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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100892/2022

**Final Hearing held in Dundee on 20 – 23 March 2023,
11 – 14, 17 – 21 and 24 - 25 July 2023, 30 October - 3 November 2023 and
13 November 2023**

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**Employment Judge A Kemp
Tribunal Member P Fallow
Tribunal Member J Lindsay**

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Dr Dita Wickins-Drazilova — **Claimant
Represented by:
Mr L G Cunningham,
Advocate
Instructed by:
Ms A Peat,
Solicitor**

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University of Dundee — **Respondent
Represented by:
Mr P Grant-Hutchison,
Advocate
Instructed by:
Ms L Rankin,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that

(i) the Tribunal does not have jurisdiction to consider the claims under the Equality Act 2010, save for an allegation of breach of sections 26 and 40 of that Act in respect of a failure to address a grievance intimated by the claimant on 31 August 2021;

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(ii) the said claim for breach of sections 26 and 40 of the Equality Act 2010 in respect of a grievance intimated by the claimant on 31 August 2021 does not succeed;

(iii) there was no dismissal under section 95(1)(c) of the Employment Rights Act 1996;

and the Claim is accordingly dismissed.

REASONS

Introduction

1. This was a Final Hearing into claims for constructive unfair dismissal under section 95 of the Employment Rights Act 1996, and discrimination under sections 13, 15, 19, 20, 21, 26 and 27 of the Equality Act 2010 on the protected characteristics of sex, race and disability. The claimant in the Claim Form had also referred to protected characteristics of pregnancy and maternity but they were not pursued. The claimant quantified her claim in the most recent Schedule of Loss provided at a little over £200,000.

2. The claims are all defended, and issues of jurisdiction were reserved to this hearing. The respondent accepts however that the claimant was a disabled person and that it had knowledge of that disability on and after 13 August 2018. In submission the claimant accepted that that was the appropriate date, subject to a minor correction to 17 August 2018.

3. Each of the parties was represented by an Advocate, Mr Cunningham for the claimant and Mr Grant-Hutchison for the respondent. The Tribunal was grateful to them for their full and helpful submissions, and for the work they and their instructing solicitors had undertaken on what was a complex and lengthy case.

4. There had been a Preliminary Hearing on 6 April 2022 at which various case management orders had been made. Arrangements for a Final Hearing were then made. That Final Hearing was postponed after a further

Preliminary Hearing on 21 November 2022. The present hearing was arranged thereafter. It was held in person in Dundee. Originally it had been fixed for seven days but it quickly became apparent that that would not be sufficient and additional days of evidence were arranged, and then extended further by ten days in two separate weeks when those days were not sufficient. 13 November 2023 was utilised for submissions, with deliberations commencing thereafter. Those deliberations led to an unanimous decision.

Amendments

5. The claimant made an application at the start of the Final Hearing to amend her claims to add, in the heading prior to paragraph 31 of the paper apart to the Claim Form, and after reference to section 95 of the Employment Rights Act 1996, the following – "and section 39(2)(c) and section 39(7)(b) of the Equality Act 2010". The respondent objected to that application. The Tribunal considered the position, and resolved to grant the application. A separate Note on that was issued at the request of the respondent so that it may have considered an appeal, but it decided not to pursue that.

6. At the conclusion of his submission Mr Cunningham applied to amend paragraphs 38 - 40 of the Claim Form, and issues 12 and 14 below, by adding the following words after "hours" and before "if" – "in addition to those hours required to fulfil the duties of the role." That was not opposed by Mr Grant-Hutchison and was allowed.

Issues

7. The parties through their respective counsel had agreed a list of issues in the case, which was as follows, and has been amended in accordance with the preceding paragraph

"Constructive Dismissal (section 95 Employment Rights Act 1996)

1 On 18 May 2021, did the Claimant give notice to terminate the contract under which she was employed in circumstances in which she was entitled to terminate it by reason of the Respondent's conduct, the

Respondent's conduct being so serious that it was a fundamental breach of the contract, being a breach of the implied duty of trust and confidence, going to the root of the contract?

5 2 Does the fact that that the Claimant worked out her notice and her employment ended on 31 August 2021 mean that she affirmed her contract and was not constructively dismissed?

3 If the Tribunal finds that the Claimant was constructively dismissed, was the reason for the dismissal a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996?

4 If the Claimant's dismissal was one of the potentially fair reasons, did the Respondent act reasonably or unreasonably in dismissing the Claimant with reference to section 98(4) of the Employment Rights Act 1996?

Time Limits

5 Have the proceedings under the Equality Act 2010 been brought before the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable? It being alleged by the Claimant that the date of the act to which the complaint relates is 31 August 2021 (the last day of her employment) as she was subjected to conduct extending over a period ending on 31 August 2021 and it being alleged by the Respondent that the date of the act to which the complaint relates is 17 May 2021 (being the last alleged act of discrimination, as pled by the Claimant).

6 In respect of any acts which occurred before 17 May 2021 or 31 August 2021 (as the case may be), do they constitute conduct extending over a period which ended

on or before 17 May 2021 or 31 August 2021 (as the case may be) for the purposes of section 123(3)(a) of the Equality Act 2010?

Knowledge of Disability

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7 When did the Respondent first become aware of the Claimant's disability or could reasonably have been expected to know of the Claimant's disability? The Respondent admits knowledge of the Claimant's disability from 13 August 2018.

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Direct Discrimination (s13 Equality Act 2010)

8 Did the Respondent discriminate against the Claimant because she is female by treating her less favourably than they treat, or would treat, a male? The alleged less favourable treatment being the decisions not to promote the Claimant in 2015, 2016 and 2017.

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9 Did the Respondent discriminate against the Claimant because of her race (Czech nationality) by treating her less favourably than they treat, or would treat, others (British nationality)? The alleged less favourable treatment being the decisions not to promote the Claimant in 2015, 2016 and 2017.

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10 Did the Respondent discriminate against the Claimant because of her disability (Chronic Idiopathic Pancreatitis) by treating her less favourably than they treat, or would treat, others (those not having that disability)? The alleged less favourable treatment being the decision not to promote the Claimant in 2018.

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Discrimination arising from Disability (s 15 Equality Act 2010)

11 Did the Respondent discriminate against the Claimant (a disabled person) by treating the Claimant unfavourably because of something arising in consequence of her

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disability, such treatment not being a proportionate means of achieving a legitimate end? The alleged unfavourable treatment was refusing to even consider the Claimant for promotion if she could not work the hours being demanded of her. The Claimant's inability to work the longer hours being demanded of her arose from her disability.

Indirect Discrimination (s 19 Equality Act 2010)

12 Did the Respondent discriminate against the Claimant by applying a provision, criterion or practice (PCP) which was discriminatory in relation to the Claimant's sex? The PCP which was allegedly applied was a requirement to work longer hours in addition to those hours required to fulfil the duties of the role if you were to be considered suitable for promotion.

a. Was this PCP applied to both males and females within the applicable pool for comparison?

b. If so, did this PCP put females at a particular disadvantage when compared with males because females statistically have greater responsibilities for childcare and cannot work longer hours?

c. If so, did this PCP put the Claimant at that disadvantage because she was unable to work longer hours due to her childcare commitments?

d. If so, has the Respondent shown that the PCP was a proportionate means of achieving a legitimate end?

13 Did the Respondent discriminate against the Claimant by applying a provision, criterion or practice (PCP) which was discriminatory in relation to the Claimant's disability? The PCP which was allegedly applied was a requirement to work longer hours if you were to be considered suitable for promotion.

a. Was this PCP applied to both disabled and non-disabled persons within the applicable pool for comparison?

b. If so, did this PCP put disabled persons at a particular disadvantage when compared with non-disabled persons because disabled persons find it more difficult to work longer hours and maintain attendance?

c. If so, did this PCP put the Claimant at that disadvantage because she found it more difficult to work longer hours and maintain attendance?

d. If so, has the Respondent shown that the PCP was a proportionate means of achieving a legitimate end?

Failure to Make Reasonable Adjustments (s 20 and s 21 Equality Act 2010)

14 Did the Respondent apply a PCP, namely a requirement to work longer hours in addition to those hours required to fulfil the duties of the role if you were to be considered suitable for promotion?

15 If yes, did this PCP put the Claimant at a substantial disadvantage when compared to persons who are not disabled because the Claimant was not able to work these long hours? The alleged substantial disadvantage the Claimant was placed at being less likely to be considered suitable for promotion.

16 If yes, did the Respondent fail to take such steps as it is reasonable to have to take to avoid the disadvantage? The reasonable steps which it is alleged that the Respondent failed to take being:

a. To adjust the Claimant's excessive workload so that this could be managed within her contracted 37 hours

(1 FTE) per week as supported by Occupational Health. This would have removed the substantive disadvantage as it would have allowed the Claimant to better demonstrate her abilities to a promotion panel.

b. To allow the Claimant to work part-time on a job-sharing basis with her husband. This would have removed the substantive disadvantage as it would have allowed the Claimant to better demonstrate her abilities to a promotion panel.

c. To provide support from another colleague to assist with the workload when the Claimant was off sick, so that the Claimant did not have double the workload on her return. This would have removed the substantive disadvantage as it would have allowed the Claimant to better demonstrate her abilities to a promotion panel.

d. To implement the recommendations made by the DWP following the Claimant's assessment. This would have removed the substantive disadvantage as it would have allowed the Claimant to better perform and therefore be better placed to demonstrate her abilities to a promotion panel.

Harassment (s 26 Equality Act 2010)

17 Did the Respondent harass the Claimant by subjecting her to unwanted conduct related to her sex which had the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The alleged unwanted conduct being that Professor Mires continually attempted to increase her workload, stating that she "will never get promoted here". This was related to her sex because the Claimant was unable to do an increased

workload due to her being a mother of small children with childcare responsibilities.

18 Did the Respondent harass the Claimant by subjecting her to unwanted conduct related to her nationality which had the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The alleged unwanted conduct being that Professor Mires continually attempted to increase her workload, stating that she "will never get promoted here". This was related to her nationality because the Claimant had disclosed her Czech nationality in the Respondent's HR form when she started her employment. Did Professor Mires know that she was Czech?

19 Did the Respondent harass the Claimant by subjecting her to unwanted conduct related to her disability which had the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The alleged unwanted conduct being that Professor Mires continually attempted to increase her workload, stating that she "will never get promoted here". This was related to her disability because the Claimant was unable to do an increased workload due to her disability.

20 Reference is made to paras 6, 7,11, 18, 19, 23, 25 and 30 of the ET1, being the acts of harassment pled.

21 If so, was it unreasonable for the Claimant to have reacted to the alleged events in the way she did?

Victimisation (s 27 Equality Act 2010)

22 Did the Claimant do a protected act when she raised a grievance in 2016 in respect of her failure to be promoted

which included an allegation that Professor Mires has contravened the Equality Act 2010?

23 If yes, did the Respondent subject the Claimant to a detriment because she had done this protected act? The alleged detriment treatment being that Professor Mires continually attempted to increase her workload, stating that she "will never get promoted here".

Discriminatory constructive dismissal (section 39 Equality Act 2010)

25. Did the Respondent discriminate against the Claimant by constructively dismissing her contrary to section 39(2)(c) of the Equality Act 2010?

Remedy

26. How much, if any, compensation for financial loss and injury to feelings should the Claimant receive?

27. Should a deduction be made to the Claimant's award on the basis of contributory fault?

28. Should an uplift of up to 25% to the compensation awarded by the Tribunal be applied because the Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

29. Should the compensation awarded by the Tribunal be reduced by up to 25% on the basis that the Claimant did not follow the ACAS Code of Practice on Disciplinary and Grievance Procedures in that she did not await the outcome of her grievance before raising her claim?"

Evidence

8. The written documentation before the Tribunal was substantial, at approximately 1,500 pages, within four main lever arch files and with a supplementary volume. Most but not all of it was referred to in oral

evidence. No Statement of Agreed Facts was tendered. Some documents were tendered during the course of the evidence, such as procedures on appeals in promotions said to be from 2014 and 2015 during the evidence of the claimant, received subject to submissions on them from the claimant, who noted that neither document contained any date. They were received subject to submissions in relation to them. Some documents had been submitted in black and white and during the hearing colour copies were provided, without objection.

9. A Note of the appeal hearing in respect of the claimant's second application for promotion was tendered by the respondent, having just been found by the respondent at that time, without objection from the claimant but subject to questions on provenance and issues related to it, on the tenth day of the hearing. The claimant was permitted to be recalled to speak to it. Before she gave that supplementary evidence she asked to make a statement as to her health, which she was permitted to do without objection from the respondent, but with the Tribunal stating that it would consider matters after she had done so. The Tribunal, after hearing that statement, offered the claimant and her counsel time for discussion to consider matters and whether the claimant wished to proceed with her evidence, and having done so Mr Cunningham stated that the claimant was fit to give evidence and wished to do so. She was then examined on the production, cross examined about it, asked questions by the Tribunal, and re-examined.

10. Evidence was given by the witnesses orally, commencing with the claimant, who also called as witnesses Dr Carlo Morelli and Ms Marion Sporing both of whom were her trade union representatives. The respondent called the following witnesses: Professor Rory McCrimmon, the Dean of the School of Medicine, Professor Maggie Bartlett who for a period was the claimant's line manager, Professor Gary Mires, the claimant's former line manager and Dean, who had retired in 2018, Dr Ellie Hothersall Head of the Undergraduate Programme at the School of Medicine, and also for a period the line manager of the claimant; Dr Paul Bennett on statistical matters, Mr Richard Scrivener Head of Operations at the School of Medicine, Ms Aileen Ross at the material time an HR

Officer and Ms Julie Strachan HR Manager Deputy Director People and previously Senior Personnel Officer.

11. There were some objections to a number of aspects of the evidence, in brief summary primarily on the basis of an absence of fair notice in the pleadings. They were addressed during the conduct of the hearing. The claimant intimated an objection to the evidence of a witness for the respondent, which the respondent replied to. The Tribunal issued a provisional view of the matter, subject to further submissions. Oral submissions were made on that point on 11 July 2023 and the Tribunal decided to hear that evidence under reservation of its admissibility and allowing the claimant an opportunity to consider leading additional evidence once that evidence had been given, as there was no written document to set out what it was to be. As it transpired the claimant decided not to lead additional evidence on that point. The evidence is addressed below. The claimant had also sought to lead additional evidence on loss, set out by email of 4 July 2023, which the respondent objected to by email of 5 July 2023. The parties gave oral submissions on that on 11 July 2023. The Tribunal decided to refuse to allow such additional evidence, as it was evidence that was available to the claimant and her solicitor at the latest at the time she provided a further Schedule of Loss which was within the documents before the Tribunal, and to receive it would not be in accordance with the overriding objective, but that it was permissible to lead evidence from the claimant on a matter that arose after the adjournment of the hearing. That duly took place.

12. Breaks were taken during the claimant's evidence when she wished them in light of her disability. Her evidence was heard over a total of a little over nine days. Breaks were otherwise taken on a regular basis.

Facts

13. The Tribunal considered all of the evidence written and oral submitted to it. It was very substantial, and addressed matters on occasion in minute detail. There was a very broad ranging enquiry into the claimant's employment with the respondent. The Tribunal did not consider that all of the evidence it heard was directly relevant to the issues, and that for some

of the parts of the evidence that were relevant that was to a very limited extent. For reasons of proportionality this Judgment does not detail every fact on which evidence was heard.

14. The Tribunal found the following facts, which it considered to be the facts material to the issues before it, to have been established:

The parties

15. The claimant is Dr Dita Wickins-Drazilova. She is female. Her date of birth is 30 December 1975.

16. She is Czech by nationality, which was known to the respondent from the time she commenced employment with them. She is married to Dr Jeremy Wickins, who has a law degree. She has two children, twins born in June 2016. She is a disabled person under the Equality Act 2010 as a result of chronic idiopathic pancreatitis as set out more fully below. She has an excellent command of English but it is not her first language.

17. The claimant received her PhD in 2005. She then commenced a series of research roles in academic institutions, firstly in the Czech Republic and latterly in the UK. She also undertook roles in teaching and scholarship in both countries, including as a Lecturer at the University of Warwick which was her last post before joining the respondent.

Employment with the respondent

18. The claimant applied for a vacancy with the respondent as a Lecturer in June 2012. The vacancy included a form of job description setting out Responsibilities and areas for Teaching. (The terms of the job description for the vacancy are referred to further below). She was successful.

19. The claimant commenced employment with the respondent as a Lecturer (Teaching and Scholarship) on 1 January 2013. Her terms and conditions of employment were set out in an offer letter dated 10 September 2012, which made reference to contractual terms within that letter and to a document with standard conditions of employment. The letter stated

"You will work under the general authority and immediate direction of the Dean of School/ Head of Unit and will conduct such classes within the syllabus adopted from time to time by the Senatus Academicus, with the approval of the University Court, as may be required by the Dean of School/Head of Unit You will act as required as internal examiner and will undertake such other duties as the Dean of School/Head of Unit may assign to you including departmental and administrative duties and the invigilation of exams. "

20. The letter stated that the claimant was employed at Grade 8. The heading of hours of work had the following: "Working time is that reasonably required to fulfil the duties of the post". Her employment was a permanent one subject to a probationary period of three years. The appointment was to the post of Lecturer in Ethics and Global Health.

21. The standard terms included the following –

"**2. Duties and responsibilities**

You shall be under the direction of the Dean of School/Head of Unit for the satisfactory performance of the duties of the post. You shall undertake such duties as the Dean of School/Head of Unit may from time to time require……

9 Grievance Procedure

Any grievance arising in the course of your employment shall be determined in accordance with the established grievance procedure (University Statute 16, Part VI). If you wish to seek redress of any grievance relating to employment, you should apply to the Dean of School/Head of Unit, in the first instance……

14. Handbooks, policies and guidelines

These are enclosed where marked *, the remainder will be sent direct to your school/unit to await your arrival. If you wish to review these prior to your start date please contact Human Resources

Policies and guidelines

- Equality & Diversity

- Dignity at Work & Study
- Work/Life Balance

…….”

22. The claimant accepted that offer in writing on 3 January 2012.

23. The claimant's role was divided between three Schools of the respondent (the names and organisation of the Schools changed over time). The intention was that 60% was to be undertaken in the School of Medicine and 20% in each of the Schools of Nursing and of Dentistry. Her role was in the field of medical and related ethics, and included the subject of Global Health, on which she taught on a one-year programme. Her role included planning the curriculum, developing teaching materials, delivering teaching and supporting others doing so, and preparing examinations and marking them. She also carried out teaching for post-graduates. Her role also included administrative areas such as attending meetings. She separately undertook scholarship, which involved reading academic writings, general research, and undertaking some publications in the academic sphere.

24. The claimant's line manager initially was Professor Gary Mires. That continued for about two years, when her line manager became Dr, later Professor, Jon Dowell. That position changed thereafter as referred to below.

25. When the claimant commenced working for the respondent it was agreed that her primary role was for the School of Medicine, which had the greatest need for her services. Her line manager was from the School of Medicine at all times. The line manager was responsible for line management in that School, and there was no formal line manager for work the claimant did in the Schools of Nursing or of Dentistry.

Policies and procedures

26. The respondent operated a number of policies and procedures including for grievance, probation and promotion.

27. The policy on Grievance had the following provisions material to the present case

"1. Policy Statement

1.1 The University aims to deal with grievances promptly, fairly, consistently and as near as possible to the point of origin. Grievances are concerns, problems, or complaints that members of staff raise with their employer…..

2. Informal Procedure

2.2 Where there is an open policy for communication and consultation, problems and concerns may often be raised and settled as a matter of course. Members of staff should aim where possible to settle a grievance in the first instance informally with their line manager…….

2.3 Mediation may also be considered…..

2.4 The University has separate procedures for dealing with grievances on particular issues (for example, harassment and bullying and equality issues). In these circumstances the Dignity at Work and Study procedures may be used instead of the normal grievance procedure.

2.5 Where a member of staff has raised a grievance informally with their line manager, the line manager should respond to the grievance as soon as possible but normally no longer than 3 working days after it was first raised.

2.6 If the complaint concerns the immediate line manager, the grievance should be raised with the next line manager.

2.7 The outcome of any informal meeting should be confirmed in writing.

2.8 If it is not possible to resolve a grievance informally the member of staff should raise it formally in writing with their Dean of School/Director. This should be done in writing and without unreasonable delay and should set out the nature of the grievance……

3. Formal Procedure

3.1 Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case.

3.2 That said, whenever a grievance process is being followed it is important to deal with issues fairly. There are a number of principles to this which are summarised as follows

3.2.1 Issues should be raised and dealt with promptly and there should not be unreasonable delay arranging meetings and confirming decisions…..

3.2.3 The University representative should in conjunction with Human Resources carry out any necessary investigations to establish the facts of the case

3.2.4 All parties concerned should have an opportunity to outline their case before any decisions are made…..

3.2.6 A member of staff will be entitled to appeal against any formal decision made……..”

28. There was a separate Dignity at Work and Study Policy and Procedure (Harassment and Bullying), known as the DAWS policy, which had the following provisions material to the present case

“Procedures

Introduction

……The complainant should raise their initial complaint normally within three months of the date of the last alleged act. Reports or complaints pursuant to this Policy will be addressed and resolved as promptly as practicable after the complaint or report is made, noting that some cases can necessarily be complex in nature………

Formal procedures for making a complaint about harassment, bullying or victimisation

…….A formal complaint must be made within six months from the date of the first instance or attempted information resolution in order to make an investigation feasible. Once a formal complaint about bullying or harassment has been raised, the University has the responsibility for investigating the complaint in order to protect the

> complainant and given the respondent a fair hearing, consistent with the principles of natural justice. …..”

29. There was a Procedure for Applications for Promotion to grades 8 or 9, as well as to Reader and Chair (Professor). It stated that “Through this process the University seeks to encourage staff to continue to improve their performance and develop their careers further in line with nationally and internationally recognised standards of excellence.”

30. It set out in paragraph 2 the principles applied, which included at paragraph 2.1 “This procedure is intended to be fair, thorough, transparent and compliant with current employment legislation and good employment practice.” Paragraph 2.5 referred to mitigating circumstances that may have impacted on the volume of their activity. The procedure stated at paragraph 2.10 that the responsibility was on the applicant, by presenting evidence in their application, to convince the Annual Review Committee (“ARC”) that promotion is merited. Paragraph 2.12 referred to an Equality Impact Assessment being conducted and reported to the HR Committee.

31. Paragraph 3 referred to the Dean’s role, and to the Dean submitting an objective assessment of the application, and stated that the Dean’s role was critical. It set out responsibilities for the Dean. The application process was set out in paragraph 4. It was to be made on a standard template in Appendix 2 and include an applicant-nominated reference set out in Appendix 4, and could include mitigating circumstances in a form that was Appendix 3. Applicants required to nominate one referee of their own choosing under paragraph 4.3. It was the applicant’s responsibility to obtain the reference.

32. Paragraph 5 was headed The Two-Stage Process. It stated as follows:

> “5.1 The first stage of deliberating upon potential promotions will take place at the June/July CSARC [the ARC meeting] based on the evidence presented by the Applicant (see 4.2) and an independent report provided by the Dean which assess the application (Appendix 5). The Dean’s Report will be prepared using a standard template and will draw on input from relevant senior staff in the School. …

5.3 [For applications for promotion to Grade 9] the Committee will consider whether there is a *prima facie* case for promotion. If the CSARC decides that there is a case they will pursue the matter by moving to the second stage to obtain external references.

5.4 The CSARC will consider and approve the list of external referees proposed by the Dean of School (Appendix 5a). In compiling the list of External Referees the Applicant **must not** be consulted……

5.7 At the September meeting of the CSARC the Committee will consider the references and the case as a whole, and decide whether to

- Promote the Applicant
- Award a Contribution Point or advancement within the Applicant's existing grade if promotion is declined but the Committee feels that alternative recognition is merited
- Reject the promotion….

5.10 Applicants for promotion to Senior Lecturer (or Researcher equivalent) will be notified, in writing, of the outcome of their application by the Vice-Principal and Head of College after the second meeting of the CSARC (Stage Two of the process). No verbal feedback should be given in advance of the Vice-Principal and Head of College's letter"

33. There was a right of appeal provided for in paragraph 7. It set out provisions for such an appeal, which included that the University Secretary should be notified of that within 10 days of receipt of the letter informing the applicant of the unsuccessful application, unless there were exceptional circumstances. An Appeal Committee was formed comprising three senior academic members of staff. It was to be "constituted in such a way as to ensure its independence, including at least one member from outside the College, and will aim to have as diverse representation as possible. The Chair will be a Vice- or Deputy Principal of the University.". The decision was normally to be communicated to the Appellant within 7 working days of the Appeal Hearing. The decision of the Appeal Committee was final.

34. The Procedure was reviewed annually. The procedures were amended in the calendar years 2014, 2015 and 2016. An amendment in May 2016 was an update, and had effect for applications made thereafter. It had a provision that if someone worked across more than one School the Dean should consult with those Schools for the report. It had the following provision in place of that at 5.3 above:

> "Applications for promotion to Grades 8 to 9 are submitted to the Annual Review Committee with the self-nominated reference. If it is considered appropriate to progress the application **two external references** will be sought so that the case for promotion can be considered at the next Annual Review Committee."

35. It amended paragraph 8.1 by providing for reviews every four years. There was otherwise no material change to the procedure for the purposes of this case.

36. In practice the Dean's report was not determinative of the outcome of an application before the ARC. Not all reports that supported an applicant led to promotion and not all reports that did not support an applicant led to the refusal of promotion. The decision on whether or not promotion should be given was for the ARC, subject to an appeal to the Appeal Committee. There was no provision in the Procedure stating specifically what the Appeal Committee could or could not do if an appeal was allowed in whole or part.

37. The Procedure had a number of appendices (not all of which were before the Tribunal). Appendix one was for Promotions Criteria. It stated the following:

> "**Criteria for Academic Promotion….**
> Promotion is awarded in recognition of work which demonstrates a high standard of achievement in three broad categories, which are aligned with the University's core values:
> a. **Academic Excellence**
> b. **Valuing People and Working Together**
> c. **Making a Difference…..**

Criteria for Promotion to Senior Lecturer (Teaching & Scholarship or Teaching & Research)

Candidates for promotion to Senior Lecturer are expected to achieve a sustained, higher level of performance, and will be considered on the basis of:

1) A sustained record of **academic excellence**, evidencing embodiment and promotion of the University's values of **valuing people** and **working together, and**
2) Evidence of the effectiveness of their activities of **making a difference**, be it to their discipline, student learning and experience, their School, the University, and/ or the wider world."

38. Appendix 1a was titled "Indicators of Excellence." It was not before the Tribunal. It contained examples of what would be regarded as excellence in this context.

39. There was a policy on Work/Life Balance [which was not before the Tribunal].

Initial events

40. The claimant attended her first Systems in Practice ("SIP", which is the name for the first three years of a medical degree) meeting of the respondent on 31 January 2013. She was introduced by the Chair of that meeting Dr Tom Fardon as "the new girl" when he found pronouncing her name difficult, and he invited her to introduce herself, which she did. The claimant felt that it had been inappropriate to be so introduced.

41. Dr Fardon generally introduced people in such meetings by name, either their first or family name. He has an informal style. He has referred to Dr Hothersall as his "minion".

42. At a further SIP meeting held towards the end of February or March 2013 a comment was made by someone present, unknown to the claimant, that someone else who had been appointed to a role as Lecturer was a foreigner, and another person a white British male whose identity is otherwise unknown to the claimant said that "you have to be foreign and

a woman to get a job here", after which a number of those present laughed. That made the claimant feel uncomfortable, and to question whether she had been appointed on merit or for reasons of diversity.

43. On 30 September 2013 the claimant was informed by the respondent that she had completed the first year of her probation. The period of probation was due to expire on 30 September 2015.

44. On 21 August 2014 the claimant emailed her line manager Professor Gary Mires, who was then a Teaching Dean in the School of Medicine, asking for his support in an application for promotion to a Senior Lecturer, a Grade 9 post. He replied the same day to state that he was supportive but that as she was still under probation she was not eligible for promotion. There was nothing within the respondent's promotion procedure to the effect that someone on probation could not be promoted, and paragraph 2.3 stated "there is no eligibility period for making an application." He suggested that they concentrate on securing the passing of her probationary period.

45. On 15 December 2014 the respondent informed the claimant that she had successfully passed her probation, and that her permanent position was confirmed. That is known as tenure. It was granted early following the view that she was making an outstanding contribution in her role, expressed in a report prepared by Professor Mires so stating. Doing so was unusual in that those on probation were generally required to complete the full period set out in their contract before tenure was confirmed.

First application for promotion

46. On 21 May 2015 the claimant applied formally for promotion to the role of Senior Lecturer, at Grade 9. She completed a standard application form to do so. Under the heading "academic excellence" her application commenced "my main contribution to academic excellence has been in developing and leading the delivery of the innovative Ethics Theme curriculum on the MBChB program." She expanded on that in the application and referred to interprofessional ethics teaching in the Schools of Dentistry and Nursing, together with that in the School of Medicine. There were sections under the headings "Valuing People" and "Making a

Difference" There was a section headed "Academic Outputs and Funding."

47. She nominated as her referee Professor Kenneth Boyd of the University of Edinburgh, who provided a reference dated 26 May 2015 supportive of her application. Professor Mires prepared a Dean's report in relation to the application which indicated that "the feedback from the consultation on her application was that this is probably slightly premature in that she needs to be able to demonstrate more academic outputs and also see through some of the initiatives that she has started, particularly external collaborations and development of new project ideas. The view was that she is on a trajectory for senior lecturership, is clearly an effective and committed teacher and should be given positive feedback and support in her aspiration for promotion." That report was on a standard form which stated in relation to academic excellence "an evaluation of the quality and volume of the distinctive contribution of the applicant, be it in Learning and Teaching, Research or Wider Impact."

48. On 13 June 2015 Dr Dowell emailed Professor Mires after being asked to comment on two applications for promotion, one for the claimant. His reply for the claimant commenced "I am ambivalent here and felt Dita was perhaps over egging her achievements a little." He said that she was "clearly an effective and committed teacher" but had "a fairly thin publications/presentations list."

49. The claimant's application was considered at an ARC Panel meeting on 30 June 2015. The minute of the meeting noted that Professor Mires was "supportive, but there may be a question around timing which was felt to be premature." and it was agreed that external references would be obtained. Professor Mires did not attend that meeting. He was informed of the outcome and consulted with colleagues about potential referees, but not the claimant herself. One of those he spoke to did ask the claimant to nominate a referee, and she suggested Dr Anne Slowther, Associate Professor at the University of Warwick.

50. The Vice Principal, Professor John Connell, arranged that letters were sent to at least two potential referees seeking the references. The

documents sent were the application form and the criteria, but not the Dean's report.

51. A reference in relation to the claimant was given by Dr Slowther dated 12 August 2015. Her reference commenced with a declaration of a conflict of interest that she had been the claimant's line manager at the University of Warwick. It generally supported the claimant's application but stated "Her application is less strong against the criterion of sustained academic excellence. This may be in part due to the focus of her post on delivering teaching across three Schools which may have left little time for scholarship in the last eighteen months." It concluded that more evidence was needed in relation to academic excellence if that criterion was strictly applied.

52. The Panel met again on 1 September 2015. Professor Mires was present and a part of that Panel. It was chaired by Professor Connell, and also included Professors Margaret Smith, Mark Hector, Tim Hales and Carol Mackintosh, as well as HR representatives. The Panel decided "The external reference received supported the view of the Group that this application was slightly premature. At present Dr Wickins-Drazilova has not yet delivered fully on the new academic outputs that would justify promotion to SL [Senior Lecturer]. She should be given positive feedback however her application was not supported at this stage."

53. The decision was intimated to the claimant by letter dated 3 September 2015. It stated as the reason for her not being successful "the Committee judged that you had not yet met, sufficiently, the criteria for promotion". A meeting with the Dean was referred to, and it was stated that it was hoped that the discussion with the Dean will provide constructive suggestions and advice towards helping her meet the criteria for promotion in the future. It confirmed that the claimant had a right of appeal.

54. The claimant did not exercise her right of appeal against that decision. She met with Professor Mires to have feedback on her application, who sought to give her feedback and make suggestions for improving her prospects for the future. She made comments to him in relation to the

decision of the Panel, with which she did not agree, including that she was not in her view paid to do research.

