employment Judge Gumbiti-Zimuto. The parties agreed at the commencement of this Hearing that no amendment to those issues was required and they remained the issues for determination by the Tribunal. They were as follows:-

Time Limits / Limitation Issues

(i) Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010 ("EqA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and / or conduct extending over a period, and / or a series of similar acts or failures; whether time should be extended on a *"just and equitable"* basis.

(ii) Given the date the Claim Form was presented and the dates of Early Conciliation, any complaint about something that happened before 28 March 2019 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it.

Unfair Dismissal

(iii) What was the principal reason for dismissal and was it a potentially fair one in accordance with §.98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was redundancy, alternatively some other substantial reason justifying the dismissal of the Claimant.

(iv) If so, was the dismissal fair or unfair in accordance with ERA 1996 s.98(4), and, in particular, did the Respondent in all respects act within the so called "band of reasonable responses"?

Remedy for Unfair Dismissal

(v) If the Claimant was unfairly dismissed and the remedy is compensation:

a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed? See: Polkey v AE Dayton Services Limited [1987] UKHL 8; and paragraph 54 of Software 2000 Limited v Andrews [2007] ICR 825.

Direct Discrimination because of race (s.13 EqA 2010)

(vi) Has the Respondent subjected the Claimant to the following treatment:

a. The School failed to share with the Claimant the nature of the complaint made against the Claimant or give her an opportunity to defend herself (22 November 2018);

b. The formal investigation against the Claimant (23 November 2018);

c. The failure to investigate the Claimant's complaint of race discrimination made against the School Business Manager (27 November 2018);

d. The investigation into the Claimant's complaint against the School Business Manager was not fairly conducted;

e. The School Business Manager made a comment about the Claimant's accent while conducting investigation into the complaint made about the Claimant (23 November 2018);

f. The Claimant was shown two different complaint letters from the parent (22 November 2018 email to Sarah Curtis and then shown the letter not emailed to Sarah Curtis);

g. The Grievance rejected / not investigated. Rejecting the Appeal against the Grievance;

h. The School Business Manager made discriminatory remarks to a Governor in the course of the Grievance Investigation, that she found it difficult to work with the Claimant;

i. Subjecting the Claimant for a Redundancy Process following a restructuring, but no need for redundancy;

j. The selection of the Claimant for redundancy; and

k. Consultation process for redundancy was not fairly conducted, e.g. not fairly sharing information about the interview and how it would be conducted (4 March 2019). The Claimant was excluded from discussions about possible job sharing.

(vii) Was that treatment "less favourable treatment", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the following comparators: Vicki Hamer; Belinda Meaden; and / or hypothetical comparators.

(viii) If so, was this because of the Claimant's race and / or because of the protected characteristic of race more generally?

<u>Harassment related to race</u> (s.26 EqA 2010)

(ix) Did the Respondent engage in the following conduct:-

a. The School failed to investigate the complaint made by the Claimant against the School Business Manager;

b. The School business Manager deliberately invoking investigation of a parent complaint when it was not necessary;

c. When the Redundancy Process was completed the Respondent failed to provide scoring information and weightage applied in the interview process,

under the School's procedure it was required to do so but it was not provided in the Claimant's case without the Claimant having to chase it up, the Respondent initially refusing to do so;

d. The Claimant was harassed by the conduct of Lester Dennis in the Appeal and also by the School allowing Lester Dennis to appear as the Case Presenter in her Appeal;

e. The School allowed the Witness (Kate Simpson) to remain throughout the Appeal Hearing and refusing the same facility to the Claimant's Witness;

f. The Appeal Panel refusing to hear the Claimant's Grievance 'Number 5' although this was investigated in Stage 1 and Stage 2;

g. The Appeal Panel helped and favoured the Witness by suggesting the answers and asking for yes or no answers from the Witness;

h. The Appeal Panel produced a parent complaint letter that was different in content to the complaint produced at Stage 1 and refused to clarify why the letters were different; and

i. In the Appeal a Member of the Panel stated that various matters complained of by the Claimant were upheld, but this was not reflected in the Appeal Outcome Letter.

(x) If so, was that conduct unwanted?

(xi) If so, did it relate to the protected characteristic of race?

(xii) Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation (s.27 EqA 2010)

(xiii) Did the Claimant do a protected act? The Claimant relies on the complaint made by the Claimant against the School Business Manager (27 November 2018).

(xiv) Did the Respondent subject the Claimant to any detriments as follows:-

a. Making the Claimant at risk of redundancy;

b. Dismissing the Claimant; and

c. Failed to follow their own procedures as set out in the redundancy and Restructure Policy and the School Policy as a whole.

(xv) If so, was this because the Claimant did a protected act and / or because the Respondent believed the Claimant had done, or might do a protected act?

Remedy

(xvi) If the Claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of Remedy and in particular, if the Claimant is awarded compensation and / or damages, will decide how much should be awarded.

The Facts

23. Based on the evidence presented to us, we have made the following findings of fact.

24. The Claimant began working at the School in September 2008 as an unpaid Classroom Assistant. This was a voluntary role. The Claimant assisted a Classroom Teacher and helped pupils with English and Maths.

25. The Claimant then began working (still as an unpaid volunteer) in the School Administrative Office / Reception and whilst she continued to do more voluntary unpaid work, was contracted from 1 March 2010 to work three hours per week as an Attendance Officer reporting to the Head Teacher.

26. The Claimant then had a series of other contracts. She worked 22 hours per week as the Head Teacher's PA / Finance Assistant from 1 February 2012 until May 2014 and from 1 June 2014 to March 2017 she worked as a Lunchtime Controller.

27. From June 2014, the Claimant worked 15 hours per week as an Attendance Officer and also covered general Administrative duties including Reception. That remained her contract up to the time of the matters complained of.

28. Alison Cowen joined the School in November 2016. The Claimant described her as the *"Bursar"*, she later became School Business Manager.

29. On 8 March 2017, Ms Cowen had her first meeting with the Administration Team. In her job description part of her role was the management of the Administration Team.

30. At that meeting she gave the Claimant a new job description with the title "Receptionist". The Claimant's evidence was that she considered this a demotion and said that she had a contract dated 1 March 2010 as an Attendance Officer and did not accept the change.

31. On 22 November 2018, a parent of a child at the School submitted what they called an "official complaint" against the Claimant and made reference to having made a previous complaint against the Claimant.

32. The matter was passed to Ms Cowen.

33. Under the School's Complaints Policy any form of complaint raised by a parent would be handled under Stage 1 of the Respondent's Complaints Policy.

34. Ordinarily, under that Policy, it would be the Head Teacher who would deal with such a complaint. At that time, however, there was an Interim Head Teacher in place (Sarah Curtis). She was absent from School having broken her ankle that day. The Deputy Head Teacher was absent through sickness and the Interim Deputy Head Teacher had only just taken up their post. Ms Cowen was asked to deal with the complaint by Lester Dennis (Governor) as a member of the School's Senior Leadership Team.

35. Ms Cowen acknowledged the complaint and sent the parent a copy of the Complaints Procedure.

36. On the following day, Ms Cowen met the Claimant to discuss the complaint and hear the Claimant's version of events.

37. The complaint related to a telephone call made by the parent to explain that she was coping with the death of a friend and that another person would be collecting her child that day.

