



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr C Mitchell

v

United Learning Trust

Heard by CVP

On: 11 – 13 November 2020

Before: Employment Judge Manley
Members: Mr H Smith
Mr J Turley

Representation

For the Claimant: In person
For the Respondent: Mr M Bloom, solicitor

RESERVED JUDGMENT

- 1 The claimant was subjected to less favourable treatment because of his race, age and sex when he was not given the opportunity to apply for a Curriculum Leader vacancy in May 2018.
- 2 The claimant was not subjected to less favourable treatment because of his race, age or sex when he was not given the opportunity to apply for a post of Lead Teacher in RE between March to May 2018.
- 3 The claimant was not subjected to less favourable treatment because of his race, age or sex during the grievance and appeal process.
- 4 The claimant was not subjected to less favourable treatment because of his race, age or sex in the discussion with the Head Teacher on 11 June 2018.
- 5 The claimant was subjected to less favourable treatment during a discussion with the Principal in a meeting on 11 June 2018 because he had carried out a protected act when he complained on 4 June 2018 .

- 6 The matter is now listed for a remedy hearing by CVP on the agreed date of **Tuesday 26 January 2021** at 10am. Orders are made at the end of this judgment to ensure that hearing is effective.

REASONS

Introduction and issues

1. At an earlier preliminary hearing the issues in this case had been agreed. The claims are for four acts of alleged direct race, age and sex discrimination and one of victimisation. The issues were recorded to be as follows:-

“EQA, section 13: direct discrimination because of race/age/gender

- (i) The claimant relies on the same treatment on all three protected characteristics of race, age and gender.*
- (ii) The racial group on which the claimant relies is that he is a black person.*
- (iii) In respect of age, he relies upon being in his mid-fifties.*
- (iv) It is not in dispute that the respondent subjected the claimant to the following treatment:*
 - a. Failed to appoint to post of Curriculum Leader of Social Sciences.*
 - b. Failed to appoint to post of Leader Teacher role.*
 - c. Failed to uphold grievance and rejection of appeal*
 - d. Conversation between the claimant and Head Teacher 11 June 2018 concerning his future at the school.*
- (v) 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 – successful candidates to two positions, Ms Holly Austen (a white female in her thirties) and Ms Iona Drysdale (a white female in her twenties) and/or hypothetical comparators.*
- (vi) If so, was this because of the claimant’s race, sex and/or age, and/or because of any of the protected characteristics more generally?*

Equality Act, section 27: victimisation on race sex and/or age

(vii) *It is not in dispute that the claimant did a protected act by raising and pursuing his grievance including the appeal starting in June 2018.*

(viii) *Did the respondent subject to the detriments as follows:*

a. *Conversation between the claimant and Head Teacher 11 June 2018 concerning his future at the school.*

(ix) *If so, was this because the claimant did a protected act?*

Remedy

(x) *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."*

2. Although the acts of direct discrimination were recorded above as being for a "failure to appoint", the respondent agrees that it is more accurately described as a failure to provide an opportunity to apply for the two roles mentioned. It is also clear that the part of the conversation on 11 June 2018 relied upon by the claimant for the victimisation claim is from the point when the Head Teacher (referred to more often as the Principal) offered him a "late resignation".

The hearing

3. The hearing was by CVP which was largely satisfactory. The claimant had been unable to join at the outset, perhaps because the link didn't work but he joined after a short break. We had another unplanned break when one of the tribunal members suffered a power cut. We were able to continue but decided we would reserve our judgment to deliberate on the third day. The tribunal used an electronic bundle and the parties and witnesses had hard copies.
4. We heard evidence from the claimant; Mr Wilson, the Principal; Reverend Rey, the grievance hearing officer and Ms Shadick, the grievance appeal officer. Ms Morris, who was acting Head Teacher when two of the alleged acts of discrimination occurred has left the school and lives in Hong Kong so we did not hear from her.

Relevant facts

5. Bacon's College (the school) is a state secondary school opened in 1991 as a collaboration between government, faith and charitable sponsors. It has a little over 1000 pupils 11-18. After an inspection in February 2017, Ofsted found overall effectiveness was "inadequate". Between October 2017 and April 2018 Ms Fiona Morris was acting Principal. The school joined United Learning Trust ("the Trust") which runs a significant number of primary and

secondary schools in the private and public sector, on 1 March 2018. Mr Wilson joined as Principal in May 2018.