55. The claimant later met Professor Karl Leydecker, a Vice Principal of the respondent, to raise her concerns over her not being promoted, and how that had been handled, who suggested that she might appeal and that he would also discuss matters with Professor Mires. They had a discussion as to whether the claimant could be permitted to make an application for promotion in 2016.

56. The claimant met Professor Mires again thereafter. He suggested that she speak to a colleague Dr Fiona Muir as she had recently been successfully promoted to Senior Lecturer. The claimant did so. She was allowed sight of Dr Muir's CV.

57. In January 2016 the claimant informed Professor Mires that she was pregnant. On 29 March 2016 she made a formal claim for maternity leave, completing form MAT B1 to do so.

Second application for promotion

58. The claimant made a second application for promotion on 19 May 2016. The claimant had spoken to Professor Leydecker in advance of doing so in light of her pregnancy, and he had said that that was not a reason not to make the application. She added to her first application further detail of what she had done since that application, including conferences attended, and her involvement in a BBC 1 programme watched by about 1.5 million viewers. She made reference to the basis of her contract being for Teaching and Scholarship, and two new refereed conference publications. One was from July 2015 in Edinburgh with I Bertram, and the other in June 2015 in Newcastle and again in September 2015 in Cagliari, Italy with Y Karachiwala. Her application did not respond to the heading seeking, inter alia, percentage and nature of contribution if not sole-authored and number of pages or word count. She included two articles in preparation. She included details of teaching she had carried out as she had seen that from Dr Muir's CV. She referred to her being pregnant within the body of the document that she had "suffered with lots of nausea, thus unable to travel to professional meetings, conferences, workshops or other events

outside of Scotland since October 2015". She did not provide a form for mitigating circumstances, or a report from her GP to support that. She obtained a further reference from Professor Boyd dated 20 May 2016 which was again supportive of her application.

59. The claimant commenced maternity leave on 6 June 2016. The claimant's husband was recruited by the respondent to act as her maternity cover for the period of the maternity leave. The precise details of the contract were not in evidence but the contract was for a fixed term to 31 July 2017. Dr Wickins carried out duties primarily in the School of Medicine. The Schools of Dentistry and Nursing made other arrangements for the teaching of ethics in those Schools during the claimant's maternity leave. The Chair of the School Ethics Committee became Dr Carlos Widgerowitz during her maternity leave.

60. Professor Mires prepared a Dean's report in relation to the claimant's application for promotion dated 8 June 2016. It was similar to the previous report that he had made. It referred to the application the previous year, that she had "fairly limited academic outputs. This means that her career publication record remains small" It referred to consultation with senior staff in the Medical School, which was said to be mixed. It referred to the matters that the claimant had referred to which were not in her 2015 application and new matters. It added "The general consensus was, however, that Dita is working at the level of a very good Lecturer and not at present at the level of a Senior Lecturer. In that respect it was still considered that this application was premature and that there would need to be significant increased evidence of academic outputs and sustained activity before Senior Lecturer would be warranted."

61. The ARC Panel met on 15 June 2016. It was chaired by Professor Nic Beech, Vice-Principal. It included Professor Mires, as well as Professors Tracey Wilkinson, John Livesey (an external member) Fordyce Davidson, Martyn Jones, Margaret Smith, Mark Hector, Mairi Scott, Julia Blow and Claire Halpin. HR staff were also present. It concluded that there was insufficient evidence to warrant promotion or to seek external references. The minute stated "Dr Wickins-Drazilova was appointed 3 years ago to lead ethics teaching across the College of Medicine, Dentistry & Nursing

and has made a significant contribution to the programme including being a major contributor to the delivery. She has begun to contribute to other areas including the MSC programme in global health. It would appear that there is nothing substantive in her external profile and there is no other evidence of external outputs. Dr Wickins-Drazilova now needs to think of her external profile and scholarly outputs before being considered for Senior Lecturer. The Committee agreed that this was a borderline case but there was insufficient evidence to warrant promotion at this time." External references were not sought.

62. The claimant was informed of the outcome, that her application had not been successful, by letter dated 13 October 2016. It was in similar terms to the letter sent on 3 September 2015.

63. The claimant met Professor Mires on 4 November 2016 to receive feedback from the application decision. Professor Mires explained the basis of the decision made, and sought to encourage her to continue. He mentioned a role as Chair of the Research Ethics Committee as a possibility for her which would assist her in seeking promotion. He commented on post-graduate supervision. He suggested that she speak to her line manager Dr Jon Dowell about her workload.

Appeal against refusal of promotion

64. The claimant later spoke to Professor Leydecker as to the position, and his advice was for her to appeal. The claimant did so on 4 December 2016 by letter of that date setting out her grounds of appeal, in which she raised both the 2015 and 2016 applications. She set out a series of what she considered to be irregularities in the procedures followed, under seven headings. She did not in terms allege discrimination by Professor Mires or more generally. She attached documents in support of her application.

65. Professor Mires wrote to Ms Julie Strachan of the respondent's HR department on 13 January 2017 with his detailed comments on the appeal. Professor Beech also prepared a document setting out his views on the appeal dated 16 January 2017.

66. The Appeal Committee met on 21 March 2017. The date of it had been delayed as the clamant sought a caseworker from her union and as her witness was away for part of February 2017. The Committee consisted of Professor Tim Newman, Professor Iain Stewart and Professor Vidya Jindal-Snape. The claimant attended with her trade union representative Dr Carlo Morelli. The respondent had a note taker present at that hearing. Professor Leydecker attended as a witness for the claimant when invited during the meeting to do so, and later and separately Professor Mires attended as a witness for the respondent. He then left. The meeting continued with submissions made by the parties present. The appeal committee then decided to allow the appeal in part, as set out below. A note of the meeting was compiled by the note-taker, Ms Gray of HR. It is a reasonably accurate record of the discussions held. It was not provided to the claimant or her representative at the time.

67. A written report was prepared on the appeal, which was not provided to the claimant at the time. The report confirmed that the Panel unanimously decided to uphold the appeal, in part, in that the report from the Dean for both the 2015 and 2016 reviews did not include representations from the Schools of Nursing & Health Sciences (as it was then called) and Dentistry. As a remedy it recommended that a "new Dean's report is prepared which reflects the input of Deans and senior academics from the three Schools within which Dr Wickins-Drazilova teaches….". It found that the 2016 ARC was not remiss in not seeking external letters. It stated its belief that it would have been advisable for the ARC in 2015 to have sought a second external letter of appraisal, and recommended an update to guidelines. It further stated that the Panel "found no evidence of bias from clinical academics in the School of Medicine towards non-clinical academics" and that the Dean had fairly used his judgment in relation to input from senior colleagues in the School of Medicine in his Report.

68. The outcome of the appeal was communicated to the claimant by letter dated 21 March 2017. It repeated some but not all of the terms of the report of the decision of the appeal committee. It referred to the irregularity in the Dean's reports for the 2015 and 2016 processes in that there had been a failure to follow process in that the report from the Dean did not

include representations from the Schools of Nursing and Dentistry and the recommendation of a new Dean's report. It did not refer to the belief in relation to the 2015 ARC of seeking a second letter of appraisal.

69. Three options were given to the claimant as to how to proceed in light of that, which were the same as those set out in the Report, being (i) that the 2016 application was presented to the 2017 ARC with a new Dean's report (ii) that the claimant prepare a new application to be considered by the 2017 ARC with a new Dean's report or (iii) given that she had been on maternity leave for much of the academic year that she submit a new application for the 2018 ARC. Other aspects of the appeal that the claimant had argued for were not successful. It did not mention all the findings in the Report.

70. The claimant wrote to the Panel to comment on their decision on 29 March 2107, arguing that if her appeal was successful she should be promoted. She did not raise a matter of discrimination when doing so. Professor Newman replied on 6 April 2017 rejecting an allegation she had made in that letter that there had been a collective failure of the ARC. He confirmed that there was no further appeal.

71. The outcome letter of 21 March 2017 was provided to Professor Mires. He did not prepare a new Dean's report. He arranged for letters to be provided by the Deans of the Schools of Nursing and Dentistry.

Application for job share

72. The claimant submitted an application for job share for the period of one year from 1 August 2017. She did so on 7 March 2017. She did so on a form headed

> "Work/Life Balance Policies
> Flexible/Job Share/Part-Time Working Application Form."

73. The claimant's application was stated to be for a job share with her husband Dr Wickins, who was undertaking at that stage a role as her maternity leave cover. The application sought to have the claimant work three days per week, and her husband two days per week, as such a job share, for that period.

74. The respondent had a Guidance Notes and Procedure document for such applications. The Notes stated that the said form "is intended for use when an employee wishes to reduce their working hours and change their pattern of work." Under Procedure it had the heading "Requests to work reduced hours in current post." It stated that the form should be sent to the Discipline Lead/Dean/Director, who "must fully consider the applicant's request and assess the current role of the individual…….Where it is felt that the role does not lend itself to the proposals made by the applicant thought should be given to any alternative working arrangements which could be accommodated."

75. On 29 March 2017 Dr Wickens brought one of his twin children to a small group session with students when teaching those students. Dr Dowell emailed him in relation to that thereafter, referring to "surprise expressed" in relation to that, and on 11 April 2017 Dr Wickens replied to state that he had done so when both he and the claimant had been unwell. He made further comments with his views that doing so was appropriate.

76. On 18 April 2017 Ms Wendy Marlow of HR emailed the claimant with comments on the process for the application, in which she said that it was not an option to proscribe specifically which individual undertake the work instead of the staff member.

77. The claimant sent her line manager Professor Dowell, copied to Professor Mires and another, a two page summary and table setting out the detail of her proposals on 24 April 2017. So far as the School of Medicine was concerned it proposed that the claimant carry out one-third of the workload and her husband two-thirds. It proposed that the claimant carry out the majority of the work in the School of Nursing and that she and her husband share the work in the School of Dentistry. The claimant also emailed Ms Marlow that day with comments on her application.

78. Ms Marlow raised with Professor Mires the application made by email on 27 April 2017. He enquired of the Schools of Nursing and Dentistry what resource they required when the claimant returned from maternity leave, and both stated that they could manage without the resource provided by the claimant. Professor Mires understood from Professor Dowell that there

were concerns in the School of the performance of Dr Wickins in his role, which was part-time. That included that he had attended teaching for students with one of his twins, and had not been easy to communicate with when arranging teaching. The decision had been made to end the arrangement whereby Dr Wickins provided maternity cover for the claimant when the claimant returned to work.

79. Professor Mires on 28 April 2017 emailed Ms Marlow to inform her of that and stated, "I suggest therefore that we say to Dita happy for her to reduce her hours to 3 days a week but this would be with the School of Medicine but continue as part of that as lead for interprofessional ethics teaching which would involve liasing with an identified lead within each of Schools of Dentistry and Nursing."

80. On 3 May 2017 Ms Marlow called the claimant to inform her of the decision made, and that was confirmed in writing by letter dated 16 May 2017 sent under the name of Professor Mires, but signed on his behalf. It had been drafted by HR and approved by him. It stated

> "After careful consideration of your request we are pleased to confirm that we can grant your request to reduce your working hours; this can be facilitated with you working three days per week for the School of Medicine. In addition you would retain your lead for interprofessional ethics teaching which would necessitate liaison with identified leads within the Schools of Nursing and Dentistry. Regarding the hours which would temporarily remain within Nursing and Dentistry after consultation with each School both have confirmed they would not require additional resource in these circumstances; they are able to continue to absorb the work in their schools whilst you work part-time hours within the Medical School. As such the job-share arrangement you have proposed to facilitate your return on a part-time basis (and the costs associated with this) is not necessary. We would not want this to detract from the fact we are able to accommodate your request to reduce your working hours and in doing so can retain your knowledge and skills within the University. In summary though, the business reason for

declining the introduction of a job-share in these circumstances is the cost associated with this……"

81. By email dated 17 May 2017 the claimant sought a meeting to discuss matters stating that she was trying to resolve the matter without undertaking a grievance, complaint or appeal. On 29 May 2017 Ms Jones of the respondent wrote to the claimant commenting on matters and reminding her of a right to appeal. On that date she wrote to Professor Mires commenting on the letter from him, and stating that she had sought a job-share not part-time working.

82. On 30 May 2017 Professor Mires emailed Ms Marlow referring to a report on Dr Wickins and adding "We may need to discuss being honest around the fact that Jeremy is the issue??" By that he meant that he and his colleagues had decided that they did not wish Dr Wickens to be involved in teaching beyond the period of maternity cover for the claimant for the reasons given above.

83. Ms Marlow replied that day to Professor Mires stating in relation to the email of 17 May 2017 that their (HR) advice was to take that as an appeal, and that their advice was against raising the issue of performance with Dr Wickins as that could be linked to the application and construed as victimisation.

84. The claimant was concerned that if she agreed to work on a three day a week basis for a year, that at the end of the year that arrangement may become permanent or lead to redundancy. She did not wish to accept that proposal for that reason, and separately as the family income would be materially reduced.

85. Ms Marlow wrote to the claimant on 16 June 2017 asking whether she wished to appeal, although the time to do so had passed, and seeking an answer by 26 June 2017. The claimant replied on 26 June 2017. Her letter did not state specifically that she did appeal but sought answers to three questions, that she would make a decision on an appeal in due course and would return full-time on 7 August 2017 unless the matter was resolved. On 3 July 2017 Ms Marlow wrote to the claimant to state that she was out of time for an appeal and setting out the options for her on

returning to work full-time or doing so on a part-time basis of three days per week.

86. The claimant returned to work following her maternity leave on 9 August 2017. She did so on a full-time basis.

5 87. In around mid-August 2017 Professor Mires commenced a period of absence from work after having surgery, and he returned towards the end of October 2017.

Re-submitted application for promotion

88. The claimant re-submitted the application for promotion she had made in 10 2016 for the 2017 ARC meeting on 17 April 2017, together with a form for mitigating circumstances (which was not before the Tribunal, nor was the date on which she did so given in evidence). A document on mitigating circumstances had not been submitted with the second application but was provided for the re-submitted application (which was not before the 15 Tribunal). The document on mitigating circumstances included a report from the claimant's GP, also not before the Tribunal. A sub-committee of the respondent separate to the ARC Panel considered that, which included an HR member of staff Ms Julie Strachan, and accepted that there were such circumstances for a period it set out (which was not given 20 in evidence to the Tribunal), but the detail of the mitigation facts was not given to the ARC to maintain confidentiality. The outcome from the sub-committee meeting was given confidentially to the Chair of the ARC (no document from the sub-committee doing so was before the Tribunal).

89. The Dean of the School of Dentistry, Professor Mark Hector, supplied a 25 report after consulting two named colleagues which concluded "The message coming back to me is that Dita is performing well as a lecturer and promotion at this stage is not necessarily appropriate." The Dean of the School of Nursing Professor Margaret Smith provided a report that supported the assessment of Professor Mires in relation to the claimant's 30 application. She also made reference to a letter which she attached from Mr John Lee, Head of Undergraduate Studies in that School, which was generally supportive of the claimant but did "not make any comment on

her suitability for a senior lecturer post". Those reports were provided to the ARC.

90. The claimant's application was considered by an ARC panel on 17 April 2017. It was chaired by Professor Nic Beech. It included Professor Mires, as well as Professors Tracey Wilkinson, John Livesey (an external member) Iain Stewart, Peter Mossey, Margaret Smith, Mark Hector, Mairi Scott, Julia Blow and Claire Halpin. HR staff were also present. It decided that her application did not succeed, but the claimant was not informed of that outcome at that stage. The minute of the meeting stated

> "…..The Group considered this case but felt there was no evidence of role enhancement, innovation or sustainability of outputs to merit promotion at this stage. It was noted that [the claimant] had taken on the role of lead of School Ethics Committee and there would be scope for her to develop and enhance her role. The Group felt that [the claimant] should be given appropriate mentorship to support her to flourish. The Committee noted that there had been mitigating circumstances. "

91. The respondent wrote to the claimant to inform her that her application for promotion had not been successful on 19 October 2017, again in similar terms to the letter of 3 September 2015. The claimant was informed of a right of appeal. She did not exercise that right.

92. She did not make any further applications for promotion. She discussed with her union the possibility of raising a grievance in relation to her lack of promotion after being informed of that outcome in October 2017, but did not do so as she was feeling under stress, and believed that she was working under what she considered to be an authoritarian management. She did not wish to put her job in jeopardy, as she considered that it would be if she raised matters formally by grievance or Employment Tribunal Claim, when she was the principal bread-winner for her family, and her family finances had been adversely affected from her period of maternity leave. No grievance raising discrimination in respect of the lack of promotion nor any claim to an Employment Tribunal was presented at that stage.

93. In December 2017 the claimant met Professor Mires. They had a general discussion on the outcome of her application for promotion.

Disability

94. In about November 2017 the claimant began to suffer from health problems in the form of abdominal pain. The claimant suffered bouts of severe abdominal pain in the period from about January to summer 2018. There were intermittent flare-ups of pain that led to her attending the Accident and Emergency Department of her local hospital intermittently. She was generally sent home after the pain eased. Tests were carried out to seek to ascertain the cause. She had a series of absences each lasting about three or four days about twice per month because of those incidences of such pain. She also consulted her GP. She was diagnosed as suffering from Chronic Idiopathic Pancreatitis. In addition to severe pain, the claimant suffered extreme fatigue as a result of it.

Other matters in 2018

95. On 9 January 2018 Professor Mires emailed Dr Wigderowitz asking him to meet the claimant, stating that she was back from maternity leave, stating that he thought that there might be some advantage to a joint arrangement to chair the School Ethics Committee.

96. On 10 January 2018 the claimant emailed Professor Mires acknowledging that he had sent her "the additional documents about consultation with nursing and dentistry school. I understand that as Dean of the School of Medicine you submitted exactly the same report in 2017 as in 2016….."

97. On 6 February 2018 Professor Mires emailed the claimant and asked whether she "may be interested in taking over" a role as the Caldicott Guardian, which is a role to manage personal data within an organisation. The incumbent in that role was Professor Ian Crombie, who was to be retiring in June 2018. The claimant replied that she would be happy to discuss it but that her first thought was that it was a very senior role. Professor Mires replied to state that he thought that she had the skill set to undertake it and do it well, and that he was thinking of development opportunities for her. They met to discuss it on 13 February 2018. The

claimant said that she would do so if her workload was modified to accommodate it, and mentioned her seniority as she was concerned that a Lecturer would not have the standing to carry out the role, which she understood was a senior one. Professor Mires said that it would be possible to carry it out without reducing her other role.

98. The claimant later that day met Professor Crombie who said that the role involved at least one day per week, and that he had administrative support, which the claimant considered would not be available to her if she accepted the role. She emailed Professor Mires again later that day to thank him for the offer of the roles of Caldicott Guardian and Chair of the Non-Clinical Research Ethics Committee, state that she agreed that she could do both roles, but said that "without the necessary relevant seniority the credibility of the School will be diminished, along with my reputation…." She referred to her application for promotion where he had referred to her in his Dean's report as an early career academic, and concluded "I hope that there is some way that we can resolve this situation to both our advantage." By that she hoped that he would agree to support a later application for promotion to senior lecturer.

99. The claimant was unclear who her line manager was after receiving an email on 18 April 2018 from Professor Rami Abboud that he was to carry out her annual appraisal. She raised that with HR who informed her that Professor Mires had stated that Professor Abboud was to be her line manager, by email of 17 May 2018. When she raised that with Professor Abboud however he said that he had not agreed to act as her line manager.

100. The respondent's practices included that there was an Objective Setting and Review meeting held between an academic employee and line manager each year. It was referred to within the respondent as an "OSaR". It was held towards the end of each academic year, with the process commencing with the reviewee completing a standard form and sending that to the reviewer. A meeting between them then took place, after which the reviewer added their comments, and the reviewee added theirs. Each signed and dated the form. The completed form was generally seen and

retained only by those parties, but if there was agreement it could be sent to others such as HR or higher management.

101. The claimant's 2018 OSaR took place with Professor Abboud on 20 March 2018, at which the claimant raised what she considered to be her excessive workload. In a section as to career objectives the claimant referred to her unsuccessful applications for promotion, the appeal and the 2017 decision. She stated "Given that the current Dean is leaving, I have decided that I will not appeal again and wait, in the hope that the new Dean will take the University policies more seriously." Her comments included "Increasing the number and quality of peer-reviewed publications. Three papers to submit in next 12 months." Professor Abboud in his comments referred to the claimant being passionate about her work and acknowledged the immense work she had done. He concluded "in fact her workload model is excessive and is leaving us exposed to 'a single point of failure' if we do not invest in another member of staff to support Dita and the Ethics teaching requirements. I will be supportive of her going for promotion for Senior Lecturer in 2018 or 2019 whenever she feels ready."

102. The OSaR form was not signed and dated by Professor Abboud and did not contain the comments of the claimant as reviewee.

103. On 26 June 2018 a report was issued by Ms Isla Reid, an Occupational Health Nurse, after the claimant self-referred to the Occupational Health Department of the respondent. She did so in light of concerns over her health and her lack of clarity as to who was acting as her line manager. The report referred to the claimant's condition and to stress.

104. In July 2018 Professor Mires retired.

105. On 17 August 2018 Dr Jonathan Reed, Occupational Health Physician, issued a report to the respondent, with a copy sent to the claimant, in relation to her. It recommended that there be a discussion with the claimant as to her workload, amongst other matters. That was raised with the claimant by email dated 28 August 20218, with an exchange of messages on 30 and 31 August 2018 in which the claimant said that she could not think of ways she could contribute to discussions on exploring a

return to work or reviewing her workload at that point, and Ms Boyd of HR stated that some staff found it helpful to continue to explore issues while signed off so that they are resolved by the return to work.

106. The claimant commenced a more prolonged period of absence from work in about August 2018. The claimant had been told by her consultant in August 2018 that her condition was a chronic one, and that if she did not change her lifestyle it could be terminal. She was advised to sleep more, eat more regularly, and slow down her pace of life. She felt that her workload was at the equivalent of 1.5 Full Time Equivalents (FTE). She considered that she was working 50 – 60 hours per week. She had twins, then aged a little over 2.

107. On 31 August 2018 Ms Boyd emailed the claimant to state that Dr Hotherstall was sympathetic to her situation and was happy to meet her "to explore any workload concerns you may have and look at any support or reasonable adjustments to support your return to work when the time is right."

108. On 13 November 2018 the claimant emailed Ms Boyd to raise concerns that her teaching was not being carried out during her absence, and that that would cause a difficulty on her return to work. Ms Boyd replied on 20 November 2018 to state that she would raise that and that it would be considered when she was able to return to work.

2019

109. In January 2019 the claimant had surgery, which led to an improvement in her condition after a period for recovery.

110. In around early 2019 Dr Hothersall became the claimant's line manager. Dr Hothersall was not provided with a handover in relation to the claimant. She had limited knowledge of the claimant's medical condition. She was not informed then, or later, of the detail of the OH reports that were obtained.

111. The claimant returned to work in February 2019. She did so on a period of phased return lasting six weeks initially. There was a return to work meeting held with her on 19 February 2019. That same day Ms Ross wrote

to the claimant to summarise what had been discussed, which included the level of workload the claimant had which she considered to be unrealistic. It was agreed that she would work with Dr Hothersall to collate a work plan that accurately reflected the needs of the Medical School by the end of March 2019.

112. The claimant sent a document with comments on her workload to Dr Hothersall on 25 February 2019. It had within it a table of the workload she considered that she then had. It indicated that she was working over 50 hours per week.

113. Dr Reed provided a second OH report on 13 March 2019. It made reference to adjustments to the claimant's workload and that that was being discussed with the claimant's manager.

114. The claimant had a further meeting with HR in relation to the report on 20 March 2019, a note of which is a reasonably accurate record. Workload was discussed and the claimant raised her work for the Schools of Dentistry and Nursing, on which further work would be done.

115. On 25 March 2019 Dr Hothersall prepared a draft report to seek funding for an additional 0.2 FTE role to carry out ethics teaching in the School of Medicine. Her purpose in doing so was to seek to assist the claimant by securing a resource to help with her teaching, thus reducing her workload to an extent. She did so by reference to Measurement of Teaching ("MoT") records maintained for the claimant from 2013. Those records included details of actual work carried out, such as a particular teaching session, and notional work such as an equal period of time for a teaching session as preparation time for it. In addition to records inputted by administrative staff from their records an employee could add additional details described as self reported.

116. The report noted that the work that the claimant was carrying out was divided as follows:

0.2 FTE – School of Nursing
0.2 FTE - School of Dentistry
02. FTE – Global Health in the School of Medicine

0.4 FTE – Ethics teaching in the School of Medicine.

117. Within the allocation of time for the Schools of Nursing and Dentistry was included time for scholarship and valuing people. It was not included within the allocation for the School of Medicine. For that school, the allocation made was 10% of the teaching time for each of scholarship and valuing people.

118. Dr Hothersall reviewed the MoT records for the claimant, which had the following total hours recorded for the relevant academic years:

	Year	Hours
(i)	2013/14	958
(ii)	2014/15	1,008
(iii)	2016/17	101
(iv)	2017/18	701.33

119. Dr Hothersall proposed that the claimant work for the School of Medicine for what would be the equivalent of 0.86 FTE and reduce the work in the other two Schools. In her report she sought approval to appoint someone to teach at 0.2 FTE, and sent that report to the Dean and Associate Dean. It was intended to secure funding for that post from that source, within the School of Medicine. Dr Hothersall did not send it or show it to the claimant.

120. The claimant involved her union, the University and College Union (UCU), and spoke to Marion Sporing. Emails were exchanged between Ms Sporing and the respondent's HR team on 3 April 2019, referring to meetings held on 19 February 2019 and 20 March 2019, in relation to the claimant's return to work on a phased basis, and her workload. The claimant's phased return to work was extended to 30 April 2018 confirmed by email dated 3 April 2018. It contained a recommendation to meet Kaye Montador of HR (working for the Schools of Nursing and Dentistry) to undertake a stress risk assessment of the claimant. The claimant did not accept that recommendation, believing that it should be conducted by an health professional, and such a stress risk assessment was not carried out. Ms Sporing replied to the claimant to state that in her view it was unacceptable that the claimant was being expected to arrange this herself when it was an HR task.

121. On 5 April 2019 Ms Ross emailed the claimant commenting on her own message and proposing a further meeting on 20 May 2019.

122. On 13 May 2019 a report was issued by the Department of Work and Pensions (DWP) following a visit to the claimant's workplace, which made recommendations in relation to providing a printer and heater for her office, giving assistance with transport between the Schools by taxi, and conducting a stress risk assessment. It recorded the claimant's position that she was working 35 – 50 hours per week. The claimant informed HR of the respondent of that report and provided a copy.

123. The claimant returned to work on a full-time basis on 13 May 2019.

124. A further report was provided by Dr Reed on 15 May 2019 again referring to adjustments in relation to her workload. It stated that fatigue was still a significant background problem, and that the most important issue that needed to be addressed was to do with her workload. He stated that it had been clear for some time that the claimant was unlikely to cope with the level of demand that her role had historically involved, but that he was pleased to hear that the manager was looking into possible solutions through a reduction in work requirements or providing additional resource. It was he considered essential to tackle that issue and achieve a level of work demand that the claimant could comfortably cope with within her normal working hours if her health was to be maintained.

125. On 17 May 2019 the claimant sent Dr Hothersall an email with a summary of the roles she carried out, a comparison with what she thought she was supposed to do according to her contract, and what that would be if she had work from Nursing and Dentistry. It indicated that she considered that she was or would be doing the equivalent of about 55 hours per week in total.

126. The claimant, accompanied by her union representative, met Dr Hothersall and two representatives of HR on 20 May 2019. There was a discussion of the claimant's health, and reference made to disability. At the meeting Dr Hothersall proposed changes to the claimant's workload. She suggested removing postgraduate work, which the claimant did not wish to do as that lessened the prospects of promotion. Dr Hothersall said

during the meeting words to the effect that to be promoted one needed to work 60 hours per week. She was emotional when she said that. After doing so she was corrected by one of those from HR who said something to the effect that that was not right. Dr Hothersall suggested that she may be able to obtain approval for additional resource of 0.2 FTE for teaching to assist with workload for the claimant. There was confidence expressed by Dr Hothersall of being able to obtain that additional teaching resource to assist. There were action points set out which included the claimant meeting Dr Hothersall in June 2019 to agree her workload.

127. There was a note of the meeting prepared by HR, which the claimant then revised, and which Dr Hothersall revised further. As so revised it is a reasonably accurate note save for it not including the remark by Dr Hothersall as to needing to work 60 hours per week to be promoted.

128. In email exchanges with the claimant later on 20 May 2019 Ms Sporing suggested some revised wording to propose for the note of that meeting. The claimant said "I still think that asking for it more strongly in the minutes might be worth considering, as Ellie basically confirmed discrimination to me. And falling out with her a bit, and requesting to be line-managed by the Associate Dean for Teaching and Learning might not be a bad idea for the future."

129. On 20 May 2019 Ms Montador emailed the Deans of the Schools of Dentistry and Nursing to explain that the claimant would be contacting them.

130. On 21 May 2019 Dr Hothersall sent an email to Ms Ross and Dr Stella Howden with a summary of the claimant's work. It stated "I am concerned that this does not match her comment in today's summary of discussions ….I do not want to create tension but equally am aware that the shifting narrative could lead to conflict. Do you have any advice?" The document attached indicated a view that the claimant did a total of 1,768 hours work per annum, and contained a proposal that the work for the Medical School be 0.86 WTE [the same as FTE], stating "This would require [the claimant] to reduce her commitment to one or both of the other schools, which would require further discussion."

131. On 22 May 2019 the claimant emailed Dr Hothersall in reply to a message from her with revised minutes and stated “I am glad to hear that you don’t agree with the culture that only staff working lots of overtime should be considered for promotion….” She also emailed to state that “the previous Dean threatened me that he will not support my promotion unless I take on a role of Chair of the School Research Ethics Committee.”

132. Ms Ross emailed the claimant and others on 3 June 2019 to acknowledge the amended minutes from the claimant. She stated “As noted in the minute please see attached the job description supplied when the role was advertised.” She attached a document which had the heading

> “Internal Ref No – 27/10)
> Vacancy for
> Lecturer in Medical Ethics and Global Health.
> Salary commensurate with your current position, up to a maximum of £?????pa….”

It had a section for overall objectives of the post, and provisions as to responsibilities that did not refer to the MSc Global Health and Wellbeing.”

133. The claimant considered the omission of reference to that MSc to be suspicious. She found an old laptop which had retained the notice of the vacancy she had seen, and sent that to Ms Ross. The notice the claimant had seen had as a heading:

> “Vacancy for
> Lecturer in Medical Ethics and Global Health
> Salary: Clinical or Non-clinical lecturer scale as appropriate.”

It had a different section for Background and Overall objectives of the post to that for overall objectives in the document referred to in the preceding paragraph. The section for responsibilities included “contribute to the School of Nursing & Midwifery (SNM) MSc Global Health and Wellbeing” and related reference to that MSc in relation to Teaching.

134. Both documents had the following provision:

> “**3.2 Research**

There are no specific research requirements to this post but it is expected that the postholder will wish and be able to contribute to research or other scholarly activities which related to these teaching activities."

5 135. On 11 June 2019 the claimant sent Dr Hothersall a document with a summary of what work she did for the Medical School, and some suggested solutions for her role in future. She said that she had done so "all for our meeting on Monday." Dr Hothersall did not reply to that email.

136. On the same date the claimant emailed Ms Ross with the version of the
10 notice of vacancy she had found, and asked her to "put this correct version in my HR file please". She said that she would be meeting Dr Hothersall on the following Monday. Ms Ross replied to state that she would do so in relation to the job description. Also on that date she emailed Lynne Mulgrew, one of the SIP administrators stating that she would "probably
15 be around only Monday to Wednesday from next academic year" and asking her to look into how difficult it would be to move all her sessions to Mondays to Wednesdays.

137. On 12 June 2019 the claimant sent Dr Hotherstall an email with a table of her ethics teaching on the MBChB.

20 138. On 13 June 2019 Ms Mulgrew emailed Dr Hothersall about the claimant's work asking if she should cover interprofessional ethics teaching which ran every afternoon save Wednesday. Dr Hothersall replied the same day to state that as the claimant worked across three schools it was not reasonable to expect her to be at the medical school for four afternoons
25 unless absolutely necessary, and if there was no one else to cover the sessions two weeks of Mondays and Tuesdays would be appropriate.