38. The Claimant had told the parent that a request of that type should be made in writing.

39. When she spoke to Ms Cowen, the Claimant said that she understood the parent was going to a funeral, not that their friend had just died. She said she recalled the telephone call, that she knew the parent was cross, but that she [the Claimant] had apologised to the parent.

40. The Claimant asked why the complaint had been made three days after the telephone call and invited Ms Cowen to ask the parent for an explanation for that delay, which she declined to do due to the desire to de-escalate the issue rather than cause, in her words, further upset to the parent.

41. The Claimant believed that she had been following Safeguarding Procedures. She asked for a copy of the actual complaint email, but the contents had been explained to her and Ms Cowen took the view that giving a copy of the email would have caused the Claimant further upset. Subsequently, Ms Cowen discussed this point with the Interim Deputy Head (Miss Voisey) who agreed with Ms Cowen's approach.

42. Ms Cowen in her meeting with the Claimant gave what she described as *"management advice"* about the way the Claimant spoke to parents.

43. The Claimant says this related to her accent and thus her race. Ms Cowen says that it related to being professional and respectful to parents as *"customers"* of the School. Ms Cowen's unchallenged evidence was that she said that an element of compassion would have helped diffuse the situation and that she would have given similar or the same advice to other members of the Team.

44. We accept that Ms Cowen was not commenting on the Claimant's accent at all, but rather her comment touched on the tone or style of communication. We do not find that the Claimant did, or could reasonably, have found the comment anything other than helpful or a reasonable piece of management advice.

45. Ms Cowen concluded, after considering the matter and speaking to the parent, that no further action needed to be taken and the Claimant was informed of this on 26 November 2018.

46. During the course of the Hearing, the Claimant suggested that there was in fact no parental complaint and that as she had seen two versions of the alleged complaint email, she believed that the entire matter had been made up.

47. That suggestion is without any evidential foundation and we reject it. The complaint email was genuine. It was annexed to a second email from the parent confirming that the complaint related to the Claimant and further, it was later copied and pasted (without the details of the sender and the date of it being sent) in the course of a separate Hearing relating to the Claimant's Grievances. The contents, however, were exactly the same.

48. We do not accept the Claimant's contention that a further, unseen, copy of the email was addressed directly to the Head Teacher. Nor do we accept that the complaint itself was anything other than genuine. At the relevant time the Claimant recalled the telephone call with the parent and having apologised to the parent. Absent some communication from the parent, it is difficult to understand how the School generally and Ms Cowen in particular, could have become aware of it.

49. The Claimant then raised a complaint against Ms Cowen on 27 November 2018.

50. In that complaint the Claimant said that,

> *"According to Ms Cowen there is a parental complaint against me…"*

And that she believed Ms Cowen was,

> *"…deliberately constructing a case against me on a trivial matter…"*

And claimed that Ms Cowen had an,

> *"ulterior motive"*

And was, *"targeting"* the Claimant.

51. The complaint ran to four pages of typed A4 and ended with nine questions which included at question 3,

> *"Why is she* [Ms Cowen] *discriminative towards me?"*

And question 9,

> *"Why is she too eager to be my line manager?"*

52. In relation to the latter question, we find as facts that as Bursar / Business Manager, Ms Cowen had line managing duties for the Administration Team of which the Claimant was a member. Ms Cowen describes the Claimant as reluctant to accept this. There may have been a lack of communication on this point, but as a fact Ms Cowen had become the Claimant's Line Manager on appointment. The Claimant's reluctance to accept this is corroborated by her attitude to the amended job description at the meeting on 8 March 2017 and her insistence on continuing with her contract of 1 March 2010 as "Attendance Officer".

53. As regards the Claimant's comment that Ms Cowen was being *"discriminative"* and the comment in the body of the complaint that,

> *"I am not at all happy with the way the complaint matter was being handled and the way I was treated… This is a serious act of discrimination towards me".*

and the Claimant's further comment that similar complaints against others had been handled informally, whereas this complaint was treated as a formal matter, we find as follows.

54. Ms Cowen's evidence was that as the email from the parent was described as an "official complaint", the School's complaints process was engaged. We accept that.

55. Further, the use of the word *"discrimination"* in the Claimant's complaint relates to other complaints being handled informally. There is no mention of race in the Claimant's complaint email and when Ms Cowen gave evidence it was not put to her that she acted as she did because of anything to do with race, and in particular the race of the Claimant.

56. We find as facts that Ms Cowen applied the School's Complaints Policy because it was appropriate to do so and that, as she said in her evidence,

she would have done so irrespective of the identity of the person being complained about given that this was an "official" or "formal" complaint.

57. We also find that Ms Cowen dealt with the complaint in an appropriate manner. The Claimant was told no further action would be taken after Ms Cowen spoke to both the Claimant and the complaining parent and she was given reasonable, sensible and appropriate guidance by Ms Cowen as her Manager.

58. There was no difference in treatment between the Claimant and any other person about whom an official or formal complaint might be made. Any employee who had had an informal complaint raised against them would not be a true comparator.

59. If Ms Cowen, as the Claimant alleged, was *"targeting"* her then it would be surprising that no action was taken against the Claimant in the light of that parental complaint.

60. The Claimant complains that the complaint was not properly investigated. However, it formed part of the Claimant's Grievances (Grievance 5). The Claimant's complaint before us, as it emerged, was that the School did not investigate the allegation of racial discrimination against Ms Cowen, which it was said on her behalf was *"implicit"* in the complaint.

61. We do not accept that any such complaint was implied in the Claimant's complaint. Her reference to *"discrimination"* was, we find, in the ordinary use of the word – i.e. a difference in treatment – and that it related to the question of why Ms Cowen had dealt with the matter through the formal complaints procedure, rather than informally.

62. The Claimant did not at the time raise the question of race and thus we cannot criticise the School for not investigating a complaint which the Claimant did not make.

63. Further, it cannot be said that the alleged failure to investigate the allegation of *"discrimination"* was motivated by or related to the Claimant's race, race generally, or the nature of the implied (as the Claimant says it was) complaint. The School did not investigate an allegation of race discrimination because it was not, on their reading of the complaint which was entirely reasonable, made.

64. In February 2018, the First Respondent appointed an Interim Executive Board (IEB) over the School to raise standards and prepare for an Inspection by Ofsted. This was explained to parents in writing following a decline in pupil outcomes and the need, in the First Respondent's opinion, to strengthen governance.

65. Subsequently, in May 2018, the Ofsted Report rated the School as 'inadequate'.

66. The School was in the meantime expanding to a 2 Form entry from a 1.5 Form entry, with associated building work and a review of Administrative provision, including Reception, took place under the direction of the IEB.

67. The IEB asked Ms Cowen to lead the restructure of the Administration Team. She sought support from the School's HR Manager, Ms Simpson.

68. It is right to point out that the level of HR support provided by the First Respondent in these circumstances was, as Ms Simpson freely admitted, entirely reactive and was limited to answering questions put to the HR Team. The HR function was centralised.

69. Having said that, the decision to make any restructure, including any necessary redundancies, lay entirely within the control of the IEB.

