EMPLOYMENT TRIBUNALS

Claimant: Mr G Siapolya

Respondent: North Kent College

Heard at: London South (by video)

On: 23, 24, 25 and 26 September 2024 (morning only)

Before: Employment Judge Evans
Ms E Thompson
Ms J Cook

Representation
Claimant: in person
Respondent: Mr Wayman, counsel

JUDGMENT

The Tribunal's unanimous judgment is that the complaint of direct race discrimination is not well-founded and is dismissed.

REASONS

Preamble

1. The claimant's employment with the respondent began on 1 September 2022 and ended on 20 March 2023. Early conciliation began on 12 April 2023 and ended on 24 May 2023. The claimant presented his claim, which was a complaint of direct race discrimination, on 24 May 2023.

2. The claim came before the Tribunal on 23 September 2024. The parties had agreed a bundle prior to the Hearing ("the Main Bundle" or "MB") which ran to 364 pages (although inserted pages meant that the pagination ran just to page 339). On 25 September 2024, following orders made by the Tribunal on 24 September 2024, the respondent produced a supplementary bundle ("the

Supplementary Bundle" or "SB") which ran to 91 pages. All references to page numbers are to *electronic* page numbers, i.e. to the pdf page numbers.

3. The claimant gave evidence by reference to a witness statement. So too did Mr David Dunne, the Head of Curriculum for the Design, MGA and Media Department of the respondent and Mx Jessie Howard, the Deputy Head of Curriculum for Media in the same department.

4. The claimant's witness statement was dated 13 April 2024. He had also written a 12-page document to the Tribunal and the respondent dated 18 September 2024 and this was treated as a supplementary witness statement. Mr Dunne had produced a supplementary witness statement in response to the Tribunal's orders of 23 September 2024 in addition to his main witness statement. Mx Howard had produced a single witness statement dated 9 September 2024. The respondent also produced a witness statement for Kerrie Francis in response to the Tribunal's orders of 23 September 2024. The claimant did not cross-examine this witness.

5. The first day of the hearing was spent discussing the issues and disclosure matters arising from them. The Tribunal heard evidence and submissions on the second and third days. The Tribunal deliberated on the morning of the fourth day and reached the decision set out in these reasons. The fourth day of the hearing had been cancelled as a result of a lack of judicial resources on the eve of the Hearing, but the Judge and members were in the end able to meet during its morning. However, the loss of part of the fourth day meant that the judgment had to be reserved and these written reasons provided.

Applications and orders during the hearing

6. The claimant had made an application for specific disclosure on 14 July 2024 which was referred to a Judge on 11 September 2024. A written decision in relation to it was sent to the parties on 13 September 2024. That decision contained orders for specific disclosure. The claimant then sent further correspondence to the Tribunal which did not appear to contain any further application but was not entirely clear.

7. The Tribunal therefore asked the claimant whether there were any issues arising (1) in relation to whether the respondent had complied with the orders made on 13 September 2024; (2) in relation to disclosure more generally, which he considered the Tribunal needed to address. The claimant said "yes" to (1) and "no" to (2).

8. There was a discussion of the issues that the claimant considered to be outstanding and, as a result of that, the Tribunal made further orders in relation to disclosure and other matters on 23 September 2024. Reasons were given for the orders orally and the orders themselves were sent to the parties on that same date. The respondent complied with these by the morning of 24 September 2024, as noted above, and the relevant additional documents were all included in the Supplementary Bundle.

The issues

9. The issues arising in this case were set out as follows in the case management orders of 6 December 2023 (MB page 47). The parties confirmed in a discussion at the beginning of the Hearing that those were indeed the issues that we should decide (but we comment in relation to the discussion of comparators further at [77] below). In this discussion the claimant explained to which of the various issues the ten numbered points set out in his witness statement related.

Direct race discrimination (Equality Act 2010 section 13)

1.1 The claimant describes himself as a black person and he compares himself to a white person.

1.2 Did the respondent do the following things:

1.2.1 It is admitted that the respondent dismissed the Claimant on 20 March 2023 during his probationary period of employment;

1.2.2 The claimant states that his dismissal was based on false allegations that applied higher standards to him than the comparators

1.2.3 Specifically, the respondent decided to dismiss him for:

(a) not printing the SO92 report during a couple of team meetings,

(b) classroom management,

(c) attendance,

(d) failure to use eTrackr.