139. A meeting took place between the claimant and Dr Hothersall on Monday 17 June 2019 to discuss workload issues for the claimant. It was a lengthy meeting. No written record of it was maintained. In practice the claimant
30 was working within the School of Medicine at that stage, in the fields of ethics and global health, and not for the Schools of Dentistry or Nursing. The hours she was working varied but were an average of about 40 hours per week, and on occasion to about 50 hours per week, at that stage. Dr

Hothersall raised during that meeting the possibility of the claimant working part-time, which she did not wish to do in light of the effect on salary. In broad terms the proposals that the claimant made set out in the document sent on 11 June 2019 were accepted, although that was not formally communicated to the claimant.

140. Communications between the claimant and HR were undertaken in relation to the DWP report recommendations, including by email on 24 June 2019. The claimant was asked by the respondent to obtain three quotations from taxi companies, which she did, and then by email dated 19 July 2019 there was a suggestion of a process to follow to arrange a taxi service. That service was operational from around November 2019.

141. Adjustments were otherwise not made for the claimant to her hours of work. They remained at around an average of 40 hours per week with on occasion work to about 50 hours per week. The claimant continued to work primarily in the School of Medicine, and to an extent in the School of Nursing, but not the School of Dentistry. The School of Medicine was situated at Ninewells Hospital. The Schools of Nursing and Dentistry were situated on the Central Campus of the respondent, about three miles from the School of Medicine. On average the claimant would work at both separate locations two or three days per week, involving travel between them.

142. On one other occasion during the second half of 2019 on a date not given in evidence the claimant met Dr Hothersall alone. Dr Hothersall raised with the claimant her health, and what her doctors were saying, and raised as a possibility again the claimant working part-time hours. The claimant felt upset at that suggestion, which she did not wish to take up as she had explained before. Her intent was to have her hours restricted to a maximum of 40 per week, which she felt that was the most she could cope with given her health condition and circumstances.

143. On a date not given in evidence the request for funding for a 0.2 FTE post was refused. Dr Hothersall then sought funding for that by another route, via ACT, which provides funding to support NHS clinicians to teach, and was successful in doing so towards the end of 2019.

144. On 29 July 2019 Professor McCrimmon emailed colleagues, including the claimant, about a draft outline of planned workload that had been provided, and asked that it be accepted by 31 July 2019 otherwise there would not be compliance with a Transparent Approach to Cost methodology (TRAC), used by higher education which formed part of a mandated annual return. If not provided it put funding received by the respondent at risk. The claimant did not reply, as she did not think that the workload model for her was accurate.

145. He sent an email to the claimant on 26 August 2019 asking her to do so, and added "As this is an institutional and statutory requirement, it is likely that the senior management team in the University will review all staff who do not sign off on their draft activities." The claimant replied on 27 August 2019 and he responded also on the same day. The claimant did submit her approval to it, but did so under protest. Her email referred to absences caused by her maternity leave and her disability.

146. The claimant was not able to conduct teaching on 29 August 2019 when she felt unwell, and Dr Hothersall learned of that. She emailed the claimant about it on 30 August 2019, asking whether there was to be self-certification or a doctor's note, and the claimant replied on the same day explaining her position. Each email had been copied to Ms Ross, who wrote to the claimant by email on 2 September 2019 stating that working from home when off sick was not the expected standard. The claimant replied that day to state that she would refuse to be at Ninewells more than three days per week from then on.

147. On 16 September 2019 the claimant and Dr Hothersall exchanged emails about arranging teaching slots for the teaching missed during her absence. Dr Hothersall told her to pick it up with two members of the SIP team. The claimant then emailed Dr Hothersall that day and copied it to those two team members. They later that day approached Dr Hothersall and said that they were upset by the tone or content of the claimant's email or both.

148. The claimant met Dr Hothersall for her Objective Setting and Review (OSaR) on 17 September 2019. The claimant had sent the form for the

same to Dr Hothersall over a week beforehand having completed her sections. In relation to the objective from the previous year of becoming a senior lecturer the claimant wrote "I currently don't have trust in the fairness of these UoD procedures, particularly that I have any chance now due to my maternity leave, prolonged illness and disability status." She referred to the OSaR with Professor Abboud which was the only OSaR she had had in the previous four years. She referred to a lack of support, the struggles to have a fair promotion process, lack of communication across Schools, and a "lack of understanding of my unrealistic workload." She said that there had been "some improvement in these areas".

149. Dr Hothersall did not complete the section for the reviewer, nor sign and date it. At the end of the meeting Dr Hothersall raised concerns over the email that the claimant had sent on the previous day, not identifying which one, which were suggested by her not to have been in appropriate terms. The claimant was surprised by her doing so, as she had not prepared for that matter and was not aware of the detail.

150. The claimant returned to her office after their meeting, and was upset, crying in her office for a period of about two hours. She telephoned her husband who suggested that she come home after telling someone. She sent emails firstly to her union representative Marion Sporing, and secondly to Aileen Ross of HR, later on 17 September 2019. In her email to Ms Sporing she referred to part-time working being raised at the meeting, that the claimant had agreed to develop online resources at their June meeting which the claimant did not think she had and "then she told me that 3 members of staff complained about the tone of my emails yesterday, where I was pointing out to her that I never agreed to develop these online resources."

151. She also emailed Dr Hothersall that day to send a document to her sent in June 2019 as had been discussed at their meeting.

152. The claimant attended her GP, who gave her a fit note regarding absence of one or two weeks, but who said that she should consider overnight whether she was to use it.

153. On 17 September 2019 Dr Hothersall emailed Professor Hector to inform him that the claimant was not very clear what was expected of her in the School of Dentistry.

154. On the following morning the claimant felt that she did not require to take the time off indicated by the fit note.

155. The claimant met Dr Howden to discuss her concerns over the annual review meeting in about late September 219, who suggested a meeting with the Dean. The claimant had a separate meeting with Aileen Ross, with her union representative Gary Roberts in attendance, on 4 October 2019 at which Ms Ross raised the possibility of the claimant pursuing a grievance in relation to the OSaR meeting. The claimant indicated that a meeting with the Dean was what she wished. The claimant sought a meeting with the Dean of the School of Medicine Professor Rory McCrimmon by email of 7 October 2019. Professor McCrimmon was Dr Hothersall's line manager. His diary was full at that time and an appointment did not immediately take place as he did not understand that the issue was urgent.

156. On 22 October 2019 Richard Scrivener of the respondent responded to a reminder that day from the claimant about a heater and printer for her and apologies that he had not got back to her sooner. The claimant had sent a reminder on 1 October 2019 and attached an email from Ms Ross on 12 August 2019 stating that Mr Scrivener would contact her. He said that there was a move "away from standalone printers to the big ones" and that a standalone printer could not be given to her, and that he was looking at relocating her "to a space that will be nearer to a multi-user printer and of course with better heating than you currently have."

157. Mr Scrivener attended at the claimant's office, as she referred to in an email to him, later that same day (22 October 2019). The claimant was inside, with the door closed, and initially neither he nor security staff he spoke to could enter. The claimant then opened the door and he entered. He saw that there were four electric oil-filled radiators in the room, and that it was warm. He discussed the claimant moving to a new office. The new office was in the medical physics building. It had a place to allow taxi

drop off outside it. The new office for the claimant was inside the main entrance of that building. It had a printer immediately outside her office for her to use. It had effective heating. The security staff expressed a view to him that the claimant had changed the lock on the door, which she had not done.

158. The claimant met Professor McCrimmon on 11 November 2019. At it she outlined what had happened at her annual review meeting, indicating that it had not gone well and she had not been supported. He explained that a new Head of Undergraduate Medicine was to be appointed shortly. He said that he would discuss matters with Dr Hothersall. No note of the meeting was taken.

159. On the same date the claimant emailed Professor McCrimmon to state "Thank you very much for meeting me earlier today. I really appreciate it."

160. On 11 November 2019 the claimant emailed Mr Michael McDiarmid of the respondent with a copy to Ms Burgess and Mr Scrivener saying that she did not know what was happening that she had told him that she would not find time to pack in November and that January was the earliest she could find time for at least half a day for the move.

161. Mr Scrivener replied on the following day to say that she was needed to move in November as the space was required, and that he was under the impression she was aware of that. He referred to the printer that would be used, and that a heater had been ordered, but that that would not prevent her moving as she currently had extra heating resources. The claimant replied to ask who was moving into her office, and when. Mr Scrivener emailed the claimant to state that the space was required for an SOM review. The claimant responded on the same date and stated that she had told him that she would not be able to move until around or after Christmas due to her many commitments. He offered to meet to explain matters. A new heater was ordered which conformed to the requirements of the NHS which operated the building, and which was placed in the office identified for the claimant in the medical physics building. The claimant remained in her former office at that stage.

162. Professor Maggie Bartlett was appointed to the post of Head of Undergraduate Medicine and announced as such around 19 November 2019.

2020

5 163. A Teaching Assistant was obtained to assist the claimant in delivering teaching, with that person, Dr Eleanor Brewster, who was a clinician in the NHS, appointed as a Lecturer for one day per week, commencing in or around February 2020.

164. In February 2020 an away day took place involving the claimant and about 10 100 other staff. Dr Hothersall was at the away day and attended as one of the organisers. During the course of it there was a discussion about the timing to introduce a new curriculum held with all those present. The claimant questioned whether there was time to do so, and commented that it may be appropriate to delay doing so until the following academic year 15 in light of the developing pandemic. Dr Hothersall said in response something to the effect "let's calm down" about that matter. The claimant felt that that was directed at her, did not make a comment at that time, but left the meeting about ten minutes later. Dr Hothersall intended that her comment be directed to the group as a whole, not the claimant alone.

20 165. On 3 March 2020 Joan Robertson, Equality, Diversion and Inclusion Officer of the respondent, emailed Professor McCrimmon about implementing reasonable adjustments and asking that that be progressed without delay, setting out the risk to the respondent if not done. Professor McCrimmon replied on the same day that he would look into it 25 immediately. He did, and understood that the matters were addressed.

166. In early March 2020 the claimant met Professor McCrimmon again. She informed him of what had happened at the away day. He apologised for not progressing the change of line manager, and said something to the effect that he would do so. He had not spoken to Dr Hothersall about it, 30 although that was not said to the claimant.

167. The Covid-19 pandemic led to restrictions being introduced on 23 March 2020, as a result of which staff were instructed not to attend the

respondent’s premises save with specific permission, The claimant, as with other staff, started to work from home as a result.

168. A printer was supplied to the claimant for office use during March 2020, but was not connected because of the Covid-19 pandemic arrangements on 23 March 2020 which prevented return to the premises at that time.

169. In May 2020 Dr Hothersall was seconded to work for NHS Tayside in a public health role, and ceased to work in her role with the respondent as a result. Professor Maggie Bartlett took over the role of line manager of those Dr Hothersall had been line managing, which increased the number of staff she was line managing from about 17 to over 40. She became the claimant’s line manager in around May 2020.

170. On 3 June 2020 Professor McCrimmon exchanged emails with Dr Howden in relation to the claimant and his meeting with her in November 2019. Dr Howden asked for a steer on the claimant’s line management, and stated “Dita suggested that in your conversation with Dita (poss at the start of this yr) that her line management could move from Ellie to Maggie.” Professor McCrimmon replied that it had slipped off his radar, he could not find a note of the meeting and could not recall all the details. He said “I did say I would look into this – although my next step should have been to discuss with Ellie and I suspect I did not do this. At the same time I do not think I would said her line management would effectively change there and then, more that I would explore it further…..”

171. On 9 July 2020 Dr Howden emailed the claimant confirming that Dr Hothersall was undertaking a full-time public health role for six months and that Professor Bartlett was taking over her OSaRs. She commented on the claimant’s OSaR with Dr Hothersall, and that Dr Hothersall had not been informed of that. She suggested seeking guidance from the dispute resolution team. The claimant replied on 13 July 2020 agreeing that such guidance could be sought, and referred to her experiences which she said were negative about “speaking up about bullying, discrimination and unconscious bias”, that she had not had a fair promotions process, and that she had her doubts as to whether the respondent was committed to

tackling such matters. She expressed a view that involving the dispute resolution team might put her (the claimant) in the spotlight.

172. On 31 July 2020 the claimant met Professor Bartlett online for her OSaR meeting. In the form prepared by the claimant prior to the meeting the claimant's comments included "The School of Dentistry have not used me for teaching and assessment in the last academic year, despite my regular reminders." In her career objectives she stated "successful senior lecturer promotion in the academic year 2020/21." She stated "I believe that I am ready to submit a successful application in the academic year 2020/21". During the meeting Professor Bartlett commented on the claimant's expressed wish to seek promotion to senior lecturer, and discussed with her the level of her outputs that was required, as she was concerned that, from the form submitted, they were not likely to be sufficient to secure promotion. She sought to assist the claimant to be able to meet the criteria for promotion.

173. The claimant sent her comments in relation to the form on 3 August 2020, and thanked Professor Bartlett for the meeting. On 3 August 2020 the document confirming the OSaR was completed.

174. The reviewer section of the form stated "Promotion – we talked about the new criteria and the need to consider them before embarking on the process. You have had supportive discussions with the Dean and others about this and you have an external academic mentor." The claimant in her comments stated that she was very grateful to Professor Bartlett for a frank and open discussion, and referred to the position on promotion, agreeing that she had to check the criteria and commenting that if research and publication was required for promotion that should be reflected in contracts. She referred to surprise that the contract she was on was raised at the start of the meeting, and set out her position.

175. Towards the end of 2020 the claimant decided to apply for a post advertised at Birmingham University as a Senior Lecturer.

2021

176. On 5 February 2021 the claimant had a period of absence through sickness. Her GP provided a fit note for the period 5 – 21 February 2021 sent to the respondent on 22 February 2021. Another fit note was provided for the period 22 February 2021 to 7 March 2021. On 8 March 2021 the claimant emailed Ms Ross to say that she was not fit to return to work yet.

177. On 9 March 2021 Ms Ross emailed the claimant to seek to arrange a meeting with her, with Professor Bartlett, to "discuss your concerns regarding workload and to explore potential adjustments to support your return to work when your health allows." A meeting on 15 March 2021 was proposed. The claimant replied and messages were exchanged with the claimant proposing that it be postponed until she arranged union representation. On 15 March 2021 Ms Ross emailed the claimant with regard to the meeting proposed in the previous year to discuss workload issues and said that it had been "overtaken by the further conversations we had privately."

178. The claimant attended an interview for the post of Senior Lecturer at Birmingham University on 24 March 2021 and an hour or two after doing so was informally offered the job. After receiving that offer and on the same day the claimant sent an email to Professor McCrimmon, Dr Howden and Professor Bartlett informing them of that offer of employment, saying that she would like to schedule a meeting with them to discuss the position. She said that Birmingham University would need to be told her decision within 10 days. She stated "I would be happy to stay here if you could match their offer in terms of Senior Lectureship and pay and also re-shaping my post to allow for more authority and career developments."

179. Professor McCrimmon replied on 29 March 2021 to congratulate her on the post. He said "Unfortunately the School of Medicine is not in a position to match the promotion and salary increment offered by Birmingham." He did not meet her to discuss the matter. He did not have the authority to match the offer that had been made. Promoting the claimant to Senior Lecturer at the respondent would require an ARC process, and that would

not be possible to conclude within the 10 day period the claimant had referred to.

180. On that date the claimant replied “thank you for letting me know and the good wishes.”

181. At the end of March 2021 the claimant consulted her GP about what she feared might be cancer. Her GP referred her for a scan to investigate it. As a result of the pandemic she was told that that might take more than the target of around 4 weeks.

182. Professor Bartlett discussed the proposal to arrange a return to work meeting with the claimant during the last days of March or first days of April 2021. The claimant informed Professor Bartlett that she was to be leaving to go to Birmingham.

183. On or around 4 April 2021 the claimant informed Birmingham University that she would accept their offer, by clicking a link on an email of “accept/refuse”.

184. A formal offer of employment as Senior Lecturer was made to the claimant by Birmingham University (which was not before the Tribunal), which the claimant accepted (on a date not given in evidence).

185. In early May 2021 Dr Hothersall returned to work at the respondent, on a 0.5 FTE basis. She resumed her former role.

186. On 17 May 2021 Dr Hothersall emailed the claimant and five other members of staff stating

> “I’m very pleased to say that after my protracted absence I am now back in my university role. I am immensely grateful to you all for the enormous amount of hard work you have put in through this extraordinarily difficult period – it has been a huge relief knowing the students were in such safe hands. I know it has been very difficult and tiring.
>
> I hope to have an opportunity to catch up with each of you as soon as possible. Some of you in this email would normally have an

OSAR with me, and hopefully we can do that (or start it?] at the same time. I have made a Doodle poll for you to book a slot……"

187. Those she wrote to included two for whom she had not carried out the OSaR for. The email was in similar terms to others that she had sent to other staff seeking meetings with them as part of her return to work for the respondent.

188. At some point around this time (on a specific date not given in evidence) Professor Bartlett told Dr Hothersall that she (Professor Bartlett) would carry out the claimant's OSaR given the difficulties that the claimant had had, or words to that effect.

Resignation

189. The claimant gave notice of termination of employment by letter dated 18 May 2021. It was given with notice which was to expire on 31 August 2021. In her letter she stated

"……I am resigning because I have received an offer to become Senior Lecturer at the University of Birmingham. The primary reason I started applying for jobs elsewhere at the beginning of this year, and have taken the decision to leave, is that the University of Dundee does not treat academic staff on Teaching and Scholarship (T&S) contracts equally to staff on research contracts…….

The second reason why I am leaving is that I have experienced discrimination and bias from members of staff in Dundee, especially in the undergraduate teaching side of the School of Medicine. Being a woman, a mother, non-British and with disabilities makes it impossible to thrive professionally in such an environment. I would be happy to provide the very long list of inappropriate things that were said and done to me in my 8 years here, especially since I had children and developed chronic health problems about 5 years ago. Just three examples of this are 1) a previous line manager said very inappropriate things about disabled staff to me in front of two HR officers, openly showing that she holds discriminatory views about disabled people. Despite her

statement ending up in minutes of the meeting, and me talking about it to management repeatedly, no action was ever taken by anyone in the university. 2) HR in the School of Medicine falsified my contract (specifically my job description when the position was advertised) and created fake information that was not there before. 3) my previous manager (and former Dean) deliberately hindered my promotion application, something that an appeal complaint panel confirmed, but no action was taken by the university anyway……I therefore decided to be very clear about my true reasons for leaving and copy several people throughout the University…..”

190. The resignation was initially acknowledged by Ms Ross using a standard form letter the same day. It referred to having an exit interview. It did not refer to the comments that she had made in the letter as to the reasons for her resignation. HR of the respondent offered to meet the claimant to discuss her resignation by emails of 25 May 2021. The claimant replied that same day stating that she had been raising concerns about discriminatory, inappropriate and unfair practices in the School for five years, that she had lost trust in the institution and that HR had been a part of the inappropriate practices for many years. Arrangements were proposed for the claimant to do so with Fiona Brown, the School Manager. A meeting took place in our around June or July 2021 between the claimant and Ms Brown, which the claimant commented on in an email on 27 May 2021. (No notes of such a meeting were before the Tribunal).

191. The claimant remained at work with the respondent for the period to 31 August 2021 subject to periods of annual leave. That leave included the period from 6 August 2021, during which the claimant made arrangements to move from Dundee to Birmingham.

Grievance

192. The claimant sent a six page grievance to the respondent on 31 August 2021, her last day of employment. In it she gave a detailed commentary on the matters of which she complained. She mentioned the OSaR with Professor Bartlett as “a last straw in my will to stay in Dundee.” She

mentioned the email from Dr Hothersall, being that dated 17 May 2021, "who seems to believe that she is yet again my line manager after her return. So, had I stayed in my job, I would have no protection from her further bullying, discrimination and bias, despite me making grievances about it to several members of the School management, including the Dean…… "

193. It was acknowledged on 20 September 2021 by Dawn Robertson of HR. The claimant replied on 21 September 2021 to allege breaches of policies, and stating that whilst she had left the respondent she was available for online meetings. She referred to a submitting her written complaint. On 5 November 2021 Ms Poor wrote to the claimant to say that she was looking at the "various strands" of the complaint made. A further message was sent to the claimant on 7 November 2021, which the claimant replied to that day.

194. Two investigators were appointed to investigate the grievance, being Ms Jennifer Donachie, School Manager in the School of Health Sciences, and Ms Leonie Poor HR Officer. They did not contact the claimant to offer her the opportunity to contribute to it, or to attend a grievance hearing. They prepared a draft written report, which was not dated. The grievance was rejected.. The respondent sent the claimant that draft report by letter on 27 April 2022, the report being dated 22 April 2022. No right of appeal was offered to the claimant.

Events after 31 August 2021

195. The claimant commenced new employment with Birmingham University on 1 September 2022 as a Senior Lecturer.

196. The claimant commenced Early Conciliation on 24 November 2021. The Certificate in respect of the same was issued on 4 January 2022.

197. The present claim was presented on 3 February 2022.

Consequences for claimant

198. The claimant's gross weekly wage with the respondent at termination was £967.15 per week, and her net weekly wage was £630.46. She received

a higher wage and pension provision with the University of Birmingham from and after 1 September 2021. She incurred relocation costs in moving from Dundee to Birmingham in the sum of £7,398. .

199. In the event that the claimant had been promoted to Senior Lecturer by the respondent in August 2016 she would have received higher net wages and related pension contributions for the period to 31 August 2021, the loss of which is reasonably estimated in the sum of £26,735, exclusive of interest.

200. The claimant felt stress, upset and frustration by the rejection of her applications for promotion. She felt stress, upset and frustration by what she perceived as the treatment of her by her managers in particular Professor Mires, Professor McCrimmon, Professor Bartlett, and Dr Hothersall, and by HR officers including Ms Ross. She felt stress, upset and frustration when intimating her resignation. The resignation and acceptance of the offer involved a move of home from Dundee to Birmingham.

Other matters

201. When the claimant commenced her employment with the respondent it was structured in Colleges. In or around 2016 that structure changed, and Schools were introduced.

202. In the respondent, research was considered, in basic summary, to be an investigative process that resulted in new knowledge that could be applied in practice. Scholarship was considered to be ensuring awareness of best practice in the subject discipline, evaluating one's own performance and the performance of the relevant curriculum, in basic summary research and scholarship are not entirely different concepts, but had distinctions between them.

203. Lecturers and many other academic staff at the respondent were employed under two types of contract. One was Teaching and Research, under which there was a material part of the focus of the role on research output as well as the delivery of teaching. The other was Teaching and Scholarship under which the focus was on teaching, and a notional 10%

of time allocated for scholarship. The effect of the Teaching and Research contract arrangement was that it was generally easier to obtain evidence of academic excellence to support an application for promotion than for a Lecturer on a Teaching and Scholarship contract.

5 204. It was and is common for many academic staff in the respondent, including the School of Medicine, to work long hours of the order of 50 to 60 hours or more per week.

205. Records for MoT for the years after 2017/18 were not provided to the Tribunal. The years 2016/17 and 2017/18 were materially affected by the
10 claimant's maternity leave and sickness absences.

206. Clinical staff in the School of Medicine have duties and responsibilities in the clinical field in addition to their academic duties.

207. The School of Medicine uses space at Ninewells Hospital in Dundee which is owned and managed by NHS Tayside, and is not under the direct
15 control of the respondent.

208. The respondent's staff undergo regular training on equality, diversity and inclusion. For academic staff it is a matter addressed in the OSaR each year.

209. The respondent issued a Pay Gap report in 2019, which noted that there
20 was a gender pay gap of approximately 20% between females and males, with the former having the lower pay. There was very little gap between those disabled and not, with the average showing a gap in favour of disabled people and the median a gap against disabled people. There was a small gap in favour of those identifying as BME (black and minority
25 ethnic, otherwise BAME) against those who identified as white, but the claimant did not identify as exclusively either BME or white.

210. The report noted that there were 270 male staff at grade 8 and 254 female staff at that grade, and that there were 142 male staff at grade 9 and 118 female staff at that grade.

30 211. The report noted that there were 457 staff identified as white at grade 8 and 48 identified as BME at that grade, and that there were 231 staff

identified as white at grade 9 and 19 identified as BME at that grade. White staff included those who were white European. It noted that there were no BME staff in grades 1 – 2.

212. Of the full-time staff there were 413 at grade 8 who were non-disabled and 17 who were disabled at that grade, and 223 at grade 9 who were non-disabled and 12 who were disabled at that grade.

213. The respondent issued a Mainstreaming and Outcome Update Report in 2019. It referred to three staff networks, which included a Disability Group. It noted that Harassment Advisers had been appointed in the respondent, who staff or students could access. The claimant did not do so as she was not at the time of her employment aware of that facility.

214. The School of Medicine prepared a document highlighting issues of equality, diversity and inclusion in the School. It was prepared in relation to the academic year September 2020 to August 2021.

215. The Race Equality Charter of the respondent issued a Survey and Focus Group Findings and Analysis in April 2021. It contained a Foreword by the Principal and Vice-Chancellor Professor Iain Gillespie which commenced "In successfully tackling any problem we first need to try to understand both the nature and extent of it. That is the spirit in which our race equality survey was carried out." In the Survey, the group that was white included those of an European white background. The concerns noted in the Survey included lack of black and minority ethnic (referred to as BME or BAME) representation in decision and policy making committees, key leadership roles and within the Senior Management Group, as well as low representation of BAME staff across the respondent. There was a perceived lack of transparency regarding decision-making processes including for promotions. In an article published in the Dundee Courier newspaper in relation to the Survey Professor Gillespie was quoted as saying that the "results were disturbing, shocking and uncomfortable."

216. In general terms there are proportionately more men than women in clinical roles in the School of Medicine, and were so in the period of the claimant's employment with the respondent ("the relevant period"). In general terms there are proportionately more women than men on

Teaching and Scholarship contracts with the respondent than on Teaching and Research contracts, and that was so in the relevant period. In general terms there is proportionately a greater incidence of success in applications for promotion for those on Teaching and Research contracts than for those on Teaching and Scholarship contracts, and that was so in the relevant period.

217. The School of Medicine promotion statistics for 2020 show that three male applications had been made for a Grade 8 post, and four (sic) granted, six applications for such a post made by a white person and seven (sic\0 approved, and eight non-disabled persons had applied for such a post and nine (sic) approved.

218. The proportion of those who are black or ethnic minority in the Dundee area is about 10% at present. In the relevant period it was in the range of 4 – 10%, but a more precise figure was not given in evidence.

219. Those on Teaching and Research contracts have external verification of their research efforts and output from being able to apply for research grants, and from the assessment of research output by the respondent annually, and from a Research Excellence Framework assessment conducted for all higher education institutions in the UK every five years or thereby. Those on Teaching and Scholarship contracts are likely to have less formal publication, no research grant income, and less direct external assessment of scholarship activities than those on Teaching and Research contracts.

220. At some point in 2022 the respondent changed the criteria for promotion to grade 9 to make it easier for those on Teaching & Scholarship contracts to secure promotion. The revised criteria were not before the Tribunal. The respondent has also changed from the OSaR process.

221. Ms Boyd of HR of the respondent remains employed by it, as does Ms Montador. Dr Fardon remains employed by the respondent.

222. Of those on the ARC Panels which considered the claimant's applications for promotion in 2015, 2016 and 2017 a number have left the respondent but remain in Great Britain, and a number remain employees of the

respondent. Of the Appeal Committee Professor Newman has retired from the respondent, but remains in the Dundee area doing consultancy work, Professor Stewart has left the respondent but remains in Great Britain, and Professor Jindal-Snape remains employed by the respondent. Professor Jindal-Snape told Ms Strachan (on a date not given in evidence) that she did not recall the reasons for the Appeal Committee decision in relation to the claimant.

223. Ms Donachie who investigated the claimant's grievance remains employed by the respondent, as does Mr McGeorge. Ms Poor retired at some point after the report was completed.

Submissions for claimant

224. Mr Cunningham provided a full written submission, which he supplemented orally. It was in two parts, the first in relation to the law, and the second submissions on the issues, facts and application of law to fact. As it had been tendered largely in writing it is not repeated within the Judgment. All of the submission was considered, including all of the authorities relied on although not all are set out in the summary of the law below. He sought a finding in favour of the claimant and an award in accordance with the Schedule of Loss. We address the arguments made to us below.

Submissions for respondent

225. Mr Grant-Hutchison also provided a full written submission, which he supplemented orally. He provided a separate volume of authorities relied on. As it had been tendered largely in writing it is not repeated within the Judgment. Again all of the submission was considered, including all of those authorities although not all are set out in the summary of the law below. He argued that the claim should be dismissed.

The law

(i) Unfair dismissal

(a) Statute

226. Section 95 of the 1996 Act provides as follows:

5 "**95 Circumstances in which an employee is dismissed**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

……………..

(c) the employee terminates the contract under which he is
10 employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

227. Section 98 of the Act provides as follows:

"98 General

15 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

20 (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

25 (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

30 (d) is that the employee could not continue to work in the position which he held without contravention (either on his

part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……………

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."………………..

(b) Case law

Dismissal

228. The onus of proving a dismissal where that is denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

229. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in ***Malik*** to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

5 230. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the
10 EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT:***

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or
15 seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

231. The law relating to constructive dismissals was reviewed in ***Wright v North Lanarkshire Council [2014] ICR 77***, which in turn referred to ***Meikle v Nottinghamshire Council [2004] IRLR 703*** on the issue of
20 causation. The reasonableness or otherwise of the employer's actions may be evidence as to whether there has been a constructive dismissal, although the test is contractual: ***Courtaulds Northern Spinning Ltd v Sibson and Transport and General Workers' Union [1988] IRLR 305***, ***Prestwick Circuits Ltd v McAndrew [1990] IRLR 191***. There is in
25 general no contractual right to observance of statutory rights, especially where the statute itself provides a remedy: ***Doherty v British Midland Airways [2006] IRLR 90,*** where an employee left because of alleged victimisation on trade union grounds which was held not to be a constructive dismissal. In ***Green v Barnsley Metropolitan Borough
30 Council [2006] IRLR 98*** it was held that a failure to make reasonable adjustments for disability over a period of time was a constructive dismissal because it constituted a breach of trust and respect. Where, however, the alleged breach of trust and confidence consists solely of an exercise of a discretion granted to the employer by the contract of

employment, an employee who is disadvantaged by it can only challenge it by showing that no reasonable employer would have done so ***IBM UK Holdings Ltd [2018] IRLR 4*** (applying ***Braganza v BP Shipping Ltd [2015] IRLR 487***).

5 232. Delay may or may not lead to acquiescence in a breach. It is a matter of fact and degree. That includes if notice given is greater than that required under the contract – ***Cockram v Air Products Ltd [2014] ICR 1065***.

233. In ***Omilaju v Waltham Forest London Borough Council [2005] IRLR 35*** the Court of Appeal held that where the alleged breach of the implied
10 term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. In ***Kaur v Leeds***
15 ***Teaching Hospitals NHS Trust [2018] IRLR 833*** where the claimant relied on her being disciplined as the last straw to various earlier alleged instances of employer misconduct it was held by the Court of Appeal that on the facts the employer had acted entirely properly in activating the disciplinary procedure and so that could not constitute a last straw at all.
20 That case, also in the Court of Appeal, reviewed the position in relation to the last straw.

234. The onus is on the claimant to establish that there was a dismissal.

235. Account is to be taken of the ACAS Code of Practice on Disciplinary and Grievance Procedures (section 207A of the Trade Union and Labour
25 Relations (Consolidation) Act 1992). The Code defines grievances in the introduction section as “concerns, problems or complaints that employees raise with their employer.” It is also stated that what action is reasonable depends on all the circumstances, but includes that

- “Employers and employees should raise and deal with
30 issues promptly….
- Employers and employees should act consistently……”

236. Paragraphs 32, 33 35 and 40 provide

"32 If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

33. Employers should arrange a formal meeting to be held without unreasonable delay after a grievance is received…..

35. Workers have a statutory right to be accompanied by a companion at a grievance meeting…..

40. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay……The employee should be informed that they can appeal if they are not content with the action taken….".

(ii) Discrimination

(i) Statute

237. The Equality Act 2010 ("the Act") provides in section 4 that each of sex, race (including nationality) and disability is a protected characteristic. The Act re-enacts large parts of the predecessor statutes on sex, race and disability but there are some changes.

238. Section 13 of the Act provides as follows:

"**13 Direct discrimination**

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."

