



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Downing

**First Respondent:** Lancashire County Council

**Second Respondent:** The Governing Body of Our Lady Queen of Peace Catholic Engineering College

**Third Respondent:** Lancashire Teaching Agency

**Heard at:** Manchester

**On: 11 – 15 December 2022**

**Before:** Employment Judge Leach, Mr A Gill, Mr J Flynn

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr M Mensah (Counsel)

# JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's complaints under the Equality Act 2010 (direct discrimination, indirect discrimination and victimisation) do not succeed and are dismissed.

# REASONS

## Introduction

1. The claimant is a maths teacher who undertakes supply teacher work. He has worked with various schools where, for example, there is a need to cover for a teacher's long term absence.

2. The claimant worked as a supply teacher at the second respondent school from early October 2019 to late May 2020. This work ended during the first coronavirus lockdown period. The claimant considered that he should have been furloughed in the

role he was carrying out so that his employment continued and that not doing so amounted to race discrimination.

3. The claimant makes other allegations of race discrimination and victimisation about to the way that he says he was treated as a supply teacher, in terminating his contract as a supply teacher and following that termination.

### **This Hearing**

4. This hearing took place over 5 days. We decided that the first day should be a reading day. The tribunal was provided with a main bundle of some 750 pages. In addition the claimant provided a bundle of 140 or so pages. It was not clear whether the respondent had seen all the documents in the claimant's bundle and Mr Mensah was provided with time to review the bundle provided by the claimant and take instructions if necessary.

5. The claimant's bundle arose (in part at least) from a refusal by the respondents' advisers to add certain documents to the main bundle. The Tribunal made clear the requirement for parties to cooperate and their expectation that parties attend with one agreed bundle. The respondent should have included in the bundle, those documents that the claimant asked to be included.

6. Day 2 was taken up with the claimant's evidence.

7. On day 3 we heard from Mrs Gresty, the chair of the board of governors of the second respondent.

8. On day 4 we heard from Mrs Hilton, an employee of the first respondent who was involved in the administration of a service providing supply teachers.

9. We heard the parties' submissions on the morning of day 5 and reserved our decision. We spent the remainder of that morning and the afternoon, reaching our decision.

### **The Issues**

10. The parties agreed the issues were as set out in the record of a case management hearing that was held on the 14 June, but with an amendment that the claimant required, to the allegation of direct discrimination at 2.2.5 and the PCP relied on by the claimant in his indirect discrimination complaint. No objections were raised by the respondents. The issues for us to decide are set out below (including the amendments). We also include some notes on these issues ( not in italics).

1. *Who is the correct respondent to these proceedings?*

*The first respondent states that it employed the claimant from 18th November 2019 to 22nd May 2021.*

*The claimant states that he entered a contractual arrangement with the third respondent Lancashire Teaching Agency and believes that this body might be liable.*

*The first and second respondents' position is that LTA is not a legal entity, merely being the name of the mechanism used by REED for appointing and paying supply staff.*

## 2. Direct race discrimination (Equality Act 2010 section 13)

*2.1 The claimant identifies as mixed-race Afro-Caribbean and white.*

*2.2 What are the facts in relation to the following allegations:*

*2.2.1 Placing and prioritising the claimant on the rota during the school closure period starting 20th March 2020, with the expectation and intention he would attend work during the pandemic under threat of no pay if he was ill or needed to isolate, contrary to health and safety guidance and putting others at risk.*

*2.2.2 The 1-3 respondents paying the claimant through REED payroll for 6 weeks at the start of his assignment with subsequent loss of benefits, from 4th October 2019, instead of LCC payroll, as per the terms of the LTA agreement, withholding a copy of that agreement signed at LTA registration on 25th October 2018 in order to achieve that.*

*2.2.3 The respondents wrongly portraying the claimant's contract of employment as fixed-term, rather than as the casual, zero hours contact that the claimant believed it to be, for the purpose of attempting to release him at the earliest opportunity without the ongoing support readily afforded to others.*

*2.2.4 Not being considered by the respondents for a role becoming vacant due to retirement on the date of school closures, 20th March 2020, that role being reserved and given to the retiree on a supply basis. Instead targeting the claimant for removal from the education sector, to work in the relatively low-paid and higher-risk social care work, contrary to union and government guidance to retain, support and utilise supply teachers in response to the crisis.*

*2.2.5 moving the claimant from the public sector payroll with associated benefits such as death benefits and protection under the public sector equality duty and placing him on the private sector payroll without any such benefits and lesser pay and conditions.*

*2.3 If found to have occurred as described, did the claimant reasonably see the treatment as a detriment?*

*2.4 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The claimant says he was treated worse than Danna Fondja and/or on a hypothetical comparison.*

*2.5 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?*

*2.6 If so, has the respondent shown that there was no less favourable treatment because of race?*

### *3. Indirect discrimination (Equality Act 2010 section 19)*

*3.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:*

*moving the claimant from the public sector payroll with associated benefits such as death benefits and protection under the public sector equality duty and placing him on the private sector payroll without any such benefits and lesser pay and conditions.*

NOTE: We asked the claimant how that PCP put the claimant at a disadvantage compared to persons who were of the same race as him. He accepted that benefits would be lost, regardless of race. He told us that the relevant disadvantage was the loss of protection afforded by the Public Sector Equality Duty (PSED). He did not explain this or provide evidence about it; what the disadvantage was and how the PSED provided advantages to the claimant during his employment with the first respondent that would be lost to him in the event that he was no longer their employee and instead became an employee of Reed.

*3.2 Did the respondent apply any of those the PCPs to the claimant?*

*3.3 Did the respondent apply any such PCP to persons of another race or would it have done so?*

*3.4 Did the PCP put persons of his race at a particular disadvantage when compared with persons who were not his race through the loss of benefits associated with being a public sector employee and protections under the PSED?*

*3.5 Did the PCP put the claimant at that disadvantage?*

*3.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondents will say that the claimant being on REED's payroll was the only way the claimant could have received furlough support and was thus a proportionate means of achieving a legitimate aim.*

*3.7\_The Tribunal will decide in particular:*

*3.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;*

*3.7.2 could something less discriminatory have been done instead;*

*3.7.3 how should the needs of the claimant and the respondent be balanced?*

#### *4. Victimisation (Equality Act 2010 section 27)*

*4.1 Did the claimant do a protected act as follows:*

*4.1.1 Notifying LTA/LCC about a breach of pandemic health & safety guidance, as well as concerns about the intention to exploit supply teachers for risks associated with the pandemic in an email to Amy Schofield on 22nd March 2020 and through notification to his union, the NEU about concerns over safety, discrimination and the retiree's re-appointment as a supply teacher, via a statement dated 6th April 2020 to Chris Anderson by email which was then raised with the respondent.*

NOTE: In discussions at the beginning of the hearing, the claimant allegation of victimisation changed. It was noted that neither of the correspondence items referred to, on their face, amounted to a protected act. It was clear that the claimant understood what was meant by the term Protected Act. The claimant told us that he would rely on the provisions in section 27 EQA in relation to victimisation because the respondents believed he may carry out a protected act and that the 2 correspondence items referred to were what put the respondents on notice that the claimant may do a protected act.