6. The claimant, who describes himself as Black British of Caribbean descent, and was aged 55 at the time of the matters complained of, applied for a maternity leave cover post in early 2018. This was to cover for Ms Amer, a Lead Teacher in RE and sociology. The claimant was interviewed by Mr Hall (Vice Principal) and Ms O'Connell who was Curriculum Leader in social sciences and would be his line manager. The claimant was appointed on a one-year fixed term contract (with a three month probationary period) to run from January to December 2018, and attended for a few days in late 2017 for handover. The claimant taught A level sociology and RE to earlier years. The claimant had been a teacher for over 25 years, teaching at secondary level, up to and including GCSE and A level. He had held curriculum middle leadership roles in two schools.
7. The claimant was provided with an employment contract and various policies. These included an Equal Opportunity policy for the school and, after transfer to the Trust, there was a further Equal Opportunities statement which required all schools and colleges to have their own policy. Those documents are, in large part, aspirational rather than containing specific goals or targets. The introduction to the school's policy reads as follows:

"The Governing Body of Bacon's College is committed to the principle of equality of opportunity for all in employment. We take pride in our increasingly diverse community and all the cultural richness that it brings with it.

This statement outlines our commitment to equality and diversity. It sets out our intention to create an environment in which everyone in our College community can take full part in the social and cultural life of the College. It also sets out our commitment to promote equality and diversity among our staff.....

The Governing Body recognises that certain groups in society have historically been disadvantaged on account of unlawful discrimination they have faced on the basis of their race, gender, disability, religion/belief, sexual orientation or age. We will put in place a range of actions to eliminate prejudice, unlawful discrimination and victimisation within the College community we serve and our workforce". (emphasis in the document)

8. Under 3.3 of the Equal Opportunities Policy it reads "Our commitment is supported by a legal duty to provide employment opportunities fairly, without unlawful discrimination. We believe we have a strong moral and social duty to recognise any unlawful discrimination, take steps to challenge prejudice and discrimination and promote equality". Later in that section the policy states:-

“We will put in place a range of actions aimed at tackling prejudice and celebrating diversity within our workforce. This will be achieved by:

- *developing a workforce which reflects the community at all levels*
- *making sure that all employees understand their responsibilities under this statement*
-
- *developing and promoting policies which give everyone equal access to employment and opportunities”*

9. There was also a grievance procedure. It provides for an informal procedure to be raised before the formal process. The formal process provides for the grievance to be in writing, for a meeting to be arranged and the right of appeal. Where the grievance is about the Principal the grievance is to the Chairman of the Governors.
10. During the proceedings the claimant had asked the respondent for details of ethnic origin of staff applying for leadership roles since Mr Wilson joined the school in April 2018. The information was not as helpful as it might have been because the tribunal needed to focus on the dates of the alleged discriminatory acts. Mr Wilson also named others from ethnic minority backgrounds who had leadership positions when he started to give his oral evidence. Again, the claimant challenged this information on the basis that the appointments had been made after his complaint. On considering the list between 227-229 of the bundle of documents, that does seem to be the case. It is clear that those from ethnic minority backgrounds were under-represented in leadership positions in May 2018.
11. The school, not unusually for an inner London state school, had a ethnically diverse student population. We were also shown data on the ethnic background of students between 2016 to 2019 which showed, broadly White British students at around 23% with Black African at around 25% and Black Caribbean at 8%. “Other groups” were 20%. In a document in 2019 (page 251) from the CEO of the Trust raised his concerns about diversity and inclusion stating - *“the facts we have about the low numbers of black, Asian and minority ethnic leaders in United Learning worry me greatly. Around a third of our pupils are from ethnic minority backgrounds, as are around 15% of our staff, but only 2% of heads. Its hard to look at those figures and not be worried that we’re missing out on developing black, Asian and minority ethnic talent – and so missing out on people with the capability to become leaders in our schools”*. It was not suggested by the witnesses that the situation was any better in 2018.
12. The claimant covered Ms Amer’s work during 2018. He carried out teaching responsibilities, supported junior members of the department, produced digital resources and marking schemes. Ms Amer was a Lead Teacher and Mr Wilson accepted that the claimant carried out her responsibilities although it is not entirely clear to the tribunal whether the claimant’s post carried the designation of “Lead Teacher”.