239. Section 15 of the Act provides as follows:

"**15 Discrimination arising from disability**

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

240. Section 19 of the Act provides

5 **"19 Indirect discrimination**

(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 purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —

10

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) 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,

15

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

20 (3) The relevant protected characteristics are—

……disability;….race…..sex…..":

241. Section 20 of the Act provides as follows:

"20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

25

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage……"

30

242. Section 21 of the Act provides:

> **“21 Failure to comply with duty**
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person….”

243. Section 23 of the Act provides

> “**Comparison by reference to circumstances**
>
> (1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case….”

244. Section 26 of the Act provides

> **“26 Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> ………
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5)The relevant protected characteristics are …..disability….race….sex…..”

245. Section 27 of the Act provides:

> “**27 Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(*a*) B does a protected act, or

(*b*) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

………

(*d*) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

246. Section 39 of the Act provides:

"**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

………

(7) In sub-sections (2)(c) and (4)(c) the reference to dismissing B includes a reference to the termination of B's employment-

……

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

247. Section 40 of the Act provides:

5 "**40 Employees and applicants**

(1) An employer (A) must not, in relation to employment by A, harass a person (B) –

(a) Who is an employee of A's ……."

248. Section 123 of the Act provides

10 ""**123 Time limits**

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

15 (b) such other period as the employment tribunal thinks just and equitable…….

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

20 (b) failure to do something is to be treated as occurring when the person in question decided on it."

249. Section 136 of the Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the 25 absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

250. Section 212 of the Act states:

30 "**212 General Interpretation**

In this Act - ………

'substantial' means more than minor or trivial".

251. Schedule 8 to the Act, at paragraph 20(1) (b), provides that an employer only has a duty to make a reasonable adjustment if they know, or could reasonably be expected to know, that the employee has a disability or is likely to be placed at a substantial disadvantage.

252. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

253. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned." The Act is similarly construed against the terms of the ***Equal Treatment Directive 2006/54/EC*** in relation to the equal treatment of men and women in employment.

254. The Directives referred to are retained law under the European Union Withdrawal Act 2018.

(ii) Case law

(a) Direct discrimination

5 255. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional*** 10 ***Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the 15 alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

256. Further guidance was given in ***Amnesty***, in which the then President of 20 the EAT explained the test in the following way:

> "… The basic question in direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of. ……..
> In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself……
> 25 In other cases—of which ***Nagarajan*** is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always 30 an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions).

> Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in ***James v Eastleigh***, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling ***James v Eastleigh*** and ***Nagarajan***. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

257. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

258. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

259. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

260. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

261. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

262. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'

263. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

264. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the following (in a case which concerned the protected characteristic of disability):

> "5
>
> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.
>
> 6
>
> In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee

raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

(b) Discrimination arising from disability

Knowledge

265. There is a defence to the claims under sections 15 and 20/21 if the employer did not know, and proves that it could not reasonably be expected to know, that the employee was disabled. Guidance on these issues was given in ***IPC Media Ltd v Millar [2013] IRLR 707*** that it is necessary to determine who the alleged discriminator was (ie whose mind is in issue and who, in an appropriate case, becomes 'A' in sub-s (2)). It was subsequently held by the EAT that the knowledge of one element of the organisation (eg HR or Occupational Health) is not automatically to be imputed to the manager actually taking action against the employee; if that manager lacks the requisite knowledge, sub-s (2) may operate*: **Gallop v Newport City Council [2016] IRLR 395, Reynolds v CLFIS (UK) Ltd [2015] IRLR 562**.* In ***Pnaiser v NHS England [2016] IRLR 170*** the EAT gave further guidance that the knowledge required was of the disability, not the "something". The EHRC Code of Practice at paragraphs 5.13 – 5.19 also provides guidance on what matters might be sufficient to amount to knowledge or imputed knowledge (that which the employer ought reasonably to know) in this regard. Similar comments are made at paragraphs 6.17 – 6.22 in the context of reasonably adjustments.

Something arising

266. The EAT held in ***Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893*** that the requirement for knowledge under section.15 was not that the putative discriminator knew that something arose in consequence of the disability; once the discriminator knew of the disability, and objectively the something which caused the unfavourable treatment arose in consequence of the disability, the terms of the section were satisfied. That "something" did not need to be the sole or principal cause

of the treatment, but required to be at least an effective cause, or have a significant influence on, the treatment.

267. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305****:*

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' – and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

268. In ***City of York Council v Grosset [2018] IRLR 746****,* Lord Justice Sales held that

> "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

269. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** *that:*

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

270. In ***iForce Ltd v Wood UKEAT/0167/18*** the EAT held that there could be a series of links but required that there was some connection between the something and the disability.

271. In ***Dunn v Secretary of State for Justice [2019] IRLR 298*** the Court of Appeal held that "it is a condition of liability for disability discrimination under s 15 that the claimant should have been treated in the manner complained of because the 'something' which arises in consequence of that disability". This will typically involve establishing that the disability or relevant related factor operated on the mind of the putative discriminator, as part of his conscious or unconscious mental processes. This is not, in this context, the same as examining 'motive'.

272. In ***Robinson v Department of Work and Pensions [2020] EWCA Civ 859, [2020] IRLR 884*** the Court of Appeal held it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be *because of* the something which arises out of the disability.

Unfavourable treatment

273. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. That was undisturbed by the Supreme Court when it later considered the case. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage." Reference to the measurement against an objective sense of that which is adverse as compared to that which is beneficial was made in ***T-System Ltd v Lewis UKEAT/0042/15.***

(c) Indirect discrimination

274. Lady Hale in the Supreme Court gave the following general guidance in ***R (On the application of E) v Governing Body of JFS [2010] IRLR 136***

"Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

The same principle applies for other protected characteristics, one of which is disability.

Provision, criterion or practice

275. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science* [*1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in ***Essop v Home Office [2017] IRLR 558***.

276. In ***Ishola v Transport for London [2020] IRLR 368*** Lady Justice Simler considered the context of the words PCP and concluded as follows:

"In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

277. In ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** it was held that there cannot be a group of one person. The importance of identifying what the PCP that is relied on was stressed in Pipe v Coventry University Higher Education Corporation [2023] EAT 73.

5 *Disproportionate impact*

278. The PCP must create a disproportionate impact on, in this case disabled persons. The wording of section 19 does not necessarily require statistical proof. As Baroness Hale put it in ***Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601*** the change in the Act over the
10 predecessor provisions

> ~was intended to do away with the need for statistical comparison where no statistics might exist… Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question~.

15 279. In ***Essop v Home Office [2017] IRLR 558*** the Supreme Court made the following comments:

> "A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be social, such as the expectation that women will
> 20 bear the greater responsibility for caring for the home and family than will men…."

280. In the case of ***Cumming v British Airways plc UKEAT/0337/19*** that quotation was referred to in relation to sufficiency of evidence as follows:

> "there may be an argument that Lady Hale's general proposition
> 25 was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities".

30 281. Whether evidence is required on disadvantage depends on the circumstances. In ***Hacking and Patterson v Wilson UKEATS/0054/09***

the question was asked of whether or not refusal of a request of flexible working puts women at a particular disadvantage. In ***Cowie and another v Scottish Fire and Rescue Service [2022] ICR 1693*** the Tribunal considered whether the Covid-19 pandemic might have adversely impacted more on women than men, but held that it could not simply assume that. That approach was upheld on appeal.

282. In addition to group disadvantage there must also be disadvantage to the claimant herself.

Reasonable adjustments

General

283. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, and in ***Newham Sixth Form College v Saunders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in ***Ashton***. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.***

284. The Court in ***Saunders*** stated that:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

285. The duty may involve treating disabled persons more favourably than those who are not – ***Redcar v Lonsdale UKEAT/0090/12.*** The duty to make reasonable adjustments does not extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless be of evidential

significance. In ***Project Management Institute v Latif [2007] IRLR 579*** the EAT stated that

> "… a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."

286. The EHRC Code is guidance, to be taken into account in this assessment. In relation to the Code applicable to the predecessor provision, in ***Environment Agency v Humphreys EAT/24/1999*** it was held that a failure to treat the Code as a checklist will not invalidate a tribunal's decision; it is the statute that takes precedence.

Adjustments

287. The EAT stressed the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The adjustment proposed can nevertheless be one contended for, for the first time, before the Tribunal, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205.***

288. An employer may take into account wider implications of the proposed adjustment for the work and other employees: ***Weaver v Chief Constable of Lincolnshire Police [2008] All ER (D) 291.***

289. In ***Griffiths v Secretary of State for Work and Pensions, [2016] IRLR 216*** the Court of Appeal held that the word "step" is to be given a wide interpretation generally, but that if a step is not likely to protect employment it is not likely to be a reasonable one to require

290. In ***Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 644,*** on the predecessor provisions of the 1995 Act, it was held that conducting a risk assessment is not itself a step that should reasonably be taken because it would not in itself affect the underlying problem; however, it was later held *that case* should not be applied too strictly and if such a risk assessment would go further and produce a recommended course of action, that *may* constitute such a step: ***Watkins v HSBC Bank Ltd [2018] IRLR 1015.***

Chance of success

291. One factor to consider is whether or not a proposed adjustment would avoid the disadvantage. It is not essential for the claimant to prove that it would certainly, or in probability, have done so. It may be sufficient that there is a chance that the adjustment would be successful in doing so (***South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/0341/15***). In ***Griffiths v Secretary of State for Work and Pensions [2017] I.C.R. 160*** the EAT held that uncertainty of outcome was one of the factors to weigh up when assessing the question of reasonableness.

292. In cases under the predecessor provision it had been held that what was required was a reasonable prospect of preventing the disadvantage in question, not merely that it would give the employee an opportunity of avoiding it, and it was only if there was such a reasonable prospect that the tribunal should consider if it was reasonable to expect the employer to have provided it: ***Romec Ltd v Rudham UKEAT/0069/07***; ***Royal Bank of Scotland v Ashton [2011] ICR 632, Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075,*** *and* ***London Underground v O'Sullivan UKEAT/0355/13***. As ***Ashton*** has been held to apply to the 2010 Act (see above) we consider that the test of having a reasonable prospect of preventing disadvantage remains, but that that is less than probability.

293. In ***Noor v foreign & Commonwealth Office UKEAT/0470/10***, the EAT clarified that an adjustment might be reasonable even if it does not remove all the disabled employee’s disadvantage. Deciding whether a particular

adjustment would overcome the disadvantage in question might require the employer to consider a package of adjustments, since achieving the objective of one adjustment may depend on other adjustments being made: ***Shaw & Co Solicitors v Atkins UKEAT/0224/08***

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Harassment

294. Guidance was given by the then Mr Justice Underhill in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** in which he said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not *per se* a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

295. Para 7.9 of the Equality and Human Rights Commission Code of Practice states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording. The test for "related to" is different to that for whether conduct is "because of" a characteristic. It is a broader and more easily satisfied test – ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another EAT 0039/19.***

296. There can be harassment under this provision arising from an isolated incident; for an example, see ***Lindsay v London School of Economics***

[2014] IRLR 218. It is not necessary for the claimant to have expressed discomfort or air views publicly ***Reed and Bull Information Systems Ltd v Steadman [199] IRLR 299.***

Victimisation

297. There are two key questions – (i) has the claimant done a protected act (ii) if so did she suffer a detriment because she had done so, which is a causation test - ***Greater Manchester Police v Bailey [2017] EWCA Civ 425.*** Guidance on the issues that arise is in Chapter 9 of the EHRC Code of Practice.

298. What amounts to an allegation for these purposes in predecessor legislation was addressed in ***Waters v Metropolitan Police Commissioner [1997] IRLR 589*** in which the Court of Appeal said: 'The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in s 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of s 6(2)(b).' In ***Durrani v London Borough of Ealing UKEAT/0454/2012*** the EAT held that "it is not necessary that the complaint referred to [the protected characteristic, in that case race] using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies." There the claimant had used the word "discrimination" but when asked whether that was race discrimination had stated that it was more of unfair treatment generally.

299. In ***Fullah v Medical Research Council EAT/0586/12*** it was held that context was relevant and that "An employer is entitled to more notice than is given by a simple contention that there is victimisation and discrimination."

300. On the issue of detriment the question is - "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" as explained in ***Shamoon.*** It is to be interpreted widely in this context – ***Warburton v Chief Constable of Northamptonshire Police EA-2020-000376*** and ***EA-2020-001077.***

Burden of proof

301. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the relevant protected characteristic, but which may be relevant to the issue of whether the respondent applied a PCP to the claimant, or victimised her, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities.

302. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***

303. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was

already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

304. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

305. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

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

306. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***

307. The application of the burden of proof is not as clear in a reasonable adjustments' claim, in particular, as in a claim of direct discrimination. In

Project Management Institute v Latif [2007] IRLR 579, Mr Justice Elias, as he then was, gave guidance of the specification required of the steps relied upon, and that what was required was evidence of an apparently reasonable adjustment which may then lead to the burden of proof shifting to the respondent. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** however held that ***Latif*** did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one. It is not easy to reconcile these two decisions of the EAT, and it is a point addressed further below.

Jurisdiction

308. The date on which timebar starts to run is not straightforward. Where the act complained of is the refusal by employers to redress a grievance timebar commences from the date on which the decision was made, and not the date when it was communicated to the claimant (***Virdi v Comr of Police of the Metropolis [2007] IRLR 24,*** although there is a decision to the contrary in ***Aniagwu v London Borough of Hackney*** **(*[1999] IRLR 303*).** In ***Parr v MSR Partner Ltd and others [2022] ICR 672*** it was held by the Court of Appeal that where a discretion was exercised that was an one-off act, rather than an act with continuing consequences, and was not conduct extending over a period.

309. Where discrimination arises out of a dismissal the date from which timebar commences is the date when, by reason of such notice, the employment was terminated (***Lupetti v Wrens Old House Ltd [1984] ICR 348,***; ***Gloucester Working Men's Club & Institute v James [1986] ICR 603***; ***British Gas Services Ltd v McCaull [2001] IRLR 60)***. Where a discrimination claim is based on a failure to promote the claimant, the date is to be determined by asking whether a cause of action has crystallised, rather than by focusing on whether the claimant felt that she had been discriminated against (***Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490***).

310. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387.*** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner, [2003] IRLR 96***).

311. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). All of the circumstances may be considered, but three issues that may normally be relevant in this context are firstly the length of and reasons for the delay, secondly prejudice to either party (particularly whether a fair hearing of the case is possible) and thirdly the merits of the claim.

312. There is a divergence of authority in relation to the first aspect. There is one line that even if the tribunal disbelieves the reason put forward by the claimant as to delay it should still go on to consider any other potentially relevant factors: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, following ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** A different division of the EAT decided in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed In ***Edomobi v La Retraite RC Girls School UKEAT/0180/16*** in which the Judge added that she did not “understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay.”

313. In ***Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801*** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason".

314. In ***Rathakrishnan*** there had been a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, which in any event does not apply in Scotland, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim in England, where it was held to be appropriate to consider the plaintiff's prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT in ***Rathakrishnan*** concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

315. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held similarly:

> "First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion."

316. That was followed in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23,*** which discouraged use of what has become known as the ***Keeble*** factors, in relation to the Limitation Act referred to, as form of template for the exercise of discretion.

317. The Tribunal considers that the first line of authority set out in ***Rathakrishnan*** is that which accords with the statutory definition, and is supported by the Court of Appeal authorities referred to in the two most recent paragraphs. It considers therefore that no single factor is determinative. It notes that in ***Afolabi*** a delay of nine years was not held to be unduly long to allow the discretion to be exercised. It is a matter of fact and degree having regard to the particular circumstances of the case.

318. The Inner House of the Court of Session held in the case of ***Malcolm v Dundee City Council [2012] SLT 457*** that the issue of whether a fair trial was possible was "one of the most significant factors" in the exercise of this discretion, in its review of authority. It referred *inter alia* to the cases of ***Chief Constable of Lincolnshire v Caston [2010] IRLR 327*** and ***Afolabi v Southwark London Borough Council [2003] ICR 800.*** In ***Malcolm*** the delay had been of the order of a month, but it is notable that whether a fair trial was possible or not was not considered to be a determinative issue, which the Tribunal considers also supports the conclusion in the preceding paragraph.

319. The Court of Appeal in ***Morgan*** commented on the issue of prejudice and whether the delay prevented or inhibited the employer from investigating the claims while matters were still fresh. In ***Adedeji*** the court stated that there would be prejudice if the evidence was less cogent, but also had the effect of requiring investigation of matters that took place a long time previously. In each case it stated that those were factors to be taken into account, but did not suggest that they were determinative issues.

The EHRC Code

320. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, under section 15(4) of the Equality Act 2006,

Observations on the evidence

321. **The claimant** gave lengthy evidence over a little more than eight days. It was an unusually lengthy period for such a case. The Tribunal took into account the length of that evidence which was liable to induce fatigue, her disability, the OH reports which commented on fatigue in particular, and that English is not her first language, even though her command of English is very good. She clearly had concerns over what had happened from a very early stage in her employment with the respondent, and in a number of different respects. Her views were genuinely held. She believed the evidence she gave to be true, in our view.

322. The Tribunal requires to assess all the evidence that it heard in determining the claims that the claimant has brought. The Tribunal requires to assess the reliability of the oral evidence given. In a large number of respects we did not consider that the claimant's evidence was reliable. That was principally as on many occasions her oral evidence was not consistent with the contemporaneous written records of what had happened, some of which were authored by her.

323. One example was in relation to the "last straw". In her oral evidence she stated that it was the email from Dr Hothersall to her and others on 17 May 2021. For reasons we address in more detail below however we did not accept that. The letter of resignation does not mention it at all despite that letter stating "I have therefore decided to be very clear about my true reasons for leaving…." She said that she was leaving because she had received an offer to become Senior Lecturer at the University of Birmingham, in the context of an earlier message to the respondent stating that she required to respond to the offer within ten days.

324. Separately, she stated in her resignation letter that the primary reason she started applying for jobs elsewhere was that the respondent did not treat staff on Teaching and Scholarship contracts, as she was, equally to those on research contracts, and that a second reason was that she had experienced discrimination and bias at the respondent. The email from Dr Hothersall said to be the last straw was not referred to at all. When that was pointed out to her, in cross-examination, she said that it was not the

last straw, and that the last straw had been the failure of Professor McCrimmon to do what he had promised, in having the new Head of Undergraduate Training, Professor Bartlett, become her line manager. That change of line manager, however, had taken place, and her change of position to deny that the 17 May 2021 email was the last straw was in our view significant in undermining the reliability of her evidence.

325. In what was a further inconsistency between her letter of resignation and her initial oral evidence in the letter she had referred to a "previous line manager" in terms which clearly meant Dr Hothersall. That was therefore not consistent with her oral evidence that the claimant believed that Dr Hothersall was again to be her line manager. It was consistent with Professor Bartlett remaining as line manager, as was the fact that the letter was sent to Professor Bartlett.

326. Whilst the grievance letter of 31 August 2021 does refer to the 17 May 2021 email in general terms, it does not suggest that it is the last straw. What is referred to as "a last straw" in that letter is the OSaR with Professor Bartlett.

327. Given these striking inconsistencies, and the evidence overall in relation to the claimant which we comment on below, we concluded that her evidence that the 17 May 2021 email from Dr Hotherstall was the last straw that led her to decide to resign was not reliable evidence, we did not accept it, and we consider that it was the offer from Birmingham University, which was to be appointed a higher post than that of Lecturer, was why she had resigned from the respondent (as her letter of resignation stated).

328. In what we consider was another example of inconsistency between the claimant's oral evidence and a contemporaneous document authored by her there was a dispute over the OSaR with Dr Hothersall which was whether Dr Hothersall mentioned the concerns over an email the claimant had sent recently at the start of the meeting, as the claimant said, or at the end, as Dr Hothersall said. It appeared to us that the email sent by the claimant after that meeting, to Ms Sporing, which set out what had happened, using "then" twice in doing so, after the second of which was

mentioned the email she had sent being raised with her, contradicted the oral evidence of the claimant.

329. As another example the claimant said in her evidence in chief that at a meeting on 20 May 2019 Dr Hothersall said that the claimant should not talk of promotion, that is for those who work 60 plus hours per week, and not for those who need disability adjustments, or words to that effect. The minute of that meeting included an amendment authored by the claimant which stated "Ellie stated that at present the priority was Dita's health and well being which may mean the promotion was not an immediate consideration. It was clarified that promotion prospects should not be impacted by disability or workload." It was largely the language that had initially been proposed by her union representative, that the claimant had commented on in a message to Ms Sporing on 20 May 2019 that said that Dr Hothersall had "basically confirmed discrimination to me." The wording proposed by Ms Sporing was then largely that used by the claimant when proposing her amendments to the respondent. That is we consider very different language to that which the claimant had alleged in her evidence in chief which had been that disability adjustments had been mentioned specifically.

330. The other evidence we heard did not support any suggestion of disability matters being mentioned by Dr Hothersall at that meeting. But the claimant had claimed that to be so not just in her oral evidence, but also in her grievance letter, and her resignation letter. The reference to disability in the two letters and oral evidence was we considered a "gloss" later added to what had been said, looking at matters generously for the claimant, and not the words that had been used.

331. Another example of the difference between oral evidence and contemporaneous record is when the claimant said in evidence in chief that the reason she had not pursued a possible role as Caldicott Guardian was because of its effect on her workload, and that other duties were not being taken away from her. But in her email to Professor Mires to reject the possibility she did not refer to that, and gave a strong indication that she would accept the role if promoted. Her email at the time was not we considered consistent with her oral evidence.

332. Somewhat similarly the claimant alleged that Professor Mires had said in December 2017 something to the effect that unless she took the role in the School Ethics Committee she would not get promotion, but that cannot have been the timing as addressed below in our comments on Professor Mires' evidence. His explanation as to why he would not have made such a comment, separate to the issue of its timing, we also accepted as being both credible and reliable. Her appeal against the 2016 promotion decision stated that "strong indicators were given to me by senior management in late 2015" that establishing and chairing the committee would put her on the right trajectory towards promotion. That is not consistent with her allegation that unless she did so she would not be promoted.

333. Similarly again her evidence that he had said at a meeting on 4 November 2016 something to the effect that she would never get promotion at the respondent unless she took on the role offered to her was one on which we did not accept her evidence. We did not find support for the claimant's allegation where it might have been referred to, such as in the appeal against the 2016 promotion application, dated 4 December 2016 and therefore only a month later, which was lengthy and made specific reference to Professor Mires in other respects, or her resignation letter. To omit such an obviously relevant matter, if that phrase had been said as she now claims, was we considered entirely unexplained.

334. In other instances the claimant's oral evidence was we considered not reliable. The claimant alleged in evidence in chief initially that in the appeal hearing in relation to her second application for promotion she had alleged discrimination. Her position on the detail of that changed during her evidence. The claimant had suggested initially in her evidence that the comments made had included allegations of discrimination specifically on the protected characteristics of sex and race including nationality, and said that it was an issue of inequality. She latterly accepted that the term "inequality" had not been used, but said that there had been a reference to bias. What the detail of that bias was, as expressed in the meeting, was then said to relate firstly to a difference of treatment between clinicians and non-clinicians, which did have some support in the note of the meeting

that was produced during the hearing, and to a difference between those on Teaching and Scholarship contracts against those on Teaching and Research contracts, which did not. Neither of those alleged bases were directly at least one of the protected characteristics founded on, and at best may have been based on a claim of indirect discrimination, but not that alleged in the pleadings. There was no pled case that such distinctions formed a basis for a claim of direct discrimination. Her position latterly on what she had alleged in respect of discrimination at that meeting was that that had not been done explicitly, but rather by what she described as “hints and implications”.

335. We considered it relevant that although the claimant alleged discrimination in not being promoted when she had applied for that, and in her Claim Form referred to an application in 2018, there was no such application made. That is in the context of an OSaR held on 20 March 2018 in which she stated that she would not appeal the decision in 2017, but would wait in the context of there being a new Dean. Even with a new Dean in place however no new application for promotion was put forward by the claimant either in 2018 or in the years that followed. In the 2020 OSaR she stated a view that she was ready to submit a successful application for promotion in the academic year, but Professor Bartlett noted that they had talked of the new criteria for promotion (which were not before the Tribunal) and to consider them before doing so. The claimant responded that she would check the criteria and guidance and discuss matters with her academic mentor. Whilst the academic year had not concluded by the time of the claimant’s resignation there was no evidence of an application being prepared as at that time.

336. We were also concerned that the claimant thought that saying that falling out with Dr Hothersall a bit would be good, as she suggested in her email to Ms Sporing on 20 May 2019, which indicated a degree of provoking conflict. Separately, the claimant’s oral evidence in regard to the meeting held that day is not easy to reconcile with the terms of her message to Dr Hothersall on 22 May 2019 saying many thanks for the meeting, and referring to details and documents, which appears conciliatory in tone and not suggestive that Dr Hothersall had used words of discrimination two

days earlier. It is also notable that no grievance was raised about that matter at that time.

337. That she was seeking to effect a change in line manager is also we considered relevant to reliability. In general terms an employee cannot choose who the line manager is. That is for the employer. If something significant occurs with a line manager, it is normally expected that it is raised as a grievance at that time. The claimant did not do so, although Ms Ross mentioned that specifically on one occasion. In the absence of a formal grievance, it was in our view unsurprising that her manager met with the claimant on occasion alone, for example for the annual review in September 2019, although latterly Professor Bartlett assumed that role when Dr Hothersall left to work in public health during the Covid-19 pandemic. Nevertheless the claimant complained that her line manager had done so but in our view not with any proper basis for that.

338. The claimant had a tendency to mischaracterise what had happened. An example is her letter of resignation, as addressed in more detail above and below. The second example was of HR creating "fake information" in relation to the job advertisement or description which was sent to the claimant by Ms Ross, who had found it in a computerised record.. Ms Ross had not done anything to fabricate it. What had been produced by her was clear from its face as a draft, and for an internal promotion not external advertising. It was not the document that the claimant had seen, but to make such a serious allegation without foundation was a concern for us.

339. She gave as the third example of discrimination that the Dean, Professor Mires, had "deliberately hindered my promotion application, something that an appeal complaint panel confirmed…." The appeal panel had not done so at all. It had found that there had been irregularities in the procedures, in particular that the Dean's report had not covered two of the three Schools she had worked for, but not that that was deliberate as alleged.

340. Separately the panel itself, through Professor Newman stated in a letter to her on 6 April 2017 that "The Panel did not determine that there was a

"collective failure of the Annual Review Committee itself", which the claimant had alleged in her letter which that replied to.

341. The claimant was on many other occasions wrong on points of detail. That there are some details incorrectly recalled by any witness is not a surprise, particularly where the incidents being considered were from several years ago, but that there were as many as in the claimant's evidence was unusual and not indicative of reliability. On occasion the claimant said that what she had herself written was also factually inaccurate, such as her email suggesting that she had current responsibility as Chair of the REC. There were occasions on which the claimant's evidence was, we considered, not in accordance with standard practice or common sense, for example when she complained that Dr Hothersall had raised the possibility of her working part-time, and had not asked her whether doing so would be something that she could afford. She had also complained that Dr Hothersall had asked her about her health, and what her doctors had told her, claiming that that was intrusive. It did appear to the Tribunal that it was normal for a manager to enquire as to someone's health when that had been an issue, but also that had Dr Hothersall asked about an effect on finances that would be potentially intrusive. It was not clear how the manager could have negotiated such matters without causing some upset to the claimant.

342. There are other examples of errors in detail, such as that the claimant initially denied having received a copy of a report from Dr Reed sent by OH, but later accepted that it had been posted to her home address. She continued to dispute what amendments she had proposed to the Minute of 20 May 2019 even when her counsel told her that the colour coding he was looking at on his laptop indicated that one part was her own, and she later conceded that that was so. A further example is the claim in her Claim Form that she had received no reply to her grievance, which was not correct. There was a reply on 20 September 2021, to which the claimant replied, for example.

343. On several occasions the claimant did not answer the question asked. That that happened on some occasions is again not a surprise, not least given the length of her evidence, but the claimant did so on a not

infrequent basis and beyond that which might be expected. That included giving answers that sought to justify her actions or criticise what others had done, making an argument on a point, when a simple yes or no answer would be expected.

5 344. She had a tendency to find ulterior motive in many of the actions of the respondent, whereas the terms of the emails concerned indicated an intention to try to assist her. That included for example the offer of a role as Caldicott Guardian, not something she was directed to take as alleged by her, but an offer to try and improve her chances of promotion. She 10 alleged that there was an attempt to gather evidence against her to cause her a detriment when she had applied for a job share, when her application was responded to by an offer of part-time work that rather than discuss in detail she did not accept, and although the opportunity to appeal was extended she did not take it. She alleged that what appeared on its face 15 to be a helpful comment from Ms Ross in an email to her, saying that working when off ill was not expected, was a deliberate attempt to cause her detriment. It was clearly not that. She appeared to have disagreements with many of those at the respondent, and made a number of allegations against them, some of which were very serious, which had little or no detail 20 or evidence to justify them.

345. It is possible to give notice of termination and there still be a dismissal but the length of the notice was substantial, and it was only on the very last day of it that the claimant intimated a grievance. She had not intimated a formal grievance about any of the matters she complained about when 25 they occurred. That was so even though she alleged discriminatory comments and actions, for example. Whilst that does not negate the possibility of such matters having occurred the absence of challenge at the time does not assist a contention that the claimant’s evidence is reliable.

30 346. In that regard we take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures, which states that matters should be raised promptly. Once the claimant had resigned formally, it is hard to understand any possible basis for not raising a formal grievance at that time. We did wonder whether her letter of resignation ought itself

to have been treated as a grievance, but that case was not pursued with the respondent's witnesses, we did not consider that we should do so ourselves given that, and we considered that it was not in any event a material matter for the purposes of this case. The claimant had said in evidence that she could not raise a grievance or claim at the time of the various matters as if she raised an allegation of discrimination when employed her position would become untenable and she was the breadwinner for her family. But she also alleged that in her appeal hearing against the rejection of her second application for promotion that women were disadvantaged, and women and foreigners had to work harder to be promoted, or words to that effect, which was an allegation of discrimination on grounds of sex and race. Similarly she alleged discrimination in her letter of resignation yet remained working there for over three months, for only part of which was on annual leave. We considered that her evidence in this regard did not assist the contention that her evidence was reliable.

347. We also had concerns over the extent of the claimant's understanding of how a promotion would be handled. She appeared to consider that as 10% of her time was allocated to scholarship, and that her role was otherwise focussed entirely on teaching, that for her academic excellence was primarily her delivering that teaching. But firstly the title of her role included "Scholarship", and secondly and more significantly the criteria for promotion of which she was aware included a "sustained record of academic excellence", and it was in that respect that her application was considered to be lacking, as even a referee she had proposed, Dr Slowther, commented on. That referee explained her view that more was needed in that regard, and the claimant explained that that was because the referee was at a University where the time available for scholarship was about 50% and at the respondent it was 10%. If that is so, and Dr Slowther did not give evidence, that does not really address the issues before us. In our view the claimant's evidence on Dr Slowther's reference shows an incomplete understanding on her part of what was needed for promotion.

348. The claimant was applying for promotion to a post as senior lecturer, and to achieve that she required to provide evidence of meeting the criterion

of sustained academic excellence. The application form itself referred to "Academic Outputs and Funding" in a section. It was those outputs, which are a record that can show sustained academic excellence, that the claimant's application was judged to be insufficient. The evidence overall supported the view expressed at the time that the claimant's application was premature. That was not to say that it would always be refused, but that more evidence was required. There are we consider two difficulties with the claimant's position. The first is that her understanding of what academic excellence was for these purposes was not correct. It is exemplified in her first written application in which she stated "my main contribution to academic excellence has been in developing and leading the delivery of the innovative Ethics Theme curriculum on the MBChB program". She is there referring to her role as Lecturer, not the standard required for promotion to Senior Lecturer. The second is that although Dr Slowther, Professor Mires and others gave her advice or suggestions on how to secure sufficient evidence of academic excellence she tended not to take them up. That was despite their having substantially more experience of promotions and the standards required than she did.