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant says they were treated worse than Billy Reed, David Hillman, Graham Gladin and Jessie Howard who were all white lecturers.

1.4 If so, was it because of race?

The Law

10. In broad terms, the Equality Act 2010 ("the Equality Act") prohibits various forms of discrimination by employers against employees with certain protected characteristics. Those protected characteristics include race.

11. Section 39(2) of the Equality Act provides that an employer must not discriminate against an employee as to the terms of their employment; in the way it affords access to (or by not affording access to) opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; by dismissing the employee; or by subjecting the employee to any other detriment.

12. One of the forms of discrimination prohibited by the Equality Act is direct discrimination. This occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1) of the Equality Act).

13. The question, therefore, is whether A treated B less favourably than A treated or would treat an actual or hypothetical comparator and whether the less favourable treatment is because of a protected characteristic – in this case race. On such a comparison, there must be no material difference between the circumstances relating to each case (section 23 of the Equality Act).

14. Section 136 of the Equality Act provides for a shifting burden of proof:

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

15. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263.The Barton guidance is as set out here. The references are to sex discrimination because it was a sex discrimination claim, but the guidance applies equally to a claim of direct race discrimination.

> *(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".*

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into ac-count in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

16. There is therefore a two-stage process to the drawing of inferences of direct discrimination. In the first place, the claimant must prove facts from which the Tribunal could conclude in the absence of any other explanation that the respondent had committed an act of discrimination against the complainant. If the burden does shift, then the employer is required to show a non-discriminatory reason for the treatment in question.

17. In Efobi the Supreme Court confirmed the point that a Tribunal cannot conclude that "there are facts from which the court could decide" unless on the balance of probability from the evidence it is more likely than not that those facts are true. All the evidence as to the facts before the Tribunal should be considered, not just that of the claimant.

18. In Madarassy v Nomura International plc [2007] ICR 867 the Court of Appeal stated that "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it. The Court of Appeal also pointed out that the burden of proof does not shift simply on proof of a difference in treatment and the difference in status. This was because it was not sufficient to prove facts from which a Tribunal could conclude that a respondent could have committed an act of discrimination.

19. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that they have relevant circumstances which are the same or not materially different as those of the claimant having regard to section 23 of the Equality Act. Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ. If anything, more is required to shift the burden of proof when there is an actual comparator, it will be less than would be the case if a claimant compares their treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator .

Submissions

20. The parties did not provide written submissions, and their oral submissions were relatively brief. We do not set them out in full here, but they may reasonably be summarised as follows.

21. Mr Wayman for the respondent contended that the claim had never been about discrimination but rather had been about a dismissal which the claimant regarded as being unfair. The claimant had only begun to raise the issue of race when he realised that he could not because of his short service pursue a claim of unfair dismissal.

22. Mr Wayman submitted that the question of the SO92 reports was clearly not a factor in the claimant's dismissal. He submitted that the claimant's response to his dismissal was inconsistent with his contention that the allegations against him were false. The claimant perception and reality did not align. Mr Wayman submitted that the claimant could not show a difference in treatment when a hypothetical comparator was identified. The reality was that the factual allegations for which he had been dismissed were clearly not false. Mr Wayman submitted that the claimant's credibility was damaged by various matters, including the inherent improbability of his case.

23. The claimant submitted that there were no concerns about his performance until the February half term. His attendance and performance were accepted as being good. He was accused of not using eTrackr properly, but Mr Reed had not used it at all. His use of eTrackr was clearly as good as that of Mr Hillman.

24. So far as classroom management was concerned, the claimant submitted that Mr Dunne had done nothing when he had raised concerns in relation to Mx Howard and Mr Gilman at the beginning of the year and yet he had been dismissed for similar concerns a few months later. Mr Dunne had had no concerns in relation to his classroom management prior to the February half-term. Similarly, Mr Dunne had accepted he had had no concerns until the February half-term about attendance except perhaps in relation to lateness. The claimant placed considerable emphasis on what he regarded as a change of attitude towards him from the February half-term.

25. The claimant further submitted that he had been treated less favourably than Mr Gilman who had had several days off as a result of having contracted Covid and yet had not been penalised for this. Turning to the question of the SO92 reports, it was clear that other lecturers had not taken those reports to meetings and yet he was the only one who had been penalised for that by being dismissed. In view of all these matters, it was clear that the reason that he was dismissed was very much related to race.