Mr Mensah for the respondents did not raise any objection and we considered this amended complaint.

*4.2 Did the respondent do the following things:*

*4.2.1 Exclude the claimant from the public sector crisis support scheme and instead place his livelihood in the hands of the person he had complained about; head teacher Mrs Knight.*

*4.2.2 Mrs Knight making written expressions of resentment towards the prospect of supporting the claimant in accordance with union and government guidance to his NEU representative and labelling him as someone attempting to profit from the crisis and not worthy of her consideration; amounting to undermining and disrespectful comments.*

*4.2.3 Excluding the claimant from future work offers; becoming apparent from September 2020 when schools returned and not being allocated an LTA 'consultant' to liaise with as is normal practice with a supply teacher.*

*4.3 By doing so, did it subject the claimant to detriment?*

*4.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?*

*4.5 If so, has the respondent shown that there was no contravention of section 27?*

## **Findings of fact**

### The claimant

11. The claimant is an experienced maths teacher. He works as a supply teacher and as such does not have a permanent teaching position with one school. He has worked at various schools for different lengths of time.

12. In October 2019 he commenced work as a supply teacher at the second respondent school.

13. The claimant identifies as mixed race, Afro Caribbean and white.

### The first respondent

14. The first respondent claims to have been the claimant's employer during the time that he worked as a supply teacher. Whilst the first respondent accepted this well before the final hearing, the claimant was unclear and there remained a dispute about which entity employed the claimant.

### The second respondent

15. The second respondent (School) is a Voluntary Aided school within the relevant Catholic Diocese. It employs its own teaching and non-teaching staff. The claimant was based at the School, working as a maths teacher between October 2019 and May 2020.

### The third respondent

16. According to the claimant, the third respondent is the entity which employed him during the time he worked as a supply teacher at the second respondent school. According to the first respondent, there is not an entity called Lancashire Teaching Agency. It is a term which describes a project or service operated by the first respondent. The service is the provision of supply teachers to schools within Lancashire. At the relevant time, the first respondent did not carry out the day-to-day administration of this service. It had contracted with a well-known recruitment business called Reed (or one of the companies within the Reed group). We accept this explanation.

17. Reed employees assisted and communicated with the claimant about his supply work at the second respondent school and in relation to the LTA service more widely. Reed is not a party to these proceedings.

Contractual arrangements.

18. The bundle includes some contractual documents which we comment on below to the extent relevant.

Conditions of employment – 140 – 145

Clauses 1.1 – 1.5 provide as follows:

*1.1 “your registration with the LTA is for one year and can be renewed annually.”*

*1.2 “The supply teachers employment and continuous employment begins on the date of the commencement of the current Assignment. Other service may count as continuous where this meets statutory definitions.*

*1.3 Lancashire, through the LTA will endeavour to provide the Supply Teacher with the opportunity to work as a Teacher in Lancashire Schools where suitable work (an “Assignment”) is available.*

*1.4 Lancashire through the LTA reserves the right to offer any Assignment to such temporary employees as it may elect where the available work is suitable for several workers.*

*1.5 the duration of the Supply Teacher’s employment will be for the duration of the Assignment with the School described on the Supply Teacher’s copy of the timesheet provided that the Supply Teacher satisfies Lancashire’s and the Schools requirements. Lancashire may end the Assignment at any time.”*

It is also relevant to refer to Schedule One of the agreement between the first respondent and Reed, governing the management of the LTA service. Clause 4.2.6 of this schedule provides as follows:-

*Teachers engaged on Assignments of 30 consecutive working days or under may be employed by either LCC or the Service Provider, unless the school indicates that it wishes to engage a teacher employed by LCC, in which case the Teacher will be employed by LCC. All Teachers engaged on Assignments of over 30 consecutive working days will be engaged by LCC.*

19. Having considered these terms and heard the evidence (particularly from Mrs Hilton), we find as follows:

- a. A supply teacher is registered with the LTA service for a year. This provides her/him with various benefits which are noted at page 103 of the claimant’s bundle. These include being in receipt of teachers pay in accordance with nationally agreed terms, contributions to the Teacher Pension Scheme, appraisals, training, searches for new assignments.

- b. Schools within Lancashire (and neighbouring boroughs) may (but are not obliged to) contact LTA if they need a supply teacher for a period of time (an assignment). LTA will endeavour to match those supply teachers registered with it, to assignments.
- c. When a supply teacher works on an assignment s/he becomes directly employed by Lancashire County Council (first respondent). However, during the first 30 working days of an assignment, the “employer” is Reed and payment to the supply teacher is through Reed’s payroll. Once the first 30 working days end, then the supply teacher becomes an employee of LCC and is paid by LCC. We find that the start of the assignment for the purposes of 1.3 is the date immediately following the initial 30 working day period.
- d. We find that these arrangements apply to substantially all supply teachers engaged via the LTA service. They do not apply where a teacher is paid a senior grade (above a grade called M5). Reed’s payroll only covers posts up to M5. In those circumstances, the first respondent becomes the employer from day one of an assignment.
- e. When the assignment comes to an end the Supply teacher’s employment with the first respondent comes to an end although they remain registered with the LTA service and Reed try to find another supply contract for them.
- f. Employment with the first respondent is not the same as employment with the School. As noted above, the School directly employs its staff. It looks to the LTA arrangements when a supply teacher is needed. The claimant in this case was employed directly by the first respondent but on a temporary basis in order to fulfil the supply teacher assignment at the School.
- g. Supply teachers registered with the LTA service are listed on 2 payrolls, being the first respondent’s payroll and Reeds. That does not mean that they are paid by these 2 organisations every month. During the time that they are registered and working under the LTA arrangements they will sometimes be paid by the first respondent and sometimes by Reed.

20. The claimant was initially engaged to work at the School in order to cover for the absence of a maths teacher called Miss Button. At the beginning of this assignment he was provided with a confirmation email from Reed (page 280). This did not state an estimated duration of booking. It simply stated that the estimated duration was “TBC- Trail Day. However the claimant, the School and Reed all knew that the purpose of the assignment was to cover for Miss Button and she was expected to be absent for the rest of the autumn term.

21. Another maths teacher, Mrs Moonan became absent from early December 2019. She was expected to be away from School for the whole of the Spring term – returning at Easter.

22. As at December 2020 the School had 2 maths supply teachers, the claimant and another supply teacher called Mr Birkett. The decision was made to end Mr Birkett’s assignment and provide the opportunity for further supply work to the claimant.



23. As at the beginning of Spring Term 2020, the expectations of the claimant and School was that the claimant would work for the whole of that term and that the assignment would end on Mrs Moonan's return.

