IN THE EMPLOYMENT TRIBUNAL **CASE NO: 1400727/2020**

BETWEEN

Ms Betty Knight

Claimant

-and-

Havant & South Downs College

Respondent

RECONSIDERATION APPLICATION

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1. The Claimant applies under rule 70 for a reconsideration of the reserved Judgment of the Employment Tribunal promulgated on 23 December 2021.

2. Specifically, the Claimant asks that the Tribunal reconsiders the following decisions:
   2.1 Its Decision that the Claimant was not subject to direct race discrimination in relation to the 2017 recruitment circulation events due a lack of jurisdiction (issues 2.1.1 and 2.1.2);
   2.2 Its Decision that the 3 December 2019 lesson observation and IIP were not acts of harassment (issues 3.1.3, 3.1.5) or victimisation (issues 4.2.3, 4.2.4)
   2.3 Its Decision that the throwing E&D remark made on 5 December 2019 was not an act of harassment (issue 3.1.4);
   2.4 Its Decision that Ms Richardson's misleading of the internal investigation in 2020 about the number of complaints made and quality of the Claimant's work in 2018 was not an act of harassment (issue 3.1.8);

2.5 Its Decision that the constructive dismissal was not an act of (a) victimisation (issue 4.2.7) (b) harassment (issue 3.1.9) or (c) direct discrimination (issue 2.1.9);

2.6 Its Decision that the first Grievance decision was not an act of direct race discrimination.

The ET acted perversely and/or misdirected itself in law in failing to find the proven race discrimination claim to be within time

3. By way of background, the Tribunal found that the complaint of race discrimination "proved" (para 245).
4. However, it found that the discriminatory act was not part of a continuing act and also that it was not just and equitable to extend time, and therefore not a breach of the Equality Act 2010 ("EA 2010") due to a lack of jurisdiction.
5. In terms of the continuing act, if the Tribunal reconsiders the misleading February 2020 interview and constructive dismissal as acts of direct race discrimination, it is submitted that that would be sufficient to establish a continuing act linking the 2017 act to the dismissal, and thereby bring the 2017 act into time.
6. In terms of the just and equitable time extension, the Tribunal does not appear to have properly considered the relevant law on such time extensions.
7. The Tribunal has failed to properly apply ***DPP v Marshall***; where the delay does not prevent a fair hearing, time should be extended (NB: this related to an allegation of discrimination, rather than proven discrimination).
8. It was perverse and/or wrong in law for the Tribunal not to extend time for the following reasons:

8.1 It must be just and equitable to extend time for a proven complaint of race discrimination (as opposed to an allegation of race discrimination), where a fair trial has been held (applying ***DPP v Marshall***). This is because to fail to do so entirely undermines the purpose and efficacy of the EA 2010 which is to eliminate

discrimination, and therefore would not be in the interests of justice. It also brings the law into disrepute. Such a decision would also breach the Human Rights Act 1998 (Article 6 and 13 of the ECHR in denying a fair trial and outcome for the right not to be discriminated against).

8.2. Where the Tribunal does not consider the jurisdictional time points prior to making findings of fact, it must assess the time extension in the light of those facts. With the benefit of hindsight the Respondent did racially discriminate against the Claimant in 2017. It cannot therefore be just or equitable to allow the Respondent to then escape liability where a fair trial is/has been possible (applying ***DPP v Marshall***). Put another way, the Tribunal must factor in the Respondent's proven bad conduct in assessing the just and equitable extension and having been proven to have acted illegally and to have denied on oath such unlawful conduct before the Tribunal (or simply failed to show up as a witness), it cannot be just or equitable to benefit the tortfeasor and refuse the extension given that proven bad conduct.