70. Ms Cowen was concerned that the coverage in Reception was inadequate, with periods of time (particularly in the afternoons) when Reception was not staffed. She was of the view that it appeared that people simply worked the hours they wanted to.

71. In preparation for the planned re-organisation of the Administration Team, a consultation document was prepared by Ms Cowen with input from Ms Simpson and Mr Dennis who was then the Governor with responsibility for staffing and the building programme at the School.

72. In January 2019, the IEB determined that a formal process should commence in accordance with the School's Redundancy Policy, in relation to the re-organisation of the Administration Team.

73. On 16 January 2019, a meeting was held with all impacted staff and Ms Simpson presented the Consultation Paper.

74. At that time there were three members of staff, including the Claimant, dealing with Administrative matters along with a School Secretary (full time) and Ms Cowen as Business Manager.

75. The Claimant worked 15 hours per week (8.30am to 12.15pm, four days per week, not on Thursdays). The Finance Officer / Admin Support worked 11 hours per week (working three days) and the Administration Assistant worked 8 hours per week (8am to 12noon Tuesdays and Thursdays).

76. Other than the Finance Officer working until 3pm on a Wednesday and 4pm on a Thursday, none of the Administration Team worked after 12.15pm on any day.

77. The preferred option for the School was to retain the school secretary, but reduce the number of other administrative staff from three to two, whilst increasing the total number of hours worked from 34 to 42 with coverage up to 3.30pm every day.

78. The decision to reduce the number of staff was, we were told, for the following reasons:-

    78.1. First, the roles would be multi-disciplinary so that each of the two Administrative staff would be required to cover all Administrative and Reception duties;

    78.2. Second, having two staff, not three, would make communication and hand over easier, Ms Cowen describing this as leaving less likelihood of matters being *"dropped"* or falling between people; and

    78.3. Third, the aim was to increase consistency and *"ownership"* of the roles.

79. We accept that these were the genuine reasons for the proposed restructure which would include the reduction in staff numbers from three to two.

80. The Secretary (on a full time contract and on a higher grade) was not impacted by the proposed changes.

81. The Respondent was willing to consider allowing either of the posts in the Administration Team to be offered as a job share. Although Ms Cowen's unchallenged evidence is that this would have to satisfy the Respondent's reasons for reducing from three to two, in particular consistency of approach, role ownership and clear hand overs, as well as ensuring all staff could cover all administrative duties.

82. The Consultation document set out the selection criteria for the new Administrative roles being standard competencies, job specific competencies and specialist skills.

83. The selection criteria were not challenged by either the Claimant, the relevant Trades Unions or any other impacted employee.

84. The School remained willing to consider alternative structures so long as they met the requirements of the restructure, including budgetary constraints.

85. Each employee was invited to complete a "Role Preference Form".

86. The Claimant said that she was willing to carry out either role and that she would be willing to job share. Because neither of the other members of staff were willing to job share, Ms Cowen felt she could not pursue that option. In Ms Cowen's words she could not *"force"* an employee who had said that they were unwilling to job share, to do so.

87. Under the School's Redundancy Policy the following steps were to be undertaken:-

87.1. Formal Consultation would begin with written communication to the staff and to the relevant Trades Unions (this was done on 16 January 2019);

87.2. There would be a period of Consultation allowing the employees and Unions to make written comments (all employees did and were given until 6 February 2019 to do so);

87.3. Each employee would have a one to one meeting with the Head Teacher, or appropriate member of the Staff Team to discuss the implications of the proposals, including if appropriate "slotting in" scoring methods for selection and timescales, along with any alternative proposals made by the employees and any alternative employment opportunities;

87.4. Thereafter, the 'at risk' employees would be told in writing they were at risk; and

87.5. Thereafter a selection process would take place if required.

88. The Claimant put forward alternative proposals for coverage in Reception and the carrying out of administrative duties, but they did not meet the requirements for coverage throughout each school day.

89. On 5 February 2019, the Claimant submitted a further proposal for consideration.

90. The day before this the other two members of staff had put forward a joint proposal which included one of them working 27 hours, one working 14.5 hours and the Secretary working an extra half hour.

91. Ms Cowen considered this to be a *"viable option"* giving as it did full coverage across the school day, each day.

92. All three members of the Administrative Team were sent 'at risk' letters on 13 February 2019.

93. On 4 March 2019, the Claimant was informed of the structure of the Interview Selection process to take place on 6 March 2019; there was to be a formal interview with two set tasks.

94. The Claimant complains that the other two members of staff were made aware of the interview structure before she was. This, we were told, happened in a discussion on the previous working day when the Claimant was not present. It was not suggested to any of the witnesses before us, nor was it said as part of the interview / selection process that this was in any way motivated by or related to race. Nor was it suggested to the

Selection Panel that it had disadvantaged the Claimant so that she should be given extra time or have her interview deferred to a later date if she had been unable to prepare fully in time.

95. The Selection Panel consisted of Ms Cowen and Mr Fisher and Ms Connolly (both Governors and Members of the IEB).

96. Each Panel Member scored the three candidates individually and there was thereafter a 'moderation' discussion to agree scores for the candidates across the competencies.

97. Although the Tribunal expressed concern that this could potentially mitigate against the independence of the individual Members of the Panel, the results were reviewed and the 'moderation' process did not impact on the overall selection.

98. The final scores for the other two employees were 47 and 44. The Claimant scored 31.

99. On 7 March 2019, the Claimant was informed that she had not been successful, first in person and then in writing. The Claimant was reminded of her right to a Representation Meeting.

100. The Claimant emailed Ms Cowen on 10 March 2019 stating that she may not be in work on 11 March 2019 as she was under stress. She asked for feedback from her interview by 11 March 2019.

101. Mr Dennis advised the Claimant on 11 March 2019 that he would provide feedback once it was collated and that normally this would be done face to face at the Representation Meeting.

102. That day the Claimant advised that she had been signed off work until 25 March 2019, hat she wanted her representation meeting after she returned to work and would like the feedback when it was available.

103. As the last day of term was 5 April 2019, Ms Cowen was concerned that the Claimant's Representation Meeting might not be held before the new structure was implemented at the beginning of the following term.

104. On advice from Ms Simpson, Ms Cowen sent the Claimant a Notice of Termination, giving nine weeks' notice of dismissal on 15 March 2019, conditional on the outcome of the Representation Meeting in that if that meeting resulted in any change, the notice would be withdrawn.

105. The First Respondent also wrote to the Claimant and she was advised of her right to Appeal against the decision.

106. The Claimant and her Trade Union sought the Claimant's interview scores. Ms Cowen was reluctant to send them without explanation, but as the Trade Union insisted they were sent on 27 March 2019.

107. The Claimant returned to work on that day (27 March 2019).

108. On 27 March 2019, the Claimant raised an "Informal Grievance" complaining of a breach of confidentiality (a member of staff having sent the Claimant a job advertisement on the basis that she believed the Claimant had left her employment at the School), a lack of compassion (stating that the letter of 15 March 2019 could have been delayed until her return to work) and harassment (relating to the delay in sending her interview scores).

109. On 4 April 2019, the Claimant then provided the first of six formal Grievances which were submitted as follows:-

109.1. Grievance 1 dated 4 April 2019 – *"breach of confidence, harassment and bullying".*
A formalisation of the informal Grievance.