Findings of fact

26. These findings of fact do not of necessity refer to all of the evidence that was before the Tribunal. The Tribunal made plain at the outset that it would not necessarily read pages contained in either bundle that were not referred to specifically in the witness statements or during the course of the Hearing.

General background findings

27. The claimant was employed as a Lecturer in Media Studies from 1 September 2022 until 20 March 2023, when he was dismissed before the conclusion of his probationary period and a payment in lieu of notice was made to him.

28. The Head of the claimant's department, and so in formal terms his line manager, was Mr Dunne. However, in practice, the claimant was managed day-to-day by Mx Howard, the Deputy Head of Curriculum for Media. This was because she managed day-to-day the Media section of the department. Overall, because of this Mx Howard had a clearer picture of how the claimant performed in his role than Mr Dunne.

29. The claimant's contract of employment provided for a probationary period of 8 months (MB page 104). The respondent's probationary policy and procedure was set out at Main Bundle page 219. For new employees it provided (section 5.1) for three electronic assessments during the probationary period, where possible to be carried out at the end of the first, fourth and eighth months of employment. The assessments were to be made "… on line manager's observations and where applicable lesson observation reports" (section 5.2).

The probation process, meetings and the claimant's dismissal

30. Mr Dunne did a lesson observation (or "learning walk", in the respondent's terminology) on 3 October 2022 (MB page 131). It was ungraded but the Overall Summary at MB page 133 is positive and does not suggest any significant concerns about the claimant's classroom performance. Sue Berry then observed a lesson given by the claimant on 11 October 2022 (MB page 135). Again, it was ungraded but again the Overall Summary (MB page 138) is positive and does not suggest any significant concerns. Finally, Ms Berry observed a lesson given by the claimant on 5 December 2022 (MB page 144). The overall grade was "good" (MB page 147).

Meeting on 28 February 2023

31. The first and second electronic assessments provided for by the probationary policy had not been carried out by the end of the fourth month of the claimant's employment, although there was an informal discussion at which no significant concerns were raised. The claimant was then invited to a "second probationary review" on 28 February 2023. The meeting was attended by the claimant, Mr Dunne and Mx Howard.

32. No minutes were taken but following the meeting on 28 February 2023 Mr Dunne wrote to the claimant summarising the concerns he said had been addressed during the meeting as follows (MB page 177):

    32.1. **Attendance at work**: in essence, the criticism was that the claimant was not always at work during his "admin hours". Specific reference is made to February half-term week and the Friday before it. Further, reference is made to the claimant having said that sometimes he was late because he

needed to drop his children off. Mr Dunne said that "we can accommodate this" but that a meeting needed to be set up to discuss.

32.2. **Classroom and course management**: the points raised by Mr Dunne were (1) a need to have "more authority and control over your learners"; (2) an issue with a particular student that needed addressing immediately; (3) the failure to bring a SO92 report to the meeting with the result that attendance concerns could not be fully discussed; (4) the need to review eTrackr notes for those who were at risk of not passing the course ("we need documentation on there to help communicate concerns you may have for individual students").

33. The email concludes by saying "both Jessie and I are concerned over your performance at the moment, please speak to us more about how we can offer further guidance and support to you. We have set a meeting for Tuesday 14th March to review these concerns". That meeting was in fact re-arranged to 20 March 2023.

34. The claimant replied to the email on the same day (MB page 176). The general tenor of his email was that he would address the concerns raised. He did not suggest that he disagreed with anything said in Mr Dunne's email.

Mx Howard's concerns raised on 17 March 2023

35. On 17 March 2023, Mx Howard raised further concerns about the claimant by an email to Mr Dunne (MB page 181). Specifically:

35.1. **9 March class incident:** The claimant telling Mx Howard 15 minutes before a session began on 9 March that "he couldn't take the class as he has pitches";

35.2. **9 March class incident:** Having complaints from that class when she had briefly dealt with it that the claimant "doesn't control the noise and they struggle to work";

35.3. **9 March class incident:** After the session of the claimant with that class discovering sweet wrappers and bottles on the table;

35.4. **Student HO**: The fact that although a student, HO, had not completed any work during the year "the first time it was raised on eTrackr was 10/02/2022 and this was by David Hillman. [The claimant] did follow up with a meeting on 02/03/23. There has been no intervention or parental meeting up until this point. I've just checked Harry's site and there has been no follow-up despite how bad it is".