24. A confirmation email was sent to the claimant ( page 297) by Reed, which gave details of the assignment and the expected duration of the assignment being until Easter 2020.

25. We have not seen any copies of completed timesheets. Neither the claimant nor the respondents had provided copies. According to the respondents ( which we accept) the timesheets are documents provided by Reed and not administered by the respondents. We simply do not know therefore whether they included information stating that his assignment was due to end at Easter 2020. However we note:-

- a. When the claimant was asked at the beginning of December 2019 to continue at the school, he knew it was "probably until April" (email from claimant to Reed of 2 December 2019)
- b. The confirmation of booking email dated 3 December 2019 in which Reed state "estimated duration of booking:- until Easter
- c. email from another agency to the claimant dated 24 February 2020 when it is noted that the claimant is available for April 2020 roles and the claimant's reply of 25 February 2020 that *"my placement should be coming to an end in the next few weeks."*
- d. Text message from Peter Allsop ("PA") (head of maths at the School) to the claimant dated 18 March 2020 ( first day of school closure) *"I spoke to Natalie and she said that you would definitely be paid until Easter as previously agreed."* Claimant's reply *"I was expecting to stay on until [Mrs Moonan] is fit to return or shortly after if she has a phased return."* (page 319)

26. We consider the document at page 310 to be particularly important. This is an email from the School to Reed dated 13 March 2020. It makes clear the School's intention for the claimant to finish "at Easter." This email was sent before any contentious issues between claimant and respondents arose. Whilst the claimant has questioned the validity of document, we find it to be genuine.

27. We also find that Mrs Moonan did return to work immediately following the Easter holidays in 2020.

#### Covid Pandemic and School Closures.

28. The Covid Pandemic had a huge impact on education. Like other schools across the country, the School closed (or substantially closed) on or about 20 March 2020.

29. The Claimant was in less of a secure position than permanent teaching staff or other supply teachers who had longer assignments. It was particularly unfortunate for the claimant that the supply arrangements were only expected to continue to Easter. However, as we note below, some security of income arrangements were put in place for him.

30. Understandably, in the immediate aftermath of school closure announcements, the claimant was concerned about his position and his income. On 22 March 2020 he exchanged text messages with the head of maths at the school (para 25 d above)

31. Whilst the claimant initially appeared satisfied with some confirmation of security he soon pushed further. We have no criticism of the claimant trying to secure additional guaranteed income. We also note that the claimant and the respondents were dealing with the unknown and unexpected. No one had experienced a pandemic before and/or the rules and requirements being issued by central government. Everyone, individuals and organisations alike, were trying quickly to understand and adapt to the circumstances and the new rights and obligations relating to the pandemic. This does in part explain the behaviour of the parties during this period.

32. It is also relevant to note the terms of the claimant's email to Amy Schofield of Reed of 19 March 2022. At page 320 –

*Hi Amy*

*Thank you for your telephone call yesterday confirming that I'll be paid as contracted staff in the event of school closures and measures associated with the coronavirus. It means that I can continue to serve the school, children and community unhindered by concerns over lost income.*

*I trust that I will be kept on as expected until the person I am covering returns to school and completes her phased return, which I am advised is likely to be sometime after Easter. Fortunately none of my household have shown symptoms so I can continue to function and be utilised in school if needed during the closure period. With regard to timesheets, I will continue to fill those in as normal whether I'm in school or not unless you advise otherwise.*

33. That email makes clear that :

- a. the claimant was expecting to be kept on “*until the person I am covering returns to school and completes her phased return which I am advised is likely to be some time after Easter*”
- b. That no one in his household was suffering symptoms and that he was willing to be utilised in school if needed during the closure period.

34. In his evidence to the Tribunal, the claimant said that it had not been communicated to him at the time that Mrs Moonan was returning to work at Easter. On being questioned, he accepted that he had seen Mrs Moonan in School on a day, in March and that he saw that her leg was in a cast. We have seen documentary evidence making clear that Mrs Moonan was returning to school at Easter. Whilst the claimant has said that he has some doubts over the genuine nature of these documents, having considered all of the evidence, we accept them as genuine. We also find that the claimant knew that Mrs Moonan would be returning immediately following the Easter holidays although it may not have been clear to him whether this would be an immediate, full time return or a phased return.

35. On the evening of 19 March 2020, the claimant wrote to the head teacher and to the School's HR Manager (page 326). The terms of this email are to a large extent consistent with the email to Reed at page 320 (quoted above). However in the email to the head teacher he states that he was told that it was unlikely that Mrs Moonan would be back at work immediately after Easter and that he has "*since been saying that I am unavailable for supply work elsewhere in the period immediately after Easter.*" There is no evidence of the claimant turning down other supply work. There is no evidence of the claimant being offered and turning down work opportunities provided via LTA arrangements at this time. The claimant has other education authorities on or near his doorstep and there is evidence that he deals with other agencies but no evidence that he turned down work from them.

36. There is no evidence that the claimant was told that it was unlikely that Mrs Moonan would be back after Easter.

37. The School wrote to the claimant on 20 March 2020. They provided a clear end date of 1 May 2020, which was a few weeks into the summer term. The terms of the letter were as follows:

*Dear Richard*

*Thank you for the commitment that you have given to our school to date as a supply teacher. In recognition and appreciation of this, even though school is closing to the majority of children, we will continue to pay you until the end of your agreed booking, which is Friday 1st May 2020.*

*This is with the expectation that you will work from home when required and be in school when requested. If you are required to be in school and you cannot come in or are unable to work from home (e.g. due to illness, etc.), we will unfortunately not be able to pay you on these days.*

*Although we endeavour to do this until the agreed date, due to government advice and guidance changing daily, and in these uncertain times, we may need to assess and review this. We will keep you fully informed if any changes are required.*

*Thank you for your continued support.*

38. The 1<sup>st</sup> May represented about 2 weeks' extension to the assignment. It was not by agreement as the letter stated. The agreed assignment duration was up to the return of Mrs Moonan which was expected to be (and was) immediately following the Easter holidays. The letter was sent at the beginning of national lockdown and schools closures. We accept the evidence of Mrs Gresty about how hard the head teacher was working at the time. We find that the days immediately before and after closures will have been a fast moving, sometimes frantic environment and that the head teacher was required to navigate the School through this.

39. We find the School wrote on the same terms to the 3 other supply teachers that were working at the School at the time. The claimant raised concerns about whether the copy letters provided by the school (to the 3 other supply teachers) were genuine.

40. When being questioned by the claimant, Mrs Gresty commented that she had recently seen those other letters on the School system ( she said she had viewed them the previous evening). This prompted us to ask about whether there was some indication from the School IT system which tended to show when those documents were created. Later that afternoon some proof was provided to the claimant and Tribunal in the form of electronic copies of the letters in question as well as a screenshot or print out of the contents of a computer folder showing the letters that had been saved in MS Word and PDF formats and with the late modified date of 20 March 2020 (the date that the letters were, according to the respondents, created and sent).

