EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100011/2021

Hearing held in Glasgow on 28 September 2021 (pre-reading), 29, 30 September 2021, 1 October 2021, 4 October 2021, 4 May 2022 (by video) and 18, 23 May 2022 (deliberations)

Employment Judge M Whitcombe
Tribunal Member Mrs F Paton
Tribunal Member Ms J Whistler

Dr Shawki Abdul Rakib Al-Dubaee	**Claimant** **Represented by:** **Mr A Argue** **(Solicitor)**
University of Strathclyde	**Respondent** **Represented by:** **Mr C McDowall** **(Solicitor)**

JUDGMENT

The unanimous judgment of the Tribunal is that none of the claims of direct race discrimination are well-founded and that all of them are therefore dismissed.

REASONS

Introduction

1. The claimant has been an employee of the respondent since 19 February 2019 and continues in that employment. He is a highly qualified specialist in computer engineering who had an academic career in Yemen before leaving that country as a refugee.

2. The respondent is a well-known academic institution. At the times relevant for the purposes of these proceedings the claimant's role was Partnership Development Lead and he was employed on a two-year fixed term contract which began on 19 February 2019. The post was funded by an external source, the EU funded Manufacturing Industry Digital Innovation Hubs project (MIDIH). The claimant was initially based within the Digital Team of the respondent's Advanced Forming Research Centre (AFRC) but later moved to the Business Development Team within the respondent's National Manufacturing Institute Scotland on or about 3 August 2020.

3. It was not always easy to understand the nature of the claimant's claims from the narrative sections of the claim form (ET1) received by the Tribunal on 4 January 2021. It was apparently drafted without legal assistance. Case management led to further and better particulars of the claim which were prepared by the solicitors by then acting for the claimant. That became the core document setting out the claims. The respondent set out its response to each allegation in an equivalent document. Those documents also influenced the structure of the representatives' written closing submissions, although those filed on behalf of the claimant departed slightly from the previous numerical order.

4. It is necessary to explain why this case has been heard over such a long period. By 4 October 2021 almost all of the evidence had been heard and the case was heading rapidly towards its conclusion. However, on the joint application of the parties it was adjourned because they had reached agreed terms of settlement.

Ultimately, no finalised settlement was concluded and the claimant requested that the claim should be relisted. That proved difficult for multiple reasons including some difficulties within the Tribunal's listing process, various key individuals becoming ill at short notice with Covid-19 and the general problems of availability and scheduling that can affect any case. There were several failed attempts to finish the hearing. We are grateful to both representatives for the creativity and dedication shown to finishing the task in hand. Both sides were happy to make their closing submissions entirely in writing in order to avoid any further scheduling difficulties or delay.

Claims and issues

5. All of the claims are for direct race discrimination contrary to s.13 of the Equality Act 2010. The protected characteristic of race is defined for the purposes of these claims as Arab ethnicity. Although the claimant sometimes referred in his evidence to nationality too, Mr Argue confirmed that the case was based solely on Arab ethnicity.

6. The claimant alleges that he was treated less favourably than hypothetical comparators because of his Arab ethnicity in 10 different ways, although some of them contain more than one allegation. They are set out in full in his further and better particulars of the claim. In summary the factual allegations are as follows:

    6.1. From September 2019 onwards, deliberate isolation of the claimant from the digital manufacturing team, his deliberate exclusion from strategic and future projects meetings and his exclusion from the digital innovation hub. This claim is based on hypothetical comparators.

    6.2. From September 2019 onwards, the claimant was "blocked from carrying out his remit" and tasks central to his remit were given to another member of staff. In particular, the claimant was prevented from representing the AFRC in high volume manufacturing catapult cross-centre activities and that responsibility was given instead to Ms Anastasia Khatunsteva. The claimant

was not allowed to arrange any CPD meetings whereas Mr Sam Hume was given permission to arrange such events. Despite naming those individuals, this allegation is also based on hypothetical comparators.

6.3. On 15 October 2019 the claimant received an email from Mr Richard Millar into which other staff members were copied. The email was very critical of the claimant and the claimant regarded it as a personal attack upon him which had been made public. This claim is based on a hypothetical comparator.

6.4. In the course of a probation review meeting on 4 December 2019 the claimant was accused by Mr Danny McMahon of having plagiarised the work of a colleague, Mr Connor MacFadden. The accusation of plagiarism is alleged to have been less favourable treatment than that which a hypothetical comparator would have received.

6.5. Also in the course of the probation review meeting on 4 December 2019, the respondent advised the claimant that his probationary period was to be extended. The reasons given were allegedly invalid, but included plagiarism, timekeeping, attitude and alleged difficulties with the claimant's technical delivery of the Catapult project.

6.6. On or about 17 April 2020 Mr McMahon produced a structure chart in relation to the AFRC. The claimant was placed below Mr Sam Hume on that chart despite supposedly being at the same level of seniority. In an allegedly related point on 18 June 2020, Mr Hume was asked to take part in a phone call with Transport Scotland whereas the claimant was told that it was not necessary for him to do so. The claimant considers that this treatment was consistent with the way in which he and Mr Hume had been depicted on the structure chart. Despite having named Mr Hume in that way this claim is also based on hypothetical comparators.

6.7. On 16 December 2019 the claimant complained to the respondent's HR department that his probation had been unfairly extended and also complained about a number of other matters including his exclusion from meetings, training sessions and projects. The claimant alleges that his complaint was not properly or fairly investigated or dealt with, for example by failing to interview Mr McFadden in relation to the plagiarism issue. Further,

the respondent shared the outcome of the investigation with Mr Millar two days before it was shared with the claimant. The claimant's complaint was not upheld. The claimant alleges that those procedural failings and also the outcome were less favourable treatment because of race.

6.8. The claimant appealed the outcome of that process. Again, he alleges that the appeal was not dealt with fairly and that the outcome of the appeal was predetermined. The claimant alleges that the respondent's Dawn Watt was not impartial, that she asked leading questions of Mr McMahon and that the claimant was only reluctantly given extended time in which to explain his appeal. The claimant alleges that those failures and the outcome were each less favourable treatment because of race.

6.9. The minutes of the appeal hearing which took place on 12 August 2020 were fundamentally inaccurate and did not reflect the true nature of the discussions. When the claimant sought to amend them the respondent refused to accept the claimant's corrections. This is alleged to have amounted to less favourable treatment because of race. Further, the claimant alleges that the real reason for the respondent's failure to uphold his appeal was race rather than the reasons set out in the letter of 4 November 2020.

6.10. Finally, the claimant's contract was not renewed at the end of its fixed term whereas staff who had joined AFRC at the same time as the claimant did have their contracts renewed. Mr Sam Hume was one such person. It is alleged that the failure to renew the claimant's contract in circumstances where the contracts of others were renewed was less favourable treatment of the claimant because of race.

7. The respondent has raised jurisdictional time points in relation to those allegations. The claimant alleges that all 10 allegations amount to conduct extending over a period for the purposes of section 123(3)(a) EqA 2010. The respondent denies that they do.

Evidence

8. We were provided with an agreed joint file of documentary evidence running to 858 pages. A small number of supplementary documents were introduced during the hearing.

9. The claimant gave evidence and the statement of Mr Derek Keenan (lay union representative) was uncontested and admitted into evidence without the need for him to be called.

10. The respondent called the following six witnesses:

    10.1. Daniel McMahon, Senior Manufacturing Engineer and Team Lead for both the Digital Manufacturing and Metrology teams.

    10.2. Richard Millar, Senior Research and Development Engineer with the AFRC (also a "Theme Lead");

    10.3. Dr Philip Riches, Senior Lecturer in the Department of Biomedical Engineering and Associate Dean of the Department of Engineering. He investigated the claimant's complaint.

    10.4. Dr Kepa Mendibil, Principal Teaching Fellow with the Department of Design, Manufacturing and Engineering Management, Post-Graduate Leader and Associate Dean (International) for the Faculty of Engineering. He heard the claimant's appeal.

    10.5. Dawn Watt Cowley (usually referred to in evidence as Dawn Watt), HR Partner for the respondent's Innovation Centres, which include the AFRC. She assisted Dr Mendibil with the claimant's appeal.

    10.6. Stephanie Lumb, Assistant HR Adviser, promoted to HR Adviser in May 2020. She assisted Dr Riches with the investigation of the claimant's complaint.