35.5. **Student AW:** A failure to follow up on a piece of work for another student, AW.

36. We use throughout this judgment when referring to students the initials listed in the Supplementary Bundle at page 71.

The meeting on 20 March 2023

37. The final probationary review meeting took place on 20 March 2023 (MB page183). Mr Dunne referred to previous discussions and is recorded as raising (MB page184) the following issues:

    37.1. The cancellation of the class on 9 March 2023;

    37.2. The failure to address the fact that a student had not submitted any work all year until a meeting with their parent at the beginning of March;

    37.3. Continued absence from working during "your administrative where you are working from home";

    37.4. Concerns over classroom management – "the food and drink and arriving late" (MB page 185).

38. He is then recorded as saying:

> *As a result, I have considered your performance over your tenure and regrettably, I have concluded that you are not meeting the standards expected in your role as Lecturer in Media and your shortcomings in performance, despite support measures being put in place is untenable with the department, the impact of this on the teams means that they are having to take on additional workload in addition to impact we are seeing on the learners.*
>
> *I had hoped that your performance would have improved by now, or be improving somewhat to a point where we could continue to support upskilling you in the role during your probation period, however I have not seen the necessary improvements needed in order to continue with this and I do not believe that there is any additional training or support that we haven't already put in place that I can provide you with to resolve these issues, I, therefore, do not deem it suitable for you to continue working at the College.*
>
> *It is my decision to terminate your employment within your probationary period.*

39. The decision was formally confirmed by a dismissal letter sent on 23 March 2023 (MB page 193).

Credibility of the witnesses

40. The credibility of the witnesses is a relevant factor in this case, and we make the following findings in relation to credibility.

41. We did not find the claimant to be a credible witness because of inconsistencies. For example:

41.1. In his post dismissal letter to the respondent (MB page 198) he says "All the students met all the minimum criteria to pass their projects and all were on target to successfully complete their course". However, he accepted in his oral evidence that seven were at risk of not progressing. When this inconsistency was put to him his explanation was wholly unconvincing: he suggested that the seven he had referred to were at risk of not achieving merits or distinctions rather than of not being able to pass and so progress to the next year.

41.2. In his witness statement (page 8) he said in respect of the February half-term holiday "Throughout that week I kept on updating David Dunne of what was happening through emails and text messages". In fact, his text message exchange with Mr Dunne on Thursday 16 February shows that this was not the case. It strongly implies that there had been no text messages during that week before Thursday afternoon and shows that the claimant had not looked at emails before then ("My apologies I have not checked my emails") (MB page 163).

42. Further, there were inconsistencies between how he acted and what he said he believed at the time, and he was unable to explain these satisfactorily. For example, the claimant was adamant that he had been working at home during those days of the February half-term week when he was not attending a course. Mr Dunne suggested that he should take the disputed days as holiday, and the claimant did, without documenting any objection. This was inconsistent with his assertion that he had been working; one would have expected him to, for example, at least set out in detail the work he had performed on the days in question and query whether he should be required to take holiday. When this issue was put to him in cross-examination, he was initially evasive about whether he had raised any objection – first not answering, and then suggesting he *might* have raised some objection. When pressed further, he said he could not remember.

43. A further example of inconsistencies between how he acted and what he said he believed at the time was reflected in how he responded to being dismissed. He described the decision as "a bit harsh" (MB page 185). This reaction is wholly inconsistent with a belief that his dismissal was an act of race discrimination resulting from a series of fabricated allegations. The same point arises in respect of his response to the respondent's email of 1 March 2023 (MB page 177). The response (MB page 176) suggests that in broad terms he accepts the concerns are well-founded; certainly, there is nothing in it which suggests that he believes the concerns to be false or fabricated.

44. Turning to Mr Dunne and Mx Howard, the Tribunal did not find either of them to be particularly impressive witnesses. Neither had a good command of the documentation and neither had particularly clear recollections of the detail of events. The Tribunal did not, however, have concerns about the consistency of their evidence and there was nothing that damaged their credibility in any significant way. Consequently, the Tribunal found them to be generally credible witnesses.