13. The social sciences department had about 6 people working in it. Ms O'Connell was Curriculum Leader (and therefore the line manager) when the claimant joined. Another member of the department was Ms Foreman who later played a role in recruiting Ms O'Connell's replacement. There was also a teacher called Ms Pearce who left some time in 2018. The claimant's case is that, in May 2018, all other members of the department were white, female and younger than him. The respondent have not said otherwise.
14. One of the claimant's named comparators, Iona Drysdale, is a white female, aged 25 in 2018. She joined the school in September 2016 from "*Teach First*", which was described in the tribunal hearing as a scheme designed to bring "*high flyers*" into teaching and the majority of whom were under the age of 40. The training period was for 2 years and Ms Drysdale was on a fixed term contract as RE Teacher between 1 September 2017 and 31 August 2018. She was therefore, during 2018, referred to as a newly qualified teacher ("NQT"). Various lesson observations show that her teaching was well thought of. Around March 2018 Ms Drysdale told the school that she had been offered another job elsewhere. Ms Morris was concerned and wanted to encourage her to stay, particularly as others were also leaving. There was some confusion about what her role might be but it seems she was offered the title of Lead Teacher which would lead to an increase in salary from September. An email from Ms Morris to Ms Drysdale dated 18 May 2018 said no process was needed for this exercise as Ms Drysdale was the "*only person eligible*". Formal confirmation of the offer was in a letter from Mr Wilson to Ms Drysdale dated 22 May 2018. From the evidence before us, it appears that the claimant only found out about the offer of this post to Ms Drysdale after he started the grievance about the Curriculum Leader post.
15. On 18 April 2018 the claimant passed his probationary period. His lesson observations also appear positive.
16. Ms O'Connell had indicated an intention to leave the school to go to the North of England. Nothing was certain until she was offered a post in the last week of May which was the week before half term. It seems Ms Morris knew in the early evening of 22 May 2018. This timing was problematic for the school as most teachers in work have to give either half a term or one term's notice and there was concern to have enough teachers in place for September. Ms Morris took immediate steps with agencies and with HR to place an advertisement on the school and the Trust's websites on 23 May, the closing date being the next day. The claimant was later told about these advertisements but did not see them. Those considering how to fill the vacancy were Ms Morris and Ms Foreman who was an Assistant Principal and RE teacher. During the later investigations, Ms Morris said that she believed the claimant was aware of Ms O'Connell's intention to leave. The tribunal finds that the claimant was aware of that intention but not that she had secured a job and formally given notice (which was a few days later) or that steps were being taken to recruit her replacement.

17. The tribunal has seen emails between people involved in this recruitment. Arrangements were being made for interviews and lesson observations for candidates suggested by agencies which had been approached. As well as Curriculum Leader, a RE teacher post was also to be filled. Ms Morris asked Ms O'Connell for her permission to *"let Iona know"* in the email exchange on 22 May. Ms O'Connell replied *"Of course let Iona know and advertise"*. Later Ms Foreman said *"I'm drawing Iona into the process heavily to give her experience – invaluable"*. Ms Morris replied giving information about advertisement and adding *"I will discuss with Iona tomorrow, should she wish to apply"*. Ms Foreman replied with suggestions, adding *"I'll catch Iona about the CL position – good to ask her"*. It seems that Ms Drsydale did not apply. She was involved in lesson observations for the posts the next day. There was only one candidate for the Curriculum Leader position, Ms Holly Austin, who was referred by an employment agency and was considered to be a strong candidate. She was offered appointment to the post the next day, Friday 25 May. Mr Aaron Danquah, who is Black, male and in his mid-fifties was appointed to the RE teacher role.
18. The tribunal saw an email from Ms O'Connell to Mr Hall after the interviews in which she expressed concern about the appointment of Mr Danquah. She said *"Is Aaron the best person we could get? Is it worth having an NQT/Teach First person we can properly invest in, like I have with Iona, rather than someone on a one year contract that nobody seemed particularly overawed with. I want Holly to be able to build a strong department"*. The claimant said that this showed two matters which pointed to discriminatory attitudes. The first was a desire for the school to save money by favouring NQT/Teach First people who would be cheaper but also younger than the claimant, suggesting age discrimination. The second was critical remarks about Mr Danquah whose protected characteristics are the same as the claimant's. The tribunal finds that this email does not help us in our decision making because Ms O'Connell was not a decision maker and Mr Danquah was appointed. The decisions about which the claimant complains are not affected by these comments, made by someone who was leaving the school.
19. The claimant heard about the appointment to the Curriculum Leader post on Friday 25 May. He spoke to someone from HR who directed him to Ms Morris. She told him that the post had been advertised and offered to someone. He was very upset as *"it was just the sort of opportunity I was hoping would arise"*. He subsequently discovered that others in the department had been aware of the vacancy and that Ms Foreman and Ms Drsydale had been actively involved.
20. It was the half term holiday the following week. The claimant did some research and read the school's Equal Opportunities Policy. On Monday 4 June 2018, the first day back after the holiday, the claimant sent an email to Mr Wilson. The subject heading was *"Potential breach of Bacon's College Equalities Policy"*. The email set out the information the claimant had received about the Curriculum Leader position and stated *"I have been given no realistic opportunity to compete for this position"*. The claimant