349. The further difficulty for the claimant is that she made a third application which was rejected in 2017, did not appeal that, and did not make any fresh one. We accept that she had the difficulties caused by her health condition from late 2017 onwards, as well as dealing with her young children, and what she considered to be an excessive workload, but for the reasons given below we preferred the evidence of Professor Mires that the remark she alleges he made in December 2017 was not made. We also noted that in the 2018 OSaR she stated in brief summary that she would pursue promotion, that the present Dean, Professor Mires, was retiring, that she would increase her academic output, and that she would seek promotion again in two years' time. If Professor Mires had made the remarks alleged but then retired, and if he had the kind of influence that she alleges he had, it is not consistent with her position that she did not attempt a further application for promotion in around March 2020, if not earlier given Professor Abboud's comments in the 2018 OSaR that he would support applications in 2018 or 2019.

350. The claimant's view that an appearance on a TV programme, and other similar appearances or articles in the press, was evidence of academic excellence was not we considered correct. Whilst far from irrelevant in the second criterion for promotion, it was not in Professor Mires' view, which we accepted, evidence of a record of sustained academic excellence in the form of an academic output. The application form made clear that published works such as books, journal articles, and conference publications, both refereed and non-refereed, were considered relevant, although there were sections for research-based creative practice and other matters, and a section for forthcoming work. There was a section for Funding which was of much less significance for someone on a Teaching and Scholarship contract, although some funding could be sought. The form itself we considered supported the evidence Professor Mires gave and contradicted the evidence the claimant gave in relation to the merits of her own application.

351. Similarly her view that if she was successful in her appeal in relation to promotion that meant that it should be awarded to her was we considered at best simplistic. Latterly she moved towards accepting that an appeal on a matter of irregularity did not lead to promotion. It appeared to us that the claimant did not appreciate what the respondent told her of the steps needed to achieve promotion, and took a rather intransigent stance on it, which was to the effect that she deserved promotion from what she had done. She was however not in the best position to judge that issue. Those on the Panel doing so were Professors, far better qualified and experienced to make such a judgment than she was, as she had no experience of doing so. It was also we considered significant that the ARC Panels on each occasion were not the same. Their membership changed, and the latter two Panels included an external member. The Panel view, involving a relatively large number of professors, was recorded, and it appeared to us to be most unlikely that Professor Mires could have persuaded so many experienced academics to a view that they did not regard as the correct one. That so many senior academics held a view contrary to that of the claimant herself with regard to her promotion application was we considered relevant to the assessment of whether or not the claimant's evidence was reliable in this respect.

352. That she was not promoted was clearly a source of great frustration and upset for her, and she strongly disagreed with the decisions made. We considered that those emotions and circumstances underpinned much of her relationship with the respondent itself. She had a burning sense that it was not fair that she had not been promoted, and we considered that that led her to the view that the decisions not do do so must have been discriminatory. She attacked Professor Mires in particular, but many others as well, in this regard, but we did not consider her evidence to be reliable having regard to all of the evidence we heard.

353. The claimant's evidence was to the effect that Professor McCrimmon had definitively agreed that her line management would change when they met around December 2019. He denied that. The emails that he exchanged with Dr Howden on 3 June 2020 supported his version of that discussion, although his recollection of it was not clear. The word that Dr Howden used when describing what the claimant had said about that meeting was that her line management "could" change. That is, we consider, indicative of possibility, not of a decision having been made. It is also instructive that the emails were in June 2020, about six months after the conversation, and if there had been a decision to change line management taken around December 2019 we would have expected the claimant to raise that, or the failure to act by Professor McCrimmon, far earlier than that. We appreciate that Covid 19 led to lockdown in March 2020, but that delay is not we consider consistent with the claimant's position, Professor McCrimmon set out in his reply that he would look into it, not that he had agreed to a change, and he explained that further in his evidence. His email is consistent with his oral evidence, and not consistent with the claimant's position.

354. The claimant stated in oral evidence that the procedure for the application for promotion was not that tendered by the respondent, which bore the date 6 May 2016. Documents said to be those from 2014 and 2015, which appeared to be in essentials very similar, were tendered by the respondent during the hearing as referred to above. The claimant did not accept that the 2015 document was that applicable at the time of her application in that year or 2016. No other document with such a procedure was

tendered, however. In her letter of appeal she referred on a number of occasions to irregularities in procedure, and did so in terms consistent with the 2015 document. She referred to Appendix 5a in her letter of appeal, and such an Appendix appears in that document. Her union representative Dr Morelli accepted that that was the relevant procedure. The Tribunal did not accept the claimant's contention that there was a different procedure for promotions that was not before it, although it is true that not all of the appendices were produced.

355. We were also struck that the claimant had not raised matters about which she later claimed at the time by a formal grievance or by appeal, when she could have done so. She did not for example appeal the 2017 promotion decision, although she had done so in the previous year, she did not apply for promotion thereafter, nor did she raise a grievance in relation to the OSaR with Dr Hothersall even though Ms Ross specifically raised that at a meeting. She did not appeal the job share application outcome, although that was offered to her with the time to do so extended. She did not raise a formal grievance until the very last day of her employment. With so many issues now raised in this claim, it is we consider surprising that at no stage did she utilise either the grievance policy or the DAWS policy where that was a possible course of action, and the one that might be expected to be used. She did not appear to follow the terms of other policies, in particular the promotions policy itself. She did not complete a mitigation form when pregnant, although from the policy it appeared to us clear that that was her responsibility if she wished to argue for that, but her evidence was that the University knew of her pregnancy and related matters. She did not comply with the policy provisions about the detail of the application in some respects.

356. We did take into account the claimant's diagnosis of chronic idiopathic pancreatitis, that that is a serious condition and that she was told that unless she changed her lifestyle it could be terminal. We were however surprised that when the respondent suggested changes to reduce the work she did, which included taking away post-graduate work, she resisted that because of its effect on promotion as she saw it. Her overall aim was to work around 40 hours per week, which was entirely

understandable given all the circumstances, but what she did not do was agree to a step that would help do so. She did not take up a recommendation that a stress risk assessment be undertaken to inform decisions as to the work she could do, as she thought that having that done by HR was not appropriate and that it should be by OH. Her view was however not a reasonable one we consider. Such assessments are regularly undertaken by HR, or by line managers. There are occasions where she either sought other work, or discussed doing other work, such as questioning why the School of Dentistry had not been using her, which is hard to reconcile with her argument that she was working excessive hours.

357. We considered that there was much in a point put to her in cross examination that she viewed what had earlier taken place through the prism of her views of the unfairness of everything she felt had happened to her. We considered that that sense of unfairness, which was genuine and not without at least some basis as we address in our conclusions below, had distorted her recollection of what had happened, and underlies the nature and number of the difficulties with her evidence as we have set out above. We concluded that her evidence was not reliable, as these issues were so many, varied, and material both individually and particularly collectively, and that for us to accept a particular matter of fact on the basis of that evidence there required to be some form of support for it from other evidence or otherwise a basis on which to do so.

358. **Dr Carlo Morelli** was the representative around the time of the claimant's appeal against the second promotion application, and supported her evidence to an extent. We accepted that he sought to give honest evidence. He genuinely believes that there is discrimination in the employment process at the respondent affecting women, those within the BME group in the pay gap report, and those who are disabled. The Tribunal was concerned however that he had little recall of what had been said at the appeal hearing, that his evidence on what had been omitted from the note was solely related to his own contribution but that otherwise it was a fair note, and gave evidence that was rather general as to areas of discrimination at the respondent, as he saw it, which in addition to being

general was also in part at least not on matters relevant to the present claim or which had been pled in relation to it. He believed that he was in a better position to judge the claimant's application than the ARC or the appeal committee, but had not himself read many of the documents submitted as the application, as considered by the ARC, or that were before the appeal committee. His knowledge of discrimination law was lacking, as he thought that the burden was on the respondent to disprove discrimination, whereas the initial burden at least falls on the claimant for the reasons set out above. He said that he had raised discrimination concerns at the appeal hearing but in a non-confrontational way. What that meant was not explained in detail however. It appeared to the Tribunal that the note was more likely to be accurate, as it appeared to be contemporaneous, follow a chronological order, and include a summary of what had been said. It was also notable that the claimant's message to Professor Newman after receiving the letter of outcome did not allege discrimination. We considered that that tended to support the impression we had that Dr Morelli was not reliable in his evidence in regard to what he had said.

359. We were also of the view that his evidence was affected by the passage of time, during which he has (for entirely appropriate reasons) continued to argue that there is discrimination. He sought to do so before us, but without having direct evidence as to the cause of an apparent disadvantage that those who are women, of BAME grouping, or disabled, may suffer. He alleged institutional discrimination. But the claim before us is not that. It is not our function to seek to determine whether there is institutional discrimination or not. His evidence was at times more making an argument that may well be appropriate in a different forum rather than evidence to support the claim the claimant has made.

360. There were some general assertions made, for example that there may be data that supports that there are more men in clinical roles than non-clinical ones, but not with any specific figures for that being provided. There was some reliance placed on a Framework Agreement between the respondent and the union, but it was not before us. There was evidence as to inequality between those who were white and BAME, in his view, but

how that affected the claimant, who is white and non-British, was not clear, particularly as in the University's document the claimant fell within the white category, which included those who were European.

361. There was however some evidence given by Dr Morelli that we considered might be relevant to the claim before us. It was not assisted by detailed data in documentary form, but was supported to some extent by the pay gap report in 2019. We have made reference to those aspects in the findings in fact under the heading "other issues", in which is included some detail from other sources in addition to that report.

362. **Ms Marion Sporing** was also a union representative for the claimant, starting to do so from around March 2019. She has since retired. She had difficulty in recalling several aspects of the detail, which is not at all surprising given the circumstances and passage of time. We considered her to be a credible witness, and in general terms reliable where she was able to recall matters. She was concerned that the claimant's workload was high, and excessive given her health conditions. Her evidence about the meeting on 20 May 2019 was we considered instructive. She said that she thought that Dr Hothersall was stressed, had made a form of emotional outburst, and had commented about promotion in a way informed by her own experience. She did not recall that Dr Hothersall had said that disabled people would not be promoted or words to that effect, and agreed that had that been said she would have at least addressed that in the meeting. Her evidence was that in summary the comment had been to the effect that if you want to be promoted anywhere you need to work more than 40 hours per week, although other evidence we heard was we considered more reliable that the figure had been 60 not 40. That had immediately been contradicted by either or both of the HR staff present. In turn that had been incorporated into the minutes of that meeting in wording that Ms Sporing had largely suggested to the claimant. She agreed that a number of steps potentially to reduce workload were suggested at that meeting, and she said that the meeting was a positive outcome in the right direction. That was very different to the evidence of the claimant but reasonably close to that of Dr Hothersall and Ms Ross.

363. **Professor Rory McCrimmon,** Dean of the School of Medicine at the respondent from 2019, having acted in such a capacity for a year and a half before that, was we considered a credible and reliable witness. We were impressed by the candour, clarity, and measured nature of his evidence. He accepted a number of propositions put to him in cross examination although not helpful for the respondent's position. He was supportive for example of the reported comments of the Principal on a report on racism in particular. He had responded to Dr Howden with regard to a meeting with the claimant in November 2019 that he may not have followed up on matters as he should have done, accepting a degree of fault for that, and for not noting the conversation, explaining that he had not thought it a formal one and that required any formal follow up. We considered that his evidence was to be accepted in relation to that. We considered that the claimant's message to him later that day, which did not refer to a change of line manager, supported to an extent his evidence that no formal follow up was required, and contradicts the claimant's version. He was also clear in his evidence that there was no requirement to work long hours for promotion, and that what mattered was not hours worked but output achieved. We accepted his evidence, which we considered entirely credible and reliable. There were however limitations to it, in that he was not involved in the processes of determining the claimant's applications for promotion in 2015, 2016 and 2017.

364. **Professor Margaret (Maggie) Bartlett** was we considered a credible and reliable witness. She gave straightforward answers to the questions asked in a manner we considered to be compelling. We accepted her evidence as to the OSAR meeting, which was supported to an extent by the email exchange with the claimant afterwards. No hint of a claim of bias was made at that stage, and was only put forward in the grievance letter of 31 August 2021. It puzzled her, as she did not know what it related to, and we considered that that was a genuine and understandable reaction to it. She supported the evidence of Professor McCrimmon that there was no requirement to work long hours or similar for promotion.

365. **Professor Gary Mires** retired in July 2018 from his role as Dean of the School of Medicine, and could not recall the detail of some of the meetings

with the claimant or in relation to her. He had been surprised when informed of the claims made, and had thought that he had had a good relationship with the claimant. He denied the allegations made against him of comments to the effect that the claimant would not get promotion or would only do so if she took on a particular task.

366. We considered his evidence carefully, as he was much of the claimant's focus of claims of discrimination. We considered that he was credible, in that he sought to give honest evidence, and that in general terms he was reliable. He was not always so. On one occasion he said that he had not described the claimant as an early career academic, when he had used the essence of that phrase in Dean's reports in relation to her. His oral evidence was we considered wrong on this point, but that error is mitigated by the substantial passage of time. The comment in the report was from at least one perspective not correct, although from the perspective of an employee of the respondent it was. He was however otherwise clear and convincing in his evidence, and we considered that his position was supported most often by the contemporaneous documents.

367. He was also we considered balanced and candid when giving evidence. An example of that is when asked whether the claimant had ever contacted him to ask who her line manager was. He said not directly but he had seen emails about the OSaR with others. He could simply have said no to the question asked. Another example is when it was put to him that after the decision of the Appeal Committee Professor Beech had a conflict of interest in chairing the 2017 ARC in relation to the claimant given the findings of the appeal, to which he said in effect that he saw the point being made. In general terms he did not stick rigidly to his position, but made concessions where he considered that appropriate, and did so in a manner we found convincing. As an example he accepted that he was aware that the claimant had chosen to resubmit her 2016 application for the 2017 ARC, had therefore chosen option (i) following the appeal, and that that meant that he ought to have prepared a new Dean's report, but had not done so.

368. Where there was a dispute between the claimant and him on matters we preferred his evidence. One issue that was materially disputed was what

was said in the meeting between the claimant and him on 4 November 2016. We accepted as reliable his evidence that the disputed comments alleged to have been made by him in a note prepared by the claimant were not made. That included the alleged comment that unless she accepted the role on the research committee she would never be promoted. He denied making that, and other allegations, in a clear and convincing but understated way. His impression was that there was no confrontation at that meeting, and in his mind he sought to be supportive and encouraging of the claimant. The claimant felt however that the decision was wrong, and her own perception was different. But that we consider does not make Professor Mires' evidence wrong, and on this particular matter we preferred his evidence, a view which we consider is substantially supported by the remarks made above as to the reliability of the claimant's evidence more generally.

369. A matter put to him in cross examination on the basis of what the claimant said in her evidence was that he had said in a meeting in December 2017 when asking her to take on the role as Chair of the School Ethics Committee he had said "you'll never get promoted here unless you take on this work". He gave the following answer, summarising his evidence (i) he would never force anyone to take on such a role the individual must want to do it (ii) the person would not get promoted for doing one role (iii) he did not have the authority to decide whether or not someone was promoted and (iv) she had by that time already taken on the role. On that fourth point his position was supported by the minute of the ARC meeting in April 2017 to the effect that the claimant had taken on that role. We considered that his evidence was clearly reliable in this respect, and that the claimant's evidence was clearly not. The claimant's evidence is also not consistent with the email she wrote on 22 May 2019 which alleged that Professor Mires had threatened her that he will not support her promotion unless she took on that role. Whilst the distinction is not an opposite it is material in our view.

370. We accepted that he had had a meeting with the claimant at that time, as that was supported by a diary entry, although the entry did not give any detail as to what its purpose was. He did not recollect the detail of that

meeting, and did not think that he had had a meeting to give feedback to the claimant after the outcome of the 2017 ARC was made known to her in October 2017. We consider however that it is more likely that the meeting was for such feedback as that was referred to in the outcome letter and was a part of the promotion process. We consider that Professor Mires was likely to have followed the process, and that he was wrong that he had not discussed the promotion application with her. To that extent therefore we did not accept his evidence but we accepted his evidence that the remark alleged to have been made by him was not made.

371. In assessing whether his evidence or that of the claimant should be preferred we also took account of the assessment of the claimant's evidence set out above. The demeanour in which he gave evidence was we considered that of someone who was, throughout the events he gave evidence about, genuinely seeking to assist the claimant. That was clear in his report to secure early passing of probation. It was less clear in the Dean's reports, but they set out his genuine views of her application as also informed by the views of those he consulted, which also sought to encourage her to continue, and that was carried forward with other suggestions made to give her development opportunities that might assist future applications.

372. It is true that he did not personally address the issue of her workload, and how taking on other roles would then be affected, but that was an issue for her line manager. He agreed with the final part of the note the claimant had made of their meeting to the effect that such matters should be discussed between the claimant and her line manager. In his role as Dean it was we considered sufficient to make such suggestions, done with good intentions, and leave the detail to be addressed by the claimant with her line manager.

373. We accepted his evidence that the suggestion made by the claimant that he deliberately used language in his Deans' reports that did not suggest the excellence required to give a signal to the Panel not to promote her was not what he had done. His evidence on this aspect was supported by the reference from Dr Slowther, and the views of the Panels considering the applications made, which were to similar effect to his own views from

the minutes of the meetings. It was notable that Dr Slowther had not seen his report when preparing her reference. His views also had support from Professor Bartlett's evidence who raised the issue of evidence of sustained academic excellence in her OSaR with the claimant, as she also sought to support and assist her.

374. On certain points of detail the claimant's evidence was not put to him, such as that she had told him in about January 2018 of her attendance at hospital. Where the point was not put in cross-examination, and having regard to our other comments on the claimant's evidence, we did not find such a matter to have been established.

375. Professor Mires was the only witness from the three ARC Panels which had considered the applications. We considered that his explanation of what sustained academic excellence was, in the context of someone on a Teaching and Scholarship contract, was compelling. We noted that those he had consulted included many on such contracts. He was himself a consultant obstetrician, and medical educator of lengthy experience. Those he had consulted had a similar view as he had in relation to the claimant. Scholarship could be demonstrated in the ways he expressed in evidence such as by publishing innovative methods of delivering courses in peer-reviewed Journals or the results of evaluations of courses either in peer-reviewed Journals or by giving papers to Conferences of peers. That was in general supported by the headings in the standard application form. It was also supported by the ARC minute form 2015 for example which referred to her not yet delivering fully on academic outputs. What was sought was something beyond the delivery of a course, however good that was, and the building of an academic profile within the academic community. It was in that respect that the claimant had not yet secured sufficient evidence, and we accepted his evidence in that regard as reliable.

376. We accepted his evidence that the Dean's report for the application was not an expression simply of his personal views, but an objective account as he saw it that included the views of those he had consulted. Those views were set out in the report. One was to the effect that the claimant had "over-egged" parts of her application. That came from an email from

Dr Dowell, the claimant's line manager. When Professor Mires was cross-examined on the detail of the claimant's application, he was asked about a phrase she had used as to robust medical education research and the set of figures and graphs provided. He explained that that was not robust medical education research as it was feedback from students for one year, part of the normal process of evaluation, and to be robust it both had to be for a period of 3 – 5 years and be subject to detailed statistical analysis. We accepted that evidence, and considered that it tended to support the view of Dr Dowell as expressed in that email, although Dr Dowell, now Professor Dowell, did not give evidence.

377. There are other matters that we considered relevant. Professor Mires spoke of the constitution of the ARC Panels. Professor Beech was the Chair for the 2016 Panel, and a different chair to that for the 2015 Panel. The Minute of the 2016 Panel is brief, and it is not in terms clear whether it considered the outcome of the 2015 application. The 2016 application has additional detail over that in 2015, including for example reference to two Conference papers, one delivered abroad. But the claimant had not stated the required information for those papers, and her role as the person not named as the Lead was at best unclear. We accepted Professor Mires' evidence that this was evidence moving towards what was likely to be considered sufficient, but not sufficiently so at that point. There were limits to the evidence of sustained academic excellence we considered were apparent from the terms of the application itself. That is not criticism of the claimant, but an observation that securing such evidence takes time, and that doing so within the relatively short timespan between the 2015 application being rejected and that in 2016 being submitted was not likely to be achieved. That was particularly so where the claimant referred to her role as the Lead for ethics in Scottish Schools of Medicine, but not what that entailed, what had been done within it by her, such as the arrangement of or attendance at a Conference at which she delivered a paper, for example.

378. The claimant had not appealed the 2015 decision that year. When she appealed the 2016 decision she did not do so within the 10 days required, and did not suggest exceptional circumstances. No point was taken by

Professor Mires in that regard when he responded to the appeal however, and the appeal addressed both applications. If there had been a desire to prejudice the claimant, either on the protected characteristic of her sex or race, there was that obvious route to deny her such an appeal.

5 379. The Appeal Committee did not accept the arguments for the Dean, at least in part, and accepted those of the claimant at least in part. That tends to suggest that the process was not one that simply accepted the word of the Dean. We consider that that tends to support the impression we formed that the evidence of Professor Mires was reliable, as the Committee did 10 not go further than refer to irregularities in the process.

380. **Dr Eleanor (Ellie) Hothersall** was for a period the claimant's line manager, and someone the claimant claimed had been bullying her. We concluded that there were elements of Dr Hothersall's evidence that were not reliable. The key aspect of that was her initial evidence denying that 15 she had used, or would say, words to the effect that 60 hours per week was required to be worked for promotion at the meeting held on 21 May 2019. She maintained that that was the case. It was pointed out to her in cross examination that the respondent admitted that she had done so in paragraph 25 of the paper apart to the Response Form. Her position then 20 changed, and she appeared to accept that she may have done so. The evidence overall was we considered clear that some form of remark of that nature had been made by her at that meeting, although the evidence of the witnesses was not consistent on some of the detail of it.

381. There was a second matter where her recollection was not we considered 25 reliable. It was initially said by Dr Hothersall that there had not been a meeting with the claimant in June 2019, which was a meeting referred to in the notes of the meeting held on 21 May 2019. But there was an email sent to her by the claimant in advance of a meeting in June 2019 referring to it being "on Monday" and a later email referring to a long meeting they 30 had held in June that year. Dr Hothersall confirmed that she had no recollection of such a meeting. There was no written record of it. She had not however (from the materials before us) responded at the time to deny that such a meeting had taken place, and that it had was consistent both with the note of the meeting held on 21 May 2019 which stated that a

meeting would be held between them to discuss workload, the emails that the claimant sent in relation to her workload in advance of it, and the emails before and after it referring to it. We concluded that it was very likely that such a meeting had taken place. Not noting such a meeting was at the least not good practice. Not recalling it was a further concern as to the reliability of her evidence, albeit that the passage of time was material.

382. There were other aspects of her evidence which changed materially. An example is in relation to her failing to complete the document for the claimant's OSaR. Her initial evidence was that she had not done so as that was what had happened for three of her own OSaRs. Latterly however she accepted that the process was that the reviewer send comments on the form to the reviewee, who could comment, and the document should then be signed and dated by both reviewer and reviewee. She had also had sight of the OSaR of the claimant carried out by Professor Abboud, which was not signed and dated. It appeared to us that she was seeking to justify what was a clear failure by her to finalise the document rather than candidly to acknowledge a degree fault on her part, albeit that she was not alone in that respect.

383. There were some errors made in the report she made on the claimant's hours to seek funding for a 0.2 FTE role. That was most likely to have been as she did not meet the claimant to discuss the matter before preparing it. She did not reply to two emails from the claimant with documents commenting on hours and workload, with proposals to remedy matters. That, and the evidence overall, indicated that there was at the least a difficult working relationship between the claimant and Dr Hothersall

384. Dr Hothersall did not give the impression of aways being a particularly considerate manager. Her evidence on occasion focussed on the perspective of the respondent, and what its needs were, rather than that of the claimant as a disabled person. That was evident from the contemporaneous documents. An example is an email from her to the claimant on 2 September 2019 after the claimant had not attended a teaching session which had been scheduled as she had been unwell. Rather than start by enquiring about the claimant's health, Dr Hothersall

asked about whether or not the absence would be such as required a fit note, in effect. That is however to be balanced by other emails in which Dr Hothersall did seek to support the claimant's position, including in relation to not working when unwell, and working for the School of Medicine for Mondays to Wednesdays such that if teaching was required outwith those days others would require to do so, and that Dr Hothersall had not been fully informed of the nature of the claimant's disability from the OH reports received, none of which she had had sight of.

385. There was a particular dispute between Dr Hotherstall and the claimant over the hours the claimant was working. The claimant suggested at the time both orally and in a written report that she was working about 60 hours per week. Rather than accept that Dr Hothersall looked at the records in the School of Medicine's Measurement of Teaching (MoT) system. That, she considered, did not support the claimant's views. But it was a system that was at best based at least in part on a form of notional time being spent from the records of teaching that existed, and did not necessarily measure the time actually being taken, and whilst it was part of an entirely appropriate enquiry not addressing the issues she thought were raised by those records with the claimant herself, and then noting matters from their discussion either in a report, note of meeting or email so as to record agreement and areas of disagreement if there were those was not best practice.

386. Although she said that she had extensive knowledge of discrimination matters in her evidence, she said in an answer to a question about whether the remark of 60 hours per week to secure promotion it was claimed she had made was discriminatory, that that had not been her intention, which is not the test. She accepted that she did not know the test for harassment. She referred to disability status using the term "the D word", which was an unusual way of referring to disability discrimination, in our view. Her own knowledge of the claimant's circumstances was limited, although the respondent's knowledge of disability status had been admitted from August 2018, and in the meeting in June 2019 reference had been made explicitly to matters of disability (which was the meeting Dr Hothersall had no recollection of). Although Dr Hothersall stated that

with hindsight that was clear, at the time she had not, it appeared to us, appreciated fully that the claimant being a disabled person was an issue. That was despite she then being the claimant's line manager.

387. At the time that she sent the email of 17 May 2021, in her own mind it appeared to us that she was likely to have believed that the claimant was one of those for whom she would be doing the OSaR, although that was not clear from its terms. Latterly when asked about this she accepted that she may have believed that she (Dr Hothersall) would be doing so when the email was sent, and she also accepted that she was relieved that she would not be having what she described as a difficult conversation with the claimant when Professor Bartlett spoke to her to say that she would conduct the claimant's OSaR. She could not recall when Professor Bartlett had said that she would do so. It appeared to us unlikely that Dr Hothersall would have sent the email that she did that day if by then she knew that she would not be conducting the claimant's OSaR.

388. There were other aspects of her evidence that were either inconsistent, or caused us concern. For example on the second day of her evidence Dr Hothersall had said that she had in effect been relieved when Professor Bartlett told her that she would remain the claimant's line manager. But on the next day she said that she thought she was friends with the claimant, and would have had a catch up meeting with her if there was not to be an OSaR, in a manner that gave the impression that she would welcome that. When asked about the June 2019 meeting she stated that she was not practicing defensively at that point and was not taking notes to ensure that she could defend it later, which rather implied that she was defensive in that sense later on. We do however require to take into account the many calls on Dr Hothersall's time both generally, and on her return to work after secondment, and the difficulties in remembering details from what was in several instances a substantial time earlier with no formal grievance raised such that matters were investigated when more fresh in the memory.

389. Overall we concluded that there were some issues with the reliability of the evidence Dr Hothersall gave, either because of a failure of accurate recollection or because of a desire to explain or justify what had taken

place in a manner that might be considered as more favourable to her. There was in general terms greater support for Dr Hothersall's position against that of the claimant from contemporaneous documents (for example the issue of when the claimant's email was brought up at the OSaR), and save where we have made specific findings as set out above we generally preferred the evidence of Dr Hothersall to that of the claimant.

390. **Dr Paul Bennett** is a current employee of the respondent. Whilst therefore not an independent expert witness he gave evidence on statistical matters, particularly in relation to data concerning those at grades 8 and 9. We accepted his evidence as reliable (we did not consider that an issue of credibility arose). His essential point was that the reason for any difference of numbers, ratio or otherwise between males and females at those grades, and across grades between 7 and 10, could not be explained in the gender pay gap report or the Race Equality Charter. He also explained that under the scheme utilised in the former report, which included issues of ethnicity, the claimant was within the group classified as "white" rather than "BME". Whilst there were some more wide disputes as to the classification of the latter category, and some organisations did not use it or the same as that in the report, it was what had been used. Where there was a dispute between his evidence and that of the claimant and Dr Morelli we preferred that of Dr Bennett.

391. **Richard Scrivener** gave evidence in relation to steps taken to follow up on guidance from the DWP in relation to the claimant. We accepted his evidence as credible and reliable. Whilst there was a reasonably lengthy delay from when Ms Ross told the claimant that he would be in touch to his actually doing so, of around three months and then required a form of prompt from the claimant, he proposed that she move to a new office, with a space for a taxi to drop her off, and a printer, very close to it. It also had heating facilities that were understood to be better, with an additional heater provided for it. The claimant however did not wish to move there, and was we considered somewhat obstructive about it. She remained in her former office, and did not move. Where there was a conflict in the evidence on matters surrounding these issues we preferred the evidence

of Mr Scrivener save that we did not consider that the claimant had changed the lock, although we accept that Mr Scrivener had been told that by security staff.

392. **Aileen Ross** was we considered in general terms a credible and reliable witness. She gave her evidence in a measured way, accepting a number of matters put to her in cross examination and explaining her position when she did not. There were some matters where she could not recall detail. That included some aspects of the meeting held on 20 May 2019, and her recollection of what had been said by Dr Hothersall in relation to hours worked for promotion being very different to the evidence of the claimant or Dr Hothersall. Ms Ross recalled that the comment was a ridiculous one of working what she initially said was 160 hours per week, which according to her recollection led to a comment to the effect of "please, come on, that is not the case." Latterly she accepted that it might have been 60 hours per week which she also regarded as ridiculous and excessive as a workload. She anticipated that an average working week of more than about 42 hours was excessive. She said that she thought that the comments on hours was a joke. Given that it was a form of outburst however we found that not reliable.

393. Overall however it was we consider clear that Ms Ross was seeking to handle matters as well as she could, and to assist the claimant in general terms. Although the claimant had alleged that a job description sent by Ms Ross for her had been falsified, that was not put to her in cross examination.

394. Ms Ross might have followed up on matters following the meeting on 20 May 2019 more proactively but it was an issue that was to be discussed at a meeting between the claimant and Dr Hothersall in June 2019. We accepted that by October 2019 the claimant was stating that she did not wish to have a further meeting to follow up on that in May, and wished to speak to the Dean about her concerns over the OSaR held that month. Ms Ross mentioned grievances under the grievance or DAWS policies, but the claimant did not wish to pursue those. The claimant did not then pursue matters until March 2021, when a meeting was to be arranged after emails were exchanged on that, but was superseded by the resignation.

395. **Julie Strachan** is the Deputy Director of People for the respondent. She spoke to the procedures for promotions, and we were satisfied from her evidence that the document which had indicated on it that it was for 2014, and that indicated for 2015, were the documents in force in those calendar years, and for the latter one that it remained in effect until an amended one on 5 May 2016. We accepted her evidence that she had been on the sub-committee determining the claimant's claim to mitigating circumstances, and that that claim was accepted, although the detail of that, including the reasons and period of time involved, were not given in evidence. We attribute that to the passage of time. She spoke about the receipt of the grievance and the correspondence following that, including the report, but she had not been directly involved in that process herself, and could not answer why the report was marked as a draft for example.

396. There were a number of **witnesses not called by the parties,** but who might have been**.** For the claimant that included in particular Professor Leydecker, who had attended the appeal hearing as a witness for her. He has since left the respondent's employment. For the respondent itself it included those on the ARCs who assessed the three applications for promotion, and those on the Appeal Committee who assessed her appeal. That meant that there was no direct evidence of the reasons for those decisions. That was surprising given that those decisions were the focus of much of the claims of discrimination, and of the list of issues that had been agreed between counsel. The respondent did not call those who had investigated the claimant's grievance and prepared what was marked as a draft report, or Mr McGeorge who issued the decision letter. This all meant that questions that might have been asked of such persons could not be asked, and we did not as a result place any weight on the report into the grievance (although we do comment on one point of detail in relation to Dr Hothersall at the end of the Judgment). Those not called by the respondent also included Dr Fardon, Ms Montador, Ms Boyd, and Ms Brown.

397. That witnesses who might have been called but were not was a factor that we required to take into account. Whilst some of those concerned had moved to other institutions that appeared at least for many to be in Great

Britain and there was no real explanation from the respondent as to why they were not called, if necessary on witness order (as the claimant could have done with Professor Leydecker) save for reasons of proportionality.