The allegations which the claimant says were fabricated

Not printing the SO92 reports

45. The SO92 report was a report that could be printed through eTrackr, the respondent's student management system, and which would record, amongst other things, attendance levels.

46. Mr Dunne would ask tutors to bring SO92 reports to team meetings so that individual tutors could identify students whose attendance levels were a cause for concern. Examples of such emails are at MB pages 256 to 258. We note that the emphasis is on *bringing* rather than *printing* the SO92 report in two of the three emails. The claimant was also asked to bring the SO92 report to the probation review meeting on 28 February 2023.

47. The claimant did not know how to print SO92 reports, even by the time of the meeting on 28 February 2023 (his email of 1 March 2023 at page 176 comments "I will ask Jessie to show me how to print the SO92"). We find that he could have asked Mx Howard about how to do this earlier and that, if he had, she would have shown him.

48. We find, having heard the evidence of the witnesses, and in light of the emails referred to above, that the reason Mr Dunne would ask lecturers to take SO92 reports to meetings was that he required the lecturers to be able to identify those students who were "below standards" (his email at MB page 256) and to be able to comment on and discuss those students. As such, the emphasis was not on having the printed reports themselves but on having the information necessary for such a discussion available.

49. We find that the claimant did not take printed SO92 reports to team or other meetings because he did not know how to print them (on one occasion he did take them because Mx Howard had helped him print them). We find that Mr Dunne commented adversely on this on two occasions. First, in writing following the meeting on 28 February 2023 ("You failed to bring your SO92 report to the meeting so we couldn't fully discuss the attendance concerns you are facing…"). Secondly, at a particular team meeting: we accept the evidence of Mr Dunne that he worked his way around a table of lecturers asking them about attendance concerns. The claimant was the last to be spoken to. Mr Dunne asked him to show him the SO92 report and the claimant had not printed it and did not have it immediately to hand in electronic form either. We find that Mr Dunne said something which reflected his dissatisfaction with this. We find that the dissatisfaction expressed by Mr Dunne did not relate to the fact that the claimant did not have a *printed* SO92 report with him, but rather to the fact that he could not discuss students who were "below standards" because he did not have the relevant *information* to hand (for example, by having accessed it on his laptop as Mr Dunne went round the table speaking to the other lecturers).

50. We note that the claimant did not claim to have the SO92 report immediately to hand either in printed form or in electronic form. Rather, in cross-examination he put to Mr Dunne that "I had my laptop and if you wanted I could have logged in".

This rather missed the point: the question was not whether the claimant could access the necessary information on his laptop whilst others sat around waiting for him to do so, but rather whether he had it immediately to hand so that it could be discussed without delay.

51. The claimant alleges that he was "singled out" in relation to this issue. This was a generalised assertion unsupported by any significant evidence. We find in light of the witness statement of Ms Francis that it was not possible to retrospectively identify which lecturers had, or had not, printed SO92 reports before particular meetings but, even if it had been, this would have been of little if any relevance. We find that the claimant was not singled out in relation to this issue.

52. The relevance of this issue to the claimant's dismissal is considered further below. However, we find that in so far as it was relevant, it was not a "false" allegation.

Classroom management

53. We find that Mx Howard had concerns about the claimant's classroom management skills. This resulted from her experience of the claimant as a lecturer over a six-month period. The causes of her concerns included:

    53.1. Having found it necessary early in the year to swap a Year 2 class taught by the claimant on Friday afternoons for a Year 1 class that she taught on Thursday. This was because Mx Howard had concerns that the claimant could not control the Year 2 class.

    53.2. Having heard excessive noise around the claimant's classroom whilst walking the corridors.

    53.3. The 9 March classroom incident as detailed at [35] above.

54. To the extent that these findings require us to prefer the evidence of Mx Howard to that of the claimant we do so in light of our credibility findings above. Further, the claimant's position that the 9 March classroom incident had been completely fabricated was implausible for the following reasons:

    54.1. The incident is set out with a significant amount of granular detail in Mx Howard's email to Mr Dunne of 17 March 2023 (MB page 181);

    54.2. Completely inventing the incident would have been a high-risk action for Mx Howard given how easily the details of it could be checked by Mr Dunne.