41. We are satisfied that the letters are genuine. The School wrote to all 4 of its supply teachers on the same terms as noted under 37 above except that the date that the other supply contracts came to an end was different to the date that the claimant's assignment ended. 2 Supply contracts were due to end at the end of Summer Term (17 July 2020) and the other one on 11 December 2020.

#### The claimant's attendance at School after 20 March 2020

42. As already noted, by email dated 19 March 2020, the claimant made clear his willingness to attend School and be useful. The Head Teacher was putting together rotas for staff attendance at School in order to teach vulnerable children and children of key workers who needed to continue to attend at School. The claimant has complained that he seemed to be prioritised for attending. Mrs Gresty's evidence ( which we accept) was that the School needed to prioritise Maths and English. The claimant had also just made clear in his email to the head teacher, his willingness to help. It was not surprising that the claimant was asked to attend at the School.

43. It is important to note that supply teacher terms under the LTA arrangements, did not appear to include the protection of full pay during periods of sickness.

44. The claimant specifically raised this in email correspondence with the head teacher when he had been asked by her to attend school on 23 March. A chain of emails between the claimant and head teacher is at pages 331 to 335. In these emails, the claimant noted advice or guidance from the NEU concerning pay during periods when staff members were isolating or absent due to coronavirus. He also explained that 23 March was not as convenient a date for him to attend school as an alternative day later in the week.

45. The head teacher agreed that the claimant did not need to come in on 23 March and an alternative date was agreed. A week or so later (30 March 2020 – page 369) the head teacher wrote to the claimant to make clear that full pay would be made in the event that he needed to self isolate or be absent due to coronavirus.

46. At the same time as the claimant was in correspondence with the Head Teacher, he was also in touch with Amy Schofield, a Reed consultant working on the LTA service. On 22 March 2020 he sent an email to Amy Schofield in which he raised 2 issues (page 322). The first was that he did not have the benefit of pay for coronavirus related absences. The second was that he wanted to know if AS could

say where the end date of 1 May had come from and what efforts are being made to keep him in employment with LCC. It appears that a telephone call took place between the 2 and that AS had asked for someone to look at the LTA contractual terms.

47. Mrs Gresty was asked her view about the 8-day delay before the head teacher provided assurances about pay. She noted the tremendous pressure that the head teacher was under at the time, various pieces of information crossing her desk, the pressure on the particular Sunday afternoon (22 March) to ensure a contingent of teaching staff would be in attendance at the school the following day in order to look after the pupils. We accept that.

#### Further extension

48. The claimant's period as a supply teacher with the School was extended, ultimately to 22 May 2020. This followed intervention and representations on the claimant's behalf by the Teachers union, the NEU.

49. This is NEU's record of the claimant's position as at 3 April 2020 as explained by him – see page 396.

*On 6th March I was told to expect to be at the school well into the summer term, though they could not give me an end date. I had asked specifically because an agency had approached me for a summer term's work elsewhere, which I subsequently declined due to what OLQP had told me. So, less than two weeks later, they have got an end date just as the school closures are announced? I was even told by the head of dept that they would be finishing me because I would not be needed during the closures. Surely you can see that this is suspect?*

*In the absence of a fixed term, the end date of my contract should be determined based on the likely duration. There are more factors to consider than just Moonan's expected return, which as all of a sudden gone back to Easter. I understand that they want to save money but they guidelines are clear.*

50. There are some parts of this statement that we do not agree with:-

- a. We do not agree that the claimant was expecting to stay well into the summer term. He knew that the assignment was on the basis of Mrs Moonan's absence and that she was expected to return to work at Easter when his assignment would come to an end. We heard no evidence about a conversation on the 6<sup>th</sup> March that causes us to doubt this.
- b. As for the end of the assignment, the key issue was Mrs Moonan's return. We do not agree that "*there are more factors to consider than just Mrs Moonan's return*" as the claimant stated.
- c. Mrs Moonan returned to work immediately after the Easter holidays and this was always the expectation.

51. The claimant tried to maintain his supply work for as long as he could. We accept that the claimant may have felt in a vulnerable financial position when making the statement noted above. He was in atypical work. Whilst the furlough scheme had just been announced we are sure that the claimant, like much of the country at the time was trying to come to terms with the scheme, what it meant for an individual and whether and for how long income might be protected.

52. It is clear from other emails that the claimant had been told to focus on maintaining an income via furlough through Reed (page 397) which we explain below. The school also maintained its position that they had engaged a supply teacher to cover the absence of a permanent teacher and that permanent teacher had returned to work.

53. However the claimant and his union did manage to negotiate an extension to the supply contract. The following message was drafted and agreed between NEU and School:-

*Due to the unprecedented situation within education, and as a gesture of goodwill, the school have agreed to extend their support of Richard by paying salary up to half term initially (31st May.) This covers the next month's pay and should provide some reassurance to him. At that time we will review the situation regarding school closures, national guidance and the advice from LCC and discuss it further. This seems a fair compromise at the current time.*

54. We accept the term "a gesture of goodwill." The School no longer needed the claimant. The teacher being covered by the claimant had returned. In addition, schools had closed and the GCSE and A level examinations had been cancelled. Continuing to engage the claimant through the supply teacher arrangements was additional unnecessary cost for the School. In the course of negotiations about the claimant's position AK stated as follows:-

*In Richard's case, we were never intending to extend the work further, so there is no obligation legally or morally to extend the supply contract further than when the permanent member of staff returns. Clearly Richard was covering for the absent member of staff so the supply contract came to an end. Richard will therefore not continue to be employed and paid by the school for the foreseeable future. His contract ended at Easter.*

55. In the same negotiation, the NEU made the following comment:- *"the closure should not be seen as an opportunity for an employer to save money that it had already budgeted for."* The School's response to this included the comment: *"Neither should it be the case for an employee to take it as an opportunity to make money in the School."* These comments were made and sent on 3 April 2020.

#### Mr Clare

56. Mr Clare was a permanent member of the School's teaching staff up to Easter 2020. Mrs Gresty did not know precisely when Mr Clare's employment with the School started except that it was sometime around 2012 to 2014.

57. At the beginning of the 2019/20 School year (September 2019) Mr Clare informed the School that he was leaving at Easter 2020 which was when he reached retirement age and could receive a pension lump sum. He also said that he would be willing to work on a supply basis until the end of the school year. This was discussed at a governors meeting in September 2019 and they agreed that they would want Mr Clare to work until the end of the school year and therefore agreed with his proposal to work the final term on a supply teacher basis so that he could retire at Easter.

58. Those arrangements were not by way of a legally binding contract; but there was a clear understanding between the School and Mr Clare that those arrangements would be put into place. These discussions and subsequent agreement/understanding all occurred before the claimant started work at the School.