109.2. Grievance 2 dated 5 April 2019 – *"harassment, bullying, victimisation"*.
In this Grievance the Claimant said that she felt the redundancy procedure should have been suspended as the Claimant was the person selected for redundancy and was absent through sickness. She considered the letter of 15 March 2019 amounted to harassment, bullying and victimisation.

109.3. Grievance 3 dated 21 April 2019 – *"procedural irregularities, harassment and bullying"*.
This Grievance related to the delivery / non-delivery of the Interview Scores given to the Claimant.

109.4. Grievance 4 dated 21 April 2019 – *"Bias and conflict of interest, procedural irregularities, harassment / bullying and victimisation".*
This related to Ms Cowen's involvement in the Selection process, the pool of employees for selection, the duties given to the Claimant after she returned to work on 27 March 2019 and what the claimant said was an impact on the process caused by the Claimant's earlier complaint against Ms Cowen.

109.5. Grievance 5 dated 21 April 2019 – *"harassment, slander and bullying",* and *"procedural irregularities".*
This related to the way Ms Cowen handled the parental complaint (which the Claimant wanted re-opened and any apology letter to the parent withdrawn), and confirmation that there was nothing on the Claimant's personnel file.

109.6. Grievance 6 dated 21 April 2019 – *"harm caused to my health, mental anguish, stress, anxiety and depression"*.
This related to the conduct of the Restructure / Redundancy process. Mr Dennis was appointed to hear the Grievances.

110. On 21 April 2019, the Claimant proposed to meet Mr Dennis to discuss Grievances 1 and 2 on 29 April 2019 and asked that her Representation Meeting be postponed until all six Grievances had been dealt with.

111. Mr Dennis advised that he was unavailable on 29 April 2019 and said that all six Grievances would be considered together.

112. Mr Dennis proposed a meeting with the Claimant to see if an agreed resolution was possible. The Claimant was at work, working alongside the two colleagues who had been successful at interview, had no role in the new structure and had outstanding complaints against the School in general and Ms Cowen in particular.

113. The Claimant was willing to attend such a meeting provided her husband could attend. Normally the right of accompaniment to any meeting would be limited to a colleague or Trade Union Representative in accordance with the School's policy and the request for the Claimant's husband to attend was refused.

114. Notwithstanding that, the meeting took place on 8 May 2019 between the Claimant and Mr Dennis. No amicable solution was reached.

115. As a result, Mr Dennis continued to investigate the six Grievances.

116. It is clear from the documents that Mr Dennis conducted a full and thorough Investigation into each Grievance. The Outcome Letter runs to some 21 pages. The Notes of the Outcome Meeting run to eight pages.

117. Mr Dennis sent his written decisions on the Grievances to the Claimant on 23 July 2019. The outcomes were set out in detail and are summarised as follows:-

117.1. Grievance 1 - rejected
Mr Dennis concluded that there was no breach of confidentiality by the School. The fact that a colleague had posted on Facebook that the Claimant had left was not within the School's control and was inaccurate. No details of scores had been shared, all three 'at risk' employees had been advised of the outcome at the same time.

117.2. Grievance 2 - rejected
Mr Dennis concluded that the School was, at all times, seeking to follow procedure. He apologised on behalf of the School for any distress caused to the Claimant. The Representation Meeting would be held, at the Claimant's request, after the Grievances had been concluded and the Claimant's dismissal letter was withdrawn pending that meeting.

117.3. Grievance 3 - rejected
The scoring exercise was, in Mr Dennis' view, robust and fair. All three candidates had been set the same tasks and had been asked

the same questions. The Claimant's marking was substantially below the other two candidates. The complaint of delay in producing scores was on HR advice and designed to safeguard the Claimant's wellbeing.

117.4. Grievance 4 - rejected
Mr Dennis explored and explained the rationale for the restructure, the fact that all three in the *"pool"* were employed members of staff and that the pool had not been questioned by staff or Unions. Mr Dennis concluded that Ms Cowen as Line Manager for the Administrative Team was an appropriate Member of the Selection Panel and that the previous complaint against her was not a factor as it had been concluded when the parental complaint was resolved with no action taken against the Claimant.

117.5. Grievance 5 - in part upheld
Mr Dennis agreed that the meeting about the parental complaint could have been better handled. Ms Cowen had categorically denied any racist motive in her conduct towards the Claimant, but to the extent that the meeting could have been handled better, the Grievance was in part upheld.

117.6. Grievance 6 - rejected
Mr Dennis concluded that there was no basis upon which he could decide that any of the Claimant's complained of health issues were caused by any of the actions or inactions of the School and there was no supporting evidence to do so.

118. Mr Dennis suggested to skip Stage 2 of the Grievance process and go straight to Appeal but the Claimant rejected that approach.

119. The Claimant was placed on compassionate leave from 8 May 2019 onwards. She remained on full pay, on compassionate leave, until the date her employment ended.

120. On 9 September 2019, the Claimant stated that she wished to progress her Grievances to Stage 2. By this stage the School had transferred to the Second Respondent as part of the LDBS Frays Academy Trust.

121. Mr Skegg was asked to conduct the Stage 2 Grievance Hearing. He was a Governor and had been part of the IEB since early 2018. He confirmed his appointment to the Claimant on 27 September 2019 and confirmed that another Governor would be part of the Hearing Panel. In due course, Ms Warren was appointed to the Stage 2 Hearing Panel.

122. A meeting was held between the Claimant, Ms Warren and Mr Skegg on 17 October 2019.

123. That meeting lasted two hours and the Claimant set out the basis for her continued dissatisfaction with the Grievance Outcomes. The Claimant

was taken through her letter of 9 September 2019 which instigated Stage 2 of the Grievance Procedure.

124. Mr Skegg then spoke to Ms Cowen and Mr Dennis regarding the matters raised and reviewed the Stage 1 documents.

125. Mr Skegg found no evidence of harassment, victimisation or discrimination. He found no *"ulterior motive"* behind the restructure of the Administration Team as alleged and was satisfied that the Selection process had been fair.

126. Part of Grievance 2 was upheld, regarding the timing of the original Termination Letter, but otherwise the original decisions were upheld.

127. The Outcome Letter at Stage 2 was sent to the Claimant on 29 November 2019 and she was advised of her Right of Appeal which she exercised.

128. In January 2020, Mr Williams (Governor and Member of the IEB) was asked to form an Appeal Panel to consider the Claimant's Appeals.

129. Under the School's Grievance Policy an Appeal Panel must consist of at least two Governors. In this case the Panel was three strong, Kirin Sherma and Debbie Garraway joining Mr Williams.

130. The Claimant again asked if her husband could attend the Hearing with her, this was again refused as he was neither a Trade Union representative nor a colleague, as the requirements of the Grievance Policy set out.

131. The Hearing was set for 10 February 2020.

132. Mr Dennis presented the Management Case having conducted the Stage 1 Hearing. As the Head Teacher (who would normally undertake this role) was not employed prior to 1 September 2019, it was felt that Mr Dennis was best placed to present the case.