5 **Discussion**

398. This was a complex claim, involving three protected characteristics, six different claims of discrimination four of which required to be assessed separately for each protected characteristic, a claim of constructive unfair dismissal, and related issues of time-bar and as to flexible working. Some of the matters raised were far from recent. The evidence was very substantial both as given orally, and in written form. Not all of the evidence heard was obvious as being relevant to those issues as commented on above.

399. The Tribunal shall deal with each of the issues set out above in turn:

Constructive Dismissal (section 95 Employment Rights Act 1996)

1. *On 18 May 2021, did the Claimant give notice to terminate the contract under which she was employed in circumstances in which she was entitled to terminate it by reason of the Respondent's conduct, the Respondent's conduct being so serious that it was a fundamental breach of the contract, being a breach of the implied duty of trust and confidence, going to the root of the contract?*

400. We would phrase the issue slightly differently, as follows: was the claimant dismissed under s. 95(1)(c) of the Employment Rights Act1996 ("the 1996 Act") or section 39(2)(c) and 39(7)(b) of the Equality Act 2010 ("the 2010 Act). The test is in essentials the same as between the two statutes, although the context is fairness and unlawfulness respectively. The issue is normally phrased more colloquially as - was the claimant constructively dismissed?

401. The claimant did give notice to terminate the contract. We did not consider however that she did so in circumstances such that there was a dismissal under section 95 of the 1996 Act or section 39 of the 2010 Act. The onus

of proof is on the claimant. Her evidence in this regard was we considered not reliable for the reasons set out above. In this particular context however her evidence was contradictory.

402. What was said to be the last straw as was given in evidence in chief was the email from Dr Hothersall sent to her and others on 17 May 2021. It was not pleaded specifically as the last straw, but was the last matter referred to in the pleadings before the resignation was submitted. In submission Mr Cunningham argued that that chronology was significant.

403. There are however several difficulties with the claimant's position in this respect. Firstly, we did not regard that email as the kind of email which could possibly form a last straw. It was in our view innocuous, and simply an email to colleagues about her return to work, suggesting catching up, and saying that she would do the OSaR for "some of you". That was not saying that it was for the claimant. If the claimant was concerned that it might refer to her, and she would not be unreasonable in holding such a concern given that the position was itself not clear from the message, she did not ask anyone, including Dr Hothersall or Professor Bartlett who had at that time been her line manager, if it was intended to do so. She did not enquire of HR if it meant that Dr Hothersall would again be her line manager. There is no suggestion that she contacted her union for advice, at least there is no email in the documents before us in relation to that. The suggestion that was made in her oral evidence that Dr Hothersall had again become the line manager was contradicted by the fact that the claimant wrote her resignation letter to Professor Bartlett, which we consider was evidence that the claimant believed at the time that Professor Bartlett remained her line manager. That was supported by the fact that in the letter the claimant referred to her "previous line manager" in terms obviously indicating Dr Hothersall and made no mention of a concern that she was once again to be her line manager.

404. We did not consider that the email from Dr Hothersall had any aspect of something inappropriate about it. She was returning to work and asking to meet colleagues. One would expect that kind of message to be sent. It might have been sent individually, but came at a time of substantial work

to do, with Dr Hothersall working 0.5 of an FTE for the respondent. It could not amount to a last straw, in our view.

405. Secondly, when it was pointed out to the claimant later in her cross examination that an alleged last straw of the email of 17 May 2021 was not mentioned in her resignation letter sent the following day, her position changed, to the last straw being that Professor McCrimmon did not action what she alleged was his proposal that the new Head of Undergraduate Medicine be the line manager when she spoke to him in around November 2019. But the person he was referring to by post, but not then by name, being Professor Bartlett who was later appointed, did become the line manager, in around May 2020, after Dr Hothersall had been seconded to the NHS, at which point it was obvious that she, Dr Hothersall, was not to be acting as line manager. That was a year before the resignation. She wrote the letter of resignation to Professor Bartlett as we have commented on.

406. In any event we accepted the evidence of Professor McCrimmon that he had not promised to change the line manager from Dr Hothersall, merely mentioning that as a possibility which would require discussion with the existing line manager at the least, and we rejected the evidence of the claimant in this regard. We did not consider that the meeting with Professor McCrimmon and his alleged failure to act as she claimed he had promised, which he had not done, could amount to a last straw as there had been no promise of change which was not acted upon. His comments to her had been an attempt to resolve matters. Whilst he did not follow up on that as he himself acknowledged in a later email to Professor Howden, the focus of the claim in this regard was the alleged promise to change the line manager, which he did not make.

407. Thirdly there was a different last straw mentioned in the grievance letter of 31 August 2021, which was that the OSaR with Professor Bartlett had involved bias. We rejected that allegation, and accepted Professor Bartlett's evidence in that regard. There was nothing inappropriate in the OSaR meeting with Professor Bartlett that could possibly amount to a last straw, in our view. The claimant had thanked her for it, and accepted in the pleadings that it had been a better experience than the last one, which

had been with Dr Hothersall. There was nothing to found any allegation of bias on the part of Professor Bartlett, and nothing that could found a last straw from it. We rejected that suggestion.

408. The very fact of there being three alleged last straws, different in time and circumstance, none of which is capable of amounting to a last straw for these purposes, does not support the claimant's reliability on this question, and each contradicts the other as to what was the last straw.

409. Fourthly so far as the 17 May 2021 email was concerned it requires to be seen in the context that the claimant had, about two weeks beforehand, informed Birmingham University that she was accepting their offer. In our view, it was clear from the evidence that the claimant resigned because she had been offered a higher post at Birmingham University. She said as much in her resignation letter, in which she had said that she wanted to be very clear as to her reasons. That was supported by the timing of the offer to her from Birmingham University, her message to Professor McCrimmon and others offering to stay if it was matched, and her discussion with Professor Bartlett around the time she accepted the Birmingham offer saying that there was no need to arrange a return to work meeting (to discuss workload issues amongst others) as she was to be leaving.

410. Fifthly, whilst there is one day between the date of that email and the resignation letter, we did not consider that that had evidential significance given the circumstances we have referred to, particularly firstly that the offer had by then been accepted of a new post and secondly the absence of any reference to the email in the letter of resignation. There is a maxim, which is not a rule of law but a matter to consider when assessing evidence, which is *post hoc non ergo propter hoc*. It is also sometimes referred to, without the use of the negative, as a fallacy, as discussed in ***Alcedo Orange Ltd v Ferridge-Gunn [2023] IRLR 606*** in which the EAT stated "But one must be careful to avoid the fallacy commonly known by its Latin tag; *post hoc ergo propter hoc*. Just because one thing follows another, it does not necessarily mean that the latter was caused by the former."

411. We concluded that the email of 17 May 2021 was not any part of the reason for the claimant resigning. It was not part of any course of conduct viewed cumulatively which amounted to breach of the implied term, as explained in ***Kaur*** and ***Omilaju.***

412. Separately we concluded that Dr Hothersall had reasonable and proper cause for writing the email that she did. Her doing so was not an act that of itself breached the term of trust and confidence referred to above. Both Professor McCrimmon and Professor Bartlett had in any event reasonable and proper cause for acting as they did. We considered also that looking at matters cumulatively the respondent did not, without reasonable and proper cause, act in a manner that was likely to seriously damage or destroy the relationship of trust and confidence between employee and employer.

413. Even if we had considered that either of Professor McCrimmon or Professor Bartlett had acted as alleged, such that those acts could in law have amounted to a last straw, there was a material delay from each of those meetings to the date of resignation. That delay was such that there was acquiescence on the part of the claimant. The basis of the claimant's contention that there had been a dismissal was in our view very largely, but not wholly, undermined by the claimant's email to the respondent sent on 24 March 2021, therefore less than two months before she resigned, stating that she would stay if promoted to Senior Lecturer, given a pay rise, and had her duties modified appropriately, in the context of the offer to her from Birmingham University. That is not consistent with trust and confidence having been seriously damaged to the extent required for dismissal as explained in authority, and although the notice of termination was given later the only fact founded on that occurred thereafter and prior to the resignation was the Dr Hothersall email of 17 May 2021, which we considered to be a standard, benign email which did not bear the meaning contended for by the claimant in her oral evidence.

414. For completeness we shall also comment in this regard on the claimant's allegation that she had been harassed by Dr Hothersall in her response to a comment by the claimant at an away day in February 2020. The focus of the claimant's allegation was that a comment of "calm down" was

harassment, but we did not agree, as we address further below. In this context we address it separately as a potential last straw as it is part of the cumulative picture. It was not the perfect comment, and was a little terse as Dr Hothersall accepted, but it was far from the kind of comment that properly is to be regarded as unreasonable such as could amount to a last straw. It was a trivial matter, we consider. A reasonable person would not have regarded it as objectionable. Imperfection of language does not amount to what could be a last straw, or part of the cumulative history that could amount to repudiation. It was also an incident that was over a year prior to the resignation, not referred to in the resignation letter, despite the claimant stating specifically in it that she was being clear as to her reasons for resigning. It is also we consider an argument that would be unsuccessful because of acquiescence not only by delay, but also the later 24 March 2021 email.

415. The resignation letter gave as the reason for leaving not any form of repudiatory breach *per se*, but the offer from Birmingham University. The offer had been made, and the claimant was somewhat coy in her evidence as to when she had accepted it. The offer from Birmingham University formally made to her was not before us. It was in her oral evidence that she referred to an email with an accept/reject button to press to respond. It appears to us that there would then have been a formal process including for example checking references, then a letter of offer in not dissimilar terms to that followed when the claimant joined the respondent. The evidence of that whole process was also not before us. In the claimant's resignation letter in which she stated that she was being very clear as to reasons, that offer of a higher level of post as Senior Lecturer was her reason for leaving.

416. The letter then stated that the primary reason she had looked for other roles was what she considered a disparity of treatment between clinical and non-clinical staff at the respondent. That is entirely different to the matters she now seeks to found on. It was not suggested that there was any protected characteristic that could be involved in relation to differences between the groups of clinical and non-clinical staff.

417. In the letter she then gave three examples of what was alleged as discrimination, as a secondary reason for looking for other roles. We consider that what is stated within them is wrong. Before we address the detail that however we consider it of significance that the claimant did not raise a grievance under either the grievance policy or the Dignity and Work and Study policy for any of those three examples. She was aware of the policies, and when she met Ms Ross in September 2019 those options were specifically raised. But the claimant did not do either, and instead had an informal discussion with Professor McCrimmon. Particularly in relation to the alleged bullying by Dr Hothersall at the September 2019 OSaR that was at the least very surprising, and is part of the pattern we referred to earlier of not following the procedures that were in place at the time.

418. The first allegation of discrimination in the resignation letter was what Dr Hothersall had allegedly said on 20 May 2019, but her position in relation to a comment as to disabled persons specifically is not supported by the documentation, as set out above, and was contradicted by Dr Hothersall whose evidence on this matter we preferred. Dr Hothersall's position is also generally (although not entirely) supported by Ms Ross, and that of Ms Sporing. Whilst we have accepted that a comment in relation to 60 hours per week being required for promotion, or words to that general effect was made, we consider that the claimant put her own "gloss" on those words by referring to disabled persons (a matter we commented on in a different context). The allegations by the claimant are we consider part of a pattern in the evidence of an exaggeration by her, or of taking what was said and seeking to change it to fit with her own circumstances.

419. The second was an alleged falsification of a document, being the job description or advertisement, but that was quite simply not the case. The claimant had not considered the documents properly and had leapt to an unreasonable conclusion. As noted above this point was not put to Ms Ross in cross examination. The first document, being the one the claimant alleged as falsified and sent by Ms Ross, stated that it was for an internal vacancy. It had question marks in relation to salary. Ms Ross had simply found it on the respondent's system after a search for it. She had

not dealt with it herself. It appeared to us to be clearly and obviously a form of draft for an internal vacancy, which would not apply to the claimant who was at that time at another University.

420. The second document was not labelled as internal vacancy, had a different provision as to remuneration and background, and had specific reference to a Masters course in the School of Nursing that was being introduced in Global Health and Wellbeing, and other post-graduate work. It had comments on salary that were not left with question marks. It was the one that was advertised externally and seen by the claimant herself.

421. They are different documents, and it appeared to us that the former was a draft for the internal vacancy stage, which either did not lead to acceptable candidates or did not proceed, such that there was then external advertising of a different job description with detail that had changed. There may have been a degree of misunderstanding in the mind of Ms Ross about these documents, but there was no falsification of any document, nor provision of "fake information" as had been alleged in the letter. It was a serious allegation, but the basis for making it did not exist. This is, we consider, a further example of the claimant taking facts and exaggerating them, making them appear worse, at the very least.

422. The third example was an allegation of Professor Mires hindering her application for promotion as an appeal panel had, she said, found. It had not made any such finding. This is a further example of the claimant taking words and mis-characterising them, making them appear worse than they stated. The panel had merely found a procedural irregularity in his report in not having included consultation with the Deans of the other two Schools.

423. We address the allegations otherwise made against Professor Mires separately, but on the more general allegation of hindering her application we preferred his evidence to hers. He did not seek to hinder her application for promotion at all. He set out his genuine views, after consulting others, on her application in his 2016 report - views that were supported by others – but at the same time both in the report and his subsequent actions sought to assist her in achieving the evidence required

for promotion. Far from hindering her doing so, it was clear to us that he sought to assist her to do so. There was nothing in the allegation made by the claimant in this regard even if one discounts reference to the decision of the appeal panel.

5 424. We appreciate that her later grievance cites these and other examples, and that the letter of resignations states that the examples are not exhaustive, but it is we consider instructive that the examples of what she alleges to be discrimination, that she chose to refer to in her letter of resignation, were not supported by the evidence we heard, and in some 10 respects are directly contradicted by contemporaneous documents she was aware of.

425. We also deal in this regard with another matter which may be said to be part of the background to the alleged dismissal. The submission for the claimant, and a matter raised in cross examination, was an allegation of 15 conflict of interest involving both Professor Mires and Professor Beech in being on the 2017 ARC Panel. We did not consider that there was any such conflict of interest, as that term is properly understood. It is said to have arisen from them both being on the ARC in 2017. In light of the nature of the finding of the appeal panel, we have no concerns over Professor 20 Mires being involved in the 2017 Panel. He was the Dean, and would be expected to be present in that role. Professor Beech had been involved earlier, but again it would be expected that he would also be involved. There were a number of those on the 2017 Panel who had not been on that in 2015 or 2016. The Panel was a reasonably large body.

25 426. No authority was cited by the claimant in this regard, but there was reference to the test of a fair minded and objective observer. That may have been a reference to Lord Hope's comments in ***Porter v Magill [2002] 2 AC 359***. Lord Hope reviewed the domestic authorities, the impact upon them of the jurisprudence on Article 6 of the Convention of Human Rights 30 which applies to a case of bias, which that case was, and said

> "The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

427. This is not exactly the same as the issue of conflict of interest, but bias encompasses that principle. In our view a fair minded and informed observer would not have concluded that there was either conflict of interest specifically, or that the ARC Panel involving Professors Mires and Beech was biased.

428. The claimant makes arguments in relation to the job-share application she made, which are addressed separately below. One point made in submission was that the reason given by the respondent for not allowing it was the cost of two persons, and it was said to be not an allowable business reason. It was not clear to us what that referred to. Section 80G of the 1996 Act has “the burden of additional costs” as the first of the allowable grounds to refuse an application for flexible working. If flexible working is refused for what are said to be discriminatory reasons that is a different matter, and arises in the context of objective justification for indirect discrimination for example, but that depends on the PCP relied on being established. In the context of whether or not there was a dismissal that element is not required, but we did not accept the claimant’s argument that (subject to our comments that this was not the fundamental and honest reason) cost is not allowable as a reason under at least the 1996 Act.

429. The claimant further makes arguments in relation to the making of reasonable adjustments, which again are addressed separately below. On the basis of the claimant’s case before us, no breach was found.

430. For these reasons we consider that the claimant had not discharged the onus of proof on her to show that there had been a dismissal.

431. Taking all of the evidence we heard into account we did not consider that the claimant had proved that there had been any breach of a material term of contract that amounted to repudiation by the respondent. There had been reasonable and proper cause for the acts of the respondent, save where we have found otherwise. She had materially delayed in responding to earlier breaches if there were any, and had acquiesced specifically in her email of 24 March 2021. The email from Dr Hothersall on 17 May 2021 was not any part of the reason for her resignation. The reason for the

resignation was solely because on or around 4 April 2021 she had accepted an offer from Birmingham University. It follows that the claimant has not established that there had been a dismissal as explained in the case law cited above. The claim of unfair dismissal must fail. We also consider that there was no dismissal for the purposes of the 2010 Act for the same reasons, and as further commented on below. That has consequences for the issue of time-bar as referred to below.

2. *Does the fact that the Claimant worked out her notice and her employment ended on 31 August 2021 mean that she affirmed her contract and was not constructively dismissed?*

432. This point is not now relevant, but the answer is no at least in principle in relation to the giving of notice itself, as the terms of the statute confirm. A person who is the victim of repudiatory breach can react by giving notice to terminate the contract (which we consider is a reference to the notice required to be given under the contract) or by accepting the repudiation and terminating the contract with immediate effect, at their discretion. That is subject to a qualification, however, as the notice she gave was about two weeks longer than that required under the contract. For that two week period therefore she did not fall under the statutory provision. Given the circumstances and length of period involved prior to that two week period, we consider that it is sufficiently material that that is a further example of acquiescence, which means that there was no dismissal in law. The claimant gave that additional two weeks' notice when she resigned on 18 May 2021. The contract therefore continued a further two weeks beyond the notice that she could give under the contract, but did not require to if there had been a repudiatory breach. Having regard to ***Cockram,*** where although the facts were very different it was explained that this was a question of fact and degree, it appeared to us that the additional period of two weeks over and above the notice extending to three months did amount to unreasonably lengthy delay such as amounts to acquiescence and means that there was no dismissal for that separate reason.

3. *If the Tribunal finds that the Claimant was constructively dismissed, was the reason for the dismissal a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996?*

433. This point does not now arise.

4. If the Claimant's dismissal was one of the potentially fair reasons, did the Respondent act reasonably or unreasonably in dismissing the Claimant with reference to section 98(4) of the Employment Rights Act 1996?

434. This point does not now arise.

Time Limits

5. Have the proceedings under the Equality Act 2010 been brought before the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable? It being alleged by the Claimant that the date of the act to which the complaint relates is 31 August 2021 (the last day of her employment) as she was subjected to conduct extending over a period ending on 31 August 2021 and it being alleged by the Respondent that the date of the act to which the complaint relates is 17 May 2021 (being the last alleged act of discrimination, as pled by the Claimant).

435. The issue is whether any claim is outwith the jurisdiction of the Tribunal under s. 123 of the 2010 Act. That has a number of elements. Firstly, for the reasons given below but based on the same reasoning as for issue one, the Tribunal does not consider that there was a dismissal under the terms of the 2010 Act. Had there been, the date of that would have been 31 August 2021 and the claims related to such a dismissal would have been within the jurisdiction of the Tribunal.

436. Secondly, In the absence of a dismissal, the question then becomes one of whether or not there was a detriment or any detriments, when it or they occurred, and whether there was conduct extending over a period in relation to them under that same section. There is one matter that is timeously raised, in relation to the grievance intimated on 31 August 2021. We consider that the Tribunal clearly does have jurisdiction to consider that, given the dates of early conciliation and the presentation of this Claim.

437. The Tribunal does not consider that the claimant has pled any other act of the respondent, or any omission, which is related to discrimination in any way, in the period from 18 May 2021 onwards apart from that. The other matters that the claimant sought to rely on in her evidence, but did not plead, including for example no major leaving event with staff or similar, were not in any event we considered established to be anything to do with the protected characteristics founded on, and was not itself an issue that we considered did amount to a detriment. There had been some events online and matters were affected by Covid at least to an extent. These matters covered in the evidence but were not part of the claimant's submission, and as they have not been pled we do not consider that we can or should take account of them.

438. Whilst the claimant was not paid at the rate of a senior lecturer that was as the decision was made not to promote her when she last applied in 2017. In this regard it appeared to the Tribunal that the authority of ***Virdi*** which is supported by ***Clarke*** on the issue of promotion required to be applied, and that the continuing consequences of such a decision did not amount to conduct extending over a period. The decision is what is relevant in this context, and that was taken in June 2017, albeit not intimated to her until October that year. For the reasons addressed below that decision was not discriminatory in any event.

439. We sought to identify a detriment that might be said to be discriminatory. We address the detail of the various claims made below. None of those we have referred to as ones where there was, on the evidence before us, discrimination were within the primary time-limit under section 123.

6. *In respect of any acts which occurred before 17 May 2021 or 31 August 2021 (as the case may be), do they constitute conduct extending over a period which ended on or before 17 May 2021 or 31 August 2021 (as the case may be) for the purposes of section 123(3)(a) of the Equality Act 2010?*

440. We consider that the claimant has not established that there was conduct extending over a period for the purposes of this claim. We did not accept her contention of an underlying discrimination at the respondent, of which

her case was an example. The individual aspects of discrimination she sought to found on we mostly rejected, as we shall address below. In any event we consider that the events she complains of were separate and discrete. They were not indicative of conduct extending over a period as that has been explained in authority.

441. We note that it is not a part of the List of Issues that the parties' counsel had agreed, that there was a just and equitable basis for extension of jurisdiction under section 123 of the 2010 Act. It was however made in submission, without opposition as to the ability to do so, but opposed on its merits. We are prepared to amend the List of Issues to consider that argument. It appeared to us to be in accordance with the overriding objective to do so.

442. We consider that that argument fails. That is for the key reason that the passage of time had materially affected the evidence, which had prejudiced the respondent to a material degree. We have made our findings in fact based on the evidence that we heard. But that evidence was affected by the passage of time to a significant extent. There are two aspects to that. The claimant herself, as well as many other witnesses for both parties, had forgotten points of detail that were, or could have been, relevant to the issues. Some of those matters are referred to above. Ms Strachan said in evidence that she had spoken to Professor Jindal-Snape, one of those who heard the appeal against promotion being refused, who told her that she had no recollection of the reasons for that decision given the passage of time or words to that effect. The second is that evidence that might have been obtained at the time of the events complained of were not before us because of the passage of time. Documents that might have been relevant were not before us or were not complete (for example Appendix 1a with examples of the criteria for promotion). That is far from surprising given the lengthy passage of time.

443. Witnesses who might have given evidence did not. It is true that some, such as Dr Fardon and Professor Jindal-Snape, are still employed by the respondent. They might have been called, but Mr Grant-Hutchison argued that an issue of proportionality arose, and for example Professor Jindal-Snape was not called to give evidence herself simply to say that she could

not recall the reasons for the appeal decision. Dr Fardon had been mentioned only in relation to one meeting held in January 2013. There was a second meeting held about one or two months after that. We have accepted the claimant's evidence of those two meetings, but we do so from what was before us, and what was before us was substantially affected by the long passage of time before we heard it, and the lack of any grievance or informal raising of an issue by the claimant at the time.

444. The claimant argued that there had been no prejudice, with the implication that as there had been a Final Hearing the issue did not arise. We do not consider that that is right. The issue of jurisdiction has been reserved to this hearing. It has two elements (i) conduct extending over a period and (ii) what is just and equitable. These are issues that are to be determined now, having heard the evidence. It is, we consider, apparent to us having done so that there has been material prejudice to the respondent. Putting it very simply, its evidence was likely to have been better had the claim been raised timeously. It was also likely to have been better had the claimant made a formal grievance at or around the time of the matters of which she complains. Our findings in fact where they are contrary to the respondent's position may have been different had matters been raised timeously.

445. We considered that the length of the delay was material. There were a series of matters that the claimant founded on, such that the length of the delay depended on which of these matters was considered. In each case however the delay was material, and in many cases was substantial, extending to periods of several years in many cases.

446. We did not consider that the claimant had shown a good or sufficient reason for the long delays. The claimant had not taken a formal grievance when she might have done at any of the events she complained about. That was particularly striking in 2017 after the re-submitted application for promotion was rejected, but she had been informed of that possibility, and had support from her union at the material time. She had accused her head of department of discrimination on the grounds of race and sex. The issue of a grievance was raised specifically with her in late 2019, but she chose not to do so, and to speak informally with the Dean. That was a

choice she was entirely at liberty to make, but it is a factor that tells against her when assessing what is just and equitable when she much later seeks to raise such issues in a context where we have found that the claims are, unless just and equitable to extend, out of time.

447. If she did have a concern over making a formal Claim to the Employment Tribunal at such a time lest that affect her role and employment it is not we consider a concern that is consistent with the strength of the allegation she made. Nor is it consistent with the passage of time and her length of service at that point. Grievances and Claims are not infrequently taken by employees who remain in employment on the basis of detriment. If there is an adverse reaction from the employer for that fact, there is a right to claim under section 27. That right is a strong protection, quite apart from that of unfair dismissal.

448. The claimant's evidence that she could not raise a grievance with the respondent was we considered not reasonably based. A grievance could have been raised at or around the time of any of the matters of which the claimant now complains. If that had been done, there would at that stage have been an investigation internally. Her view of not making a Claim to the Tribunal we regard similarly. If there had been a Claim taken at that stage, the evidence would have been given when matters were far more fresh in the memory, including her own. It appears to us that the reason for the delay proferred by the claimant is not we consider a good or reasonable one.

449. Another and separate reason for the delay however is we accept reasonable in part. For periods the claimant was pregnant, during which she suffered some difficulties, then she was the mother of twins, and she had health difficulties which led to her becoming a disabled person and known to be so by the respondent on 17 August 2018. Nevertheless she was working full time from 13 May 2018. She had earlier prepared her further application for promotion, and the appeal against that, both of which required time and trouble to be taken to do so. There is we consider no good reason for delay from and after 13 May 2018 at the latest.

450. We considered the extent to which the claims were well founded. We address this within the Judgment more widely, but make some comments on particular matters for completeness.

451. The claimant's sex having been the basic reason for the application for job-share, the application then being refused for reasons not honestly stated, there being internal emails with HR as to whether to treat her email of complaint as an appeal but not doing so, and later emails as to whether to give an honest reason, are we considered facts that could raise a *prima facie* case of direct discrimination on grounds of sex, albeit not directly founded on. Leaving aside for the moment the issues of what had been pled and as to jurisdiction, we then considered whether the respondent had proved that their decision was in no way whatsoever taken, consciously or unconsciously, on that ground. We concluded that it had. We accepted the evidence of Professor Mires in that regard. We accepted that he did not wish to breach confidentiality. He had learned from Professor Dowell that there was a decision taken not to use Dr Wickins after his contract ended. That appeared to follow from Dr Wickins taking one of his children to a student's class. Professor Dowell did not give evidence, but there were emails on that matter at least to an extent.

452. Professor Mires ascertained that the Schools of Dentistry and Nursing had both made other arrangements for the teaching of ethics during the claimant's maternity leave, and could continue to do so after her return. That meant that the arrangement that the claimant had proposed which included her doing one day per week in each of those schools was not required, in his view. Instead however of simply refusing the application made, he made an alternative proposal of three days per week working for the claimant all of which was to be in the School of Medicine. If she had accepted that she would work three days per week in that School, rather than three days per week one day of which to be in each of the three Schools. It was therefore a different proposal as to work, but the same proposal for the claimant's work as to time, in the context that she could not we consider dictate who the job share partner would be. Making an alternative proposal is within the procedure. His evidence that he did

so to try and help the claimant we accepted. That was his genuine belief and intention.

453. The claimant then had a decision to make on whether to accept that proposal or not. It was a decision for her. That she chose not to accept it is not a great surprise to us. The offer was not specifically restricted to a period of one year, which her application for job-share was intended to be. She had a concern that if she accepted that, returned on three days per week, her future was less certain, particularly with regard to achieving promotion. We accepted Professor Mires' evidence that the failure to refer to a one year period for the part-time working was not intentionally done. It was not a matter that the claimant herself raised.

454. Given the evidence before us, we accepted that the respondent had discharged any onus on it of proving that the decision not to accept the job-share application was in no way whatsoever because of the claimant's sex.

455. We make some further specific comments on individual matters in relation to jurisdiction below.

456. Taking all that was before us into account we considered that the claimant did not have good reasons for the very long delays in bringing these matters to the Tribunal. She did not appeal the job share or 2017 promotion refusal at the time although she had a clear letter to her giving her that opportunity for the former, and was aware of the right to appeal for the latter as she had appealed the 2016 ARC decision, and not appealing either matter is not therefore easy to understand. That there was no grievance raised for other matters not least in relation to the OSaR with Dr Hothersall is also not easy to understand. No evidence of a good reason not to do so was given to us in her evidence. She could in addition or separately have presented a claim to the Employment Tribunal of breach of the 2010 Act under sections 13 and 26, and potentially also under section 19, at around the time of the outcome letter she received. She did not do so then.

457. We turn to prejudice. The respondent did suffer forensic prejudice by the delay. Professor Mires retired in 2018 and his recollection of some details

was not complete. Whist we have accepted his evidence, had matters been raised at the time further evidence may have been obtained, both written and oral. The delay between the events that took place in this regard and the commencement of Early Conciliation is very lengthy, and in so far as the commencement of early conciliation is not timeous it does not extend time for these purposes in any event, such that the delay is to the date of presentation of the claim itself..

458. The merits of the claim are we consider at best for the claimant neutral, in that the claimant had good grounds for raising some of the claim, and had grounds to argue a prima facie case for at least some of it. The claim was not one that we considered was without merit, albeit that it was not clearly pled and it was after hearing and considering the evidence that we considered that this chapter of the evidence did not suggest discrimination on any ground or under any section of the 2010 Act. Our decision is separately that the claims do not succeed on their merits, however.

459. On balance having regard to all the circumstances we consider that the lack of good reasons for the very long delay in raising the matter at the Tribunal and the material forensic prejudice suffered by the respondent from that delay leads to the conclusion that it would not have been just and equitable to extend jurisdiction where the claims are otherwise outwith the jurisdiction of the Tribunal under section 123 of the Equality Act 2010.

460. It follows that the Tribunal does not have jurisdiction in relation to the issues raised by the claims made under the 2010 Act, save for that in relation to the grievance intimated on 31 August 2021, and those claims are dismissed for that reason accordingly.

Knowledge of Disability

7. When did the Respondent first become aware of the Claimant's disability or could reasonably have been expected to know of the Claimant's disability? The Respondent admits knowledge of the Claimant's disability from 13 August 2018.

461. This issue does not now arise as in submission the claimant accepted that the date should be accepted as 17 August 2018. The difference of four

days is immaterial in this case, but the latter date is we consider the correct one referring to Dr Reed's report.

Direct Discrimination (s13 Equality Act 2010)

8. *Did the Respondent discriminate against the Claimant because she is female by treating her less favourably than they treat, or would treat, a male? The alleged less favourable treatment being the decisions not to promote the Claimant in 2015, 2016 and 2017.*

462. We address this and the following matters lest we are wrong on the issue of jurisdiction, not least as the prospective merits of the claim are one factor to weigh in the balance.

463. In doing so we note that Mr Cunningham, properly in our view, accepted in evidence that each claim as to each protected characteristic required to be considered separately, and that a fact that may be relevant to direct discrimination (or for other heads of claim) for one protected characteristic was not evidence that could be relevant to a claim based on a different protected characteristic. Putting it another way, if it be held that one fact could be evidence only of direct race discrimination that was not capable of being evidence relevant to the claim of direct sex discrimination, but if the facts could be apt to be relevant for each of those two (or other) protected characteristics such evidence could be considered. This is in the context that the provision in the Act as to dual characteristics in section 14 has not been brought into force. It was therefore necessary to consider each individual matter separately and assess whether it might be relevant to each protected characteristic in the context of each discrimination claim under sections 13, 19, 26 or 27. That was not a simple task from the volume of the material to consider, and that the claimant's submission had not set out specifically which facts were said to be relevant to the claim of direct discrimination, or of harassment, under each protected characteristic. It was an assessment we sought to make ourselves.

464. The focus of much of the claimant's evidence and argument was in relation to her not being promoted. She argued that this was direct discrimination on grounds of her sex. We consider that the claimant has not established a *prima facie* case in this regard. The first decision not to promote her was

not challenged by her on appeal, but the view of the Panel, the Dean, and the external referee were all consistent to the effect that the application did not demonstrate sustained academic excellence. The claimant believed that she had done so, but she had no experience of making such assessments, and the very fact that she thought that she was in a better position to make that judgment than those far more experienced, qualified, and senior than her does not assist her arguments. Her view does not stand comparison with those who did, some of whom, such as in the case of Dr Slowther and an external member of the 2017 Panel, were independent of the respondent. Whilst Dr Slowther was not fully independent, and the appeal committee recommended that a further reference should have been sought, Dr Slowther was suggested as a referee by the claimant herself, and was more likely to be favourable to the claimant because of that. She did not support the claimant's application. That is we consider very strong evidence against the claimant in this regard.