59. The 2020 Easter holidays were only 2 weeks of so after the decision to close schools and the wider lockdown. The School/Governors did not contemplate making changes to the arrangements that they had agreed with Mr Clare. They considered that his role was still required and so he was engaged on a supply teacher basis via a personal service company that he set up for that purpose.

60. The commencement of these supply arrangements with Mr Clare, coincided with the time that the claimant's assignment was (or should have been) coming to an end. The School did not contemplate extending the claimant's supply work so that he would take the place of the arrangement that had been agreed in September 2019 with Mr Clare. We accept that even though there was no legally binding agreement in place the Governors felt under a moral obligation to keep to the arrangements with Mr Clare. We accept (having heard from Mrs Gresty) that, had more thought been put to it, that Mr Clare would have been considered to be the appropriate person to continue to cover the pastoral needs of his pupils including pupils of the form that he had been form teacher for. Mrs Gresty provided evidence about the importance of pastoral care during this period, that Mr Clare knew his pupils (he was a form teacher as well as a Maths teacher) and was well placed to provide that care. We accept that evidence.

#### Type of contract

61. The claimant has been keen to put the contractual arrangements that applied to him in to a particular category and to prove that his contract is a zero hours, casual worker (or Contingent worker) contract.

62. As for the respondents' position, we note that Mrs Gresty considered it to be a supply contract and Mrs Hilton considered it to be fixed term employment. They both had their views.

63. We have made findings about the contractual arrangements already. During the initial 6 weeks (30 working days) the claimant was supplied to the school by an agency. He was an agency worker. Then the claimant became directly employed by Lancashire County Council who supplied him to the school for a particular assignment (or rather 2 assignments, one to continue to cover Ms Button's absence and the other to cover Ms Moonan's).

64. The claimant was expected to be employed by LCC until Easter when Mrs Moonan returned. The contractual terms enabled the claimant's employment to be brought to an end sooner than this.

Who employed the claimant?

65. LCC was the claimant's employer from the end of the initial 30-day period until the end of the assignment.

66. As to whether Reed initially employed the claimant or engaged him as a worker, we have not seen documents which detail this relationship and do not need to make that decision.

67. At the end of the assignment, the claimant's employment with LCC ended. The employment ended because the assignment ended. He continued (through the LTA arrangements) to be registered with Reed. The claimant benefitted from this as arrangements could then be made for the claimant to be supported by the furlough scheme. The claimant was placed on what was referred to in the case as "Reed furlough".

Why did the claimant's employment end?

68. It ended because Mrs Moonan returned to work.

Furlough

69. The claimant was told in early April 2020 that he should focus on protecting income through furlough. It was possible for those supply teachers who were registered with the LTA service (or some of them) to be able to claim furlough through their relationship with Reed.

70. The claimant was told that he may be able to claim furlough with Reed. At the beginning of April 2020 both his union (NEU) and the respondents, recommended that he look at engaging furlough arrangements with Reed, through his registration with the LTA service (see for example emails from the School to NEU dated 3 April 2020 – page 400).

71. The claimant referred to various documents, particularly a Cabinet Office guidance note to illustrate why he should have been placed on furlough by Lancashire County Council and not Reed. This guidance note is relevant to public sector employers who engage "Contingent "Workers" whose work has been impacted by COVID19.

72. There is dispute between the parties as to whether the claimant was a contingent worker for the purposes of this guidance. However, we find the key paragraphs of the guidance to be as follows:-

***" 14. Will this apply to all contingent workers regardless of their tenure?"***



*This approach applies to all contingent workers whilst they are being supplied under their current assignment no matter how long they have been in post. The only exception to this would be where the contingent workers are being let go as a natural end to their assignment (ie contract was due to finish and not be extended regardless of COVID-19 ).*

**15. What if a contingent workers assignment is coming to an end on there is no intention to extend them**

*Contingent workers would be entitled to this benefit but only up to the point at which their assignment is due to expire. There is no obligation to extend them if the intention was that their assignment would naturally end.”*

73. We note here, based on our findings of fact, that even if the claimant met the definition of contingent worker, the approach in the guidance would not have applied to him whilst being employed by LCC. This is because there was a “natural end” to the assignment on the return of Ms Moonan.

Other opportunities

74. On 24 March 2020 the claimant received an email from Catherine Jenner at Reed. She was one of the employees of Reed who worked on the LTA service and was a personal contact with the claimant. The email stated as follows:-

*During this unprecedented time of uncertainty, I would like to reassure you that REED are still very much on hand to support you in your search for work.*

*Following the government’s announcement to close the majority of schools, we understand that you may be worried about the amount of available work in the Education sector at this point in time.*

*REED are fortunate enough to have a nationwide, specialist Health and Care division who are working with some large care providers across the country and we are currently looking for additional people to help with the current influx of work.*

*We urgently require people and have immediate work availability for those with experience of working with vulnerable children and adults who have:*

- challenging behaviour*
- learning disabilities*
- drug and alcohol dependence*

*We are also urgently looking to speak to individuals with experience of working with young offenders and probation services.*

*Could your current skill set be adapted and utilised within a social care setting? To find out more about the temporary roles we have available within Health and Care and to register your interest please {Insert*

*hyperlink/contact details} and one of our specialist consultants will be in touch with more details?*

75. We find this to be a notification of other potential opportunities outside of the education sector, given the expected drop in schools work at that time.

76. The claimant was not excluded from Schools work. There were fewer opportunities available. We have been provided with evidence that the claimant was told about Schools based opportunities. We have no evidence that opportunities were being withheld from him. The claimant's evidence was that there were generally fewer opportunities in September and October than other times of the year. He also told us that he was nervous about returning to a schools environment because of the potential of being exposed to the coronavirus and also that he was spending time as a voluntary representative supporting other supply teachers who were concerned about going back into schools.

77. We have also seen correspondence that shows that the claimant had ongoing support and communication from Reed consultants.

#### Complaints/Grievances

78. On 15 June 2020, the claimant raised a formal complaint about the head teacher (pages 540-543). He addressed this to Mrs Gresty, in her position as chair of Governors. His complaint was about:-

- a. His contract ending even though a vacancy had been created by Mr Clare's retirement.
- b. His was one of the first names on the rota to attend school following lockdown.
- c. His contract had been portrayed as a fixed term one when it was a zero hours, casual contract.
- d. Being a "BAME supply teacher" was particularly difficult at that time as head teachers had been advised by the NEU that black educators should work from home. Whilst he made reference to a protected characteristic (race) for the purposes of the EQA he made no allegation of discrimination although did say *"I can't help but wonder what part that (which we have taken to be a reference to race) had in the decision not to even bother with a review at half term nor even bother informing me they considered my posting had ended."*

79. We find that this complaint was the first time that the School might have considered that claimant MAY raise a complaint of discrimination.