8.3 The Claimant did seek to resolve the matter internally in relation to the 2017 recruitment both at the time and later in her February 2020 grievance/accompanying letter (para 170). The Tribunal, when assessing the length of the delay and reason for that, failed to factor in her attempts to resolve the matter internally and her continuing and worsening ill-health from late 2019 to the date of the dismissal. In that regard a delay caused by a claimant invoking an internal grievance/appeal procedure prior to commencing proceedings is a key (but not decisive) factor in the decision to extend time: ***Apelogun-Gabriels v London Borough of Lambeth*** [2001] EWCA Civ 1853, [2002] IRLR 116. Both the Claimant's extended and worsening ill-health from late 2019/early 2020 to the date of her dismissal and her attempts during that period to resolve matters were wrongly disregarded by the Tribunal in its assessment of the just and equitable time extension.

8.4 The Tribunal also failed to factor in the following factors:

(a) It is common knowledge (from every public and independent report published on the subject) that most race complaints are not brought during a claimant's period of employment due to the fear of victimisation. That is a valid reason for any delay. The Claimant did not consider the matter resolved but simply that the Respondent had determined to close the matter (and to do so without any formal disciplinary investigation). The Tribunal failed to factor in the relative bargaining position of Respondent and the Claimant; that the Claimant, like most prospective claimants, felt powerless to challenge her employer.

(b) The 3 month less a day timelimit rule is regarded as being harsh. Put bluntly, if one causes psychiatric injury at work to a worker by bullying (which constitutes an act of negligence or harassment under the PHA 1997) one has 3 years to bring the claim and a s33 Limitation Act time extension, whereas if the exact same bullying conduct is metered out due to racism and with the same psychiatric impact one only has 3 months less a day to sue. Further and in the alternative, the fact that the claim was brought within the 3 year period for all other UK personal injury claims (absent discrimination) should be a factor weighed into the just and equitable time extension.

(c) The Tribunal has made erroneous assumptions about what the "legal advice" would have been if the Claimant had taken it, or if she did take it. The advice may have been that the discrimination was continuing (as it involved Ms Richardson), and therefore the timelimit did not apply. The Claimant was not cross-examined on precisely when she became aware of the 3 month timelimt.

(d) The Claimant did issue the claim itself within the relevant timelimit.

The lesson observation and IIP and E&D throwing remark

9. The Tribunal decided that the Respondent acted negatively towards the Claimant (breach of trust and confidence) in the way it conducted and gave feedback on the lesson observation and by placing the Claimant on an IIP. The negative conduct

towards the Clamant however was not said to breach the Equality Act 2010. These findings relate to harassment issues 3.1.3 (feedback and IIP) and victimisation issues 4.2.3 (IIP and selection for joint observation) and 4.2.4 (breach of process).

10. The Tribunal had no evidence on which to find at para 110 that Ms Richardson did not select the Claimant for a lesson observation based on the Protected Act, or that she was not significantly influenced by it. Ms Richardson did not give evidence. Ms Scott presumably would not have known, and did not claim to know, why Ms Richardson selected the Claimant. No other teacher in the English department was selected by Ms Richardson (all white and none of whom had carried out a Protected Act). No evidence was produced by the Respondent as to the training the Claimant was said to have received or about any observation conducted at that time or later in respect of the other English teachers.
11. The Tribunal should have drawn the inference of victimisation from those facts and Ms Richardson's failure to give evidence (and her later misleading and negative attack on the Claimant in February 2020), and found that proven, given that no explanation was offered for her decision by Ms Richardson.
12. The Tribunal wrongly found that Ms Scott was not aware of the Protected Act on 3 December 2019 (para 111).
13. The Tribunal found Ms Scott to be an honest witness (para 117). However, she lied about what she meant by the E&D remark, and lied by denying knowledge of the Protected Act at the time she made the E&D comment. These significant credibility points were ignored by the Tribunal, and not applied to their findings as to her knowledge of the Protected Act on 3 December 2019.
14. Further, even if honest, a Respondent witness can still discriminate or harass or victimise due to an unconscious motivation, so can honestly deny harassment but still have harassed the Claimant. The Tribunal did not consider unconscious motivation.
15. The Tribunal found that Ms Scott was probably aware of the Protected Act by 5 December 2019 (para 132). The Tribunal does not find how or when she acquired that knowledge between those two dates. Ms Scott admitted to speaking to HR (PS), Ms