11. In general we found all of the respondent's witnesses to be honest, credible and reliable. They had a persuasive grasp of detail and gave evidence which was consistent with the contemporaneous documents. Having listened carefully to

cross-examination we concluded that they were doing their best to help the Tribunal and were giving honest evidence to the best of their recollection.

12. However, we were not always able to say the same in relation to the claimant's evidence. By the end of cross-examination the Tribunal had doubts about his credibility. It seemed to us that the claimant was a highly intelligent witness who sometimes realised that he had given answers which might harm his case and then sought to change that evidence. That caused us to doubt whether he was really giving us the unvarnished truth from his perspective. At points it appeared that he was saying whatever he considered necessary in order to strengthen his case. We also noted a steadfast refusal to make realistic concessions even when presented with compelling evidence that he was mistaken on particular points. That also caused us to doubt the reliability of his evidence. Examples included the following.

    12.1. The claimant initially accepted that he was not recruited as a like for like replacement for Stephen Marshall and that various of Mr Marshall's responsibilities had been redistributed to other individuals. On return from a mid-morning break the claimant said that he wished to say something and then spontaneously retracted most of that evidence, accepting only a limited reallocation of Mr Marshall's duties to Mr McMahon and reversing every other concession that he had only just made in the preceding passage of cross-examination. When asked why he had contradicted the evidence he had so recently given on oath the claimant said that he had "misunderstood the timeline". We did not find that to be a credible explanation.

    12.2. The claimant's answers were often long, confusing and tangential. While we allowed for the fact that he was engaging in formal legal proceedings in a second language, it still appeared to us that he sometimes sought to deflect and avoid focussed and relevant questioning.

    12.3. When it was suggested to the claimant that he had presented work which was not his own he sought to reformulate the question as one about the proportion of the work that had been his own. We found that evasive.

    12.4. It was put to the claimant that if the grievance investigation's failure to interview Connor McFadden had been a shortcoming at all, then that

shortcoming was corrected when Mr McFadden was interviewed at the appeal stage. The claimant repeatedly failed to answer the question. Again, we found that evasive.

Findings of fact

13. The findings of fact relevant to our conclusions are set out below. Where facts were in dispute we made our findings on the balance of probabilities, in other words a "more likely than not" basis.

14. We have decided to group the findings of fact under separate headings, reflecting the themes of the claimant's further particulars of claim. We think that they will be easier to follow and to relate to our reasoning and conclusions if they are grouped in that way.

The claimant's role

15. When the claimant's employment commenced on 19 February 2019 he was to work as Partnership Development Lead following the retirement of Stephen Marshall. Daniel McMahon was his direct line manager and Richard Millar was the Connectivity Theme Lead. A large part of the role for which the claimant was recruited was the MIDIH project. It was EU funded. It was necessary for the claimant to be mainly engaged on duties concerning the MIDIH project since otherwise that revenue stream would be lost from the AFRC. We accept Mr McMahon's evidence that he made clear to the claimant at the point of recruitment that one possibility was that the claimant would go into the University redeployment process at the end of his two year contract. Although the claimant disputed that point we find Mr McMahon to be the more credible witness for the reasons set out above.

16. We also prefer the respondent's evidence that the claimant did not have the same role as Sam Hume. They were materially different. The claimant's main purpose was to progress the MIDIH project whereas Sam Hume was recruited to a different role without a particular technical project. Sam Hume

worked solely on business development activities and his role had no technical element, whereas the claimant's role was focused specifically on the MIDIH project and did have technical elements.

17. While working under Mr McMahon's line management the claimant worked on three things. First, the MIDIH project which took up the vast majority of his time. The claimant agreed in cross-examination that it would take up more than 90% of his time. Second, the claimant worked on a small "Catapult" project connected with 5G. Third, the claimant worked on another Catapult project, a large transformation project. Although the claimant's case is that Mr McMahon isolated him from projects it is clear that the claimant worked on more than just the MIDIH project. It is unsurprising that the MIDIH project should take up the vast majority of the claimant's time since that was necessary in order for the respondent to be able to draw down the funds for that EU funded project.

Exclusion from activities with European interns

18. As evidence of exclusion the claimant relies on an email dated 13 September 2019 from Mr Millar regarding planned activities with some European interns due to visit the following week. It is correct that the claimant was not one of those to whom the email was originally circulated. However, it is also correct that once the claimant raised a concern about his lack of involvement Mr Millar was entirely willing to allow him to be involved. The original email circulation list simply reflected the people to whom Mr Millar had spoken about the matter while in the office. The claimant had not been in the office that day because he had been attending a workshop in London connected with the MIDIH project. The claimant disputed these facts, in some respects equivocally, but we prefer Mr Millar's firm evidence not just because it was firmer, but also because of our concerns about the claimant's relative credibility.

Exclusion from digital innovation hub

19. The claimant also alleges that he was excluded from the Digital Innovation Hub. However, we are satisfied that the project in question was only awarded in October 2020. By then the claimant's MIDIH project had finished and he was working in a different part of the business altogether. As part of a staff reorganisation senior management had decided to centralise all of the business development team under the commercial department and the claimant was due to move to a different part of the business. The claimant was no longer working under the technical side of the business and there was no conscious decision to exclude him.

Removal of tasks by Mr McMahon

20. We accept Mr McMahon's evidence that he has never excluded the claimant from the team. Having listened carefully to cross examination we also accept Mr McMahon's view that the claimant confuses terminology across different projects. For example, there are a number of "testbeds" being developed and a number of bids for "Digital Innovation Hubs", but they all completely separate from the MIDIH project. They just use similar terminology. The similarity of terminology may have caused the claimant to believe that all of those activities were part of his remit but that was not the case. We refer once again to our findings above regarding the relative credibility of the witnesses.

Catapult Cross-Centre Activities

21. The claimant's job description indicated that he represented the AFRC in High Value Manufacturing Catapult Cross-Centre activities, but similar words appear in almost every member of staff's job description. All members of staff could expect to do it as and when required. The claimant was not solely responsible for that activity and if he genuinely thought that he was then he has misunderstood the position. Similarly, while the claimant's recruitment was a "backfill recruitment" for the retiring Stephen Marshall it was never

intended that the claimant would be a direct replacement. As Mr Millar explained, "*when I started in 2018 Stephen Marshall was the Connectivity Theme Lead. He sat below Danny [McMahon] in terms of team structure and was responsible for developing the connectivity strategy. Stephen spent 50% of his time working on the MIDIH project and the other 50% of his time was spent on business development and catapult projects.*" Mr Marshall's role was split over several people with "Connectivity Theme Lead" duties going to Richard Millar, HVMC legacy systems LTP going to William Duncan and the HMVC Digital Technology Team being taken on by Mr McMahon. It was simply not the case that the claimant could reasonably expect to be doing everything that Mr Marshall had previously done.

22. The claimant accepted that it was properly Mr McMahon who represented AFRC on several Cross Centre activities. Mr McMahon specifically involved Anastasia Khatunsteva in one Catapult Cross-Centre project for particular reasons. She had a background in waste management which was of particular interest to the Food and Drink Strategy Team. The claimant did not accept that explanation but he was not able to give any cogent reason why it would be false. We accept Mr McMahon's evidence on this point.

23. In summary, although the claimant may believe that some tasks were taken from him the truth of the matter is that they were never his tasks, or exclusively his tasks, in the first place.

24. It is also clear that the claimant *did* participate in some Cross-Centre activities. He was involved in HVMC Cross Centre activities related to digital manufacturing by supporting the HVMC legacy systems large transformational project (LTP). The claimant was one of a number of representatives from all seven centres within HVMC to be involved in the delivery of that project. To the extent that Anastasia Khatunsteva was involved in some Cross-Centre activities in preference to the claimant in about April 2019 that is because the claimant was then very new to his role and had a lot of work to do to get up to speed with the MIDIH project.

25. In March 2020 the claimant sought to become involved in testbed projects. However, those projects did not exist at the time. The claimant was not excluded from the projects. In an email of 20 March 2020 Mr McMahon made those points and also reminded the claimant that his role was 100% percent allocated to MIDIH, that he also had a small catapult project and that he was therefore over-allocated. In this context we understand "100% allocated" to mean 100% funded rather than a statement of the time spent. The claimant's role was wholly funded by EU funds.

