Appeal No. UKEATS/0014/17/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 10,11 & 12 July 2018
Handed down 5 October 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

PRESIDENT

Sitting Alone

PROFESSOR ROYA SHEIKHOLESLAMI — APPELLANT

THE UNIVERSITY OF EDINBURGH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Simon Gorton QC (One of Her Majesty's Counsel) Instructed by Norman Lawson & Co 3rd Floor St George Building St Vincent Place Glasgow
For the Respondent	Mr David Reade QC (One of Her Majesty's Counsel) Instructed by Anderson Strathern LLP 1 Rutland Court Edinburgh EH3 8EY

SUMMARY

Reasonable adjustments
Section 15
Sex Discrimination
Victimisation Discrimination

The Employment Tribunal erred in its approach to both the reasonable adjustment and discrimination arising from disability claims for the reasons set out at paragraphs 48-54 and 65-66 below.

There were other errors by the Tribunal which failed to deal with a number of aspects of the Claimant's claims of unlawful sex discrimination and victimisation.

THE HONOURABLE MRS JUSTICE SIMLER DBE

Introduction

1. Until her dismissal with effect from 12 April 2012, the Appellant (referred to as the Claimant for ease of reference) was Professor and Chair of Chemical Process Engineering employed by the Respondent from 1 May 2007. She brought claims of unfair dismissal and unlawful sex and disability discrimination, together with claims for notice pay and unpaid holiday pay. It was her case that having been employed on the basis that she would work until retirement in an academic position of prestige and profile, she was dismissed by the Respondent, without any process (still less a fair process). She claimed her dismissal on the asserted basis that her work permit was due to expire was effected simply to avoid the problem of her continued and sustained complaints that she was the victim of unlawful gender and disability discrimination leading to serious depression from 2011 onwards.

2. There was a multi-day discontinuous hearing (before Employment Judge Porter and members, Mr Nisbet and Ms Stewart) extending over the period from 14 September 2015 to 29 April 2016. The Claimant largely represented herself in the proceedings but was assisted by counsel at the September 2015 sitting and again for the concluding sitting in April 2016 when the Respondent's witnesses were cross-examined. There was then a significant delay between the last day of the substantive hearing and judgment being sent to the parties because Employment Judge Porter was unexpectedly taken ill. Before that illness EJ Porter drafted the factual findings and observations on the evidence, but her ongoing incapacity meant that she could not draft the remainder of the judgment (ultimately drafted by the Vice President assisted by the lay members). The judgment promulgated on 16 March 2017 ("the Judgment") was approved by EJ Porter, and unanimously dismissed the claims of unlawful sex and disability discrimination save to the extent that certain claims of victimisation succeeded. The claims of unfair dismissal and for outstanding holiday pay also succeeded. The Tribunal refused to reconsider an earlier refusal to permit an amendment to include a new claim for notice pay.

3. This appeal seeks to challenge the Employment Tribunal's dismissal of the unlawful disability, sex and victimisation claims and its approach to the notice pay claim in refusing to permit an amendment to include it. There are five broad areas of challenge advanced in the

Revised Grounds on the Claimant's behalf by Mr Simon Gorton QC (who appeared for the Claimant from time to time below). These raise the following issues:

(i) whether, having made clear findings of fact about what occurred in the material period, the Employment Tribunal failed (in relation to the claims of unlawful disability and sex discrimination, and victimisation) properly to apply (or misapplied) its own clear factual findings and/or erred in its approach to the burden of proof in relation to them, in reaching conclusions on the reasons for detrimental treatment by the Respondent;

(ii) whether the Employment Tribunal reached conclusions on the reasonable adjustments and discrimination arising from disability claims that are inconsistent with the earlier primary factual findings;

(iii) whether there was a material misdirection or error of law in relation to the reasonable adjustment and discrimination arising from disability claims;

(iv) whether the Employment Tribunal failed to deal with material parts of the case set out in the schedule of claims attached to the Claimant's written Closing Submissions (referred to below as the 'Closing Schedule');

(v) whether the refusal to reconsider the application to amend the notice pay claim was an error of law or perverse.

4. The appeal is resisted by the Respondent, represented by Mr David Reade QC (who did not appear below). In essence he contends that the Tribunal grappled carefully with the issues raised by these claims in what were difficult circumstances: there was no agreed list of issues; there were two rival bundles; the hearing took place over a protracted period; and there were as many as 16 preliminary hearings in advance of the full merits hearing. Having done so, the Tribunal reached conclusions on all issues it was required to address. The conclusions were open to it on the evidence and in light of its findings and absent perversity, the EAT cannot interfere with the Judgment. He submits that the only identifiable legal error raised by the Revised Grounds concerns the question of causation/comparison in relation to the reasonable adjustments claim. On that issue, the Tribunal made no error of law. Rather it was entitled to find that the single PCP identified by the Claimant did not give rise to substantial disadvantage.