Kingsley and Ms Richardson after the lesson observation but before sending her email on 5 December 2019. She spoke with Ms Kingsley before giving her feedback and before issuing the IIP (para 116). All three were aware of the Protected Act, but none admitted that before the Tribunal. All three may have so informed her. The gap in the Respondent's evidence and their false denial of knowledge of the Protected Act at all or most material times, damages their credibility. Further, the reason for informing Ms Scott of the same at that time, itself appears to be evidence of a victimising attitude towards the Claimant (as there was no reason to so inform Ms Scott about that, except to poison the well further). It also evidences Ms Scott's own hostile reaction to the Claimant.

16. Ms Scott was certainly aware of the Claimant's race. The negative feedback and IIP occurred subsequent to her knowledge of the race of the Claimant. The Respondent produced no notes of the feedback meeting (para 116).
17. The Tribunal found that Ms Scott provided "overwhelmingly negative" feedback (para 119) which had been agreed with Ms Richardson. The Tribunal found that Ms Scott (and Ms Richardson) failed to observe the Claimant for the full 30 minutes and failed to hold a second drop in session (para 122).
18. The Tribunal does not consider what the motivation (conscious and unconscious) was for such adverse treatment in breach of policy to the only black teacher in the English department. Ms Scott claimed that she followed the guidelines and then when shown she did not, said that they were only guidelines. She gave no credible evidence of not following the process with white teachers, or of providing "overwhelmingly negative" feedback to the same.
19. Ms Scott stated that her E&D remark was due to the fact that the Claimant held herself out as a "black teacher" (her WS at para 19). Aside from the fact that was untrue, and not the natural reading of the E&D remark, it is clear that Ms Scott had become fixated on the Claimant for asserting herself as a black teacher and that was strong evidence of her unconscious mindset when providing the feedback and putting the Claimant on an IIP; see ***Chattopadhyay v Headmaster of Holloway School*** [1981] IRLR 487

(EAT) (subsequent events can throw a light on the meaning and motivation of earlier events).

20. Further, if Ms Scott was informed of the Protected Act (not before the observation by Ms Richardson) but by Ms Kingsley immediately before the feedback session, then there was a clear inference to be drawn for victimisation by her (and Ms Richardson) for the IIP, given the close proximity of those events.
21. What is clear is that by 9.45am on 5 December 2019 (p242) when Ms Scott writes to Ms Richardson (copying Ms Kingsley) that the E&D remark had been thrown at her too so it is likely they had shared their knowledge and view of the Protected Act with each other prior to that; because she assumed that they would both understand the reference, and her indignation. Further, she seems to be sympathising with Ms Richardson; in that she too had been challenged by the Claimant on E&D issues.
22. Ms Kingsley failed to state in her witness statement that she spoke with Ms Scott before the feedback session and issue of the IIP.
23. There are no documents (emails or texts or meeting notes) disclosed by the Respondent from the lesson observation to 9.45am on 5 December 2019 which state who told Ms Scott about the Protected Act and why. It was also falsely denied by all concerned.
24. The most likely explanation was that it was Ms Richardson who informed Ms Scott, and that was one of the reasons for her absence.
25. The Tribunal were required to make findings as respects the joint decisions (led by Ms Richardson (who was also being observed as the observer)) in relation to the motivation of Ms Richardson and, separately, Ms Scott when jointly carrying out those acts but it has erred in failing to do so.
26. Ms Richardson was aware of the Protected Act, and was the wrongdoer accused in the Protected Act. She led the lesson observation (she was being reviewed by Ms Scott, who also jointly observed) and breached process, agreed negative feedback and the IIP. These were acts of victimisation by her. Ms Scott cannot speak to Ms Richardson's

motivation for those acts. An inference should have been raised in respect of the same and in the light of her inexplicable absence found against her.