CATP 1448

26. On 9 October 2019 Richard Millar noted concerns over a lack of technical delivery on this project. He wished to understand the reasons and to see a recovery plan to ensure that the project was completed on time. The claimant accepted in evidence that there had by that time been limited technical progress. He also accepted that there was a big risk that the project would not complete by the end of March 2020. The claimant was unhappy with Mr Millar's email but it seems to us to have been an entirely appropriate email to send in the circumstances. Indeed, the claimant confirmed in cross-examination that he accepted the accuracy of the content of the email. His complaint was about its timing but we see nothing wrong with that.

27. A meeting took place the following day, 10 October 2019. An aspect of the claimant's claim is the way in which he was addressed by Mr Millar at that meeting. We have evidence in the joint file from an independent eyewitness, Jaffar Juneja. We find that his view of the meeting is likely to be reliable. Jaffar Juneja recalled that Mr Millar and the claimant both raised their voices. He also regarded Mr Millar's feedback as reasonable, relevant to the project and to his wish for it to succeed. That negative feedback was given to others involved as well as to the claimant.

28. The claimant accepted that he was angry and frustrated in the meeting. Mr

Millar accepted in cross-examination that voices were raised and said that he was trying to motivate the team to produce the standards of work required. He said that it was "a raised voice type of meeting". He acknowledged that there was a lot of tension in the room.

29. We think it is likely that the meeting was tense and that voices were raised. We do not think it is likely that Mr Millar was the only person to raise his voice or that he raised his voice solely when speaking to the claimant. We think it is likely that the claimant also raised his voice.

Possible assistance from Sam Hume

30. On 17 October 2019 Mr McMahon emailed the claimant suggesting that Sam Hume might be able to assist him. The background was that a colleague called "Anisa" had suggested that Sam Hume could help the claimant following a regular review of the MIDIH project. The claimant's response was to indicate that he did not need any help, that the MIDIH project was on the right track and that if he needed help he would ask for it. Mr McMahon's perception was that the claimant did not want to admit that he needed help and seemed offended by the suggestion that he did. We think that Mr McMahon's perception was probably accurate. We regard this incident as a genuine and conscientious effort to provide appropriate support to the claimant rather than an attempt to undermine him or to remove elements of his role. The claimant characterised it as Mr McMahon trying "to make lots of barriers for me" but we are unable to accept that characterisation. Further, we note that ultimately the claimant did accept some help from Sam Hume on the MIDIH project.

CPD events

31. On one occasion the claimant asked if he could run his own CPD event. The marketing team suggested that he should instead take a slot at an event which was already planned. We accept that Mr McMahon had nothing to do

with this and that it was the decision of the marketing team. We find that if Sam Hume had a greater involvement in the design and management of CPD events then that was entirely consistent with his rather different role, focused on business development.

Richard Millar's email of 25 September 2019

32. The background is that on 23 September 2019 the claimant had sought the comments of 15 colleagues on an Excel spreadsheet relating to the MIDIH project. Mr Millar replied to all on 25 September 2019 saying "*I am struggling to understand why the digital and metrology team are being asked to supply information into this. As lead on the MIDIH project, you should be able to complete this on your own by being aware of the projects the digital team and AFRC are working on in the fields outlined in the spreadsheet, what is being delivered by the AFRC and University to support industry and also be aware on what is going on in industry. This can be done by engaging and collaborating with the right people for each section.*" Regardless, Mr Millar went on to provide detailed comments on many of the cells in the spreadsheet as the claimant had requested.

33. We think that it is unfortunate that Mr Millar replied to all rather than solely to the claimant. His email was certainly critical of the claimant and by "replying all" that criticism was drawn to the attention of many of the claimant's colleagues. That had the clear potential to embarrass the claimant and we are sure that it did.

34. However, we also accept the truthfulness of Mr Millar's explanation of the background. Several members of the team had approached him saying that they did not think the claimant's email was appropriate. Mr Millar chose to "reply all" as the quickest way of ensuring that none of the recipients took any further action in relation to it. We accept that he wanted to get the message out quickly although he appears to have prioritised speed over diplomacy and sensitivity. We also accept that Mr Millar and his family were going through a

tough time in September 2019. They had experienced a sudden bereavement and Mr Millar had taken a few days of bereavement leave before returning to the office on 25 September 2019. The email was therefore sent on his first day back after bereavement leave. He was short of time in which to do his work, he felt pressured and stressed. We can understand why, against that background, Mr Millar might not have been at his most diplomatic when discovering that in his absence the claimant had asked everyone in the team to fill out a spreadsheet and send it back to him as soon as possible. None of the team had time allocated against that project and some of them had approached Mr Millar to raise their concerns. Mr Millar accepted, with hindsight, that it might have been better to have had a conversation with the claimant instead of sending the email.

35. While Mr Millar accepted that he had not sent a similar email to the whole team before, we also accept that a similar situation had not arisen before, so far as Mr Millar was concerned. None was put to him in cross-examination.

Probation review 4 December 2019

36. It is first necessary to set out some background. At the claimant's ADR review in June 2019 he had been graded "excellent" against all criteria. This is a slightly confusing issue because the probation review form has been filled out in a way suggesting that an interim probation review had been carried out, but in fact that section reflects the results of the ADR review. No interim probation review was carried out at any stage. Mr McMahon had filled in part of the probation review form so as to record the ADR review results in order to show that it was only recently that matters had deteriorated and that he fully expected the claimant to be able to demonstrate the qualities necessary for his probation to be signed off after a 3 month extension.

37. At the final review on 4 December 2019 the claimant was graded "improvement required" against quality and accuracy of work, volume of work, competency in the role and work relationships. The same matrix graded him

"satisfactory" for conduct and attitude and attendance and timekeeping. He was rated "good" for awareness and delivery of stakeholder/business needs. The upshot was a three month extension of probation to 19 February 2020.

38. Mr McMahon set out some of his concerns and reasoning. He stated that very little progress had been made on the internal Catapult project, it was mostly about technical delivery so there had been no demonstration of technical capability in that context. Since the claimant's MIDIH project was not as technical a project it would be necessary to demonstrate evidence of technical skills in the Catapult project. The failure so far to do so was the most serious issue so far as Mr McMahon was concerned. The claimant was behind schedule in all of the deliverables related to that project.

39. There had also been issues raised by other colleagues which appeared to be poor interpretation of email communications and a very negative reaction on the claimant's part to constructive criticism.

40. The goal set was for CATP 1448 to be completed demonstrating technical capability. That would be sufficient evidence to complete the probation review sign off and a further review would be carried out on 19 February 2020.

41. Additionally, it had been brought to Mr McMahon's attention that the claimant had presented work created by Conor McFadden as his own. Conor McFadden had created that work for an EU funded project whereas the claimant had presented it as though it was an output of the claimant's catapult project. That was a difficulty because it obscured the true source of funding for the intellectual property concerned. The University needed to be careful to ensure that it did not claim funds from two different sources for the same work. Mr McMahon was also concerned that the claimant was unaware of the two funding streams and the potential conflict. Mr McMahon regarded this as plagiarism and raised it with the claimant at the probation review.

42. In evidence the claimant often equated plagiarism with a lack of consent,

emphasising that Connor McFadden had given permission to use the work. We do not think that is the point. During the hearing we raised with the parties the Oxford English Dictionary definition of plagiarism and enquired whether the respondent had its own definition. The respondent's plagiarism procedures required that the correct citation and referencing conventions were applied when a member of staff used or quoted the work of other people. That was intended to ensure that everyone received the credit due to them for their work and helped to demonstrate intellectual integrity. The point is not a lack of consent, the essence of plagiarism is a lack of attribution and referencing. It would not be plagiarism for A to use B's work in their own presentation *provided that* it was fully attributed to B so that no one could mistakenly think that the work was A's. In those circumstances there could not be any suggestion that A had passed B's work off as their own.

43. Mr McMahon accurately explained this to the claimant at the meeting. He sought to explain that it did not matter that the claimant had reused Mr McFadden's slides, the issue was that there were two project outputs showing exactly the same work with no reference to other authors or funding streams.

44. The claimant accepted in cross-examination that there was nothing in his slides to indicate Mr McFadden's role in creating some of the work. The claimant's evidence was that he had nevertheless attributed the work to Mr McFadden orally while giving the presentation. We do not accept that. If that had been said then we think it is highly likely that those present at the meeting would have remembered it.