133. Mr Dennis was accompanied by Ms Simpson to provide HR Support.

134. The Claimant objected to Mr Dennis presenting the Management Case, but after taking advice, Mr Williams felt that without Mr Dennis' input, the Panel would not understand why the decisions taken by the School were taken. Further, there was no right of objection to the identify of the person presenting the Case in the Respondent's Policy.

135. The Claimant also asked Ms Cowen to attend, but as she had made decisions at Stage 1 or Stage 2 of the Grievance Process, this was not considered appropriate.

136. The Appeal Hearing proceed on 10 February 2020. The Panel had HR assistance from Ms Thresher, employed by the First Respondent.

137. The Claimant objected to Ms Simpson's presence at the meeting because she was a *"witness"*. Notwithstanding that she was described as such in the relevant documents, she was, in fact not a witness. She was there to provide HR advice to Mr Dennis if it was required. The Panel considered that her presence at the Hearing was appropriate.

138. The Claimant then felt that her husband should be allowed to be present throughout because he was her witness. Again, as he was neither a Trade Union Representative nor a colleague, he was treated as a witness and was not entitled to remain in the Hearing throughout.

139. Each of the six Grievances was discussed in turn.

140. As with previous meetings the Claimant, after the event, submitted numerous amendments to the minutes. As with previous meetings, the minutes were taken by a Clerk. The minutes were not verbatim and the Claimant's amended minutes were made in spite of her not taking any notes during the Hearings themselves.

141. During the Hearing, Mr Dennis remarked that he understood why Ms Cowen had found the Claimant difficult. Mr Dennis admitted making the remark. He said it was out of frustration due to the Claimant revisiting matters over and over again. Mr Williams referred in his evidence (which was not challenged) to the Claimant not answering questions and repeating issues.

142. Mr Dennis did not say so, but Mr Williams recalled that this was in relation to the parental complaint which the Claimant would not accept - despite it being a matter of fact - that the complaint had been received, investigated, and closed without any further action being taken.

143. It was not put to Mr Dennis in cross examination that his comment was racially motivated in any way.

144. At the conclusion of the Appeal Hearing, the Appeal Panel were unanimous in their decisions.

145. The original decisions and Grievances 1, 2 and 4 were upheld for the same reasons as given by Mr Dennis at Stage 1 and Mr Skegg at Stage 2.

146. The original decisions in Grievances 3 and 5 were partially upheld, but the Panel considered that procedurally matters could have been better dealt with; that the wording of the Redundancy Policy could have been clearer and that the Claimant's complaint against Ms Cowen should have been handled as a Grievance rather than as a complaint. The Panel did not, however, consider that those matters would have made a difference to any of the outcomes.

147. In relation to Grievance 6, the Panel could not reach a conclusion in the absence of Medical expertise or evidence. Nor could they comment on the cause or extent of any of the Claimant's claimed conditions.

148. The Outcome Letter was sent to the Claimant on 4 March 2020. Although the Policy requires the Outcome of the Grievance Appeal to be sent within 10 working days, Mr Williams explained that "working days" means School days, February half term intervened and there was the impact of Covid-19 as well as his own workload.

149. On 6 March 2020, the Claimant wrote to say that she rejected the Outcome of the Appeal Panel. This was, however, the final step in the School's internal processes.

150. On 19 November 2019, the Claimant had been advised of a part time vacancy for Clerk to the School Governors, but she did not apply for that post.

151. The Claimant was aware of a vacancy as a Lunch Time Supervisor as she was informed by a message from a colleague that a member of the Team was retiring. The Respondent had not brought this to the Claimant's attention, but she was aware of the vacancy and made no enquiry.

152. During this hearing, the Claimant has referred to a vacancy for a Breakfast Club Play Worker, advertised on 1 April 2019 and not brought to her attention at the time. It is not clear when the Claimant became aware of this vacancy, but she had made no enquiry about it, nor had she raised it in any of her Grievance Meetings.

153. It was submitted on behalf of the Respondents that the Claimant would have been unlikely to consider this role as the number of hours was significantly lower than she had previously worked.

154. The Claimant's previous working hours had been such as to accommodate her taking her daughter to school, therefore a role in a Pre-School Breakfast Club would not have permitted this in any event.

155. We find as a fact that the Claimant had no interest, or would have had no interest in that role for the reasons stated.

156. As the internal procedures within the School were concluded by the Stage 3 Grievance Appeal, the Claimant's Representation Meeting was set for 18 March 2020. Mrs Hunter, as Head Teacher, conducted the meeting with Human Resources advice from a Ms Thresher.

157. Ms Hunter's unchallenged evidence was that all the Claimant's points had been covered in the Grievances. She confirmed that no job share had been considered because no other job share candidate existed.

158. Accordingly, in the absence of any alternative posts which were available at the time, Ms Hunter concluded that as the Claimant had been unsuccessful in securing a role in the restructured Administration Team and as there was no alternative employment available, the Claimant was to be dismissed on the ground of redundancy. On 19 March 2020, Ms Hunter emailed confirmation that the Claimant's last day of employment would be 20 March 2020, that she would be paid 10 weeks' pay in lieu of Notice and that the Local Authority would write to confirm the position.

159. On 27 March 2020, Ms Hunter wrote to the Claimant stating that as the Claimant had not been employed by the First Respondent since 1 September 2019, the Dismissal Letter would come from the School which was duly sent on the same day. The Claimant was advised of her Right to Appeal but she did not appeal the decision.

160. Subsequently, the Claimant sought to raise a Grievance about the handling of her Grievance Appeal and asked for her termination to be delayed pending that fresh Grievance.

161. As the Grievance Appeal at Stage 3 was the final step in the internal process, this request was rejected.

162. That is the factual background against which the Claimant brings her complaints.

The Law

163. Section 94 of the Employment Rights Act 1996 ("ERA") provides,

> 94. The right
>
> (1) An employee has the right not to be unfairly dismissed by their employer.

164. Under s.98(1) ERA 1996,

> 98. General
>
> (1) In determining for the purposes of whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

165. Under s.98(2)(c) ERA 1996, redundancy is a potentially fair reason for dismissal.

166. Under s.98(4) ERA 1996,

> 98. (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

167. Under s.139(1)(b)(i)(ii) ERA 1996,

> 139. Redundancy
>
> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-
>
> (a) …
> (b) the fact that the requirements of that business-
>
> (i) for employees to carry out work of a particular kind, or
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.

168. Under the Equality Act 2010 ("EqA"), s.4 provides that race is a protected characteristic.

169. Under s.13 EqA 2010,

> 13. Direct Discrimination
>
> (1) 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.

170. Under s.26 EqA 2010,

> 26. Harassment
>
> (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.

(2) …
(3) …
(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; and
(c) whether it is reasonable of the conduct to have that effect.

171. Under s.27 EqA 2010,

27. Victimisation

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

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

(2) Each of the following is a protected Act-

(a) …
(b) …
(c) …
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

172. Under s.123 EqA 2010,

123. Time Limits

(1) Proceedings on a complaint may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the Employment Tribunal thinks just and equitable.

173. Under s.140B EqA 2010, the time limit is extended to facilitate conciliation before the institution of proceedings, through the ACAS Early Conciliation process.