expressed his disappointment and quoted passages from the equalities policy. He went on to explain his teaching and leadership experience which he said the school would have been aware of and asked for an explanation for the failure to inform him either formally or informally of the vacancy. He concluded:-

“To me, the whole process seems deliberately shrouded in secrecy and is certainly not transparent. In the absence of any reasonable explanation as to why all this happened the way it did, I have strong reason to believe the events unfolded in this way because of my age, gender and ethnicity. If that is the case, disallowing me an opportunity to fairly compete for a leadership position in the school is contrary to the Equality Act of 2010, and would amount to direct discrimination”.

21. Mr Wilson replied very quickly and, having spoken to Ms Morris, a meeting on 11 June was arranged. No notes were taken of this meeting although the claimant did include complaints about it in his grievance of 14 June 2018 so the tribunal finds that is an accurate record of his concerns, if not the whole meeting. The evidence before the tribunal suggests there is agreement about a lot of what was said. The meeting started with a discussion about the claimant's belief that he had been discriminated against with Mr Wilson responding that there had been no discrimination. It seems that Mr Wilson had spoken to Ms Morris who had given him that assurance but he did not tell the claimant that he had spoken to her. There was a disagreement about the extent of staff members in leadership (or middle leadership) positions from ethnic minority backgrounds with Mr Wilson naming one teacher and one staff member in a non-teaching role. The claimant pointed out the sections of the equalities policy.
22. At some point the claimant said that he would feel or did feel “*sick to the pit of his stomach*” but the context of this remark is not agreed. Mr Wilson recalls, but the claimant denies, that he said something to the effect of not putting in the effort (or that it would be “*discretionary effort*” only). The claimant's case is that he referred to the extra effort that he had already put into work. Mr Wilson's evidence is that he said something to the claimant to the effect that it sounded as though the relationship between the claimant and the school had broken down and that the claimant said he wished to leave but he felt contractually bound, At that point, Mr Wilson says, he offered the claimant a “*late resignation*”. The claimant denies that he said he wanted to leave the school and that Mr Wilson's mention of a late resignation came after the mention of being sick to the pit of his stomach. When asked at the grievance hearing, the notes record that Mr Wilson did not say that the claimant said he wanted to leave but that he took the claimant “*to be indicating that he was deeply unhappy with his place of work*” and that he has asked the claimant “*if he would prefer to leave the school*” (page 119). In his evidence to the tribunal, Mr Wilson said he recalled asking the claimant if he wanted to leave. The tribunal finds that the claimant did not expressly say that he wished to leave but he did display unhappiness about what had happened.