45. Further, the finance team had raised with Mr McMahon the fact that the claimant had not been putting through his expense claims properly. On one occasion the claimant had processed £250 of foreign taxi expenses even though the route he was taking was served by regular public transport. The University's policy was that if public transport was available then it should be used. This was the reason why it was noted on the probation report that there had been concerns over non-conformance with university procurement

procedures.

46. Further, Mr McMahon had concerns about the claimant's timekeeping. He thought that the claimant often arrived after 10am. The claimant did not accept that, saying that he would only ever be 10 or 15 minutes later than 9am, his scheduled start time. We prefer Mr McMahon's evidence because of our doubts about the claimant's credibility.

47. We accept that Mr McMahon had genuine concerns about the demonstration of the claimant's technical capabilities. That was the main issue leading to an extension of probation. The other matters were subsidiary. In so far as he raised other matters which had been brought to his attention by other members of staff, we find that he did so honestly and in a way which fairly reflected what he had been told.

Organisational chart

48. It is correct that the respondent produced a structure chart which showed the claimant lower down the page than Sam Hume. However, our finding is that it was not intended to demonstrate a hierarchy, it merely demonstrated reporting lines. It was arranged in the way that it was simply because that was a convenient way of organising the relevant teams onto a single page. Mr Hume was not put under a Theme Lead because his role was very different from the technical roles which made up the majority of the chart. In truth a very flat management structure was in place at the time and Mr McMahon had a large number of direct reports. The claimant accepted in cross-examination that he was not aware whether or not everyone in the team structure reported to Mr McMahon and so we accept the respondent's evidence on this point. In order to illustrate point further, Mr Hamilton was nearly at the bottom of the chart yet he is a grade 8 and as such more senior than most of the other people shown on the chart.

Sam Hume and the Transport Scotland Call

49. On 18 June 2020 Mr Millar was asked to take part in a call with Transport Scotland about their Covid-19 response. He asked Sam Hume to join the call as well because he was a Partnership Development Lead but was not assigned to any particular project. He was also the Business Development Lead on the Transport Scotland project based on the recommendation of other colleagues. He also had experience of speaking with senior management and CEOs. It was a senior person from within Transport Scotland who would be joining the call. Sam Hume was selected because he was thought to be the best person for the task. When the claimant queried why he had not also been invited to join the call he was told that it had not been considered necessary for him to be there. There was only going to be one person from Transport Scotland involved and Mr Millar did not want too many people from the respondent's organisation to attend in case it appeared imbalanced. He wanted the meeting to be clear and concise.

Formal complaint and first stage investigation

50. On 16 December 2019 the claimant made a formal complaint about the extension of his probation period. The claimant viewed the extension as "*unfair and it is a kind of punishment because I submitted a complaint against Mr Richard Millar on 15 October 2019*". An informal meeting took place on 30 January 2020. Having considered both the grievance policy and the dignity and respect policy the claimant indicated that he would like to follow the dignity and respect procedure "*because of the misuse of power and the possible discrimination based on both ethnicity and nationality*."

51. The case was assigned to Stephanie Lumb of HR. She joined the respondent in June 2019 as an Assistant HR Advisor and was later promoted to HR Advisor in May 2020. She had a generalist HR role. She had no previous knowledge of the claimant prior to becoming involved with the investigation of his complaint. Dr Philip Riches, Vice Dean, acted as the investigating officer. Another candidate had declined to act because he felt that he had

some prior knowledge of the subject matter of the investigation. Dr Riches did not know any of the three main parties to the complaint (the claimant, Mr Millar and Mr McMahon). Ms Lumb and Dr Riches decided that they wanted to focus on the lead up to the probation meeting and the meeting itself, the potential exclusion from projects, and why the claimant felt that was due to discrimination. That seems to us to have been an appropriate and focussed approach.

52. An investigation meeting ultimately took place on 18 March 2020. The claimant presented as a highly intelligent person but also as being quite agitated. While he did not shout, it was obvious that he was tense and frustrated with the progress of the meeting. The trade union representative said relatively little.

53. The notes of the meeting were difficult to prepare because on more than one occasion the claimant sent additional information, some of which was new. There were several iterations of the notes. Ms Lumb had never found it so challenging to agree a set of notes.

54. The investigation team also met with Mr McMahon on 17 April 2020 and Mr Millar on 22 April 2020. Clearly, they were the key witnesses. Mr McMahon came across as a caring and responsible leader whose line management responsibility had grown quickly and who had not had time to review or establish team structures. Mr Millar came across as a more forthright and resolute individual, a strong character with fewer conciliatory tones than Mr McMahon. That said, he was focused, motivated by his work and wanted his teams to be successful. The investigation concluded that he was likely to have provided feedback to those around him in a clear and “unwavering” manner.

55. The investigation also met with Anastasia Khatunseva and Anisa Butt. Jaffar Juneja, Jushi Lai, Remi Zante and Sam Hume were contacted with a request to provide written responses on certain matters. They all replied. The intention was to obtain focused and specific evidence. Dr Riches was concerned not

to speak to too many people within the claimant's team for fear of disrupting its harmony and was therefore prepared to put limits on the number of people spoken to. The investigation was limited to those who could "corroborate and triangulate the statements". Dr Riches considered that he had obtained evidence from all of the important parties. That is also our view.

56. The conclusions of the investigation were as follows.

56.1. Since the claimant had acknowledged the unattributed use of someone else's work (even with their permission) that matter on its own was sufficient to justify the extension of his probationary period. Dr Riches regarded that as unacceptable performance.

56.2. There was also evidence of poor timekeeping and attitude.

56.3. Dr Riches regarded the process adopted in relation to ADR and probation reviews as being clumsy, but not unfair.

56.4. No evidence was found that the claimant's training requests had been unfairly rejected.

56.5. The claimant had not been unfairly excluded from other projects given that all work needed to be allocated to an internal budget code and there was sufficient work to be done on the project for which the claimant was recruited.

56.6. There was no evidence that the claimant had been excluded from strategic discussions.

56.7. Mr Millar could deliver his opinions in a blunt manner. However, there was also evidence that he was consistent in that manner and treated everyone equally. Multiple sources of evidence felt that his feedback had been appropriate. Dr Riches did not agree that Mr Millar's email had contained "personal insults" but felt that it could have been handled slightly better. However, there was no evidence that the claimant had been singled out and treated differently from the rest of the team.

56.8. None of the witnesses had heard any derogatory or discriminatory remarks alluding to the claimant's background. There was no evidence at all to link the claimant's treatment to his ethnicity. The staff group was diverse and nobody spoken to had suggested a culture of racism or any concerns that they were being treated unfairly because of their background. The

allegations of race discrimination were not upheld.

56.9. Overall, Messrs McMahon and Millar had given reasonable and satisfactory explanations for their treatment of the claimant.

57. The outcome report made recommendations. The first was that there should be mediation between the claimant and Richard Millar. The second was for a review of the digital team. Mr McMahon was the team lead and effectively had 22 people working for him. Theme Leads did not have any line management responsibility over those within the relevant Theme. Dr Riches struggled to understand how that structure worked in practice, especially if Mr McMahon was away. The final recommendation was that a new meeting should take place so that the claimant clearly understood what he needed to do to pass his probation, because the probation review had not been done well.

Appeal

58. The appeal process was conducted by Dawn Watt, HR Partner, and Dr Kepa Mendibil, Associate Dean. He saw his role as appeal officer as being to review the case in detail, to ensure that a fair process had been conducted and that the University's policies had been adhered to. The claimant provided grounds of appeal on 5 August 2020. Some of them were new issues, not raised in the original complaint but the appeal panel was content to investigate them anyway.

59. Email contact was made with Mr McMahon in relation to the probationary report and ADR review. In that communication Dawn Watt posed some questions in a format which a lawyer would probably regard as leading. While best practice might have been for her to have asked more open questions we do not think that this reveals bias, preconceptions or a made up mind on her part. It would be wrong to apply the standards of professional advocates operating in a formal court environment to an HR professional who was trying to progress a workplace investigation in an efficient manner.

60. A meeting was held with the claimant on 12 August 2020. It was originally scheduled for one hour but ended up running for two hours. Dr Mendibil chose to miss another meeting because he felt it was important that the claimant should be given time to state his case on appeal. The claimant was also informed that the panel would be happy to have a follow-up meeting with him if required, but that did not prove necessary.