55. The claimant put considerable emphasis on an incident at the beginning of the academic year, in his first week, when he had challenged two students who were sitting on one another's laps (his witness statement, last paragraph, page 5). He suggested that they had told him that Mx Howard and another lecturer, Mr Gladin permitted such behaviour and that he had then asked Mx Howard and Mr Gladin

about this. His evidence was that Mr Gladin said that the students were allowed to behave in that way.

56. Having heard the evidence of the witnesses in relation to this issue, we find that the claimant's recollection is mistaken. Whilst we readily accept that at the beginning of a school year students may well have tried to take advantage of a completely new lecturer by telling him that behaviour to which he objected was tolerated by other lecturers, we find that it is inherently improbable that Mr Gladin confirmed that such behaviour was permitted and indeed we find he did not do so. To the extent that this finding requires us to prefer the evidence of Mx Howard to that of the claimant we do so because we found her to be a more credible witness.

57. Overall, we find that Mx Howard had genuine concerns about the claimant's classroom management skills and that, as a result of her reports in relation to them, so did Mr Dunn.

58. The relevance of this issue to the claimant's dismissal is considered further below. However, we find that it was not a "false" allegation.

Attendance

59. There are really two aspects to the question of attendance concerns. First, the claimant arriving late for work. Secondly, the claimant not being at work when he should have been.

60. We find that the claimant arrived later for work on a number of occasions and that on at least one occasion this resulted in Mx Howard having to begin teaching a class for him (see the WhatsApp message at MB page 170). At least most of these occasions are documented in the Main Bundle by WhatsApp messages. For example:

    60.1. On 7 September 2022 (MB page 165) (late because of traffic);

    60.2. On 18 October 2022 (MB page 166) (late because of a meeting with a potential landlord);

    60.3. On 28 November 2022 (MB page 167) (late because of traffic caused by an accident);

    60.4. On 13 December 2022 (MB page 169) (late because of traffic caused by an accident);

    60.5. On 10 January 2023 (MB page 169) (late because of traffic);

    60.6. On 31 January 2023 (MB page 170) (late because of an appointment with an electrician);

    60.7. On 27 February 2023 (MB page 171) (late because of traffic caused by an accident).

61. We find that Mx Howard had genuine concerns about the claimant's lack of punctuality. Further, the claimant's attitude at the Tribunal in his oral evidence was that if there was bad traffic what could he do? He appeared surprised when it was suggested that if he was regularly arriving late then, perhaps, he should regularly leave home earlier and did not engage with the question. We find that he also conveyed the attitude to lateness reflected by this at the time.

62. Turning to the concerns about the claimant not being at work when he should be, we find that Mx Howard and Mr Dunne had genuine concerns about this, including on the following occasions:

    62.1. On 10 November 2022 (SB page 5);

    62.2. On 10 February 2023 (SB page 175);

    62.3. On 24 February 2023 (SB page 172);

    62.4. During the February half-term holiday (the text messages referred to above which are at MB page 163).

63. We find that the claimant's absence during the February half-term holiday was of particular concern because it lasted several days and followed on from the claimant, in the view of Mr Dunne, having at the very least left college early on the last Friday of the half-term. We find that it was of particular concern both because of its length and also because it was only shortly after Mr Dunne's email of 10 February 2023 reminding the claimant of the hours between which he should be on campus (MB page 175). We find that the absence during February half-term caused Mr Dunne to see the claimant as a far less satisfactory employee than previously. We accept Mr Dunne's evidence that it was "very significant" to him.

64. The relevance of this issue to the claimant's dismissal is considered further below. However, we find that it was not a "false" allegation.

Use of eTrackr

65. eTrackr is a system which enables employees to record matters specific to individual students in a way that enables other employees to see what has been recorded. The final eTrackr data produced by the respondent in relation to the claimant was from SB page 72 to SB page 91.

66. We place only limited weight on the eTrackr data in light of the following matters:

    66.1. Two versions of the eTrackr data were produced overnight between 23 and 24 September 2024. The final version of the eTrackr data was only produced because Mr Wayman noticed that the previous version was incomplete because a particular entry referred to in another document was missing. The explanation for this, which we accept as true, was that the report containing the eTrackr data had been run with a level of permission

which did not produce a full report. We were told that the Final eTrackr Data had been run with the highest level of permission and was therefore complete.