23. What is agreed is that the claimant reacted strongly to the suggestion of the “late resignation”. He told the tribunal that he told Mr Wilson that it was an “outrageous” suggestion. Mr Wilson does not recall that comment but was aware that the claimant was very unhappy. Mr Wilson’s evidence was that it was a gesture which was intended to help the claimant. The tribunal was struck by the fact that, in spite of it being clear to Mr Wilson that the offer had caused the claimant to become very unhappy, no evidence was given of any attempts by him to explain his intentions or to re-assure the claimant. Under cross examination by the claimant, Mr Wilson was asked if he had apologised or said he’d made a mistake when it was clear that the claimant had been upset by the offer and he agreed he did not. When asked if he had expressed that the school wished to retain the claimant’s services, Mr Wilson replied that there was no compulsion for the claimant to accept the offer.
24. On 14 June 2018 the claimant raised a formal grievance about the Curriculum Leader appointment. It is a detailed three-page letter which sets out the claimant’s own appointment and his experience; his work at the school; how he found out about the appointment and why he believed he should have been allowed to apply. He stated that he was the only person in the department who should have been considered and said:-
- “When there was a need to appoint a lead teacher for religious studies an individual, Iona Drysdale, was identified and placed in the role without a formal recruitment process. When there was a need for a Curriculum Leader in the department the logical person for the school to consider was me. That did not happen. I received no such approach to even apply for the position”.*
25. As with the earlier complaint to Mr Wilson, the claimant alleged that there had been unlawful discrimination. He went on to complain about the 11 June meeting with Mr Wilson, specifically the offer for the school to consider a “late resignation”, adding that Mr Wilson did not acknowledge the claimant’s contribution or suggest a place for him at the school going forward. The claimant stated that Mr Wilson’s actions amounted to victimisation under the Equality Act.
26. A relatively prompt grievance hearing was arranged with the Acting Chair, Reverend Rey, on 22 June 2018. Present at the meeting were Mr Wilson, an HR person Ms Wilkes, Mr Lau to take notes and, later in the meeting, Ms Morris. The meeting was about two hours long and the notes some nine pages. The claimant was asked to set out his grievance which he did. Various questions were asked of him by Reverend Rey, including an explanation for why the claimant believed the process was discriminatory.
27. Mr Wilson explained the school’s position which was that there was a time pressure on the school to find a replacement for Ms O’Connell. The post was advertised, with the other RE teacher post for 24 hours. Mr Wilson is recorded as denying any conscious or unconscious bias, said he had accepted that the school could have acted better “*but this had not been an admission of guilt; to construe it as such was frankly, ludicrous*” (page 115).

He “*categorically refuted*” the claimant’s assertion that he was deliberately excluded, said the post was on the website and “*contested*” the claimant’s assertion that he didn’t know Ms O’Connell was trying to leave. The claimant answered that he was aware in general terms that she wished to leave but he had not known she had resigned. Mr Wilson was asked if he and Ms Morris had had a conversation about not asking the claimant to apply and he said they had not. When asked “*Did you have any thoughts about who might be a good person to ask to apply*”, Mr Wilson said he did not recall that.

28. Ms Morris is recorded as joining the meeting shortly after this point. She read from a prepared statement which set out the timeline. She said “*It had not been customary to signpost and advertise vacancies though it was recognised that this was best practice and the college will adhere to this going forward*”. The practice, it was said, had already changed. Ms Morris said 26 new members of staff had been appointed which was a “*huge task*” and rejected any suggestions of discrimination. She said the short turnaround for the Curriculum Leader post was because it was so close to 31 May after which there would be problems with notice periods. At the end of paragraph 4.4, Ms Morris was asked “*whether anyone else within the department had been asked to apply*”. She replied “*they had not been*”. This seems to the tribunal to have been incorrect as a number of emails quoted above at paragraph 16 make it clear that Ms Drysdale was to be asked. The tribunal have no evidence that she was asked but it seems highly likely given she was involved in the process. Even if she was not invited to apply, that was the intention and she was clearly aware of the vacancy.
29. Ms Morris said that she was aware that the claimant was “*an experienced member of staff*”; and had made an assumption that he knew about the vacancy. She also explained how Ms Drysdale had been offered “*added responsibility and remuneration to retain her*”.
30. After the claimant had asked Ms Morris further questions, she left the hearing which went on to consider the victimisation grievance. Mr Wilson and the claimant told the hearing what they recalled of 11 June meeting as set out above. Towards the end of the hearing, the claimant was asked what outcome he was seeking. He stated that he wanted an apology and Mr Wilson said he would not acknowledge that the school had discriminated against the claimant as it had not. There were then some concluding remarks and Reverend Rey said he would write to the claimant with an outcome.
31. By letter of 29 June 2018 (122-124), the claimant’s grievance was not upheld. He was informed that Reverend Rey concluded that the time of the advertisement was for a short time and “*this practice has now been improved*”. It was accepted that the process was “*not in the spirit of the College’s commitment to promote policies which give everyone equal access to employment and opportunities*”.
32. The part of the claimant’s grievance which alleged discrimination was rejected with reasons, namely that Ms Morris was unaware that the claimant

was interested in a permanent position and had assumed all members of the department were aware of the vacancy. Reverend Rey said at 2 c (page 123) *“the school does not operate a system whereby staff members are individually contacted to raise awareness of opportunities that may be of interest and no other staff member within the department had been made aware of the vacancy by (Ms Morris)”*. The tribunal notes that this would seem not to be accurate because of the emails where mentioning the post to Ms Drysdale was discussed but that was not the information provided to Reverend Rey at the time of the grievance hearing.