61. The meeting went through the claimant's grounds of appeal one at a time. The panel found some of the claimant's grounds of appeal difficult to understand and attempted to clarify them at the meeting. Even after discussions at the meeting some of them remained unclear. The claimant did most of the talking on his own behalf and the trade union representative made relatively little contribution. On several occasions the claimant would go off on tangents and the panel attempted to keep the conversation focused and relevant to the points raised on appeal. The claimant had a confrontational approach to the meeting, particularly in relation to several of his colleagues and the overall process adopted for handling his complaint. The claimant regularly raised his voice when Dawn Watt was speaking, interrupted her and spoke over her. On several occasions Dr Mendibil had to intervene.

62. After the meeting the panel contacted Conor McFadden because the claimant had complained that he had not been spoken to. The panel then met with Danny McMahon on 25 August 2020 to clarify how the plagiarism issue had been dealt with.

63. Once again, it proved very difficult to agree the minutes of the meeting with the claimant. The claimant had been asked to make tracked changes on the draft notes prepared by the respondent but had not done so. He also failed to comply with a further request to send a document showing tracked changes. Instead, he submitted separate documents which, confusingly, included new issues which had not actually been discussed at the appeal meeting. Ultimately, the appeal panel felt that the only way forward would be to

maintain two versions of the notes of the meeting, their own and the claimant's. Both were held on file. We find that the claimant's approach to agreeing the notes of the meeting was unhelpful and obstructive. The respondent did all that it could realistically do in circumstances where it was obvious that agreement on the notes would not be reached.

64. The key conclusions of the appeal panel were as follows.

64.1. The claimant had not been treated in any way differently from others in relation to the timing of his ADR and probation review.

64.2. The probation had been extended because there had been limited evidence of technical capability, which was core to his role. While other issues had been raised in the same document it was explicitly stated that the demonstration of technical capabilities and outcomes would be sufficient to complete the extended probation period.

64.3. There were issues in relation to the timing of the interim and final probationary review and the annual ADR. The interim review should have been carried out in a timely manner and run in parallel to the ADR process. The ADR meeting should not have been used as an interim probationary review as well.

64.4. However, although procedures had not been adhered to that was not because of the claimant's race.

64.5. The plagiarism issue should have been investigated properly if it had been a genuine concern. There was a dedicated process for that within the University. However, the key reason for the extension of probation was not plagiarism but instead the need for further demonstration of technical capabilities.

64.6. The email sent by Richard Millar on 23 September 2019 was quite direct but contained nothing out of the ordinary. It would have been more appropriate for the reply to be sent direct to the claimant without copying in the rest of the team, but it was understandable why that had been done. Mr Millar had wished to prevent the team from spending time on the claimant's request when that was unnecessary.

64.7. The claimant had not been excluded from projects, he had failed to

understand that he was contracted to work on a very specific EU funded project and that other staff were not in the same position.

64.8. The organisational chart was purely for the purpose of communicating how the ADR process would be conducted. There had not been any change to the structure of the team. Given that Mr McMahon was responsible for managing a large number of people it was entirely reasonable for the ADR process to be delegated among the team. That happened in other parts of the University. There was no evidence that the claimant's race was a factor.

64.9. The outcome report also dealt with certain other points which are not central to this claim. We do not think it is necessary to list them all.

64.10. Overall, the panel concluded that there was no evidence to suggest that the claimant had been discriminated against because of his race. The panel had no concerns about the original investigation or outcome.

Redeployment

65. The claimant was employed on a fixed term contract. The grant funding for it expired on 18 February 2021. The contract was always going to be time-limited and that was known and clear from the start of the claimant's employment. There was no option to extend the funding.

66. While it is true that other staff within AFRC employed on fixed term contracts had their contracts renewed, they were employed on different grants. Those grants were extended by the funder resulting in an extension of the associated fixed term contracts.

Legal principles

Direct race discrimination

67. All of the claims are for direct race discrimination. This is defined by section 13 of the Equality Act 2010. Section 13(1) provides as follows:

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

68. By virtue of section 23(1) of the Equality Act 2010, when carrying out that comparison there must be "no material difference" between the circumstances relating to each case.

69. Race is listed as one of the protected characteristics in section 4 of the Act and is defined so as to include "ethnic or national origins" in section 9(1)(c).

70. Section 39(2) of the Act provides that an employer must not discriminate against an employee by subjecting that person to "any other detriment".

Burden of Proof

71. The burden of proof in proceedings relating to a contravention of the Equality Act 2010 is governed by section 136 of that Act. The correct approach is set out in section 136(2) and (3). References to "the court" are defined so as to include an employment tribunal.

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

72. The Court of Appeal has repeatedly stressed that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for the statutory language.

73. We have taken into account the well-known guidance given by the Court of Appeal in ***Igen Ltd v Wong*** [2005] ICR 931 (sometimes referred to as "the

revised ***Barton*** guidance"), which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054. ***Ayodele v Citylink Ltd*** [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in ***Igen Ltd v Wong*** and the Supreme Court in ***Royal Mail v Efobi*** [2021] UKSC 33 has now conclusively endorsed that analysis.

74. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a "*prima facie*" or, in plainer English, a "first appearances" case of discrimination which needs to be answered. If the inference of discrimination *could* be drawn at the first stage of the enquiry then it *must* be drawn at the first stage of the enquiry, because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed *unless* the respondent can discharge the burden of proof at the second stage.

75. However, if the claimant fails to prove a "*prima facie*" or "first appearances" case in the first place then there is nothing for the respondent to address and nothing for the Tribunal to assess. See ***Ayodele*** at paragraphs 92-93 and ***Hewage*** at paragraph 25.

76. At the first stage of the test, when determining whether the burden of proof has shifted to the Respondent, the question for the tribunal is not whether, on the basis of the facts found, it *would* determine that there has been discrimination, but rather whether it *could* properly do so.

77. The following principles can be derived from ***Igen Ltd v Wong*** (above), ***Laing v Manchester City Council*** [2006] ICR 1519 EAT, ***Madarassy v Nomura International plc*** [2007] ICR 867, CA and ***Ayodele v Citylink Ltd*** (above), which reviewed and analysed many other authorities.

77.1. At the first stage a Tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence

adduced by the claimant and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a *prima facie* case of discrimination. A respondent may, for example, adduce evidence that the allegedly discriminatory acts did not occur at all, or that they did not amount to less favourable treatment, in which case the tribunal is entitled to have regard to that evidence.

77.2. There is a vital distinction between "facts" or evidence and the respondent's "explanation". While there is a relationship between facts and explanation, they are not to be confused. It is only the respondent's *explanation* which cannot be considered at the first stage of the analysis. The respondent's *explanation* becomes relevant if and when the burden of proof passes to the respondent.

77.3. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the *possibility* of discrimination and a mere possibility is not enough. Something more is required. See paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy***.

78. However, it is not always necessary to adopt a rigid two stage approach. It is not necessarily an error of law for a tribunal to move straight to the second stage of its task under section 136 of the Equality Act 2010 (see for example ***Pnaiser v NHS England*** [2016] IRLR 170 EAT at paragraph 38) but it must then proceed on the assumption that the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively assumes in their favour that the first stage has been satisfied. The risk is to a respondent which then fails to discharge a burden which ought not to have been on it in the first place (see ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraphs 71 to 77, approved by the Court of Appeal in ***Madarassy***). Tribunals must remember that if and when they decide to

proceed straight to the second stage.

79. It may also be appropriate to proceed straight to the second stage when the claimant compares their treatment to that of a hypothetical comparator. Sometimes the reason for the treatment, and the question whether there is a *prima facie* or "first appearances" case of discrimination, will inevitably be intertwined with the question whether the claimant was treated less favourably than a comparator, especially a hypothetical comparator. In cases of that sort the decision on the "reason why" issue will also provide the answer on the "less favourable treatment" issue (see Lord Nicholls in ***Shamoon v Chief Constable of the RUC*** [2003] ICR 337 at paragraphs 7 to 12 and Elias LJ in ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraph 74).