66.2. The claimant was adamant that he had recorded in eTrackr early in the academic year "causes for celebration" and "causes for concern" which were not recorded in the final eTrackr data. The Tribunal questioned Mr Dunne about this and he said that they would have disappeared from eTrackr after a certain period if not marked as "resolved".

67. These matters lead us to conclude that the final eTrackr data may well not accurately reflect the claimant's use of eTrackr throughout the whole of the academic year and may not be completely accurate. However, we find that any inaccuracies reflect a lack of detailed knowledge of those printing the eTrackr data off and nothing else.

68. We find that in fact the subject of eTrackr data was of limited significance. We find that the reason it was raised in the manner set out at [32.2] above was that Mx Howard had become concerned about the progress of certain students and by the fact that their lack of progress had not been recorded on eTrackr as it should have been.

69. We find that the students in respect of whom Mx Howard had these concerns as at the date of the meeting on 28 February 2023 were:

69.1. AW (for whom she believed there were no eTrackr entries);

69.2. JB2 (for whom she believed there were no eTrackr entries); and

69.3. HO (for whom the only eTrackr entry was by another lecturer, Mr Hilman (SB page 89)).

70. We find that Mx Howard's concerns in relation to these students were genuine and not false or fabricated in light of her explanation to the Tribunal of the evidence between SB pages 25 to 36 relating to their work. We find that that evidence reflects her understanding of the state of play in the various students' work at the date when the claimant's employment ended.

71. To the extent that the findings of fact above require us to prefer the evidence of Mx Howard to that of the claimant we do so because we found her to be a more credible witness. Further, as noted at [41.1] above, whilst the claimant argued after his employment had been terminated that all his students were on target to pass, that was not what he said in his oral evidence. Equally, in his email of 1 March 2023 (MB page 176), he accepts that there are various concerns in relation to his students.

72. The relevance of the respondent's concerns in relation to the claimant's use of eTrackr to the claimant's dismissal is considered further below. However, we find that it was not a "false" allegation.

The reasons for dismissal – and the treatment of comparator employees

73. The claimant's case is that his dismissal was based on "false allegations" that applied higher standards to him than to his comparators. We have found above that none of the allegations which he says the respondent relied on were in fact false. We find that they were not false because in each case they reflected a genuinely held concern.

74. We do find, however, that as the claimant contends the concerns in relation to classroom management, attendance and the use of eTrackr in relation to certain students as set out in our findings of fact above were together the reason for the claimant's dismissal. In light of our findings in relation to the significance of the SO92 reports, we do not find that the claimant's failure to take these in printed form to meetings was a factor in his dismissal.

75. Mr Wayman contended that if the allegations were not in fact "false" (by which he meant fabricated) then the claimant's case failed. Taking full account of the fact that the claimant is unrepresented, we concluded that that was not in fact correct. The claimant's case was implicitly argued on the basis that, even if there were some merit in the allegations, by relying on them as it did the respondent applied higher standards to him than to his comparators.

76. The claimant's actual comparators were recorded in the agreed list of issues as Billy Reed, David Hillman, Graham Gladin and Jessie Howard. However, the list of issues also considered the possibility of there being a hypothetical comparator. In the discussion at the beginning of the Hearing, the claimant realistically accepted that none of the comparators that he had put forward were actual comparators: none of them were in their probationary periods, Mx Howard was more senior than the claimant, and Mr Reed had a different job (Instructor not Lecturer). His case was therefore pursued on the basis that these individuals might serve as evidential comparators.

77. To consider the relevance of evidence relating to the treatment of such evidential comparators, we must identify the circumstances of the hypothetical comparator. In light of our finding that the concerns of the respondent in relation to classroom management, attendance and the use of eTrackr were genuine, and not false, we find that the appropriate hypothetical comparator is a white Lecturer in Media Studies part-way through their probationary period in respect of whom the respondent had the same or similar concerns.