33. The part of the claimant’s grievance where he alleged victimisation was also rejected on the grounds that Mr Wilson’s motivation in offering late resignation *“ was concern when you expressed dissatisfaction with working at the school and the effect this would have on your discretionary effort and relationship with your manager in the future, as well as a general desire not to hold you to a contract that you found onerous if he could release you from it”*. Reverend Rey further stated that the school wished to retain him on the staff.
34. The claimant appealed the grievance outcome and an appeal hearing was arranged for 4 September 2018, after the school holidays. Ms Jan Shadick, who was, at that time, the Trust’s Regional Director- Secondary Academies (South) chaired the meeting. Also present were an HR business partner, Reverend Rey and Mr Lau to take notes. The hearing lasted about one and half hours. There was some initial discussion about whether the claimant needed time to look at some extra documents and accuracy of the minutes from the grievance hearing. The claimant was then asked for his grounds for appeal. It is recorded that the claimant said he did not think the case had been heard fully; that it was a *“classic case of authority bias in action”* as the grievance outcome had reflected Mr Wilson and Ms Morris’ opinions. The claimant believed all members of the department should have been spoken to. He also spoke about his belief that the Equality Act had been breached and referred to the *“lack of black male representation in the college’s leadership”*. There was discussion about this allegation and how the claimant felt having pursued the grievance. He was asked what outcome he was seeking. There was some discussion about what he had hoped for at the outset and then moved to what could now be expected. To a large degree the content of the meeting reflected what had been discussed at the grievance hearing. Questions were raised about the proportion of black staff and Ms Shadick records that she was told 30% of all staff were black but the tribunal believes this must include non-teaching staff. Reverend Rey repeated that his conclusion was that there had been procedural omissions but no discrimination.
35. Ms Shadick decided to interview Ms Morris after the hearing and before her outcome. Ms Morris repeated that she had believed all department staff knew of the vacancy and that a black man in his fifties had been appointed to the RE teacher role.

36. By letter of 7 September 2018, Ms Shadick informed the claimant that his appeal had been unsuccessful. She did not accept that Reverend Rey had needed to talk to any other witnesses. She rejected the ground of appeal that the school was obliged to provide evidence of compliance with its own equal opportunities policy when it had not been requested. As for the claimant's belief that black males were not considered for leadership roles, Ms Shadick rejected that complaint, citing evidence of the two black women in leadership roles and the appointment of Mr Danquah to the RE Teacher post. In conclusion, Ms Shadick said that the claimant's concerns about the failure to advertise the Curriculum Leader vacancy internally "*are valid and have already been upheld*" but did not "*consider the school had acted inappropriately (taking into account the severe time constraint to secure candidates for a September start) or that there is any evidence of discrimination or victimisation*".
37. The claimant had asked Ms O'Connell for a reference before she left. He was provided with a good reference. He stayed at the school until the end of his contract in December 2018 with Ms Amer returning in January 2019. We heard no evidence of any issues after the grievance process finished. The claimant secured other employment when left the school.

The Law

38. The direct discrimination and victimisation claims are brought under sections of the Equality Act 2010 (EQA). The most relevant are as follows: - section 13 for the direct sex discrimination claim (along with section 23 on comparators); section 27 for the victimisation claim and the burden of proof provisions at s136. Those sections are reproduced below.

Section 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.*
- (2) *If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

Section 23 : Comparison by reference to circumstances

- (1) *On a comparison of cases for the purposes of Section 13, 14 or 19 there must be no material difference between the circumstances relating to each case*

Section 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) bringing proceedings under this Act;*
 - (b) giving evidence or information in connection with proceedings under this Act;*
 - (c) doing any other thing for the purposes of or in connection with this Act;*
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