174. Under s.136 EqA 2010, if there are facts from which the Court or Tribunal could decide, in the absence of any other explanation, that a person has contravened the Equality Act 2010, then the Court or Tribunal must hold that the contravention has occurred unless it is shown that there was a non-discriminatory reason for the treatment concerned (i.e. that the contravention of the Act has not occurred).

175. We have been directed to a number of relevant Authorities as follows:-

175.1. In Safeway Stores Plc v Burrell [1997] ICR 523, it was confirmed that,

> "From time to time the mistake is made of focusing on a diminution in the work to be done, not the employees who do it…"

And that,

> "It is necessary to look at the overall requirement for employees to do work of a particular kind and not the amount of work to be done"

175.2. Citing with approval:

Carry All Motors Limited v Pennington [1980] ICR 806, and

Sutton v Revlon Overseas Corporation Limited [1973] IRLR 173

175.3. Both Carry All Motors Limited and Sutton were cases where the amount of work remained the same but the number of employees required to do it reduced.

175.4. Hollister v National Farmers Union [1979] IRLR 238, which confirmed that a re-organisation may lead to redundancies and might equally constitute a substantial reason justifying dismissal if there were sound business reasons for any such re-organisation.

175.5. Kerry Foods Limited v Lynch [2005] IRLR 680, in which case it was established that the bar establishing a "substantial" reason was low.

175.6. Kent County Council v Gilham [1985] ICR 233, which set out that the test of "substantial" was to deter employers from dismissing for a trivial reason.

175.7. Scott and Co. v Richardson [2005] ALL ER(D) 87, said that,

> "…the test was said not to be whether a Tribunal considers the business decision a sound one, but whether the employer reasonably considers it to be of discernible advantage."

175.8. British Coal Corporation v Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72, established that,

> "…in a redundancy situation consultation must be meaningful – it must begin when the proposals are still at a formative stage; employees or their Representatives must have adequate information on which to respond and have adequate time to do so. Any responses to consultation must be given conscientious consideration."

175.9. Capita Hartshead v Bayard [2012] IRLR 814, confirmed that,

> "Where an employer has genuinely applied its mind to the issue of the appropriate pool of impacted employees, it would be "exceptional" for a Tribunal to intervene."

175.10. Earl of Bradford v Jarrett (2) [1978] IRLR 16, established that,

> "The test of reasonableness applies to the selection criteria chosen by the employer and the way they are applied. The Tribunal can only interfere if no reasonable employer would have adopted the criteria or applied them as they did."

175.11. Morgan v The Welsh Rugby Union [2011] IRLR 376, clarified,

> "A distinction between a situation where a reduced number of employees were required to carry out the same roles as they previously did and one where following re-organisation there are different roles which may involve an internal process and a greater element of judgement."

175.12. Mitchells of Lancaster (Brewers) Limited v Tattersall UKEAT/0605/11, confirming that,

> "An element of judgement cannot be avoided in any event and alleged subjectivity can be neutralised by a properly constructed process such as ensuring all employees are asked the same questions (per Canning v National Institute for Health and Care Excellence UKEAT/0241/18)."

175.13. Bascetta v Santander [2010] EWCA Civ.351, confirmed that,

> "The Tribunal's role is not to engage in re-scoring or to carry out any detailed analysis of the way the criteria for selection were applied, only to confirm that the process was reasonable."

175.14. Quentin Hazell Limited v Earl [1976] IRLR 296, stating that,

> "The employer's duty in relation to alternative employment is to take reasonable steps to find alternative work for the employee."

175.15. The Tribunal has also had regard to the well-established principle in Igen Limited v Wong [2005] ICR 931, that,

> "A difference in treatment coupled with a protected characteristic is not enough to establish discrimination or to shift the burden of proof under s.136 EqA 2010. The Claimant must establish some fact from which the Tribunal could conclude discrimination has occurred before the Respondent is required to establish a non-discriminatory reason for any treatment complained of."

176. Applying the facts found in this case to the relevant Law, we have reached the following conclusions.

Conclusions

177. There are two "trigger" points which have by various events brought this matter before us.

178. The first was a parental complaint against the Claimant. The Claimant complains about the way this was handled by the School Business Manager Ms Cowen and the way the complaint the Claimant then made against Ms Cowen was handled and the conduct of the Claimant's Grievances including these issues.

179. The second was the re-organisation of the Administrative Team at the School where the Claimant worked and the subsequent selection of the Claimant for redundancy.

180. The Claimant's complaints, set out in full in the List of Issues at paragraph 22 above, set out the complaints the Claimant brings before the Tribunal claiming that she was the victim of race discrimination and that she was unfairly dismissed.

181. Although the Claimant sought to argue during the Hearing before us that the parental complaint of November 2018 did not in fact exist and that the entire matter was fabricated by Ms Cowen who was *"targeting"* the Claimant, that was not an issue before the Tribunal and in any event, we reject it. The complaint was, we have found, a genuine one.

182. The complaint arose from a telephone call which the Claimant, when she was asked about the matter, recalled making. She did not dispute the basis of the issue, i.e. that a parent rang to say that she was dealing with the death of a friend and explained that another person would collect her child from school that day. Nor did the Claimant dispute that she told the parent that such a request should be made in writing.

183. The parental complaint was submitted by email. We have found that the email was genuine. It came from the parent and was described as an

'official complaint'. It referred to having raised a complaint against the Claimant on a previous occasion.

184. Under the School's Policy a formal complaint from a parent must be investigated under the School's Complaints Policy. Usually this would be conducted by the Head Teacher but due to a series of events, no Head Teacher or Deputy Head Teacher was available so that a Governor, Mr Dennis, asked Ms Cowen to carry out the investigation.

185. The Claimant had referred to Ms Cowen being *"keen"* to be the Claimant's Line Manager. In fact she was the Claimant's Line Manager, having been appointed as School Business Manager with responsibility for the management of the Administrative staff within the School.

186. The Claimant contract as Attendance Officer referred to her reporting to the Head Teacher. That was superseded by Ms Cowen's appointment which the Claimant seemed reluctant to accept. She refused to sign a new contract as administration officer reporting to Ms Cowen although her evidence was that she did carry out general administrative duties.

187. The parental complaint was discussed with the Claimant. Ms Cowen gave what she described as management advice to the Claimant regarding the way she engaged with parents. Although the Claimant complains that this was a comment on her accent, we reject that and have accepted that the comment related to tone and a need for an amount of professionalism and compassion in circumstances such as the parent found herself.

188. The Claimant, in fact, recalled the call in question and told Ms Cowen she had at the time apologised to the parent.

189. After considering the matter, Ms Cowen told the Claimant that no further action would be taken as regards the matter and there, had the Claimant been willing to accept that the matter was at an end, it would have ended.

190. The Claimant complains that she was not shown the email from the parent at the relevant time. Ms Cowen told us that to do so could have caused the Claimant further upset and would not have helped her to de-escalate the issue. That was a judgment she was entitled to make and she made it for perfectly valid reasons which had nothing to do with the Claimant's race.

191. The Claimant's response was to raise a complaint against Ms Cowen, saying that she was deliberately constructing a case against the Claimant, targeting her and that she had an ulterior motive in so doing.

192. The Claimant asked, as part of the complaint, why Ms Cowen was *"discriminative towards"* her and referred to a *"serious act of discrimination"* .