78. We find that there is little if any evidence concerning the treatment of any of the evidential comparators which assists us. We find that although there may well have been other Lecturers who would attend team meetings without SO92 reports, there is no significant evidence before us that suggests that they did not have the relevant information readily to hand which was in fact the relevant concern from Mr Dunne's perspective (we refer to our findings at [49] above). Further, we have found that a failure to take printed SO92 reports to meetings was not part of the factual reason for dismissal. In relation to classroom management, contrary to the claimant's assertions, we have found above that Mx Howard and Mr Gladin did not permit students to sit on one another's laps. In

relation to attendance, the fact that Mr Gladin may have been off work sick when ill with covid sheds no light on the treatment of the claimant. Nor does the claimant's allegation that Jessie Howard missed a day's work "without explanation" – the allegation was not put to Mx Howard or Mr Dunne and the claimant has not explained clearly how he knew there was no explanation, given that one would not in any event necessarily expected one to have been given to him as a more junior employee. So far as the use of eTrackr was concerned, the nature of the respondent's concerns was quite specific. The evidence before us does not suggest that other lecturers failed to record concerns about students who were at risk of failing. The claimant did not clearly identify any such lecturers. So far as Mr Reed is concerned, we accept the respondent's evidence that as an Instructor rather than Lecturer he was not expected to make eTrackr entries.

79. The respondent pointed to two other employees who were in their probationary periods as being potential evidential comparators. One of them was dismissed earlier in their probationary period than the claimant was. The other was not and was confirmed in their position at the end of the probationary period. Again, we find no evidence of significance in this case resulting from their treatment other, than, perhaps, the fact that one of them, who was white, was dismissed by Mr Dunne earlier in the probationary period than the claimant.

80. Overall, we conclude that there is no significant evidence in relation to the treatment of the evidential comparators which is of material assistance to us.

81. We have also considered carefully, again taking full account of the fact that the claimant is unrepresented, whether there is other evidence before us that might assist the claimant in shifting the burden of proof. We find that the following evidence is potentially relevant in this respect: the failure of the respondent to fully follow its probationary policy as set out at [31] above when account is taken of the details of the probationary policy as set out at [29] above; the fact that the lesson observations of the claimant before Christmas 2022 as set out at [30] above were broadly positive; and the fact that the claimant was the only black lecturer in the department

Conclusions

82. We have concluded at [74] above that the claimant was dismissed because of concerns that the respondent had about his classroom management, attendance and use of eTrackr in relation to students who were at risk of failing. We have also found that those concerns were not false. The question, remains, however, whether the claimant was treated less favourably because of race when he was dismissed as a result of such concerns because higher standards were applied to him.

83. In light of our findings above, we conclude that the claimant has not proved facts from which we could conclude in the absence of an adequate explanation that he was treated less favourably than the hypothetical white comparator (whose circumstances we have set out at [77] above) would have been treated. There is simply not enough there, particularly taking into account the speed with which one of the other two probationers who was white was dismissed during their

probationary period and the fact that Mr Dunne's concerns about the claimant were accelerated and focused by his absence from work during the February half-term holiday. Consequently, the burden of proof does not shift to the respondent and the claim fails. In reaching this conclusion, we have taken into account that during the course of his cross-examination the claimant accepted that the respondent had legitimate concerns about whether he was on site when he should be and that such concerns were unrelated to race.

84. However, if the burden of proof had shifted to the respondent, we would have concluded that the reason for dismissal was in no sense whatsoever because of race. We would have concluded that it was because the respondent had genuine concerns about the claimant's classroom management, attendance and use of eTrackr in relation to students who were at risk of failing, as found above. We would have found that the relative speed of the process in February and March 2023 was because the respondent had very serious concerns about the claimant's reliability as a result of his failure to attend work for several days during February half-term and about his oversight of his students' progress, and that the underlying concerns about classroom management were also exacerbated by the 9 March classroom incident.

85. The claim therefore fails and is dismissed.

86. Viewed forensically the claimant's claim clearly fails for all the reasons set out above. However, we did not agree with the submission of Mr Wayman that the claimant had never believed that he had been discriminated against but had simply raised the question of discrimination when he had realised that, because of his short service, he was unable to pursue an unfair dismissal claim. There could have been many reasons for the claimant's reliance on "unfairness" rather than race immediately after his dismissal. Consequently, however poorly judged the claimant's claim of race discrimination may be after forensic analysis and with the benefit of hindsight, we do not conclude that he pursued it in bad faith.

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Employment Judge Evans

Date: **5 October 2024**

JUDGMENT SENT TO THE PARTIES ON
7 October 2024

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FOR THE TRIBUNAL OFFICE

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