80. On 1 July 2020, Mrs Gresty replied to the claimant, dismissing his complaints (pages 550-551) . She noted that the school had booked the claimant as a supply teacher via the LTA service. They had initially booked him from October to Christmas and then extended that to Easter. There was no record of a further booking but because the claimant appeared to think there was an informal agreement to keep him to help with year 11 pupils, she understood the school had kept him on and paid him until *"the summer half term he year 11 would have started their GCSE examinations"*

81. Mrs Gresty also disagreed with the claimant about another supply vacancy becoming available. *“Continuing until the end of term on a supply basis was part of the contract for the retirement of the maths teacher. He technically retired on his birthday but for continuity for the pupils was required to finish the term.*

82. On 13 August 2020, the claimant raised a grievance with Reed. He summarised his concerns at the start of his grievance (page 561)

*Victimisation in repeated attempts to exclude me from support during the crisis or otherwise limit it while others equally or not entitled under the guidance were granted support.*

*My removal from LCC payroll to be placed on REED payroll for crisis support against published government and NEU guidance while others were supported*

*Direct and indirect racial discrimination in respect of the above*

83. This was the first occasion that the claimant made an allegation of race discrimination. Reed responded on or about 29 August 2020. Their response included references to the same guidance documents regarding coronavirus as are referred to in this Judgment. The response included the following:-

*Within the correspondence I highlighted that Reed, as a private company, can apply to receive the Furlough Grant for LTA supply staff that are not on live assignments with schools or where a previously agreed assignment has ended, through the Coronavirus Job Retention Scheme. I understood that you applied and were accepted on the Reed Temp Furlough Scheme (RTFS) before the June deadline.*

*Following further correspondence in June where you requested removal from the RTFS you were informed that the Government's Furlough scheme was now closed to new employees. Therefore if you elected not to accept Furlough from Reed you might not be able to reverse that decision at some point in the future. You were informed from David Carter, LTA Partnership Manager at Reed that you were eligible for the RTFS scheme as an employee of Reed and no P45 had been issued. Reed were supporting you to help you during what is a difficult time for everyone. You were informed that Reed made no money from you being on RTFS and that the rules are clear in that all payments received from the Government must be paid to the employee.*

84. We note here that the claimant was encouraged by Reed and LCC to accept the furlough arrangements. His own union (NEU) also encouraged him. By then the NEU had made it clear to the claimant that their legal officer did not consider he had valid complaints and should protect himself through the furlough arrangements being offered via Reed.

85. Ultimately the claimant agreed and received considerable financial protection.

The claimant's named comparator

86. We had very little evidence about the claimant's chosen comparator, Danna Fondja. At paragraph 17 of his statement he describes her as a LTA supply teacher who had received support from the first respondent. We have seen evidence that a number of supply teachers working through the LTA service were retained by LCC and paid furlough monies. We are satisfied that this occurred with those supply teachers who had (1) been placed with a school in accordance with a supply contract (2) where the need for their supply teaching came to an end because the Coronavirus pandemic caused the school to close and (3) they still had time left on their supply contract and would have continued to teach had it not been for the school closure.

87. From the evidence we have, we conclude that Danna Fondja fell into the category described above. There was a crucial difference between the claimant's circumstances and Danna Fondja's. The claimant's employment as a supply teacher at the School would have come to an end anyway, regardless of the pandemic; Danna Fondja would have continued to teach at the school she was based, had it not been for the pandemic.

**The Law**Claims under the Equality Act 2010 (EqA)Time limits

88. Section 123 EqA provides that complaints may not be brought after the end of 3 months "*starting with the date of the act to which the complaint relates*" (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

89. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within "*such other period as the employment tribunal thinks just and equitable.*"

90. We note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434:-**

"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so."  
(para 23)

"...the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule." (para 25 of the Judgment)

91. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

- a. **British Coal v. Keeble UKEAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

- b. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT.**

This case noted that the issue of the balance of prejudice and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

- c. In **Adedeji v. University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ. 23** noted that Tribunal's should not rigidly adhere to the Keeble checklist (above). *"The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular ... "the length of and the reasons for the delay". If it checks those factors against the list in Keeble, well and good but I would not recommend taking it as the framework for its thinking."* (from para 38 of the Judgment).

This case tells us that the checklist in Keeble can be a valuable reminder but the relevance and importance of some or all of the factors listed in there will depend on the facts of the particular case.

#### Direct Discrimination – section 13 Equality Act 2010 ("EqA")

92. Section 13 states:

*"A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

93. An important question for us is whether the claimant's race was an effective cause of the respondent's treatment of the claimant. As was made clear in the case of **O'Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question.

94. We also note the following:-

- a. the House of Lords in **Nagarajan v London Regional Transport [1999] ICR 877, HL**, held “*discrimination may be on racial grounds even if it is not the sole ground for the decision.....If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.*” (judgment of Lord Nicholls)
- b. Paragraph 3.11 of the EHRC Employment Code which states that ‘*the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause*’

95. Section 13 provides that direct discrimination occurs where an individual is treated “*less favourably*” than another. It is generally necessary therefore to identify a comparator who does not share the claimant’s protected characteristic, although claimants can rely on a hypothetical comparator (the term “*or would treat others*” within the wording of section 13 makes this clear).

96. Section 23(1) EqA requires that there is “*no material difference*” between the claimant’s position and his/her comparators position. Case law makes clear that the comparator’s circumstances do not have to be the same in all respects; rather they have to be the same (or nearly the same) in those circumstances which are relevant to the claimant’s claim. (see for example the decisions of the House of Lords in **Shamoon v. Chief Constable of the Royal Ulster Constabulary 2003 ICR 337** and **MacDonald v. MOD; Peace v. Mayfield School 2003 ICR 937**).

#### Indirect Discrimination

97. The definition of indirect discrimination is set out at Section 19 of the Equality Act 2010 (EqA):-

- (1) “*A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.*”
- (2) *For the purpose of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if A applies or would apply it to persons with whom B does not share the characteristic. It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, it puts or would put B at that disadvantage and A cannot show it to be a proportionate means of achieving a legitimate aim.*

98. There are therefore four conditions set out in Section 19(2) and all four must be met in order for a claim to be successful.

99. **Homer -v- Chief Constable of West Yorkshire Police [2012] UKSC 15** is a Supreme Court decision in which Baroness Hale noted as follows “*the law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality worked to the comparative disadvantage of people with a protected characteristic*”

100. We are required to apply the burden of proof provisions under Section 136 of the EqA. As for what each party has to prove in an indirect discrimination complaint, we are guided by the Judgment of the Employment Appeal Tribunal in **Dzieziak -v- Future Electronics UKEAT 0271/11** (at paragraph 42). A claimant needs to establish first a PCP, secondly that this disadvantaged the relevant group generally, (so, in this case the relevant case is people who are of mixed heritage) and thirdly, that this disadvantage to the general group created a particular disadvantage to the claimant. Where a claimant is able to establish these things then the burden is on the employer to justify the PCP as a proportionate means of achieving a legitimate aim.