193. The Claimant says this was a complaint of race discrimination, but the difference in treatment referred to was that a complaint or complaints

against other members of staff had been dealt with informally, whereas this was not. Ms Cowen's explanation, which we have accepted, was that any formal or official complaint must be dealt with through the Complaints Process. The Claimant did not refer to race at any time in the four page complaint which she made against Ms Cowen and was, we find, using the term *"discrimination"* in its widest sense, i.e. complaining about a difference of treatment and / or being *"picked on"*.

194. The School was under threat of 'special measures' and an Interim Executive Board (IEB) was appointed in February 2018 to prepare for an Ofsted Inspection. The School was rated "inadequate" in that Inspection.

195. As part of the steps being taken by the IEB a re-structure of the Administrative Team was undertaken. The Reception desk at the School was understaffed or unstaffed for periods of time (especially in the afternoons) which was considered unacceptable. The IEB asked Ms Cowen to lead on the restructure of the Administrative Team.

196. At that time the Administrative Team consisted of four people. The School Secretary working full time, the Claimant and two others each working part time (the Claimant working 15 hours, the others 11 and 8 hours respectively). One of the two other Administrative Staff worked until 3pm on a Wednesday and 4pm on a Thursday, but other than that none of the three staff, including the Claimant, worked beyond 12:15 any day.

197. The Claimant's hours were of her choosing and to ensure that she could take her daughter to school each day.

198. Ms Cowen consulted the Human Resources support offered through Wokingham Borough Council and concluded that she wished to, first, increase the number of hours worked by the three Administrative Staff (the School Secretary was not impacted) to ensure coverage throughout the School day, whilst at the same time reducing the number of staff from three to two so as to improve continuity, communication and the handover process between individuals.

199. The proposal was for two employees to each work 21 hours per week. The proposal and the reasons for it we have accepted as genuine and reasonable in an effort to improve the performance of the Administrative Team particularly in relation to the staffing of Reception.

200. A Consultation document set out these proposals and they were not challenged by any of the staff impacted, nor by the relevant Trade Union. The School was willing to consider alternative structures provided it met the requirements, particularly of coverage and budgetary restraint. Ultimately a variation in the hours to be worked between the two administrative staff (and an extra half-hour to be worked by the secretary) was accepted by the Ms Cowen as a "viable option"

201. Each of the three employees completed a "preference" form. The Claimant was willing to do either of the two roles and (although other employees were not) was willing to consider a job share.

202. Ms Cowen felt that absent a possible job share partner, that proposal could not be pursued and we accept her approach that the Respondent could not *"force"* any employee to job share against their unwillingness to do so.

203. In those circumstances, with the two other employees each expressing interest in one of the roles, all three were at risk of redundancy with two posts available.

204. The School followed the Redundancy Policy with periods of Consultation with the Trade Unions and the employees individually. The final stage was a Selection Process.

205. We are conscious of our limited authority in this area. It is clear that the Respondent had considered the pool of employees at risk (per Capita Hartshead Limited v Byard), had reasonable selection criteria (per Earl of Bradford v Jarrett) and in the circumstances proceeded fairly. All three at risk employees undertook the same tests and were asked the same questions (per Canning v NIHCE) and our role is not to re-score.

206. It is clear that the process was a reasonable one (per Bascetta v Santander). Indeed, these aspects have not been seriously challenged.

207. The employee scores were individually marked and thereafter the scores were moderated in discussion between the three markers and we do not criticise that process which, in any event, based on the "raw" scores which we have seen would have made no difference to the final outcome.

208. The Claimant scored 31 points in the selection process, the other two employees scored 41 and 44 respectively and the Claimant was therefore selected for redundancy.

209. We are satisfied that the Claimant was fairly selected following a fair procedure.

210. The Claimant was told that she was at risk of redundancy on 7 March 2019 and as a result was given a letter of dismissal based on a period of notice of nine weeks on 15 March 2019.

211. Before that, however, on 8 March 2019 the Claimant began a period of absence from work. The final step in the redundancy process was for a Representation Meeting to take place and she asked that this was delayed until she returned to work, but asked for details of her scores.

212. Initially the School did not give the Claimant her scores as they considered that to do so without the discussion and explanation which would take place at the Representation Meeting, the delivery of the scores without comment could be counter productive. On the insistence of the Claimant's Trade Union Representative, however, these were provided.

213. The Claimant returned to work on 27 March 2019 and raised an informal Grievance regarding a breach of confidentiality (as another employee had sent the Claimant a job advertisement believing that she had left the School), a lack of compassion regarding sending a Notice of Termination on the ground of redundancy and harassment (delay in sending the Claimant's scores). The Claimant then issued six formal Grievances on 4 April 2019, 5 April 2019 and four more all on 21 April 2019.

214. Mr Dennis, an IEB Member, was appointed to consider the Grievances and he said he would deal with all six together. The Claimant's Letter of Notice was withdrawn pending the consideration of the Grievances and the conduct of the Representation Meeting (which the Claimant asked be delayed until the Grievances were finalised, to which step the School agreed).

215. The Grievances were properly investigated and, save for one small matter regarding the meeting to discuss the parental complaint, rejected by Mr Dennis.

216. On 8 May 2019 the Claimant was placed on compassionate leave on full pay whilst her Grievances proceeded.

217. The Grievance went to Stage 2. Again the process cannot be faulted. The Grievances were considered fully. A further part of one Grievance was upheld (the timing of the Letter of Notice), but otherwise the original decisions were upheld.

218. The Claimant exercised her right of Final Appeal. The previous decisions were then upheld again, save for two matters. First, the Appeal Panel concluded that the complaint which the Claimant raised against Ms Cowen should have been dealt with as a Grievance rather than as a complaint (but found that to do so would not have altered the outcome) and that the conduct of the re-structure / Redundancy process could have been better handled.

219. In that regard, we are conscious of our role. The question is not whether the process could have been better, but rather whether it was reasonable. Given the processes of discussion, consultation and selection, we find that it was.

220. Two possible vacancies were brought to the Claimant's attention during this time.

221. First a vacancy for a Clerk to the Governors was available, but the Claimant did not apply for it.

222. Second, a colleague advised the Claimant that a Lunchtime Supervisor was retiring. The Claimant did not enquire about any vacancy thus arising.

223. The Claimant was also referred to a vacancy for a Breakfast Club Play Worker. The complaint is that she did not have this brought to her attention. The School said that it was unlikely the Claimant would have been interested in it because of the very limited number of hours.

224. Further, we conclude that given that the Claimant's previous working hours had been designed to ensure that she could take her own daughter to school each day, we do not consider that at the time (and the Claimant made no contemporaneous enquiry about it) the Claimant would have been interested in this role because her undertaking a Pre-School Breakfast Club role would have meant that she could not have taken her own child to school.

225. The Claimant's Representation Meeting was held on 18 March 2020, more than one year after her selection for redundancy. The Head Teacher, Mrs Hunter, held the meeting and concluded that as the Claimant had not secured a role in the re-structured Administration Team, and as no alternative roles were then available the Claimant was therefore redundant.

226. She confirmed that the Claimant would be dismissed on the ground of redundancy and that she would be paid 10 weeks pay in lieu of notice. She was advised of her right of Appeal but did not exercise it.