465. In the written applications in 2015 and 2016 the kind of evidence that would justify promotion that Professor Mires in particular spoke about, being in the form of published articles in peer-reviewed Journals, Conference papers presented to peers, or something similar to those matters, was not given to the level required. Some was prospective, and in some, such as the refereed articles, the detail that the form sought was not given. It was not clear what exactly the claimant's contribution to papers she was not given as the lead author was, as she did not set that out. The detail of her application is not evidence that is, we consider, regarded by those academics qualified and experienced to make such a decision as sustained, although it is part of what was described as the right trajectory. For the reasons we have given above we did not consider the claimant's evidence to be reliable. There was no other evidence to support her position, save the references from Professor Boyd. They were however somewhat general in terms, and he did not appear before us.

466. It was of note that the only witness to the decisions of the ARC Panels was Professor Mires, although there are a number of those who were on them still employed by the respondent, or available to give evidence if

sought by witness order should that be necessary. There was no witness from the appeal committee in 2017, although Professor Jindal-Snape remains an employee and Professor Newman at least resides locally. It is a point we addressed in relation to what is just and equitable. But whilst that failure to call a witness who might have given relevant evidence is a matter to take into account, that is in the context of the initial onus, to establish a *prima facie*, case, being on the claimant.

467. We considered that there was a material level of consistency in the evidence of Professor Mires, Professor McCrimmon, and Professor Bartlett, in relation to the limitations of evidence of sustained academic excellence provided by the claimant in her application forms, and that that was supported by the written reference from Dr Slowther to which we have referred, and the comments from each of the three Panels in their written record. Separately there was not a hint anywhere in our view that the decisions made were affected to any extent by the fact of the claimant being a woman. We did not accept that Professor Mires had sought to signal to the Panel that the claimant should not be promoted. Nor did we accept that his view that a person on probation could not apply for promotion. Whilst that is not what the policy stated, he explained in his evidence that that was and remains his view and we accept that his view is genuinely held. The terms of the policy itself, as we read it, do not support that view but those terms are not so clear that Professor Mires' credibility is in issue.

468. We consider that Professor Mires simply gave in his Report and dealings more generally what he considered to be an objective and appropriate assessment of her application. She did most of her work in the School of Medicine, and her own application highlighted the work in that School. Whilst there is reference to the work in other Schools, quite properly, we consider that that was relevant primarily to the second of the two criteria. It was in relation to the first criterion that she was assessed as not yet having provided the appropriate evidence.

469. The claimant argues that the 2016 application was improved and it was illogical and unfair not to send it for external references. We did not accept that. The claimant's view is from the perspective we have addressed

above. The Panel who addressed it are those experienced and qualified to do so. There were changes, but not it appeared to us particularly substantial ones. The suggestion that we draw an inference from the failure to send to external referees was that Professor Mires was signalling the Panel not to promote the claimant we reject.

470. The clamant argues that her appeal was a grievance. We do not agree. It was an appeal under the procedure for promotions. A grievance was pursued separately under a different procedure, with a different right of appeal. There is a separate issue of whether it is a protected act under section 27 of the Act, for which the test is not whether it is a grievance.

471. What was not clear was why the Appeal Committee did not decide to refer what had been a procedural irregularity, and there were others that they had not mentioned in their Report, back to the 2016 ARC. It was the 2015 and 2016 procedures that had been found to have been irregular, and it was not of a great deal of advantage to the claimant to be permitted to apply again in 2017, a process which would take at least to the September meeting, a period of six months. No one from the appeal committee appeared to explain that to us. But again we could find nothing in the evidence that might suggest that the decision was affected to any extent by the fact that the claimant was a woman.

472. The second application was to an extent different to the first, but only to a limited extent. It was moving in the right direction under that same trajectory, but was not at its destination. The constitution of the Panel considering the second application was different to that for the first. There were those from the respondent, and an external member. There was no evidence of that decision being affected to any extent by the fact that the claimant was a woman.

473. Her appeal was successful on a procedural matter, being the terms of the Dean’s report which did not address the contributions to the Schools of Nursing and Dentistry, but the allegation of bias and discrimination that the claimant alleged she had made at the appeal hearing we did not consider to be supported by the contemporaneous documents, and we preferred the evidence of the respondent that such claims had not been

made. We made that judgment having regard to all of our comments above on the lack of reliability of the claimant's evidence.

474. The re-submitted application was again to an extent different to the first, but only to a limited extent similarly. The mitigation circumstances form was not before us, nor was the finding of a sub-committee, but it is known from the ARC report that it was accepted that such circumstances existed. The extent of mitigation allowed was not clear, and Ms Strachan could not recall that detail. There was a measure of lack of transparency in this regard, but that is in the context of these matters being raised several years after the event.

475. Nevertheless the application was rejected for essentially the same reason as for the second application, and the claimant did not appeal that decision. She did not make another application for promotion.

476. When assessing whether a prima facie case had been made out, it is not sufficient that the claimant state that she has protected characteristics, and that the respondent's treatment of her was unfair or unreasonable in her view. In some situations unreasonableness may be evidence of an act or omission being because of the protected characteristic, but what is in general required is some form of connection between the claimant, the protected characteristic founded on, and how the respondent has acted. We could not find evidence of that, either in relation to the promotion process particularly, or from the matters about which the claimant complained more generally. We took into account all of the statistical evidence, and the evidence given by Dr Morelli in addition to that from the claimant in this regard, but we did not consider that there was anything that we could take from that which provided the claimant with sufficient support.

477. There is a gap in pay between men and women. There are figures showing the numbers of men and of women at various grades, particularly at grades 8 and 9 being those relevant to this case. In isolation however they do not we consider take one anywhere, and we accepted Dr Bennett's evidence in relation to that. We were not provided with information for example as to the numbers of those applying for promotion in each of the

relevant years, or how many of those succeeded in each gender. The simple numbers in each grade at each year did not show how many had been promoted into that role, and how many had been appointed into it after recruitment.

478. We did not consider that having regard to all of the evidence we heard the claimant came close to establishing a *prima facie* case. Her evidence we did not regard as reliable for the reasons set out above. We did take account of all of the findings we made including those as to harassment, but we considered that she had not discharged the initial onus on her. In this regard we should add that although there were questions asked particularly of Professor Mires with regard to promotions awarded to other staff that was not referred to in submission, and we regarded the circumstances of those parties to be so substantially different to that of the claimant that they could not be comparators for the purposes of a claim under section 13 (either on this protected characteristic or the others relied upon).

479. Even if she had established a *prima facie* case, we consider that the respondent had established that the reason for the decisions made in relation to the promotion applications was the genuine belief held by those doing so that the claimant's applications did not meet the criteria for promotion, and not for any reason to do with her gender or race to any significant extent. The evidence to support that comes from the respondent's witnesses but in particular Professors Mires, whose evidence on these matters we accepted, and the documentary evidence as we have set out. It was we considered particularly relevant that the application form for promotion was set out in a manner that sought the kind of material that Professor Mires spoke about as being required for promotion. That form was used for all such promotion applications. The claimant did not provide the detail required within it, and what she did provide was properly, we considered, described as "thin". It was, in fundamental terms, that lack of adequate evidence within her own application form to justify promotion that led to the decisions being made not to grant it.

9. Did the Respondent discriminate against the Claimant because of her race (Czech nationality) by treating her less favourably than they treat, or would treat, others (British nationality)? The alleged less favourable treatment being the decisions not to promote the Claimant in 2015, 2016 and 2017.

480. For what are essentially the same reasons, we do not consider that the claimant has established a *prima facie* case of direct discrimination on the grounds of her race or nationality. We could find no evidence of any kind of a decision taken on the ground of nationality. The two matters where there was a reference to it was the comment in about March 2013 as to being a foreigner and woman to be appointed, and the claimant's reliance on statistics, and comments in reports on matters of race. The first point however had no relationship to the decisions made, and the second did not assist us. We accepted the evidence of Dr Bennett. In any event, it appeared to us that the evidence did not support the particular circumstances of the claimant as a white person of European background or descent.

481. Even if she had done, we consider that the respondent had established that the reason for the decisions made was the genuine belief held that the claimant's applications did not meet the criteria for promotion, and not for any reason to do with her race or nationality.

10. Did the Respondent discriminate against the Claimant because of her disability (Chronic Idiopathic Pancreatitis) by treating her less favourably than they treat, or would treat, others (those not having that disability)? The alleged less favourable treatment being the decision not to promote the Claimant in 2018.

482. The short answer to this issue is that there was no decision not to promote the claimant in 2018, such that the answer must be no. The last such decision was in the previous year following the re-submission of the claimant's application from 2016, but with mitigating circumstances added. The decision was taken in relation to that in April 2017. It was communicated in October 2017. That was well before the respondent knew or ought reasonably to have known of the disability. On that basis,

this matter cannot arise as a claim under the 2010 Act on the basis of disability.

483. The claimant did not apply for promotion in 2018 or beyond. It appears to us that that is required before an argument of a failure to promote the claimant can succeed. It was not suggested in evidence that the respondent ought somehow to have promoted the claimant on its own initiative. The closest it got to in that regard was the suggestion the claimant made, naively in our view, that the Appeal Panel ought to have remitted the matter to the Principal to make a decision to promote her, but that was not warranted on the facts, it was not within any procedure and it was before she became known to be a disabled person.

484. It may be that she had become disheartened by the rejections of those applications made in 2015 – 2017, but there was no evidence of her being unable to apply in the later years. She could have done, and had she followed the advice and encouragement given to her by Professor Mires, and the ARC decisions communicated to her, and discussed how to achieve that with her then line manager, that may have been successful once the material to support it became available. That the claimant felt that her workload was, in short, too high such that attending Conferences to give papers or to publish peer reviewed papers was not possible for her is a different matter, which is addressed below.

Discrimination arising from Disability (s 15 Equality Act 2010)

11. Did the Respondent discriminate against the Claimant (a disabled person) by treating the Claimant unfavourably because of something arising in consequence of her disability, such treatment not being a proportionate means of achieving a legitimate end? The alleged unfavourable treatment was refusing to even consider the Claimant for promotion if she could not work the hours being demanded of her. The Claimant's inability to work the longer hours being demanded of her arose from her disability.

485. For the same reason as the preceding paragraph, this issue cannot arise. The claimant did not apply for promotion after her disability was known, or ought reasonably to have been known, by the respondent. There was

therefore no application for promotion to consider, and nothing to take a decision upon.

486. There was no requirement formal or informal to work “longer hours” than those required for the role to secure promotion. Promotion could be achieved when working within a standard working week of about 40 hours. It was a matter of the quality and extent of the relevant output, not the hours put in, as Professors Mires, McCrimmon and Bartlett all spoke to, and whose evidence on this we accepted. There was no real evidence to support the claimant’s contention that she would not be considered for promotion unless she worked what she thought was an excessive workload. Her evidence in this regard we rejected. That she did not apply for promotion after 2017 was material in this regard.

487. There is a further difficulty for the claimant. We did not find evidence to support the suggestion that particular hours were demanded of her in the period after August 2018, when her disability was known. The evidence in regard to what hours she was in fact working in the period after she returned to work full-time was far from clear, in that the meeting on 20 May 2019 referred to workload and hours being discussed at a meeting the following month, which took place but without any record of it, little evidence from the claimant about it, and no recollection from Dr Hothersall about it at all. In general terms Dr Hothersall accepted the claimant’s proposals for the work she would carry out. Dr Hothersall thought that the claimant was only working in the School of Medicine from the time of her return to full-time working (13 May 2019) and doing so on the basis of 0.4 of a FTE, with that FTE based around a notional 40 hours per week. Her view in evidence was that that therefore equated to about 24 hours per week. The basis for that view was however very limited. She met the claimant rarely. She did not know about work in the School of Nursing. It was a view largely informed on the basis of the MoT data she had looked at, and the report she had prepared. It appeared to us that it was likely to be wrong, and that in fact the claimant was working more hours than that in total.

488. The claimant's oral evidence was that she was working of the order of 50 hours per week around this period. We were however concerned that that estimate was not reliable, and was liable to be an exaggeration in our view.

489. We did not have up to date documentation from MoT records, or other evidence which was clear. We noted that the claimant did not complain about workload until early in 2021, and then it appeared on an email from Ms Ross to her seeking a meeting. The claimant appeared to us to have been permitted by Dr Hothersall to work largely as she had herself proposed. Working out what those hours were was extremely difficult as the evidence to do so was not fully before us.

490. In all the circumstances, although the evidence on this is particularly imperfect, we concluded that the claimant was working of the order of 40 hours per week on average in the period from 13 May 2019 to when she resigned. The work she was doing was not for scholarship, nor was she, from the evidence we heard, working to secure the kind of evidence of academic excellence that the promotion policy referred to. She was doing some work for the School of Nursing, but limited, and the large majority of her work was in teaching and related duties in the School of Medicine.

491. In order to be able to do the kind of work that might lead to evidence of sustained academic excellence, and maintain a working week of no more than 40 hours on average, the work for the respondent on teaching and related matters would have required to be of the order of 35 hours per week or less, but that is not a matter on which we heard adequate evidence, nor was it a matter that was raised as an issue in the issue set out above, nor had it been pled. We would have required to have reworded the issue entirely, on a basis that had not been pled by the claimant. We are not entitled to do so.

492. It appeared to us that we required simply to answer this issue in the negative.

Indirect Discrimination (s 19 Equality Act 2010)

12. Did the Respondent discriminate against the Claimant by applying a provision, criterion or practice (PCP) which was discriminatory in

relation to the Claimant's sex? The PCP which was allegedly applied was a requirement to work longer hours in addition to those hours required to fulfil the duties of the role if you were to be considered suitable for promotion.

5 *a. Was this PCP applied to both males and females within the applicable pool for comparison?*

493. We consider that the claimant has not proved that this PCP was applied. Rather we consider that it has been established in the evidence that working hours were not a requirement directly or indirectly in order to
10 secure promotion, either that working more than the hours required for the role was considered necessary, or that if someone worked around 40 hours per week they would not be promoted. There are a number of reasons for rejecting the claimant's evidence in this regard.

494. Firstly the written criteria make no mention of hours of work in any way.
15 That is also supported by the format of the application form referred to above. Secondly the evidence from the respondent, particularly Professor Mires but also Professor McCrimmon and Professor Bartlett, which we accepted in this regard, was that working longer hours (the extent of which was not specified, but generally understood from what the claimant's
20 evidence was to be working of the order of 50 - 60 hours per week) was not a requirement formally or informally. Their evidence was that the written criteria were what was applied in practice. That was we considered apparent from how matters had been assessed by the two ARC Panels. Thirdly the evidence of what Dr Hothersall had said in relation to this at
25 the 20 May 2021 meeting has been addressed above, and was a form of outburst that did not reflect reality. Fourthly Dr Hothersall quickly said that she did not agree with such a matter, and the claimant acknowledged that by email to her at the time. Fifthly Dr Hothersall was not a member of any ARC panel considering the claimant's applications.

30 495. Sixthly, whilst working longer hours might assist an applicant to establish sustained academic excellence simply because someone working hard and those longer hours may (but not necessarily will) be able to produce a higher quality output, there was no evidence of it being required. On the

contrary there was evidence that applicants could be promoted working less than the standard 40 hours per week, which we take as a notional basis of the hours generally required to fulfil the contract, and when that was put to the claimant in cross examination she accepted it. The alleged PCP was not applied to all in the pool, being those seeking promotion, and it is not we consider a PCP in light of that. It is, separately, not we consider a matter of common sense that working longer hours would be a condition of promotion. It would encourage someone simply to work longer hours rather than do so effectively. As a matter of common sense promotion is something one would expect to be assessed largely qualitatively, not quantitatively on the basis of time spent working.

496. Seventhly in submission Mr Cunningham confirmed that what the PCP he sought to found on was is a form of indirect PCP, that being that in order to obtain the evidence of academic excellence that the written criteria referred to an applicant would in practice have to work more than the hours required for their existing post rather than that directly there was a requirement to work longer hours as a condition of promotion. We did not consider that form of proposed PCP would be a PCP or be, as it were, the right PCP. It was not suggested for example, nor was it pled, that the PCP was that of achieving and evidencing academic excellence. Nor was the PCP suggested or pled as being the requirement to carry out the hours necessary to fulfil the existing role, or something akin to that and based on the contractual term, as something not connected with promotion but related solely to the existing role. They would in our view have been PCPs within the statutory definition.

497. The PCP founded on in this case by the claimant sought to link working hours in the existing role with the decision for promotion to the higher role but in a manner that was not only contrary to the evidence we heard, but also and separately something that we considered did or could amount to a PCP. Such a kind of “indirect” PCP was not we considered what the statutory provision was identifying.

b. *If so, did this PCP put females at a particular disadvantage when compared with males because females statistically have greater responsibilities for childcare and cannot work longer hours?*

498. This issue does not arise.

c. If so, did this PCP put the Claimant at that disadvantage because she was unable to work longer hours due to her childcare commitments?

5 499. This issue does not arise

d. If so, has the Respondent shown that the PCP was a proportionate means of achieving a legitimate end?

500. This issue does not arise.

13. Did the Respondent discriminate against the Claimant by applying a provision, criterion or practice (PCP) which was discriminatory in relation to the Claimant's disability? The PCP which was allegedly applied was a requirement to work longer hours if you were to be considered suitable for promotion.

a. Was this PCP applied to both disabled and non-disabled persons within the applicable pool for comparison?

501. For the same reasons as given above, we consider that the answer to this question is no, and as there was no application for promotion after the date when the claimant’s disability was known to the respondent the matter cannot arise in any event.

b. If so, did this PCP put disabled persons at a particular disadvantage when compared with non-disabled persons because disabled persons find it more difficult to work longer hours and maintain attendance?

502. This issue does not arise.

c. If so, did this PCP put the Claimant at that disadvantage because she found it more difficult to work longer hours and maintain attendance?

503. This issue does not arise.

d. If so, has the Respondent shown that the PCP was a proportionate means of achieving a legitimate end?

504. This issue does not arise.

Failure to Make Reasonable Adjustments (s 20 and s 21 Equality Act 2010)

14. Did the Respondent apply a PCP, namely a requirement to work longer hours in addition to those hours required to fulfil the duties of the role if you were to be considered suitable for promotion?

505. No, for the reasons given above.

15. If yes, did this PCP put the Claimant at a substantial disadvantage when compared to persons who are not disabled because the Claimant was not able to work these long hours? The alleged substantial disadvantage the Claimant was placed at being less likely to be considered suitable for promotion.

506. This issue does not arise.

16. If yes, did the Respondent fail to take such steps as it is reasonable to have to take to avoid the disadvantage? The reasonable steps which it is alleged that the Respondent failed to take being:

a. To adjust the Claimant's excessive workload so that this could be managed within her contracted 37 hours (1 FTE) per week as supported by Occupational Health. This would have removed the substantive disadvantage as it would have allowed the Claimant to better demonstrate her abilities to a promotion panel.

507. This issue does not arise as the PCP founded on has not been established. We consider however that we should comment on it to an extent. The issue is not appropriately worded in our view as the claimant did not have a contracted 37 hours per week. The terms of the contract were not for a specific number of hours. If the words from “her contracted 37 hours (1 FTE) per week” are set aside, there is some support for considering as an amended possible issue the restricting of the claimant’s

working hours. That is suggested, at least for discussion, in Dr Reed's report dated 17 August 2018. His report refers to her suffering from fatigue. There was then some discussions on that subject as referred to above, but it was not finalised as there was no clear and documented agreement as to what hours the claimant would be, or was in fact, working. In that regard, there was perhaps the possibility of a different PCP being argued for, along the lines of working the hours reasonably required to perform her duties as Lecturer, including provision for scholarship. But such a PCP was not pled, included in the issues, or raised in argument before us. It was not a matter that we consider we are able to consider in light of that. We address at the end of this Judgment some issues that arise in relation to this observation, amongst others.

b. *To allow the Claimant to work part-time on a job-sharing basis with her husband. This would have removed the substantive disadvantage as it would have allowed the Claimant to better demonstrate her abilities to a promotion panel.*

508. Even if a PCP as alleged had been established, we did not consider this to be established as a reasonable adjustment. The issue arose before the claimant was disabled, and before the respondent ought reasonably to have known of disability. She sought the job share for a period of one year from August 2017, which would therefore have concluded in August 2018, at the time her disability was or ought to have been known. That timing effectively is fatal to this claim.

509. There were concerns over her husband's performance in the role, together with a changed requirement from the Schools of Dentistry and Nursing, which Dr Hothersall spoke to and was not cross examined on. They included that he took his children to teaching sessions which the respondent regarded as inappropriate. The claimant had no right to a job share with her husband in particular.

510. The letter of decision mentioned cost, although it was not made clear what that cost would be. Professor Mires stated that having two people conduct one role involved minor additional cost, which was correct in our view, but not the real reason for the decision. The real reason was that the

University had decided not to renew Dr Wickins temporary contract which was due to expire on 31 July 2017. That was however not a decision that they wished to convey to him or could convey to another member of staff, even his wife, due to obligations of confidentiality. HR prepared the letter of decision which Professor Mires approved, which did not give the real reason because of those concerns. There was a later exchange of emails between Ms Marlow of HR and Professor Mires where he mentioned giving the "honest reason". There was consideration of whether her letter objecting to the outcome should be treated as an appeal, and then a decision not to do so as the claimant was written to by HR with an option to appeal by a specified date, extending the normal time to do so. The claimant wrote a further letter of objection in effect but she did not appeal. As she did not appeal the matter was not addressed further at the time. Had it been, and had time passed sufficiently, the honest reason might then have been provided.

511. It was initially a concern to us that the respondent had not given what Professor Mires referred to in an email of an honest reason for the decision not to grant the job-share that the claimant sought. It was sought during her maternity leave, and was for a period of one year from her return from that leave. But we accepted that it was motivated by a desire not to raise what was a conduct or performance issue in respect of her husband. In light of all of that, the proposed adjustment, even if it had been required under section 20 generally was not a reasonable one.

c. *To provide support from another colleague to assist with the workload when the Claimant was off sick, so that the Claimant did not have double the workload on her return. This would have removed the substantive disadvantage as it would have allowed the Claimant to better demonstrate her abilities to a promotion panel.*

512. The difficulty with this proposed adjustment is that the claimant did not make an application for promotion after 2017, as addressed above. A second matter is that the evidence was that the teaching required was for a total of 29 hours, and was not necessary in that academic year, but could be undertaken within about three years. The workload was not therefore "double" on return, or anything like that. It was a further example of the

exaggeration to which we have referred above. Leaving that aside, there was insufficient evidence on this aspect, although there was some evidence of the claimant returning to work after being off ill to find that none of her teaching had been undertaken. There was no evidence as to how the outstanding teaching related to what a promotion application would have looked like had the proposed adjustment been implemented. 29 hours is seen in the context of annual hours of 1,760 if someone works a notional 40 hour week for 44 weeks of the year, with 8 weeks for leave. The position was not we considered explained in the evidence at all, or at least to a degree we considered comprehensible. We did not consider this adjustment to be reasonable in the context of a possible application for promotion never made.

> d. *To implement the recommendations made by the DWP following the Claimant's assessment. This would have removed the substantive disadvantage as it would have allowed the Claimant to better perform and therefore be better placed to demonstrate her abilities to a promotion panel.*

513. Again the difficulty is that no application for promotion was made after 2017. A second difficulty is that the respondent did seek to implement the recommendations. It did not do so with alacrity, but it provided a taxi, and offered a new office with printer and better heating. The issue did not focus on the issue of the timing of the respondent doing so. We did nevertheless consider that the respondent had not addressed these matters particularly well. It had been rather slow to respond, and there was a lack of clarity as to what was to happen. Mr Scrivener was slow in following matters up, and required something of a reminder. The message from Joan Robertson referred to a period of 8 months, and to potential breaches of the 2010 Act. This is however considered in the context of matters after Covid, of a scarcity of office space in Ninewells following the pandemic, and of the respondent not having control of the space, which was the province of NHS Tayside. Arrangements were made to secure a taxi to help the claimant in travel. It took a relatively lengthy period to set up, but that was required as a matter of practicality, and was not seriously challenged in the evidence.

514. It was not clear what Mr Scrivener was told as to the claimant's disability. He did seek to progress matters, and offered the claimant different office space with a printer near, which had a taxi drop off point nearby, and effective heating. The claimant did not wish to move, and essentially sought to delay that. We were not impressed by the reasons she gave. We did however accept her evidence that she had not changed the lock as Mr Scrivener had been told by security. It seemed to us more likely that the lock was simply not easy to operate.

515. There was however no evidence to establish that if the claimant had been given the matters recommended by the DWP at or about the time that was proposed she would firstly have made an application for promotion, and secondly been likely to have been successful with it. What would have been required was academic output at a sufficient level. That would inevitably have taken time, and it was instructive that the general rule was that a promotion could not be sought for two years after one was refused. We considered that in all the circumstances the proposed adjustment would have made a minimal if any change to her working conditions, and ability to carry out scholarship, when that is viewed through the prism of what is required for a potential promotion.

516. It appeared to us that by the time Mr Scrivener offered the claimant a new office there was compliance with the duty to make reasonable adjustments, and the difficulty was the claimant not wishing to move office. Even if the PCP had been established, it appeared to us that it would not be just and equitable to allow what was otherwise a late claim to be received. The evidence was again affected by the passage of time, there was no good reason for the claimant not raising this matter by grievance or by Claim at that stage, and even if there had been delay in effecting the reasonable adjustment it would not have led to promotion before the claimant resigned, such that it had very limited effect if any. In all the circumstances for this particular aspect of the matter it was not just and equitable to extend jurisdiction.

Harassment (s 26 Equality Act 2010)

17. Did the Respondent harass the Claimant by subjecting her to unwanted conduct related to her sex which had the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The alleged unwanted conduct being that Professor Mires continually attempted to increase her workload, stating that she "will never get promoted here". This was related to her sex because the Claimant was unable to do an increased workload due to her being a mother of small children with childcare responsibilities.

517. We did not accept the claimant's evidence of Professor Mires either stating such a matter or attempting to increase her workload as alleged. We preferred his evidence for the reasons set out above. What the claimant characterised as attempts to increase workload were in reality suggestions he made to seek to assist her in achieving promotion.

18. Did the Respondent harass the Claimant by subjecting her to unwanted conduct related to her nationality which had the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The alleged unwanted conduct being that Professor Mires continually attempted to increase her workload, stating that she "will never get promoted here". This was related to her nationality because the Claimant had disclosed her Czech nationality in the Respondent's HR form when she started her employment. Did Professor Mires know that she was Czech?

518. Professor Mires was aware of the claimant's nationality, but for the same reason the allegations made by the claimant of what he had said are not accepted.

19. Did the Respondent harass the Claimant by subjecting her to unwanted conduct related to her disability which had the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The alleged unwanted conduct being that Professor Mires continually attempted to increase her workload, stating that she "will

never get promoted here". This was related to her disability because the Claimant was unable to do an increased workload due to her disability.

519. This was not an issue as the alleged comments happened before the claimant's disability was known on 17 August 2018. As stated we have found that Professor Mires did not make the alleged remark in any event.

20. Reference is made to paras 6, 7,11, 18, 19, 23, 25 and 30 of the ET1, being the acts of harassment pled.

520. We deal with each of these paragraphs –

6 and 7 (the two SIP meetings). We accepted that the comment of "new girl" had been made, and that it related to her sex. Her evidence was that she felt "belittled and ridiculed". The Tribunal considered that could be within the definition of "humiliated". The second matter was the comment to the effect that one needed to be a woman and foreigner to be appointed. The Tribunal considered that that could also be within the definition of humiliated, and offensive. The claimant said that she was petrified by it, whether she would be taken seriously or had been appointed for diversity reasons.

521. The issue then focusses on whether the claimant was reasonable to feel in the way she spoke to in evidence. We took account of the guidance referred to above that it is "important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase". The "new girl" was an unfortunate phrase but not one in our view that a reasonable person would regard as within the statutory definition.

522. The second phrase was we considered within the statutory definition. The claimant was in our view reasonable to believe it to be so. For the reasons addressed above however we considered it outwith the jurisdiction of the Tribunal. No grievance was raised at the time, nor was any complaint made to HR informally or similar. The passage of time was very significant. It was not known who had made the comment, save that it was by a white

British male. With the passage of time it was not possible to investigate it further. Dr Hothersall had no recollection of it but said that she would have picked it up if said. It was a single, distinct and one-off incident. It was not part of conduct extending over a period. It was not just and equitable to extend jurisdiction in those circumstances.

523. **11 (Alleged comment by Professor Mires).** Professor Mires did not act as alleged. He did not say that she would never get promoted, as alleged. He acted to try and assist her to secure promotion, as set out above.

524. **18 (Questions by Dr Hotherstall).** The Tribunal accepted that Dr Hothersall did ask the claimant about how her health was, what her doctor was saying, and put forward the option of part-time working. She made the comment to propose part-time working as an option on three occasions, the first likely to have been in the June 2019 meeting, and the second at the OSaR in September 2019. Dr Hothersall accepted in cross examination that she had done so on three occasions, although the timing of the third one was not given in evidence.

525. In our view to ask about health and what the doctor was saying to inform the decision on what adjustments, if any, were required was appropriate. It would not have been appropriate to have asked if the person could afford part-time working (which is what the claimant said should have happened).

526. Where the employee had made clear that they did not wish to work part-time initially however it was we considered not best practice for that to have been raised on a second or third occasion. The focus as a matter of best practice would or should have been on the detail of the workload. But that is not the test. A reasonable person would not, in our view, have felt humiliated within the statutory definition from the second or third time this issue was raised. It was an option mentioned as one to consider, no more than that. It may have led to annoyance, or frustration, but not humiliation, intimidation or something falling within the statutory definition.

527. **19 (Comment by Dr Hotherstall in February 2019.** Dr Hothersall did not make the comment relied on in this paragraph at this meeting, in our view. It is pled as related to February 2019. No comment of this kind was we considered made at that stage. Dr Hothersall did make the comment about

60 hours in the 20 May 2019 meeting, which she almost immediately commented on in an email. It is said by the claimant in submission to be harassment on grounds of disability and sex. We accept that a disabled person might find it more difficult to work something like 60 hours per week, and that that may be more difficult also for a mother with young children. The issue is whether a reasonable person would have regarded the words used by Dr Hothersall (although at a different meeting to that pled, and not in the words as pled) as within the statutory definition. It appeared to us obvious that the comment was made in the heat of the moment, and somewhat emotionally. It was immediately commented on by HR. We consider that the claimant has exaggerated her evidence about her reaction to it. She added a gloss to the words used. We consider that what happened on 20 May 2019 does not fall within the definition of harassment under the Act given all the circumstances.

528. **23 (the ARC with Dr Hotherstall).** We did not accept that the email was referred to at the start of the meeting, but at its end as referred to above. That particular issue was not well handled by Dr Hothersall, and we accepted that it did cause the claimant substantial upset, but we did not consider that it was in any way related to any protected characteristic. It was solely about the terms of an email authored by the claimant that others had been upset by. It would have been raised with the author in the same manner by Dr Hothersall regardless of any protected characteristic.

529. **25 (the Away Day).** We found above that the comment was not directed to the claimant, but that the claimant did believe that it had been directed to her. It was not the most apposite choice of words, but no reasonable person would regard the words used as within the statutory definition. In any event, it had no relationship to any protected characteristic in our view.

530. **30 (the grievance on 31 August 2021).** The claimant raised a grievance on her last day of employment. It was an allegation of a breach of the 2010 Act, as it referred discrimination and protected characteristics of sex, race and disability. Her allegation in the Claim Form is that “to date the claimant has had no response or engagement from the University in respect of her grievance.” The Claim Form was presented on 3 February 2022.

531. The allegation of no response or engagement is not accurate. There was a reply on 20 September 2021 to which the claimant replied the following day. The email from the respondent said

> "I can confirm that the allegations you have made in your letter are taken very seriously by the University and these will be investigated further. It is noted that you are no longer employed by the University and that the 31 August 2021 was your last day of employment, however the University investigator may be in contact with you if they need to clarify any points in your complaint. …..A report will be made to the University Secretary following this investigation and you will be advised of the outcome at this time."