27. No explanation is provided by the Respondent (or the Tribunal) as to why the Respondent's staff would seek to breach trust and confidence on 3 December 2019 and shortly thereafter, absent (conscious or unconscious) harassment or victimisation.

The E&D Remark (harassment)

28. It is clear that Ms Scott gave a false narrative for why she made the inappropriate comment and in that false narrative referred to her annoyance at the Claimant holding herself up as a "black teacher" (para 9 of her WS). This demonstrates that the claimant's race was as significant influence on her making the inappropriate and harassing remark.
29. The Tribunal found that if the Claimant had been aware of it at the time it would have undoubtedly been harassing (para 147). In fact, the Claimant did know about it. The Claimant was sent the email as part of the grievance disclosure in about March 2020. She then included it as a complaint in the 19 page FBPs document she submitted to the Tribunal on 26 May 2020 and the Tribunal noted the same in its Order of September 2020 (see page 64, para 42); see pages 121-139 for the FBPs submitted on 26 May 2020 at page 130-131 where she complains about the E&D email.
30. It was perverse for the Tribunal not to find that the Claimant was aware of the same given that documentation.
31. Further and in the alternative, the Tribunal erred in law by finding that because the Claimant did not know of it at that time it could not be said to have harassed her. The Tribunal failed to correctly apply ***Virdi v Commissioner of Police of the Metropolis and another UKEAT/0373/06 ,*** a race discrimination claim arising from a decision not to promote an employee, in which the EAT held that time starts to run from the decision itself and not the date that it was communicated to the employee; the act of discrimination (or harassment) takes place when it happens and not when the

Claimant finds out about it. Hence, in law, the Claimant was subject to harassment on 5 December 2019, and not when she first read the harassing email in about March 2020.

32. The Tribunal also erred by suggesting the claim should have been amended once she became aware of it; the Claimant should have complained about harassment at that time at the time of discovery (rather than the time at which the email was written). The FBPs of 26 May 2020 included that complaint. The agreed List of Issues states that the claim was the Respondent's conduct of "throwing the E&D Black comment". It matters not when the Claimant discovered that slight had been thrown at her; ***Virdi***.

Misleading the internal investigation

33. The Tribunal found that Ms Richardson's misleading of the internal investigation in 2020 about the number of complaints made and overstating the problems with the Claimant's teaching (para 193) seriously damaged trust and confidence but did not amount to an act harassment (para 192 - issue 3.1.8).
34. The Tribunal found Ms Richardson's evidence to be false in that regard (para 180) as well as misleading (para 181).
35. It is clear that falsely asserting that the Claimant had more than one complaint from parents and pupils and overstating problems with the Claimant's teaching would be harassing of her and more so given that Ms Richardson (and Ms Scott) had previously done the same in the lesson observation feedback.
36. The Tribunal found that Ms Richardson had racially discriminated against the Claimant in 2017.
37. Ms Richardson did not attend to give evidence and did not attend for inexplicable reasons when her employer and/or her knew that she was being accused on unlawful conduct and fabricating complaints against the Claimant.
38. The Tribunal found that there was no "reasonable or proper cause" for the false impression Ms Richardson sought to give the grievance investigator (para 193).

39. The Tribunal should have drawn an inference of harassment from that dishonest conduct by Ms Richardson, in particular given her failure to appear as a witness.
40. The Tribunal should not have given any weight to Ms Richardson's account to the investigating officer (para 192) which was not subject to cross-examination and knowing her capacity to make false statements and to racially discriminate against the Claimant (which she denied).