80. In a similar vein, the Supreme Court in ***Hewage*** (above) observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination but they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

The approach to evidence

81. While the statutory questionnaire procedure has now been repealed, an inference might still be permissible if a respondent has failed to respond to a question asked outside that (now repealed) procedure. Where the burden is on the respondent, its failure to produce relevant documentation can be a relevant matter to which the tribunal should have regard when weighing the totality of the evidence (see ***EB v BA*** [2006] IRLR 471, CA at paragraphs 50 to 51 and ***Meister v Speech Design Carrier Systems GmbH*** C-415/10 [2012] ICR 1006, ECJ).

82. More generally, a tribunal should exercise caution when asked to place reliance on recollections, particularly if given some time after the event and

in the context of litigation, rather than relevant contemporaneous documents (see ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** [2013] EWHC 3560 Comm, at paragraphs 15 to 22).

83. In particular, when considering direct discrimination claims, tribunals must bear in mind the specific difficulties that arise and be astute to the danger of self-serving explanations from employers or witnesses. Discrimination is rarely overt. That problem was alluded to in the well-known passage in ***King v Great Britain China Centre*** [1992] ICR 516, CA at pages 528f to 529c. When testing a respondent's evidence in such a case, it may well be relevant that an equal opportunities procedure has not been followed or that subjective criteria have been adopted. See ***Anya v University of Oxford*** [2001] ICR 847 CA.

Submissions

84. Since the parties made their submissions entirely in writing, little useful purpose would be served by a separate summary of those submissions in this judgment. Instead, we will deal with the key points made by each side in the course of our reasoning.

Reasoning and conclusions

85. We will set out our reasoning and conclusions in an order which follows the order of issues set out in the claimant's further particulars. That will necessarily entail analysing the allegations and setting out our conclusions in a fairly linear fashion. However, we have also been careful not to consider each allegation in a separate compartment, isolated from the whole. When applying the burden of proof we have considered the aggregate effect of the allegations too, since one allegation might amount to a "***Madarassy*** factor" causing the burden of proof to pass in relation to another.

86. We also drew on the industrial experience of the non-legal members of the

Tribunal. This is a case in which we have been asked to draw adverse inferences about structure charts, probationary review processes and investigations into complaints. The industrial experience of the members has been invaluable when assessing whether alleged shortcomings in those tools and processes were of a nature which might pass the burden of proof to the respondent.

Allegation 1 – isolation and exclusion from the digital manufacturing team, exclusion from strategic and future projects meetings and the digital innovation hub.

87. We refer back to our findings of fact, and in particular those at paragraphs 15 to 25, above.

88. In short, we accept the respondent's evidence as to the facts and also as to the reasons for the claimant's treatment, which had nothing whatsoever to do with race. The claimant's submission was essentially very simple: that it was untrue that he must work for 100% of his time on the MIDH project.

89. It is important to remember the way in which the claimant's role was funded. It was funded by EU funds and it was necessary to ensure that the claimant devoted the overwhelming majority of his time to the MIDIH project, otherwise the respondent would not be able to draw down those funds. The claimant was allowed to become involved in a Catapult project which was funded from a different source, but predominantly it was necessary for him to focus on the role for which he had been recruited. This is a non-racial reason for requiring the claimant to focus principally on the MIDIH project and to limit his involvement with other projects.

90. We will also deal with a number of other points, arguably relevant to this allegation, even though they were not specifically mentioned in the claimant's written submissions. They were explored in evidence.

91. Sam Hume might have had a similar job title but he was not assigned to the MIDIH project and did not in fact have a technical role at all. His role was business development. The very different nature of Sam Hume's role was a non-racial reason for a difference in treatment.

92. A hypothetical comparator whose circumstances were not materially different from those of the claimant would be someone whose post was funded in a comparable manner and who was similarly required to devote the majority of their time to a particular project. We see no evidential basis for a conclusion that this comparator would have been treated any more favourably than the claimant. Sam Hume's circumstances were materially different and so his treatment is of no real assistance when deciding how the hypothetical comparator would have been treated.

93. We can deal with the point concerning the European interns and involvement with their visit very shortly. The reason for the claimant's omission from the original email circulation list was the fact that he had not been in the office on the day when Mr Millar had discussed the visit with those present. There is no evidence to suggest any other reason for the claimant's omission. It had nothing to do with race. Further, once the claimant had raised his concerns Mr Millar was entirely willing for the claimant to be involved, further weakening any inference that the reason for the claimant's exclusion from the email list might have had anything to do with race.

94. The allegation that the claimant was excluded from the Digital Innovation Hub is answered by the chronology. We are satisfied that the project was only awarded in October 2020, by which time the claimant's MIDIH project had finished and he was working in a different part of the business following the centralisation of those with business development functions under the commercial department. By then, the claimant had acquired a business development role. The claimant was not working in the technical side of the business at the relevant time. We are quite satisfied that the reason for the claimant's exclusion, if exclusion is even the right term, is simply that his role

had changed and that he was working in a different part of the business. It had nothing whatsoever to do with race.

95. As far as strategy meetings are concerned, only Mr McMahon was of sufficient seniority to attend. Nobody of the claimant's level was involved. That is a non-racial reason for the claimant's lack of involvement.

96. Insofar as the claimant alleges that he was excluded from the development of certain "testbeds", the explanation is once again that they were separate from the MIDIH project to which the claimant was primarily assigned. There were a number of different "testbeds" but they were not all part of the claimant's remit. We are not persuaded that the claimant was excluded from involvement in any testbed he might reasonably have expected to have become involved in, given the need for him to focus primarily on the MIDIH project. There is a clear non-racial reason for his treatment.

97. We have therefore concluded that on this allegation the claimant has not proved facts sufficient to pass the burden of proof to the respondent. Even if he had, we are quite satisfied on the evidence we have heard that the claimant's treatment had nothing whatsoever to do with race. The hypothetical non-Arab comparator whose circumstances were not materially different would have been treated no more favourably.

Allegation 2 – being blocked from representing AFRC in high volume manufacturing catapult cross-centre activities

98. We refer back to our findings of fact, and in particular those at paragraphs 21 to 25, above.

99. For the reasons set out above, we reject the claimant's suggestion that he was recruited as a like for like replacement for Mr Marshall. The job description was the same but in practice it was a different role because several of Mr Marshall's responsibilities had been taken on by others.

100. The claimant accepted that Mr McMahon properly represented AFRC on several cross-centre activities. Anastasia Khatunsteva had a particular involvement in one project because of her background in waste management. Further, the claimant *did* participate in some cross centre activities, such as a large transformational project. If involvement in testbed projects is relevant to this allegation then we repeat our findings above. In all respects, there are clear non-racial reasons for the involvement of other individuals in particular projects in preference to the claimant.

101. In so far as business development leads were passed by Mr McMahon to Mr Hume the explanation is that Mr Hume's role was focused on business development. The claimant's was not. Mr Hume's role was materially different from the claimant's. That is a non-racial reason for Mr McMahon's actions and the hypothetical non-Arab comparator with the claimant's role and responsibilities would have been treated no more favourably.

102. We do not consider that the claimant has proved facts sufficient to pass the burden of proof to the respondent. Even if he had, we think that the evidence clearly supports a finding that the reason for the claimant's treatment had nothing whatsoever to do with race.

Allegation 3 – Richard Millar's email of 25 September 2019

103. We refer back to our findings of fact, especially at paragraphs 32 to 35, above.

104. We have no doubt that this matter could have been handled more delicately by Mr Millar, or that the claimant was embarrassed by his treatment. It constituted a detriment in that the claimant might reasonably regard it as putting him at a disadvantage.

105. However, we accept Mr Millar's explanation. First, the email was sent on his first day back at work after a period of bereavement leave. He felt under

pressure. He also felt a need to act quickly to prevent the team from becoming involved in unnecessary work at the claimant's request. Those are the reasons why he replied to all making the comments that he did, they have nothing to do with race and a hypothetical non-Arab comparator who had sent an equivalent email to that sent by the claimant would have received treatment which was no more favourable. Mr Millar had not sent a similar email before but that is because a similar situation had not arisen before. We think that it would have been far better if Mr Millar's comments had been made to the claimant alone and a different message used to prevent other staff from becoming involved in unnecessary work. However, we are also quite satisfied that the reason for Mr Millar's actions had nothing whatsoever to do with race.

106. Our analysis is that the facts are just about sufficient to pass the burden of proof to the respondent because an email had been sent to the claimant and all of the claimant's colleagues which understandably caused him some embarrassment. That act calls for an explanation because those bare facts do not themselves supply an obvious lawful reason for the treatment. However, the respondent has given an explanation which we accept. We are quite satisfied on the balance of probabilities that the reason for the claimant's treatment had nothing whatsoever to do with race.