Section 136: 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.*
 - (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
 - (5) This section does not apply to proceedings for an offence under this Act.*
 - (6) A reference to the court includes a reference to—*
 - (a) an employment tribunal;*
40. The tribunal must make findings of fact and apply the legal tests to those facts. The tests for direct discrimination were discussed in Igen v Wong [2005] ICR 931 and it is clear that all evidence before the tribunal can be taken into account, not just that put forward by the claimant. The tribunal is mindful that it is unusual for there to be clear, overt evidence of direct discrimination and that it should consider matters in accordance with section 136 EQA. When making findings of fact, we may determine whether those show less favourable treatment and a difference in sex. The test is: are we satisfied, on the balance of probabilities that this respondent treated this claimant less favourably than they treated or would have treated a female, younger, white employee. We are guided by the decision of Madarassy v Nomura International plc 2007 IRLR 246 reminding us that unfair treatment and a difference in sex, or any other protected characteristic, does not, on its own, necessarily show discriminatory treatment.
41. If we are satisfied that the primary facts show a difference in race, age or sex and less favourable treatment, we proceed to the second stage. At this

stage, we look to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable or unfavourable treatment occurred because of the claimant's race, age and/or sex. The tribunal will need to consider each protected characteristic separately.

42. The claimant also brings a claim for victimisation under section 27 EQA. The burden of proof provisions apply here too. In this case, the respondent has accepted that the claimant carried out a protected act when he wrote the complaint to the Principal on 4 June 2018. The issues for the tribunal are first, whether he was subjected to a detriment in the meeting on 11 June 2018 and, if he was, whether it was because he had made that complaint.

Submissions

43. Mr Bloom made relatively brief oral submissions. They were succinct and to the point, the factual circumstances being, for the most part, undisputed. Mr Bloom accepted that this was a case where the burden of proof shifted to the respondent with respect to the two posts, the claimant having shown that as a black man in his mid-fifties, he did not have the opportunity to apply for the two posts and that they were filled by two white women in their twenties and thirties. It was accepted that the claimant had shown a prima facie case but, it was submitted that the respondent had shown, on a balance of probabilities, non-discriminatory reasons for its actions. He submitted that the respondent's witnesses were reliable and honest and that race, age and sex were not the reason for their actions. The tribunal was urged to consider the highly unusual circumstances. Whilst it was accepted that the equal opportunities policy was not followed, it does not follow that there was any discrimination. The grievance and appeal acknowledged that there were defects and improvements have been made. Mr Bloom submitted that there was no evidence that the grievance and appeal had been discriminatory, the respondent having followed a fair and prompt process. It was also submitted that what Mr Wilson had said in the 11 June meeting, whilst it was understood it upset the claimant, could not amount to less favourable treatment for a direct discrimination claim nor could it be a detriment as it was intended to be helpful. It was submitted the claimant's claims should be dismissed.
44. The claimant sent his submissions in writing to reach the tribunal, as requested, as we started our deliberations on the third day. The claimant set out several reasons why he remains of the view that there was discrimination in the appointments to the two posts, pointing out the difference in the protected characteristics. He points to the prevalence of younger white females in the department; the breach of the respondent's own equal opportunities policy and compared his own treatment to that afforded to Ms Drysdale. The claimant says the respondent has not shown a good reason for the very quick process when it could have made a temporary appointment pending recruitment. He reminded the tribunal about

the evidence of the meeting with Mr Wilson on 11 June, the context in which the late resignation was offered and the failure to make any attempts to retrieve the situation once it was clear the claimant was unhappy with that suggestion. In summary, the claimant repeats the concessions by the respondent's representative that he established a prima facie case, that the respondent failed to follow its equal opportunities policy and the post should have been brought to the claimant's attention. He submits that the tribunal should find in his favour.

Conclusions

Direct discrimination – race, age and/or sex

45. The tribunal's task is to consider whether there are facts from which it could conclude that discrimination has occurred. In this case, the claimant relies upon three protected characteristics and, because EQA currently makes no provision for "combined" characteristics, we must consider them separately. The respondent has conceded that the burden of proof has shifted with respect to the appointments to the two posts. We agree that, on the facts of this case, the claimant with the three protected characteristics relied upon, the fact that he had no opportunity to apply for two posts which were filled by younger white women, the burden shifts to the respondent on those two allegations for race, age and sex.
46. That is not the case with the grievance and appeal and the 11 June discussion, which is pleaded as direct discrimination as well as victimisation. The tribunal must consider if there are facts from the grievance process and the 11 June discussion from which we could conclude any discrimination has occurred. There are more problems here as the facts show a grievance process followed within the school's written procedures and no suggestion of anyone without the claimant's protected characteristics receiving different treatment. Nor can the claimant point to the part of the conversation with Mr Wilson about which he complains as indicating anything that appears to relate to those protected characteristics, with the possible exception of the discussion about black members of staff in leadership positions. That is not the part of the conversation complained about. The tribunal finds that the claimant has not shown facts from which we could conclude there was any discrimination linked to race, age or sex. There is no direct discrimination because of race, age or sex as in issues (iv) c and d.
47. Turning back then to the two appointments, listed in the list of issues under (iv) a and b, where respondent accepts, and the tribunal agrees, the burden shifts to the respondent. The first in time would seem to be the appointment of Ms Drysdale to Lead Teacher confirmed on 22 May at (iv) b. The facts show that the respondent, through Ms Morris, had a particular concern about losing Ms Drysdale. The tribunal accepts that this means there were materially different circumstances which applied to the offer made to Ms Drysdale. Whilst the process used by the school did amount to poor practice, the tribunal accepts the explanation and finds there was no discrimination linked to race, age or sex in relation to issue (iv) b.