5. I am grateful to both counsel for their assistance, both orally and in writing.

The facts

6. Given the nature of the appeal it is necessary to conduct a closer analysis of the primary findings of fact made by the Employment Tribunal than might ordinarily be the case.

7. The Claimant was recruited following an interview in 2006. The remuneration package offered to her by the Respondent included a shared equity scheme (and the Tribunal found an intention on both sides that the Claimant should maintain her position until retirement) and the use of a laboratory which would be brought up to the required specification. She commenced employment on 1 May 2007. The laboratory took longer than anticipated to be refurbished and was not completed until November 2009. The Claimant did not therefore have access to a working laboratory between May 2007 and October 2009. The Tribunal found that she raised the lack of technical support, the delay in construction of the laboratory and other matters on numerous occasions, comparing her position to that of Professor Brandani (a man) who she contended was given laboratory space and a technician from the outset of his employment. The Tribunal found that the handling of these issues reflected the miscommunication that existed between the Claimant and the Respondents at the time. It also accepted evidence that Professor Brandani was given laboratory space at the outset of his employment within an established laboratory which he shared with others. There was not therefore any need to have a "start-up" laboratory like that which the Respondent ultimately provided for the Claimant. The Tribunal did not accept that there was any evidence to support the proposition that the Claimant was not provided with technical support from the commencement of her employment. Moreover, in relation to the Claimant's further complaint that Professor Brandani was selected as Chair of the Board of Examiners in preference to her, although the Tribunal was critical of the lack of transparency in the criteria for selection, it accepted that these had nothing whatsoever to do with the Claimant's sex.

8. In January 2010 the Claimant was diagnosed with work-related stress and depression, and was absent from then onwards. She did not return to her employment with the Respondent. Her salary was reduced to half pay in April 2010 and then to nil pay in accordance with the Respondent's sick pay policy. Between January 2010 and the termination of her employment, the Claimant took medication for anxiety, stress and depression. The Tribunal accepted her evidence that throughout this period she had no social life and was unable to do activities she previously did, such as exercise and shopping. She was frequently tearful due to symptoms of her illness ([39]). In the same period, the Tribunal found that the Claimant attended

conferences, sometimes abroad, and on occasion gave lectures, but these activities did not take place on a weekly or even a monthly basis, and the Tribunal accepted the Claimant's evidence that this "sporadic engagement was her 'salvation' from her profound mental health issues" (see [41]).

9. By letter dated 14 April 2010 the Claimant (together with Professor Andrea Schaefer) wrote to the Principal of the University of Edinburgh, Professor Sir Timothy O'Shea raising a grievance relating to sex discrimination. The two Professors argued that they were "completely disabled in our employment due to gender discrimination…"

10. The Respondent instigated a diversity review of the School of Engineering in June 2010. The review commenced in August 2010 and was conducted by Professor Jo Shaw, a professor in the faculty of law. She published her review report in December 2010. In it she referred to an anonymous communication from within the School of Engineering seeking to deflect the review away from systemic issues to focus on personal and personnel issues, which she ignored. She also referred to earlier findings made by Dr Wendy Faulkner in 2006 including that in a

> "focus group with men from the School [of Engineering] all appear to have been convinced that the then very recent appointment of 4 women professors in the school was entirely due to what they called "positive discrimination" ….."

Wendy Faulkner had concluded that the apparent unanimity in the group indicated that there was a widespread view within the School that the women were appointed because they were women, and not because they were good enough.

11. Professor Jo Shaw described long-serving staff who overwhelmingly expressed contentment about their own treatment. There was a consistent negative theme expressed by some about an "insiders' culture" in the School, but she noted that those who might be classified as "outsiders" were satisfied with the School and its workings.

12. Her conclusion is set out at paragraph 49 of the Judgment. Although she tentatively suggested that individuals who found their competence negatively judged before joining the School were not treated in that way because of "gender bias as such", she nevertheless concluded that there was a culture which drew unhelpful distinctions between groups with

gender being “one of the vectors along which judgements about whether an individual belongs or not is transmitted". She said that laudable efforts to change the culture were starting but had yet to bear fruit and recommended a “comprehensive diversity audit" prepared by a professional team from outside the University to include work on retention. She said exit interviews and reconnection with staff members who had left since 2006 would be an important element of this work.

13. The Tribunal accepted that the recommended review was in fact undertaken by an external company and published in April 2011. By letter dated 4 February 2011, the current Head of the School of Engineering, Professor Alan Murray, wrote to the Claimant (and her fellow professor) expressing his shock at the views expressed to Dr Wendy Faulkner in 2006 as summarised above. He expressed his unqualified personal rejection of those views and regretted that they were held and expressed in a way that was felt then to be acceptable.