227. To summarise our conclusions by reference to the issues in the case:-

Unfair Dismissal

228. The Claimant was dismissed for a potentially fair reason (redundancy), the number of people required by the School to carry out the work of the type in which the Claimant was engaged reduced. She was fairly selected for redundancy under a reasonable process.

229. If the re-organisation of the School's Administration was not considered to be a redundancy situation, then we would have found that the Claimant was fairly dismissed for some other substantial reason, being her failing to secure a role in the new structure.

Direct Discrimination on the Ground of Race

230. The Claimant did not in truth pursue these matters at the Hearing and in particular the motivation of the individuals at each stage was not

questioned. It was not put to them that they acted as they did because of the Claimant's race, and that they acted adversely.

231. In any event,

231.1. The School did share the nature of the parental complaint against the Claimant. What they did not do was provide the Claimant with a copy of the complaint document and there reasons for so doing were sound. There was no racial motivation in that action and the Claimant has not demonstrated that she was subject to any less favourable treatment when that action was taken.

231.2. The complaint was properly investigated under the School's Complaints Procedure. The Claimant has not demonstrated any differential treatment and the motivation of Ms Cowen when investigating the complaint was to follow the School's Complaints Procedure. It was not suggested to her that she acted in the way she did out of any racial motive and we find that she did not.

231.3. The Claimant did not complain of race discrimination by Ms Cowen. She talked about Ms Cowen being, *"discriminative"* towards her due to Ms Cowen formally investigating the complaint raised against the Claimant. Ms Cowen did this in accordance with School Policy. The Claimant did not suggest any racial motive. She used the word *"discriminative"* in the broad sense of the word and did not attribute it to race.

231.4. Investigation into the parental complaint was fairly conducted and concluded without any action being taken against the Claimant. The Claimant has not pointed to any less favourable treatment, nor has she suggested that the outcome or the process was racially motivated. We have found that it was not.

231.5. The comment regarding the way the Claimant spoke to a parent made during the Investigation was not about her accent and was not connected with race. It was about tone and manner of address. The comment was not connected to race, the Claimant has not demonstrated any less favourable treatment and what Ms Cowen gave was a reasonable piece of management guidance.

231.6. There were not, we have found as a fact, two different complaint letters.

231.7. The Claimant's Grievances were properly investigated and considered at Stage 1, Stage 2 and on Appeal. The Claimant's complaint is in truth about the outcome. She has not established any racial motivation in the process or the outcome, this was not suggested to any of the Respondent's Witnesses and in any event the processes followed were fair and reasonable and the processes

and outcomes were not connected to nor were they on the ground of, race.

231.8. It was not suggested to any Witness that the comment that the Claimant was *"difficult to work with"* was racially motivated. It was not. It was a reaction to the Claimant's unwillingness to accept outcomes (even when the outcome was in her favour such as the parental complaint resulting in no action).

231.9. There was a clear reduction in the number of employees required to work in the Administration Team. The reduction of three to two was not questioned at the time by any employee, or by the relevant Trade Unions. The decision to reduce the number of staff was not an act of less favourable treatment towards the Claimant (the other two employees were treated the same way) and was not motivated by race, nor indeed was any racial motive put to Ms Cowen.

231.10. The Claimant was fairly selected for redundancy by a fair scoring process. There was no racial motivation or influence in the scoring and that was not suggested to any Witness.

231.11. The Claimant was not excluded from discussions about possible job sharing. The position was that no other employee was willing to job share. The Consultation and Interview processes were fair and reasonable.

232. Accordingly, these claims all fail on their facts. The Claimant has not established any fact from which we could conclude that discrimination had occurred. The Claimant has merely pointed to actions (which have in any event a non-discriminatory explanation) and her protected characteristic. She has not established any connection between the matters she complains of (even if they did amount to less favourable treatment which they do not) and her race. Even if she had, individuals involved at each stage acted fairly and reasonably. There was at each stage a non-discriminatory reason, which we have accepted, for the treatment and in any event, the Claimant has not established that that amounted to less favourable treatment than was or would have been afforded to others. Throughout the process of redundancy the two other employees were treated equally with the Claimant. Her complaint is that she was selected, but she was selected for redundancy fairly.

233. In all these matters the Claimant's complaint is, in effect, that the outcomes were not what she would have wished for.

<u>Harassment</u>

234. With regard to harassment the Tribunal concludes:

234.1. The complaint against the Business Manager was considered. It formed part of the Claimant's Fifth Grievance.

234.2. The parental complaint was properly and fairly dealt with and it was not suggested that Ms Cowen was motivated by race, or that her conduct related to race when investigating the matter (which resulted in no action being taken against the Claimant in any event).

234.3. It was not suggested to any Witness that the timing of disclosure of interview scores related to the Claimant's race. The timing was appropriate and reasonable.

234.4. Mr Dennis' presence at the Claimant's Grievance Appeal Hearing was appropriate. He presented the School's case. His presence was not an act which related to the Claimant's race. It has never been suggested that it did. His comment that he could understand why people found the Claimant difficult to work with did not relate to her race, but to the Claimant's refusal to accept findings and her revisiting of the same points repeatedly during the Hearing.

234.5. Ms Simpson was not present at the Appeal Hearing as a Witness, she was attending to provide Human Resources support to Mr Dennis. Her presence was not an act which related to the Claimant's race. It was not suggested to Mr Dennis or Ms Simpson that it was.

234.6. Grievance number five was considered fully at each stage of the process (Stage 1, Stage 2 and Appeal). The complaint that it was not investigated has no factual basis whatsoever.

234.7. The Panel did not *"produce a parental complaint letter that was different in content"* (to that which the Claimant had previously been referred to) and this allegation is without any factual foundation.

234.8. The Appeal Outcome Letter properly reflected the Panel's findings. This allegation is without any factual foundation.

235. Accordingly, the complaints which the Claimant raises under the heading of Harassment did not (and none of them did) relate to a relevant protected characteristic. The conduct in question did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her irrespective of her apparent perception that it did so. In all the circumstances of the case, which we have explored, it could not possibly be reasonable for the conduct to have such an effect. The Respondent at all times followed processes and procedures which were laid down. Again, the real complaint that the Claimant has is that she is unhappy with the outcomes.

<u>Victimisation</u>

236. The first requirement of a complaint of victimisation is that the Claimant should have carried out a protected act. She did not.

237. The complaint against Ms Cowen did not and could not on any reasonable reading of it constitute an allegation of discrimination contrary to the Equality Act 2010, in particular on the ground of race.

238. In any event, the Claimant was not at risk of redundancy because of the complaint. She was at risk because of a reasonable re-structuring process which led to a reduction in the number of staff required. That had been prompted by the "inadequate" report from OFSED, the lack of cover at reception in the school throughout he day and a desire to improve the performance of the administrative team. The Respondent had a genuine belief that the steps it was taking would improve it's performance in this area.

239. The Claimant was fairly dismissed for redundancy and the processes followed were reasonable. None of the actions complained of related to the Claimant's complaint against Ms Cowen.

240. For the reasons set out above, the Claimant's complaints fail and her claim is dismissed.

Employment Judge M Ord

7 December 2023

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Sent to the parties on:
15 December 2023

For the Tribunal Office.