101. Moving then to the point of justification; unlike direct discrimination there is a potential defence to an indirect discrimination claim where an employer can show that the application of the PCP was a proportionate means of achieving a legitimate aim. We noted and referred the parties again to the Equality and Human Rights Code on Employment, particularly paragraphs 4.29 and 4.31.

### PCPs

102. For a provision criterion or practice to be a valid PCP for the purposes of s19 and 20 of the EQA, it must be more widely applied ( or would be more widely applied).

103. Chapter 4 of the EHRC Code of Practice on Employment 2011 concerns indirect discrimination. Paragraph 4.5 says this in relation to PCPs:-

*“The first stage in establishing indirect discrimination is to identify the relevant provision criterion or practice. The phrase provision criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies rules practices arrangements criteria conditions prerequisites qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a one off or discretionary decision.”*

104. Whilst PCPs should be construed widely, there are limits. The word “practice” indicates some degree of repetition and where a PCP was identified from what happened on a single occasion, there must be some evidence of a more general practice. Paragraph 59 of the judgment in **Gan Menachem Hendon Limited v Ms Zelda De Groen UKEAT/0059/18:-**

*So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred.*

105. It does not matter why a particular group of persons is disadvantaged by a PCP. What is important is that they are; that there is a causal link between the PCP and the particular disadvantage suffered (**Essop and others v. Home Office (UK Border Agency and others) [2017] UKSC 27.**)

Victimisation – section 27 Equality Act 2010.

106. Section 27 states

- (1) *A person (A) victimises another person (B) if A subjects B to a detriment because –*
  - (a) *B does a protected act all;*
  - (b) *B believes that A has done or may do a protected act.*
- (2) *Each of the following is a protected act –*
  - (i) *bringing proceedings under this act;*
  - (ii) *giving evidence or information in connection with this Act;*
  - (iii) *doing any other thing for the purposes of or in connection with this Act;*
  - (iv) *making an allegation (whether or not express) that A or another person has contravened the act.*

107. For an act such as a grievance to be a protected act, the context of that act has to indicate a relevant complaint. It is not necessarily enough that a grievance refers to “discrimination” or “harassment” although that will depend on the particular circumstances (**Fullah v. MRC EAT 0586/12; Beneviste v. Kingston University EAT 0393/05**)

108. The word “because” used in s27(1) appears to allow for multiple causes of the detrimental treatment. We note here para 9.10 of the Code:

*Detrimental treatment amounts to victimisation if a “protected act” is one of the reasons for the treatment but it need not be the only reason.”*

Burden of Proof



109. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

110. Section 136 states:

*This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has 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.”*

111. we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassey v. Nomura International [2007] ICR 867**, where the following was noted in the judgment:

*“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”*

### Public Sector Equality Duty (“PSED”)

112. A general public sector equality duty is at 149 EQA. In summary, it requires that a public authority (when exercising its functions) to eliminate discrimination, advance equality of opportunity and foster good relations between persons who share relevant protected characteristics and persons who do not.

## **Conclusions**

### Issue One – Who is the correct respondent to these proceedings.

113. We have found that there is no entity called LTA. It is a service provided by LCC and operated by ( or in combination with) Reed.

114. The claimant could potentially have complaints against LCC ( as his employer during the assignment) under section 39 EQA and the School, under section 41 EQA.

### Issue 2 – Direct Race Discrimination.

115. We have looked at each allegation of direct discrimination in 2.2 in turn, applying the questions in 2.2 to 2.6 (where required) in relation to each allegation.

Issue 2.2.1

*Placing and prioritising the claimant on the school rota during the school closure period starting 20 March 2020 with the expectation and intention he would attend work during the pandemic under threat of no pay if he was ill or needed to isolate, contrary to health and safety guidance and putting others at risk.*

116. The respondent prioritised the teaching of Maths and English. The claimant was Maths teacher who had just put himself forward as willing to attend and work at the School. He was asked (but not obliged) to attend School on 23 March 2020.

117. It was expected that the claimant would attend at the School but on a rota system, along with other members of the School's teaching staff.

118. There is no evidence that the claimant was treated less favourably than any other member of the teaching staff in relation to this attendance rota ( or that a hypothetical comparator would have been treated more favourably). The claimant was only obliged to attend on one day and even then, when an initial date was not convenient, the School agreed to change the date.

119. The claimant was not threatened with no pay if he attended School. On 20 March 2020, he and the 3 other supply teachers were told that, under the terms of their employment, they did not receive contractual sick pay. Later, on 30 March 2020, the claimant was told that he would be covered for coronavirus related absence.

120. The claimant was not reasonable in regarding as a detriment the action of placing him on the school rota.

121. His concern about not being paid for a coronavirus related absence was genuine and reasonable.

122. However the reason why the claimant was told that he was not entitled to payment during sickness was because that is what the terms of his employment with the first respondent stated. Those terms also applied to the other supply teachers. The claimant has not proven facts from which we could conclude that the claimant was treated less favourably than someone of a different race in the same material circumstances (a hypothetical comparator) was or would have been treated.

Issue 2.2.2

*Paying the claimant through Reed Payroll for 6 weeks at the start of his assignment with subsequent loss of benefits instead of LTA payroll as per the terms of the LTA agreement, withholding a copy of that agreement signed at LTA registration on 25 October in order to achieve that.*

123. This claim is out of time. However, having heard the evidence on the issue, we are satisfied that the balance of prejudice falls on allowing the complaint to be determined - for us to make a finding. We have heard the evidence and are able to do so.

124. It is clear from our findings of fact that the same arrangements applied to all supply teachers engaged through the LTA service, except those teachers in leadership type roles who would be paid at grades above M5. The claimant was paid at Grade M5.

125. we conclude that the claimant was treated in the same way that someone of a different race was or would have been treated.

### Issue 2.2.3.

*“The respondents wrongly portraying the claimant’s contract of employment as fixed term rather than the casual zero hours contract that the claimant believes it to be, for the purpose of releasing him at the earliest opportunity without the ongoing support readily afforded to others.”*

126. The claimant was employed by the first respondent and supplied by the first respondent to the School. He was initially engaged by Reed as an agency worker. He was supplied for 2 particular purposes, the second of which was to cover Mrs Moonan’s absence which everyone expected to be until Easter 2020. The contract period was subsequently extended as a gesture of goodwill. It would not be unreasonable to regard this as engagement on a fixed term basis.

127. However, even had the contract been regarded as a contingent worker contract for the purposes of the Cabinet Office guidance the claimant has referred to, the terms of that guidance were such that the claimant would not be entitled to any support being provided for under the guidance. This is because the claimant’s employment ended because the reason that he was employed no longer applied. ( see paras 71-73 above)

128. We conclude that the claimant was treated no less favourably than someone of a different race was or would have been treated in the same circumstances.