532. On 5 November 2021 Ms Poor wrote to the claimant to say that she was looking at the "various strands" of the complaint made. A further message was sent to the claimant on 7 November 2021, which the claimant replied to that day.

533. It was not clear what the word "engagement" was meant to cover. It was not addressed in submission. The claimant's evidence was that there was a failure to follow the grievance procedure, that there was no meeting with her even online, and no appeal. She did not specify in evidence what she meant by that word. We do not consider that the failure to meet the claimant to discuss her grievance in detail with her, or to offer her a right of appeal, can be said to be violating her dignity, nor do we consider that it had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. There was no evidence of any particular reaction from the claimant other than her allegations that the respondent had breached procedure, and that reaction would not in our view properly be said to be in the context of an "environment" in the sense of the statutory provision as by that stage (from and after 1 September 2021) the claimant was working at Birmingham University. We rejected this claim for those reasons.

534. We considered separately that the messages of 20 September 2021 and following was some form of engagement. We note that a report was provided to the claimant on 27 April 2022, which was after presentation of

her claim. If the claimant meant by engagement that the respondent did not speak to her in the sense of having a grievance meeting, either in person or online, and then providing a report by the date of presentation of her claim, as well as a right of appeal, she is correct in that. But in our view that is not something that falls within the section, essentially for the reasons given in the preceding paragraph. It is in any event not something that we consider is related in any way to any of the three protected characteristics relied upon. There was no evidence to found such a position, such that there was no *prima facie* case established. The claimant's sole evidence on this was that the grievance procedure itself had not been followed.

535. In light of all of the foregoing, the claim of harassment is dismissed on its merits where there is jurisdiction in relation to the last matter under paragraph 30 of the paper apart to the Claim Form, dismissed for want of jurisdiction otherwise and those claims would have been dismissed on the merits in the event that there had been jurisdiction.

21. If so, was it unreasonable for the Claimant to have reacted to the alleged events in the way she did?

536. Addressed above.

Victimisation (s 27 Equality Act 2010)

22. Did the Claimant do a protected act when she raised a grievance in 2016 in respect of her failure to be promoted which included an allegation that Professor Mires has contravened the Equality Act 2010?

537. There is no statutory definition of "allegation". It appears to us to be a word of wide import, and that formally raising it as a grievance is not required. What matters is the substance, and whether or not what is said is sufficient as a basis to allege that there had been a contravention of that Act. There was some discussion in the written and oral submissions about whether or not the appeal letter was a grievance, but that is not the question in this respect. A letter of appeal may not be a grievance, but may make an

allegation expressly or not that there has been a contravention of the 2010 Act.

538. As ***Fullah*** states, the context requires to indicate that the allegation is of contravention of the 2010 Act without a necessity of referring to the statute itself. The context is therefore relevant, it seems to us. What the claimant did was to appeal the decision not to promote her in 2016, as the document she tendered makes clear. The context of her appeal was the irregularities she set out in the appeal document. In relation to the appeal hearing we did not accept her evidence that she had alleged discrimination under the 2010 Act. The bias she alleged, we concluded, was between clinicians and non-clinicians. That appears from the Report of the Committee. Her own evidence referred to her appeal having included "hints and implications".

539. The closest that that got to in our view was in relation to the following -

> "I believe that my pregnancy (and maternity leave from June) were ultimately used against me to show that I achieved less than I planned, rather than being taken into account as a mitigating factor…..I see this as direct proof that my pregnancy and maternity leave have been a hindrance in getting my promotion this year rather than being considered as a mitigating factor."

540. Her appeal attached documents including her notes of the meeting of 4 November 2016 which included reference to her not being successful with promotion "partly due to achieving not as much as planned last academic year due to my difficult pregnancy and then maternity".

541. As noted above the claim on the protected characteristic of pregnancy or maternity was withdrawn. It was at least intimated in the letter and to that extent gives some more detail than was the case in the ***Fullah*** authority. Whilst there is the possibility of there being reliance on the protected characteristic of sex from the mention of pregnancy and maternity, it is not clear from the face of the document that it was an allegation that there had been a breach of the 2010 Act, as opposed to a circumstance that was not fully taken account of as a matter of mitigation in order to allow her the benefit of promotion which otherwise may not have been awarded. It is not

necessary to state that there was a breach of a particular section of the Act in such words, but it is we consider necessary that it is reasonably apparent from the words used.

542. Those words should be read in their context of an appeal against promotion, under the heading “procedural flaws in addressing mitigating circumstances”, but in circumstances where the claimant had not provided any form for mitigating circumstances (in that application). She was essentially arguing that there had been insufficient consideration of what she said was mitigation despite that.

543. It is not clear to us that this is alleging a breach of the 2010 Act. The first comment is that her pregnancy had been “overlooked”. The second is that her pregnancy and maternity leave was used against her to show she had achieved less than planned. We do not read the appeal letter as intimating a claim of direct discrimination. It is, with hindsight, something that could be raised potentially as indirect discrimination, but the letter does not set out the essential facts for such a claim, in particular any form of PCP, or anything from which a reasonable reader would have inferred that a claim of indirect discrimination was being made, in our view. In our view her complaint was more akin to a general complaint of unfairness, as procedural irregularities, as explained in ***Durrani,*** and that the Tribunal required to add too much detail in order to fill the gaps in the letter of appeal to make it an allegation of breach of the 2010 Act for this purpose.

544. The claimant and Dr Morelli stated in their evidence that equality issues had been raised at the appeal hearing. Professor Mires did not accept that. The Appeal Hearing notes do not refer to discrimination, and although they refer to bias and applications being treated equally we do not consider that that indicates any breach of the 2010 Act. The bias was we consider that between clinicians and non-clinicians, or between those on different types of contract. The notes appear to us to be reasonably full. It is not clear to us what exactly was said in relation to equality issues, and whether or not those comments were such that it could be said that there was an allegation of some form of breach of the 2010 Act. Our conclusion was that it had not been, and we preferred Professor Mires’ evidence in this regard. We also considered the evidence of Dr Morelli of delay in the

decision, and his view that if a decision had been made on the day he could have persuaded the Panel to grant promotion. We did not accept that evidence. There was some time in intimating the decision in the appeal, but not undue in all the circumstances, and the decision of the Panel was very far from awarding promotion. It was confined to a procedural matter, rejecting most of the arguments made by the claimant. When the matter was then considered in 2017 the application was refused for the reasons set out, and that decision was not appealed by the claimant at that time. That Dr Morelli thought that he could have persuaded the Panel to award promotion against such a background does not lend support to accepting that evidence as reliable.

545. We did not consider that the claimant had done a protected act by the appeal against promotion in 2016. We were conscious however that if a woman was pregnant and suffering nausea, that could affect her ability to evidence academic excellence. It is possible to construct a PCP on such a basis, filling in the gaps referred to, either in relation to the criterion itself or the process of requiring a mitigation form, or otherwise, and we therefore addressed the second matter lest we are wrong in our conclusion.

23. If yes, did the Respondent subject the Claimant to a detriment because she had done this protected act? The alleged detriment treatment bring that Professor Mires continually attempted to increase her workload, stating that she "will never get promoted here".

546. For the reasons found we did not accept as established that the detriment founded on had occurred. Professor Mires did not state what he is alleged to have said. He did not continually attempt to increase her workload as alleged. He did not state that she will never get promoted here, or words to that effect. There was no detriment, and anything done by Professor Mires was not done “because of” any putative protected act.

Discriminatory constructive dismissal (section 39 Equality Act 2010)

30. Did the Respondent discriminate against the Claimant by constructively dismissing her contrary to section 39(2)(c) of the Equality Act 2010?

547. For the reasons given above in the first issue, no. There are a series of matters that the claimant considered to be discriminatory in her evidence that could, on her position, be part of an argument for a dismissal. We address them for completeness given that we heard much evidence about them, although there is an element of repetition.

548. The points founded on in submission were (i) the two SIP meetings (ii) the three promotion applications and appeal, (iii) the treatment of her flexible working application, (iv) the meeting on 20 May 2019 (v) the OSaR with Dr Hothersall (vi) the Away Day incident with Dr Hothersall (vii) the OSaR with Professor Bartlett (viii) the messages from Professor McCrimmon regarding the workload model return and (ix) the grievance letter of 31 August 2021. We therefore required to consider these matters in the context of her claims of discrimination on the grounds of sex, race and disability. The claim as to disability discrimination however can only be an issue from and after 17 August 2018 for the reasons given below. In the context of disability discrimination there was a separate matter as to reasonable adjustments which we have addressed above.

(i) The SIP meetings

549. We concluded from the evidence before us that the meetings were likely to have taken place as the claimant alleged. She had some support for the January 2013 meeting from Dr Hothersall. Dr Fardon did not give evidence. There was less support for the second, but it appeared to us that for an issue such as this the claimant was not likely to have simply made it up. We addressed these meetings more fully separately. They were however each matters with a connection to her sex, and the second had a possible connection to her race, as there was reference those who were not British, and therefore foreign, and she had relatively recently been appointed with her race known to the respondent. That she was not British was also we consider apparent from a combination of her name and slight accent with which she speaks. Whether the speakers of the words referred to knew that is however not something on which we heard evidence, not least as the claimant did not know who they were.

(ii) Promotions

550. We considered that her evidence with regard to the reasons for the rejection of her promotion applications was not reliable and should not be accepted. We concluded that she, as someone with no experience of assessing such matters, did not properly understand the process. She did not we concluded fully understand what was required for promotion, in particular the evidence of sustained academic excellence. What was required was a record, therefore evidence, of sustained academic excellence. She had not yet secured that evidence in a form set out in the applications that those on the ARC Panels, being a number of Professors with substantial experience of academic life and of the standards required, regarded as adequate for promotion. We accepted Professor Mires' description that she was on the trajectory for it, meaning that with time and application she was likely to achieve it but that she was not yet there. That was essentially the decision of all three ARC panels, which had different constitutions including different chairs on at least two of them, and an external member on at least one. There were HR staff also present. There was we considered a substantial body of written evidence that supported Professor Mires' evidence and contradicted that of the claimant.

551. We considered that Professor Mires was correct to say in his report, and evidence, that her application was premature. The first application was made not that long after her probation was ended early. Professor Mires doing so (agreeing to end probation early) is evidence of his seeking to help the claimant. Whether one could apply for promotion when on probation or not, applying at such an early stage of working in the role with the respondent was likely to be a tall order for anyone. The claimant did not take any action in relation to the position at that stage, although she now seeks to do so several years later.

552. In the 2016 and 2017 applications there was little written detail in her application itself of the kind of outputs that demonstrated sustained academic excellence. We consider that that view is also supported by the comments she made in the 2018 OSaR, where she specifically mentioned improving the quality and quantity of publications, and making further applications for promotion which in fact she did not do. At that stage it appears that she appreciated that further evidence was required, and that

once she had it she would re-apply. We concluded that the claimant's promotions were refused because they were not merited from the evidence she set out in her applications, and that that was not affected in any way by her sex or race. No applications were made thereafter.

5 *(iii) Flexible working*

553. The application for job share was not treated as transparently and carefully as it might have been. We are critical of how it was managed, as set out more fully below. But the procedure did provide for consideration of alternatives if job-share was not provided. Making an offer of part time 10 work gave the claimant an option to consider. It was an offer that gave her what she was seeking for her own part of the job share. She did not have any right to have a job share on condition that it was with her husband. There was a basis not to proceed with job share generally because of concerns over the performance of her husband. Dr Hothersall explained 15 why that was, but was not cross examined on that point. We consider that the job share application was not refused because of the claimant's sex or race in any way, as again explained more fully below.

(iv) 20 May 2019

554. The comment made at the meeting we have addressed separately. The 20 issue of workload is difficult, as not all the documents that might have been before us, were. It is we accept a difficult task in any event accurately to measure how many hours an academic such as the claimant was working at a particular time. There were some discussions with Dr Hothersall as to what the claimant's workload was, but she did not share with the claimant 25 all of her workings lest doing so exacerbated the situation. That indicated to us a desire to avoid conflict with the claimant. By the time of the claimant's return to work in early 2019 the issue was not so much what work she had been doing, but what the workload would be on return. Dr Reed was concerned as to whether she could work full-time, and 30 advised in effect that the workload be considered and clarified.

555. The claimant had suggested that she was working something of the order of 50 – 60 hours per week, and was concerned that after returning to work she would be working what she regarded as excessive hours. That was a

perfectly appropriate view to hold. It was supported by Dr Reed. The claimant suffered fatigue, and had a serious health condition, which was liable to be exacerbated by stress, which was liable to be itself exacerbated by a high workload.

5 556. It was less clear what hours the claimant did work after she returned to full time working on 13 May 2019. The DWP report indicated that the claimant said to them that it was between 35 and 50 hours per week, such that it is likely that there is no simple answer to the question. The claimant may however have been working hours that were at the limit of what she could
10 reasonably cope with.

557. It appeared to us that the detail of the claimant's workload was not finally determined by the respondent. Although there was an indication in an earlier meeting that there would be a work plan developed, which indicated a document agreed between the claimant and respondent, no such
15 document was ever prepared. The claimant made various suggestions which appeared partly to be accepted, but what the workload was to be was and remained unclear.

558. The former workload had three elements being that for each of three Schools. The claimant alleged that the total work had been of the order of
20 55 hours per week, or more. Dr Hothersall did not agree. She considered that it was materially less than that. Her view was that for work on ethics and global health combined it had not exceeded 1,000 hours for the year, or about 23 hours per week over a 44 week working year. There were some errors made in the report Dr Hothersall prepared. If one assumes
25 that Dr Hothersall is right that for both ethics and global health work in the School of Medicine however the hours in that School per week are the equivalent of 23. Adding in the other work that the claimant had been doing in the other schools, which was assessed at 0.2 FTE which is the equivalent of 8 hours per week for each of the Schools of Nursing and
30 Dentistry, and adding 10% of the School of Medicine time to account for each of scholarship and valuing people (6.4 hours per week) the total hours per week one arrives at is 54.6. That contrasts with the basic view of Dr Hothersall that the claimant had not been working much above 40 hours per week historically.

559. It appeared to us that the claimant was a hard worker, that she delivered her role professionally and conscientiously, (supported for example by the comments in the OSaR by Professor Abboud in 2018) and was doing so at a time when she was in fact unwell, and suffering from fatigue as Dr Reed commented on specifically. She had a material period of absence. We considered from the review of the evidence as a whole that prior to the maternity leave and then periods of absence in 2018 the claimant had been working about 50 – 55 hours per week. That is not unusual for an academic, and the contract of employment does not specify a set number of hours, but it is materially higher than the notional 40 hours per week. It comes into sharp focus when the claimant's disability is considered.

560. When she returned to full time work in May 2019 it is not apparent to us that the respondent took all the steps that it might have to inform itself of her condition, and ascertain what reasonable adjustments to the workload were necessary. That is the respondent's duty under the Act. We are concerned that no one person was aware of all the relevant facts. Dr Hothersall had a very limited understanding of the medical situation and advice from Dr Reed. Ms Ross had seen the report, but did not pass the full details to Dr Hothersall. Dr Hothersall knew about the position in the School of Medicine, but not that in the other two Schools. She was however aware that each of them were continuing 20% of the claimant's salary and wished to receive a fair share of time for that. Dr Hothersall however simply worked on the basis that the claimant was not doing any work for those Schools, and kept her focus on the School of Medicine.

561. We have a concern that there was a material issue over the claimant's workload, that it would have been a reasonable adjustment to maintain her hours at or below 40 per week had the PCP founded on been different and related to the requirement in her contract, and that she was working at a level which was above that for at least some of the time from May 2019 onwards. But although the claimant did raise workload, and it could have been followed up with a meeting in October 2019, the claimant had stated that she did not wish to have a further meeting, spoke to Ms Ross in confidence about the OSaR with Dr Hothersall which became the focus

of matters, did not pursue the suggestion of a grievance and said that she would address matters with the Dean. She met him. She continued to work. Some at least of her suggestions were acted upon. It appears from the evidence we heard that she did not do work for the School of Dentistry, and for the School of Nursing she did but it was at a very limited level. She continued working in the School of Medicine, and it did not appear to us that her focus was on any allegedly excessive workload but on her disagreement with Dr Hothersall, and her continuing unhappiness at not being promoted.

562. It is true that the recommendations of the DWP were not immediately implemented, and there was some lack of agreement as to that between the claimant and Mr Scrivener, but we concluded that she had been simply unwilling to move office for reasons of her own, despite that being on the face of it a better place for her to be both as to location near a stopping place for a taxi and for a printer. There was then a substantial period of time during Covid when she worked from home. These are also not matters we consider found a constructive dismissal.

563. In the context of workload generally it is also appropriate to state that the claimant mentioned in her OSaR in 2020 that the School of Dentistry was not using her that academic year (from September 2019 to August 2020), despite her reminders. It is at least surprising that such reminders were sent by the claimant herself when the claimant was also complaining of her workload. Somewhat similarly when suggestions of removing postgraduate work were made to reduce workload, the claimant objected as that might affect her promotion prospects, she thought. It appears that the claimant was focussing on the issue of promotion at the potential expense of her health, and there was a certain inconsistency in her position as a result. Again similarly when Ms Ross suggested that the claimant attend with Ms Montador for a stress risk assessment, that was rejected.

564. Whilst therefore we have some concerns over these matters, they are in the context not of the pled case but one based on a different PCP, and as such we did not consider that it was a matter that could be founded on by the claimant as the basis of a dismissal under the 2010 Act, but that even

if we had thought that she could, for the reasons given above the delay in addressing matters, the terms of the 24 March 2021 email, and the reason for the resignation being her accepting an offer from Birmingham University meant that there was not a dismissal if it could be founded on this issue. Separately there was no evidence we found that these matters were related to her sex or race.

(v) OSaR with Dr Hothersall

565. We did not accept the claimant's evidence that the email issue was raised at the start of the meeting. It was at the end, but was not a matter related to her sex. We have addressed that meeting more fully elsewhere, but found no evidence of it being related to sex, race or disability.

(vi) Away Day

566. We did not accept that the comment was related to the claimant's sex, race or disability in any way. It is addressed more fully separately.

(vii) OSaR with Professor Bartlett

567. We did not accept the claimant's evidence and preferred that of Professor Bartlett. In submission the comment was that "the question of the need to undertake research was again raised". That follows from the criteria for promotion, and we did not consider that that could be considered in any way inappropriate. There was in any event no evidence of the matters complained of being related to the claimant's sex, race or disability.

(viii) Messages from Professor McCrimmon

568. We did not accept the claimant's evidence and preferred that of Professor McCrimmon. There was in any event no evidence of the matters complained of being related to the claimant's sex, race or disability.

(ix) Grievance on 31 August 2019

569. This grievance was not handled well by the respondent, but the claimant had delayed her formal grievance stated to be such until the very last day of her employment, there was a reply contrary to her pled case, and there was an investigation and report. The ACAS Code does not stipulate that

a grievance raised on the last day of employment does not need to be met by the same general procedure as if made during employment with time to address it, but firstly it is guidance, and does not amount to a statutory duty, and secondly it does also state that a grievance should be raised "formally and without unreasonable delay" The claimant did unreasonably delay in commencing the grievance, in our view. Nevertheless, that the respondent did not meet her to discuss it or offer a right of appeal was not something we considered followed good practice, albeit that that decision appeared to us to have had no relationship with her sex, race or disability. The procedure was followed as it was because she had, by the time of receipt, left their employment. That was set out in the initial letter to her. There was no evidence that that would not have been the position whether or not the employee had a protected characteristic. The manner of handling the grievance obviously could not have affected the termination of employment as the claimant had resigned on 18 May 2021.

Remedy

570. In light of our findings, the issue of remedy does not arise.

Conclusion

571. There is no jurisdiction to consider the claims under the Equality Act 2010 save as to what was alleged to be harassment in relation to the 31 August 2021 grievance.

572. Even if we did have jurisdiction for all claims made under that Act they would have been dismissed, and the claim of harassment related to that grievance does not succeed and is dismissed.

573. The claimant was not dismissed for the purposes of the Employment Rights Act 1996.

574. We therefore dismiss the Claim. In so doing we have made reference to some authorities not referred to by either counsel in their submissions. We consider that it is in accordance with the overriding objective to issue this Judgment rather than delay matters still further by inviting further submissions on those authorities, but if either party considers that they

have been prejudiced by that, an application for reconsideration to make submissions on those authorities can be made.

575. In reaching this Judgment we do not wish to give the impression that we consider that the respondent has handled all matters appropriately. There were a number of areas in which we considered that its conduct had fallen below best practice at the least. There were a number of matters we consider we should comment on.

Workload

576. The claimant was a disabled person, for whom fatigue was a particular issue. She raised her workload on a number of occasions with the respondent, and it was made clear in OH reports that it was a significant issue, which required to be addressed. There was a lack of co-ordination between the three Schools. No one took responsibility for managing all aspects of the claimant's work. It appeared that the School of Medicine concentrated on the work in that School, and did not have full knowledge of the work being carried out in other Schools, although the line manager was in the School of Medicine.

577. Until the claimant became known to be a disabled person, whilst the claimant did have a high workload in our view, it appeared to be a manageable matter. That there was a high workload was supported by the evidence of the breakdown of work between the three Schools as parts of the FTE. For the School of Medicine in addition to the work being performed 10% was allowed for scholarship and valuing people, which is 10% of 0.6 and a total of 0.12 which meant that the total FTE was 1.12. FTE is however a difficult concept to apply when working out the workload someone is performing as there is only a notional 40 hours per week used. What the work actually is may be very different.

578. Overall however the evidence before us tends to suggest that the claimant was working something of the order of 50 hours a week on average prior to her maternity leave, and at times up to about 60 hours in particular weeks. That is a high workload, particularly when set against Ms Ross' evidence that 42 hours would be a form of benchmark to assess what was excessive.

579. Had the claimant returned to work in or around March 2019 and worked generally to the working pattern that she had been undertaking prior to maternity leave and later sickness absence, she would have worked very approximately to the following hours per annum:

5 (i) School of Nursing – 353

(ii) School of Dentistry – 353

(iii) School of Medicine – 1,000

(iv) Outstanding teaching work required 117 over 3 years, 39 pa

(v) Scholarship (10% x 1039) 104

10 (vi) Valuing people (10% x 1176) 104

Total – 1,745

580. For a 44-week working year that is very approximately 40 hours per week on average. It is broadly the equivalent of 1 FTE. It tends to suggest that the claimant's assessment of her hours of work is an exaggeration, and 15 that the workload would not be excessive, but the accuracy of the figure is in substantial doubt. The extent to which it fully recorded matters such as the Global Health work, work for postgraduate students, and more straightforward issues such as travel between different locations was not in the evidence before us, and not it appears ever discussed directly 20 between the claimant and her line manager.

581. It does appear however that if an average of 40 hours per week was to be worked the claimant was at the least more or less at that level, such that it was an issue that, when she became a disabled person, ought to have been carefully monitored. It was not. We appreciate that there was 25 evidence that there was no work for the School of Dentistry being carried out after the return to work full-time in May 2013, and little but some in the School of Nursing, but of itself that does not give confidence that the claimant was not working over 40 hours per week at least on occasion.

582. Ms Ross recorded after the February 2019 meeting that a work plan was 30 to be agreed by the end of March 2019. It was not. There was a meeting in June 2019 not recorded in any way. Although it was clear that some attempts were made by the respondent to identify what her workload was or was to be across three Schools, and how her work might as a

reasonable adjustment be reduced to a level that was appropriate to her circumstances given her disability, there was a lack of clarity over that in the evidence before us. What might well have been done was for Dr Hothersall as the line manager at the time to discuss the detail of an average working week, or a longer period to produce a reasonable average figure, and then draft a document recording in hours per week on average what the work was to be in the School of Medicine, and the School of Nursing where and when that was being done, which she could then discuss with the claimant. That appeared to be the kind of workplan being discussed in February 2019 to which Ms Ross referred in an email. It was submitted by the respondent that there would not have been agreement to such a plan, but that is somewhat speculative. It would at least have been a process that clarified what each person thought, and it is not likely that all of it would have been disputed. That was not a document ever prepared, however, and matters were left on an unfortunately unclear and informal basis, which affected the evidence we heard.

583. The PCP relied on before us was related to promotion, rather than workload *per se*, and we found that the PCP contended for by the claimant had not been proved, but the position may have been different had a different PCP been founded on and pled. What the position would have been is not known, as the respondent had not had notice of anything other than the PCP pled, the evidence was not therefore directed to any different PCP and as such it is not at all clear whether such a claim may or may not have succeeded, but there was the possibility of an issue to consider had the PCP of the hours reasonably required to fulfil duties been pled.

Promotion process

584. The procedure for promotions was not followed in 2015 and 2016. Whilst the procedures were not at that stage clear where there was work across more than one School it was accepted that the Deans of the other two schools ought to have been consulted by Professor Mires. The lack of compliance with procedure was in the following respects:

(i) The principles included a transparent process, but the notes of the Appeal meeting, for example, were not provided to the claimant.

(ii) The procedure was explicit that applicants not be asked for referees for the second stage, but the claimant was in 2015 and 2016 by Professor Dowell, albeit that Professor Mires did not know that at the time.

(iii) Dr Slowther was not independent, as she was a relatively recent (at that stage) former line manager, and she declared a conflict of interest in her reference. Although there was one reference obtained at that point, the procedure used the word references in the plural.

(iv) The Dean's report confined consultation to the School of Medicine, and did not include the Schools of Nursing and Dentistry in which the claimant also worked. He accepted that that was found in the appeal to be a breach, although the procedure did not deal directly with the situation of someone working in more than one School.

(v) The Appeal Committee suggested three options, but did not suggest the obvious one of (i) seeking a revised and proper Dean's report after consultation with the other two Deans and (ii) referring matters back to the 2016 ARC to decide thereafter if the stage one test was reached, then if appropriate seek two new external references after which taking a decision, all to avoid delay in waiting to the 2017 ARC first meeting in June 2017 and potentially a second meeting in September 2017.

(vi) After the appeal, the claimant appeared to have followed the first option, which required a new Dean's report. Such a new report was not prepared, but additional reports provided by the other two Deans. That was not exactly in compliance with the appeal outcome, although it is not likely to have made a material difference as Professor Mires attended the 2017 ARC.

Job description

585. There was confusion over the job description that applied to the claimant with different witnesses of the respondent having different views. Such a matter ought to be clear, and the Job Description to which an employee works easily found within their file.

Line management

586. There was some confusion over whether Professor Abboud was or was not the claimant's line manager. He specifically stated in an email that he would do the OSaR but not be the line manager. The claimant was not clearly told who her line manager was on occasion, but did latterly know that it was Dr Hothersall initially, and then that it was Professor Bartlett, who remained in that post until the resignation as described above. The line manager was an issue for Dr Hothersall in her own evidence. It was not therefore an issue confined to the claimant. Again such a relatively simple matter ought not to have been in any doubt.

Job-share application

587. In our view the manner in which the job-share application was handled was not in accordance with good practice. The advice apparently given by HR (those doing so not giving evidence before us) was not we consider appropriate. Whilst there was a difficulty caused by the view of Dr Wickins' performance, that was a matter separate to that of the claimant. She was entitled to seek a job-share. Doing so after giving birth to twins was entirely understandable, and not at all unusual. It was not however in her right to require who the person she job-shared with was.

588. It is not clear to us why the matter was not addressed more openly, for example by informing her of the position of the Schools of Nursing and Dentistry, meeting her to discuss the matter in more detail, and if necessary seeking a form of modified solution. But the claimant failed to appeal within the time she had been given, itself extended, and she did not raise a claim about that at that time. Seeking to do so now, six years later, carries obvious difficulties. An email from Professor Mires referred to a report about Dr Wickins, but that was not before us. It is an example of the problems associated with such a delay in time. Documents and recollections, that would have been accessible and better then, are now not produced before us or not good respectively. That is as the claimant did not address matters when she could have done.

Communication

589. In early 2019 there were discussions as to the claimant's disability and what reasonable adjustments were required. The detail of occupational

health reports were not communicated to Dr Hothersall or Mr Scrivener. They were therefore not able to take fully informed decisions. That was particularly important for the line manager, and one option would have been to ask the claimant for approval to send the reports to Dr Hothersall. Another was to communicate clearly the information Dr Hothersall required to know to take an informed decision. What was communicated however was rather vague at best and it was not clear whether anyone in the Schools of Nursing or Dentistry had any knowledge that she was a disabled person at all, save that Ms Montador was an HR representative and in attendance. As she did not give evidence nor did anyone from those two Schools we did not know what she passed on to those Schools. When there was an issue about the September 2019 OSaR raised by the claimant, none of the senior managers aware of the claimant's concerns did anything to speak to Dr Hothersall. She was unaware of any concerns as a result until the grievance was intimated. Whilst the claimant had not pursued a grievance at that time it was surprising that nothing was done to let Dr Hothersall know of the concern being raised, even in informal and general terms.

Records

590. There was no record of the meeting in June 2019 to address workload issues. It appeared to us that it had taken place however, as it was referred to in emails both before and after it had taken place, despite Dr Hothersall having no recollection of it. Professor McCrimmon had no record of the meeting in November 2019. The September 2019 OSaR was not properly completed, with no comments by the reviewer, nothing added regarding training, and no signatures and dates of the participants. The one with Professor Abboud had similarly not been completed. It was also not clear what the advantage was of making comments that no one other than the two participants saw. There was not always full provision of relevant documents (for example Appendix 1a of the promotions policy, which had "indicators of excellence"). Whilst that is partly explained by the passage of time and lack of grievance at the time, we would have expected such a document normally to have been retained and available.

Management of the claimant

591. If there was an issue about an email the claimant sent, raised by those who had seen it as Dr Hothersall said in evidence, that was far better addressed entirely outwith an OSaR, particularly given the earlier history. It was far from clear to us however what the issue was with the claimant's email. It does not read as the kind of email with any improper remark or which the recipient might be offended by. If it was perceived as such clarity was needed as to what that was and why, which might well have included taking some form of statement or similar, or at least recording the issue, and it may well have been prudent to have asked HR for advice. Dr Hothersall knew that the claimant was a disabled person. She knew that the claimant's recollection of the earlier matters differed from her own from the full email exchange. It was a matter far better handled more sensitively, after thought and some form of investigation however informal, then separately to the OSaR raised with the claimant appropriately. This is but one example of the management of the claimant being less than best practice. We have referred to the lack of clarity on workload above, and to the lack of an overall manager aware of the detail of all of the work in all the Schools being done.

Grievance

592. It is true that the claimant's formal letter intimating in terms what she said was a grievance, on 31 August 2021, was not timeous. It was sent on the last day of employment. It was, we consider, a grievance nevertheless. The claimant had offered to attend online meetings but was not contacted to arrange to do so, nor was she offered a right of appeal. That her grievance did not accord with the DAWS policy or the grievance procedure of the respondent, or indeed the ACAS Code, because it was not timeous is not really the point. Where allegations of discrimination are made, as here, one would expect an employer to wish to find out whether or not they are true and accurate. We consider that the failure to meet the claimant, which could have been undertaken online, was not good practice. We took nothing from the report issued given that (although we did note that within its terms it appears that Dr Hothersall admitted that she had made the remark about working 60 hours per week for promotion).

593. We did also wonder whether the letter of resignation met the definition of a grievance, as mentioned briefly above. In her letter she alleged that the secondary reason for seeking other jobs was "discrimination and bias" and she gave some details, saying that there were more. Whilst that was a letter of resignation it does not prevent it from also being a grievance, and she was of course still an employee at that stage. The response was a form of standard letter, with mention of a form of exit interview which appears to have taken place although there is no record of it before us. Best practice however would have been to have asked the claimant what she meant by the comments in her letter, or at the very least to have asked her if she wished to raise a grievance or not.

Concluding comments

594. We appreciate that our decision is not what the claimant had contended for, and that some of our comments in relation to her evidence may well be difficult for her to read. Where allegations are made in a Tribunal, and countered by the other party, however, we require to decide issues of credibility and reliability, assess the oral and written evidence before us, and seek to be clear as to the reasons for our decision. That is particularly so where discrimination is alleged, and where as here there are a large number of separate issues to consider in relation to matters extending over a significant period of time.

Employment Judge: **A Kemp**
Date of Judgment: **06 December 2023**
Date sent to parties: **06 December 2023**