Constructive Dismissal

41. The Tribunal found that the Claimant suffered five instances of serious damage to trust and confidence carried out the Respondent (para 239).
42. However, it found that two of those acts, the 2017 act of racial discrimination and the harassing E&D remark, were not grounds for her resignation (para 240).
43. It therefore found that the constructive dismissal was not significantly influenced by (a) the protected act (victimisation (issue 4.2.7)) or (b) direct race discrimination (issue 2.1.9) and also that it was not (c) an act of harassment (issue 3.1.9).
44. In this regard, the Tribunal again misapplied ***Virdi*** (see above) in treating the act of harassment regarding the E&D remark as not being a factor as the Claimant was unaware of it at the time. She was aware of the hostile working environment, which she believed was injurious to her health. She did not need to be aware of each act of harassment which caused that state of affairs.
45. The Tribunal erred at para 233 by stating that the Claimant was not influenced at all by the 2017 events when resigning and that the matter had been dealt with to her satisfaction. In fact, the Claimant grieved about that matter in the letter accompanying her February 2020 grievance, was investigated and wrongly rejected as an act of racism by Ms Dhesi (p296) (and para 57) and similarly erroneous findings were made on that point in Mr Barlow's grievance outcome of 13 March 2020; at p334.
46. It was an issue very clearly on her mind in February 2020 and thereafter.

47. Her resignation letter states that she does not believe Ms Richardson had been "fully investigated" (p351) for the discrimination she had carried out. The 2017 (proven) racial discrimination was clearly very much in her mind at the time because it was the event that began the path towards departure and one which was never resolved (that is identified as race discrimination, and therefore as gross misconduct, an attendant consequence of which is that the Claimant would not have been line-managed by Ms Richardson going forward).
48. It is perverse to ascribe events in December 2019 and February 2020 as contributors to the Claimant's resignation but then to exclude a matter of racial discrimination about which she grieved in February 2020.
49. Finally, if the matters relating to (a) to (d) at para 239 are reconsidered in the manner in which we have applied above, then the Tribunal would need to re-reflect on and reverse the findings that the constructive dismissal not being a breach of EA 2010.

Grievance decision (issue 2.1.6 and 2.1.7)

50. The Tribunal found that the Claimant had been subjected to racial discrimination in the 2017 recruitment. The first grievance process failed to uncover the failure to internally or to seek an explanation for the same. The grievance investigator and Mr Barlow, the decision-maker, wrongly found that there was no race discrimination; p334.
51. Mr Barlow also invented a false reason for his failure to reach the correct decision. He stated that if it was not advertised internally everyone was subject to the same disadvantage; p334. The Tribunal acknowledged that this view as only "superficially accurate" (para 64).
52. The Tribunal did not consider how or why Mr Barlow (and Ms Dhesi) failed to find racial discrimination as respects the 2017 recruitment and the fact that they sought to reach that false conclusion by adopting a superficial approach to the evidence.

53. A careful and conscientious grievance decider could not have failed to make a conclusion of racial discrimination in relation to the 2017 recruitment, and the Tribunal's decision was perverse in that regard. If that is not so, then there would be no point bringing an internal race grievance, when the only competent decision-makers reside externally in the Tribunal, and the competence test for an internal decider is so low that no black employee is likely to have a race complaint upheld. It is not a question of Mr Barlow going "further" but in him being fundamentally wrong and failing to identify the law had been broken and gross misconduct had been likely committed. It echoed Mr Myers' own failure and that of the previous principal not to dig deeper at the time, and it is therefore likely that he and Ms Dhesi knew exactly what they were doing.
54. Again if this point is upheld on reconsideration it should be factored in the constructive dismissal issue and timepoints.

The ET acted perversely by failing to provide *Meek* complaint reasons and/or by failing to provide sufficient reasoning for its judgment

55. Please see above.

Conclusion

56. The matters we ask that the above matters are reconsidered. They are said to constitute perverse decisions and/or errors of law. We ask the Tribunal to reverse its decisions and to uphold the EA 2010 breaches claimed in relation to the matters in the List of Issues which are referred to above.