Allegation 4 – accusation of plagiarism

107. Although the investigation of the claimant's complaint and the associated appeal also considered this matter our own findings are at paragraphs 41 to 44, above.

108. The source of the information was Mr Millar. He attended the slideshow at which the claimant presented the relevant work. We find that he was very unlikely to be wrong on the issue whether the claimant attributed any part of his presentation to a colleague and that Mr McMahon was entitled to treat Mr Millar as a reliable source of information on this point. So do we. We have already set out our own finding that Mr Millar was correct that the claimant

failed to attribute the relevant work to Connor McFadden at the time of the presentation. In our judgment the failure of Mr McMahon (or the original investigation) to speak to Connor McFadden is irrelevant because the issue was not Mr McFadden's permission or consent for the claimant to use his work, but rather the claimant's attribution of it in his presentation.

109. Mr Millar only realised that plagiarism might be an issue following a conversation with another colleague after the presentation. Mr Millar informed Mr McMahon on 21 November 2019, not long before the probation review meeting. In those circumstances it should not be especially surprising that Mr McMahon chose to raise it with the claimant at the probation review meeting, even if the eventual conclusion of the appeal process was that any allegation of plagiarism should have been separately investigated. Plagiarism was a potentially serious issue, especially in an academic environment. That was a non-racial reason for raising it with the claimant during the probation review meeting. Mr Millar and Mr McMahon both had genuine concerns about plagiarism based on Mr Millar's observation of the claimant's presentation. The mere fact that there was no formal plagiarism investigation does not cause us to doubt the genuineness of Mr McMahon's reason for raising it with the claimant in the context of a probation review meeting. In our assessment it had nothing to do with race and everything to do with its seriousness. Within the industrial knowledge of this Tribunal, it fell within the range of things properly discussed at a probationary review.

110. Having considered matters in the round we conclude that the claimant has not proved facts from which we could conclude, in the absence of a satisfactory explanation, that the plagiarism allegation had been raised during the probation review meeting because of race discrimination and so the burden of proof does not pass to the respondent. Even if it had, we are quite satisfied on the evidence we have heard that race formed no part of Mr McMahon's reason for raising the matter. The hypothetical non-Arab comparator who had also failed to attribute or reference the work of a colleague during a presentation would have been treated no more favourably.

Allegation 5 – extension of probation and validity of reasons

111. Our relevant findings of fact are primarily at paragraphs 36 to 47, above.

112. We reject the claimant's fundamental argument that the reasons given for the extension of his probationary period were "not valid". We think that there was credible evidence to support all of them and that they also constituted proper and non-racial reasons for extending a probationary period.

113. The main reason, and a reason which would have justified an extension of probation on its own, was the lack of evidence of technical capability as a result of a lack of progress on the claimant's Catapult project. The claimant was behind schedule on all deliverables. That is an objective matter which has nothing to do with race.

114. We also accept that Mr McMahon had evidence that the claimant was not a good timekeeper, had not claimed expenses correctly and had displayed a problematic attitude in meetings with colleagues. Those were also matters properly raised at a probation review even if they were not themselves the main reason for extension of probation.

115. We also find that the plagiarism issue was properly raised with the claimant even if it could also, and perhaps should, have been investigated separately. We can easily understand why it was raised with the claimant during the probation review and we do not consider that the failure to commence a separate plagiarism investigation casts doubt on the respondent's reasons for raising it. No adverse inference arises.

116. We find that the respondent did have a valid reason, based on evidence, for the extension of the claimant's probation period. We therefore reject the essential thrust of the claimant's argument on this allegation. The claimant has not proved facts from which we could, in the absence of a satisfactory

explanation, find race discrimination and so the burden of proof does not pass to the respondent. Even if it had done, we are entirely satisfied on the evidence we have heard that the reasons for the extension of the claimant's probation had nothing to do with race. They were all based on genuinely held concerns about the claimant's conduct and performance and the hypothetical non-Arab comparator would have been treated in a way which was no more favourable.

Allegation 6 – structure chart, the Transport Scotland call

117. Our relevant findings of fact are at paragraphs 48 and 49 above.

118. In fact, two structure charts were in issue during the hearing. That was not always clear from the way in which the allegation was framed but we will deal with both because the answer is the same.

119. The structure chart at page 143 of the joint file of documents did not, as the claimant may have misunderstood, depict hierarchy or seniority. That was not its meaning and we therefore conclude that he did not suffer the alleged detriment. For example, Andrew Hamilton was placed towards the bottom of the structure chart but he was actually a grade 8, a higher grade than the claimant and the same grade as Mr McMahon. The claimant was shown under Richard Millar because Mr Millar was the relevant Theme Lead. Sam Hume's position was displayed differently because he did not have a technical role and therefore there was no relevant Theme Lead so far as he was concerned. Mr Hume might have been higher up the chart but that should not be interpreted as showing greater seniority, rank or status. In truth, the respondent had a very flat hierarchy in this part of the business at the relevant time which was difficult to display accurately on paper of conventional dimensions.

120. Further, the reason for the claimant's treatment on the other structure chart at page 248 had nothing whatsoever to do with race. The intention was to

show who would be responsible for each person's ADR. Nothing about seniority, rank or status could be inferred from a member of staff's closeness or relative closeness to the top of the page. This structure chart was not referred to by the claimant in his written submissions but it was considered during the hearing and we deal with it for the sake of completeness.

121. We find that the claimant has not proved facts in relation to the structure charts from which we could conclude, in the absence of a satisfactory explanation, that he had been treated less favourably because of race. Therefore, the burden of proof did not pass to the respondent. Even if it had done we entirely accept the respondent's explanation for the treatment, which had nothing whatsoever to do with race.

122. The Transport Scotland call was not mentioned in the claimant's submissions, but since it was considered during the hearing we will deal with it anyway. We are quite satisfied that the reason for the claimant's treatment had nothing whatsoever to do with race. Sam Hume's role and experience made him an appropriate person to join the call. The respondent was keen to ensure that there were not too many people on the call from the respondent's side because a single person would be joining from Transport Scotland. We find that those are objective and non-racial reasons for the claimant's lack of involvement in the call. Once again, we find that the claimant has not proved facts sufficient to pass the burden of proof to the respondent but that even if he had done so the respondent's explanation is cogent and persuasive. It had nothing to do with race.

Allegation 7 – failure to investigate/properly deal with the formal complaint at the first stage, including a failure to interview Connor McFadden

123. Our relevant findings of fact are at paragraphs 50 to 57 above.

124. We think that the failure to interview Connor McFadden was a very minor matter. He might have been able to give evidence of prior consent for the

claimant to use his work, but consent was not the point. The point was whether the claimant had properly referenced and attributed the work to Mr McFadden. Mr McFadden had no evidence to give on *that* point.

125. More generally, we regard the investigation as a conscientious and reasonably thorough one. It certainly could have been *more* thorough, for example if the evidence given by Mr McMahon had been checked with other witnesses. However, in our judgment no adverse inference arises simply because it would have been possible to carry out a better investigation. The one that was carried out was conscientious, diligent and reasonably thorough. In our assessment it was not an investigation of poor quality, or one which had striking shortcomings which call for an explanation. We see no evidence of pre-judgment or of simply going through the motions of a genuine investigation. Relevant witnesses were interviewed or contacted in writing and they were asked highly relevant questions. Corroboration might not have been sought on every single point but it nevertheless strikes us as a real and genuine investigation, untainted by preconception, inconsistency or disinterest.

126. Relying on its industrial experience, the Tribunal considered this to be a fairly complex investigation, partly due to the way in which the complaint had been expressed by the claimant. For example, the claimant kept adding evidence and raising numerous issues with the minutes of meetings, including adding matters which the respondent's witnesses did not believe to have formed part of the hearings.

127. We concluded that there might have been some procedural shortcomings, especially if the investigation were to be measured against the standard of perfection, but they were not surprising shortcomings. They were of a type and degree often seen in the workplace, especially in an investigation with this much material. We also note that the HR Officer was fairly junior, an assistant HR Advisor at the relevant time, not yet promoted to HR Advisor. She had never before carried out a discrimination investigation although she

had been involved in 10 to 15 investigations of other types. As Ms Lumb said in cross-examination, "*you don't always ask every single question which with hindsight you might have wanted to*". The question for us is why those additional questions were not asked or why those additional steps were not taken. We are satisfied that they were simple oversights in an investigation of some complexity, an investigation which nevertheless reached an acceptable standard and which was fit for purpose.