48. The next appointment is entirely different as it involved a recruitment process. The respondent's explanation for the way in which the process proceeded was because of the shortage of time and the urgent need to have teachers for September. What the tribunal have found less convincing about this explanation relates to the evidence that Ms Drysdale was to be spoken to about applying for the post and was involved in the process. This information, gleaned from the email exchange but not before the grievance hearing, shows a clear pattern of difference in treatment. The tribunal have not heard from Ms Morris, nor Ms Drysdale and Ms Foreman, who might have been able to give an explanation. Ms Drysdale was considerably less experienced than the claimant, still being considered an NQT, and having only been offered extra leadership responsibilities a few days before. The successful candidate, Ms Austin, also white, female and younger was referred by an agency. She was aware of the vacancy and the claimant was not. Given the accepted lack of black people in leadership positions, the tribunal find that the difference in treatment was because of the claimant's race. Similarly, because we are not satisfied with the respondent's explanation for the difference in treatment and bearing in mind the sex and age of the comparators and those involved in recruitment, the tribunal finds that the difference in treatment is also because of the claimant's age and sex. The claimant's claim for direct discrimination because of race, age and sex under issue (iv) a succeeds.

Victimisation

49. It is accepted that the claimant carried out a protected act when he complained about not getting the opportunity to apply for the Curriculum Leader post. The next question for us is whether he was subjected to a detriment because of what was said to him by Mr Wilson in the 11 June discussion. The tribunal accepts that Mr Wilson's initial intention might have been to be helpful as the claimant was expressing concerns about continuing to work for the respondent but a suggestion to an unhappy staff member that they might want to leave always carries a risk at the best of times. This is particularly so when that staff member has raised allegations of discriminatory treatment. The tribunal believes Mr Wilson should have appreciated the claimant's real and carefully expressed concern about the recruitment process and not have made the suggestion initially. The suggestion alone might not have amounted to a detriment, if there had been an unambiguous retraction when the claimant showed his displeasure. Mr Wilson singularly failed to do that. The lack of any statement about wishing to retain the claimant left him feeling he was not wanted at the school. Taking the discussion as a whole after the late resignation suggestion, including what was left unsaid, the tribunal find that it amounted to a detriment.
50. The tribunal next has to determine whether the detriment was because the claimant had carried out a protected act. The tribunal finds that there was such a connection. The reason for the meeting was to discuss the claimant's concerns that the recruitment process had discriminated against him. That

was discussed at the start of the meeting, with disagreement about the number of black members of staff in leadership positions. Mr Wilson denied any discrimination on the school's behalf and was met with the claimant maintaining his belief that there was discrimination. The claimant was subjected to a detriment because he raised allegations of discriminatory behaviour and succeeds in issues (vii) to (ix)

51. In summary, therefore, the claimant has succeeded in showing one act of direct race, age and sex discrimination and victimisation for complaining about that act. He has failed to show the other alleged acts of direct discrimination.
52. The matter has already been listed for hearing to determine remedy on 26 January 2021. To ensure an effective hearing, orders are made below.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

- 1 The claimant shall send an updated schedule of remedy claimed to the respondent and the tribunal by **4 December 2020**.
- 2 If deemed, useful, the respondent will send a counter schedule of loss to the claimant and the tribunal by **18 December 2020**.
- 3 The parties will agree a joint bundle of documents for the remedy hearing by **8 January 2021**
- 4 The claimant will send a witness statement for the remedy hearing to the respondent and the tribunal by **18 January 2021**

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Manley

Date: 27 November 2020