### Issue 2.2.4

*Not being considered by the respondents for a role becoming vacant due to retirement on the date of school closures, 20th March 2020, that role being reserved and given to the retiree on a supply basis. Instead targeting the claimant for removal from the education sector, to work in the relatively low-paid and higher-risk social care work, contrary to union and government guidance to retain, support and utilise supply teachers in response to the crisis.*

129. The School did not consider the claimant for the role that Mr Clare carried out. Whilst the terms of engagement with Mr Clare changed in Easter 2020, the role was the same one that he had been carrying out previously. The School simply continued to engage Mr Clare in the same role for the final term of that school year. It did not occur to the School that it should be made available to the claimant instead.

130. As well as the role being the same one that Mr Clare had been carrying out, the School had made an arrangement with Mr Clare that he could work the final term of that School year on a supply basis – see our findings of fact at paras 56-60.

131. We are satisfied that a supply teacher in the same position as the claimant would have been treated in exactly the same way, regardless of his or her race. They would not have been considered for the role that Mr Clare had been carrying out.

132. The claimant's allegation that he was targeted for removal from the education sector arises from Reed's email dated 24 March 2020 (para 74 above). We are satisfied that this did not amount to less favourable treatment. The email simply informed the claimant of other opportunities. The claimant was not targeted for removal from the education sector.

#### Issue 2.2.5

*Transferring the claimant to the private sector payroll of REED from LCC public payroll with subsequent loss of benefits, without proper consultation and contrary to government guidance for supporting public sector contingent workers.*

133. The claimant was not transferred. His employment with LCC came to an end on completion of the assignment. The claimant was already on both Reed and LCC payrolls. His presence on the Reed payroll enabled him to obtain furlough support. Even had he met the definition of a contingent worker, the claimant would not have been entitled to any support arising from his temporary employment with LCC (applying the terms of the Cabinet Office guidance concerning contingent workers).

#### Issue 3. Indirect discrimination (Equality Act 2010 section 19)

*A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:*

*The First Respondent moving the claimant from public sector payroll, with associated benefits, such as death benefits, and protection under the Public Sector Equality Duty to private sector payroll without such benefits and lesser pay and conditions?*

134. Please see paragraph 122 above. The claimant was not moved or transferred from one payroll to another. His temporary employment with LCC ended. That was not by operation of a provision, criterion or practice.

*3.2\_Did the respondent apply any of those the PCPs to the claimant?*

135. Not relevant

*3.3 Did the respondent apply any such PCP to persons of another race or would it have done so?*

136. Not relevant

*3.4 Did the PCP put persons of his race at a particular disadvantage when compared with persons who were not his race through the loss of benefits associated with being a public sector employee and protections under the PSED?*

137. We have reached a decision about this, in case our conclusion about the PCP is incorrect. The claimant has provided no evidence about disadvantage other than saying that he no longer benefitted from the PSED (having accepted that the loss of other benefits applied, regardless of race). We conclude as follows:-

a. The first respondent continued to be bound by the PSED in the exercise of its functions following the termination of the claimant's employment with the first respondent. In so far as the exercise of those functions affected the claimant (and other people with protected characteristics), receiving furlough payment through REED payroll did not disadvantage him ( and would not disadvantage others).

b. The anti-discrimination provisions in the EQA apply to both public sector and private sector employers and service providers. The claimant was protected by the EQA in his relationship with Reed.

*3.5 Did the PCP put the claimant at that disadvantage?*

138. See 138 above.

*3.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondents will say that the claimant being on REED's payroll was the only way the claimant could have received furlough support and was thus a proportionate means of achieving a legitimate aim.*

*3.7\_The Tribunal will decide in particular:*

*3.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;*

*3.7.2 could something less discriminatory have been done instead;*

*3.7.3 how should the needs of the claimant and the respondent be balanced?*

139. We agree with the respondents; the fact that he was on Reed payroll enabled furlough payments to be made to him. That was the method to ensure that he had the opportunity of being protected through the furlough scheme.

*Issue 4. Victimisation (Equality Act 2010 section 27)*

*4.1 Did the claimant do a protected act as follows:*

*4.1.1 Notifying LTA/LCC about a breach of pandemic health & safety guidance, as well as concerns about the intention to exploit supply teachers for risks associated with the pandemic in an email to Amy Schofield on 22nd March 2020 and through notification to his union, the NEU about concerns over safety, discrimination and the retiree's re-appointment as a supply teacher, via a statement dated 6th April 2020 to Chris Anderson by email which was then raised with the respondent.*

140. No; neither correspondence amounted to a protected act.

141. We have also considered whether the respondents ( or any of them) considered that the claimant MAY do a protected act particularly as a result of the correspondence referred to. There is no evidence, prior to the claimant's grievance in August 2020 that any of the employees of either the first respondent or the School (or Reed for that matter) considered that the claimant may bring a complaint under the EQA or otherwise do something that would come within the definition of a protected act.

*4.2 Did the respondent do the following things:*

*4.2.1 Exclude the claimant from the public sector crisis support scheme and instead place his livelihood in the hands of the person he had complained about; head teacher Mrs Knight.*

142. No. The claimant's employment with the first respondent had come to an end. The way that the LTA service functioned – through ongoing relationship with Reed – meant that the claimant was able to receive the support of furlough payments. The arrangements by which the claimant benefitted from furlough payments ( via Reed and not via LCC) were not put in place because the claimant had done (or may do) a protected act.

143. In any event, we have found that the first time that the School considered the claimant MAY do a protected act was 15 June 2020, by which date the head teacher had already decided not to continue to engage the claimant via the supply contract with the first respondent (see para 79 above).

*4.2.2 Mrs Knight making written expressions of resentment towards the prospect of supporting the claimant in accordance with union and government guidance to his NEU representative and labelling him as someone attempting to profit from the crisis and not worthy of her consideration; amounting to undermining and disrespectful comments.*

144. This refers to the comment at page 398. As noted (para 55) that comment was in response to a comment made by the NEU. We regard it as a generic comment/response. Further, as the comment was made on 3 April 2020 it cannot have been made in response to (or due to a concern about a possible discrimination complaint arising from) the letter of 6 April 2022. See also 144 above.

*4.2.3 Excluding the claimant from future work offers; becoming apparent from September 2020 when schools returned and not being allocated an LTA 'consultant' to liaise with as is normal practice with a supply teacher.*

145. The claimant was not excluded from future work offers. The claimant did have Reed consultants available to assist him under the LTA arrangements.

*4.3 By doing so, did it subject the claimant to detriment?*

Not applicable .

*4.4 If so, has the claimant proven facts from which the Tribunal could*

*conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?*

No.

*4.5 If so, has the respondent shown that there was no contravention of section 27?*

Not applicable.

Employment Judge Leach  
Date: 30 December 2022

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
3 January 2023

FOR THE TRIBUNAL OFFICE