128. It was argued on behalf of the claimant that a comparative approach was required and that the respondent should have made clear findings comparing the claimant's treatment with that received by others. That would have been one approach but it is not always necessary or the most convenient. In our judgment it was perfectly acceptable for the respondent to adopt an approach of investigating the reasons for the treatment of which the claimant complained. No adverse inference arises from the failure to adopt a rigorously comparative approach. To the extent that the claimant relied on hypothetical comparisons there is little practical difference between the two approaches anyway.

129. As for the conclusions reached by the investigation, we are satisfied that they were cogently reasoned and based on the evidence gathered by the enquiry. The claimant did not mount any detailed attack on any of those conclusions and we see no basis for any inference that a non-Arab comparator would have received more favourable conclusions from their point of view.

130. Overall, we are not persuaded that a non-Arab comparator would have experienced an investigation process or outcome which was any more favourable. We do not consider that the claimant has proved facts from which, in the absence of a satisfactory explanation, we could conclude that the claimant had been the victim of unlawful race discrimination in this respect. Even if the burden of proof had passed to the respondent then we are quite satisfied that any shortcomings were simply minor procedural or forensic shortcomings in an otherwise sound investigation, and did not have anything

to do with race.

Allegation 7 – sharing the outcome of the report with Mr Millar and Mr McMahon two days before the claimant

131. We do not accept that Ms Lumb intentionally sent the investigation outcome to Mr Millar and Mr McMahon on 5 June 2020 and delayed the sending of the outcome to the claimant until 8 June 2020. We accept her evidence that she had been unaware that there had been a delay until these proceedings were commenced. Having seen a printout of the relevant email properties we are satisfied that Ms Lumb is telling the truth that she sent the report to both individuals at the same time on 5 June 2020, but that she must have shut down her computer before sending to the claimant had completed. The email to the claimant remained in her outbox over the weekend. Sending therefore completed after the weekend when she next logged on. That is the non-racial explanation for the delay in the claimant receiving the investigation outcome.

132. Once the facts are correctly understood we find that they are insufficient to pass the burden of proof to the respondent, but that even if they were the non-racial explanation for the treatment is clearly established on the balance of probabilities.

Allegations 8 and 9 – appeal not dealt with fairly, outcome pre-determined and issues regarding the minutes

133. Our key findings of fact are at paragraphs 58 to 64 above.

134. We do not accept that the outcome of the appeal was predetermined. On the contrary, the appeal process strikes us as a conscientious and diligent attempt to investigate the matters raised by the claimant and to give him all the time that he needed to do so.

135. Ms Watts was a HR specialist, not a lawyer, and she was not operating in a

formal court setting. Her leading question was perhaps not ideal but in our view it was a minor error rather than a systemic one. It represented an isolated departure from best practice. She had her own knowledge which she was seeking to confirm and it is understandable in those circumstances that she might have phrased the question in the way that she did.

136. As for time allocation, it was made clear to the claimant that the appeal hearing could exceed the one-hour allocated to it if necessary. He was told that and it did. The respondent was quite prepared to override other commitments to ensure that the hearing lasted for as long as it needed to last. That shows a willingness to prioritise the claimant's appeal over other matters. We note that the claimant's trade union representative made no complaint about short notice of the meeting or the decision to set its duration initially at one hour. In our judgment no inference of predetermination arises from the fact that one hour was initially allocated for the hearing. The claimant accepted that two hours was long enough for a fair hearing and that is what he was given. Although he later changed his evidence to say that three hours would have been needed we gave that little weight since it appeared to be another example of the claimant tailoring his evidence once he realised the implications of what he had said.

137. The reference to Mr McMahon being "a professional" is innocent in our view and does not betray any bias or pre-judgment. It was simply an effort to reassure the claimant that Mr McMahon would be able to hold the ADR properly and professionally, despite the fact that the claimant had made allegations against him. We think it is far too much of a leap to conclude that the appeal was predisposed to accept everything that Mr McMahon said on the issues arising in the appeal. The panel carried out far too much other investigation of the relevant facts for that to be a reasonable inference.

138. We draw no adverse inference from the failure to agree a set of minutes. Regrettably, it appears to have been a feature of the previous stage of the process too. We are satisfied on the balance of probabilities that the

explanation is the claimant's intransigence and unwillingness to accept, even in broad terms, the accuracy of a document prepared by the respondent. In those circumstances we think that the respondent selected the only pragmatic option open to it – to maintain two sets of minutes on the file, one prepared by the respondent and the other by the claimant.

139. We note that the appeal reached several positive conclusions from the claimant's point of view, for example in relation to the performance appraisal process. We also note that the appeal did interview Connor McFadden as the claimant had requested. The appeal was also prepared to investigate points raised by the claimant on appeal which had not been raised at the first stage of the process.

140. Once again, the claimant argued that the failure to adopt a strictly comparative approach to an investigation into possible discrimination was a shortcoming which called for an explanation. We do not agree. We think it was quite acceptable for the respondent simply to investigate the reason for the treatment of which the claimant complained.

141. Assessed overall we are satisfied that the appeal panel were open to the possibility of wrongdoing and that was clear from the questions they asked. Their conclusions were reached after appropriate questions and a genuine process, not pre-judgment. Those conclusions were soundly reasoned by reference to the evidence they heard.

142. Our overall finding in relation to the appeal is that the claimant has not proved facts from which, in the absence of a satisfactory explanation, we could conclude that unlawful race discrimination was the reason for his treatment. We are satisfied that a hypothetical non-Arab comparator would have been treated no more favourably during a comparable appeal process. Even if the burden of proof had passed to the respondent we are satisfied that race had nothing whatsoever to do with the claimant's treatment. Few processes are perfect and no adverse inference arises from the mere fact that improvements

could be suggested with hindsight.

Allegation 10 – non-renewal of the claimant's contract

143. Our findings of fact are at paragraphs 65 and 66 above.

144. The claimant made no real submissions on this point beyond an assertion of discrimination, "*the claimant submits that in failing to renew his contract in circumstances where the contracts of others were renewed, the respondent treated him less favourably than they would treat a non-Arab person.*" No other submission was made. The only other member of staff mentioned by name in the further and better particulars was Mr Sam Hume.

145. The claimant had been hired on a contract of fixed duration, as he knew. It was tied to a particular source of funding for the MIDIH project which was also of fixed duration. The MIDIH project wound down around September 2020 and after that the claimant was involved to a greater extent in business development activities. If the funding for the claimant's post had been extended or replaced by substitute funding from another source then the failure to renew the claimant's fixed term contract might call for an explanation. However, those were not the facts. The funding came to an end and so the claimant went through a redeployment process. He was successful in that process and found another job with the respondent.

146. Others in AFRC who had their contracts renewed were in a different situation because their roles were funded by working across various different projects including Catapult, CR&D and Directly Funded, although for administrative purposes they were attributed financially to Catapult. The point is that the sources of funding for their roles continued in one way or another. Their circumstances were therefore materially different.

147. On this allegation we find that the claimant has not proved facts from which, absent a satisfactory explanation, we could conclude that the non-renewal of

the claimant's contract was because of race. Therefore, the burden of proof does not pass to the respondent. However, even if it had we are entirely satisfied with the respondent's explanation. Essentially it was all to do with funding. The reason why the claimant's fixed term contract was not renewed was because the source of funding on which it was based was not renewed or extended. The claimant was therefore redeployed, successfully. The other individuals referred to in evidence worked in roles for which funding was renewed or extended.

148. The hypothetical compactor would be a non-Arab member of AFRC staff the funding for whose post also came to an end at around the same time. We are satisfied that such a comparator would have been treated in the same way, in that their fixed term contract would have come to an end. They would similarly have been subject to the respondent's redeployment procedures.

Overall conclusion

149. For all of those reasons our conclusion is that all of the allegations of direct race discrimination fail and are dismissed.

150. Therefore, it is neither necessary nor appropriate for us to consider jurisdictional time points.

Employment Judge: Mark Whitcombe
Date of Judgment: 15 June 2022
Entered in register: 15 June 2022
and copied to parties