14. Before that by letter dated 31 January 2011 the Claimant and Professor Schaefer wrote to the Vice Principal, Professor Nigel Brown, copying their letter to Professor Sir Timothy O’Shea (the Principal). They made suggestions for a way forward which entailed a move for them outside the School of Engineering. The Tribunal accepted the Claimant’s wish to return to work and that she saw a gradual reintegration via another school as a way back into the workplace after being absent for a year with work-related stress and depression. In response, by letter dated 16 February 2011, Nigel Brown did not rule out the possibility of a move to a different school but expressed the view that a more positive, productive way forward would be to return to their “existing refurbished laboratories in an improved relationship with current colleagues.” The Tribunal found that a move to a different school was not ruled out by the Respondent and such a move on a temporary basis would have raised no work permit issues, as Sheila Gupta, the Director of HR at the time, agreed in cross-examination ([56]).

15. On 15 February 2011 there was a meeting to discuss Professor Shaw’s report with members of the School of Engineering. The Claimant remained absent and did not attend. Certain members of the School of Engineering were unhappy about the review process and said it was unduly influenced by comments of Dr Wendy Faulkner. The Tribunal found (at [58]) after that meeting the Claimant came to be regarded as an individual to be distrusted and disliked in the School of Engineering. There was a view she had “overegged” her gender

A complaints and was making these complaints as a reaction to not having "got her way" in the School of Engineering.

16. In 2011 members of the School were instructed not to contact the Claimant, except through her solicitors, as she was in dispute with the School. This is referred to in the Judgment as an "'injunction' (in the words of Dr Don Glass)". The Tribunal held in effect that this amounted to sending the Claimant to Coventry. The Tribunal did not consider that it had evidence to determine who was involved in imposing the "injunction" but nevertheless found that Professor Alan Murray was not involved in this ([61]).

17. During 2011 following the Jo Shaw report the Tribunal found that the Claimant's health deteriorated: [62]. Nevertheless she continued to supervise the work of her PhD student from home via email, but the twice weekly contact was not considered adequate by the Respondent.

18. In the period that followed the Claimant's laboratory was reallocated to a new carbon capture consortium led by Professors Gibbins and Brandani. The Claimant's role as supervisor for her PhD student (Emad Alhseinat) was removed and Dr Don Glass took over as a new supervisor for him. Dr Glass accepted that in proceeding in this way the treatment of the Claimant could be seen as acts of hostility towards her, but he maintained this was not done because the Claimant made allegations of discrimination nor because of her gender or disability. Rather, Dr Glass said he did not think the Claimant would return to work and therefore the reallocation of her laboratory and her supervisory duties were "a necessary part of the process of clearing up". The Tribunal found the use of that term 'clearing up' reflected a general hostile attitude to the Claimant.

19. There were discussions between the Claimant and the Respondent about a way forward to get her back to work. The Respondent wished to have a clearer picture of the medical and occupational health issues involved before addressing the substantive issues. Dr Waldron wrote to the Claimant inviting her to agree to an Occupational Health assessment (first internal then independent) to facilitate a phased return to work. The Claimant wished to agree the "substantive issues" first. Later she said she would need further information before agreeing and asked for a list of questions and the brief that would be provided to the medical examiner.

When a list of questions was provided, she raised concerns about them ([68]). The result was that this avenue was not progressed.

20. Meanwhile in October 2011 Sheila Gupta prepared a document setting out possible options to extend the Claimant's stay in the UK in light of the fact that her work permit was due to expire on 12 April 2012. Although the document is expressed in negative terms as to the available options, the Tribunal referred to evidence given by Ms Gupta admitting there were possible options to extend the Claimant's stay in the UK which were not explored by the Respondent; and that there were steps not taken by her which could have been taken to enable the Claimant to stay in the UK. Furthermore the admittedly adverse, negative conclusion expressed by Ms Gupta about the Claimant in the document was done without bothering to check the position with the Claimant herself. Ms Gupta accepted that on reflection she should have written to the Claimant about other routes for retaining her employment rather than authorising a dismissal letter. She gave as the reason for not exploring possible options (or invoking the grievance policy)

> "her understanding ... that the claimant was seeking a settlement from the University and would not be returning to her previous position."

21. Sheila Gupta acknowledged that the Claimant raised a grievance with Dr Waldron which was not actioned. She said she did not consider the Claimant would wish to go through the grievance process "due to her ill-health". Ms Gupta acknowledged her role in the termination of the Claimant's employment as material and she authorised the dismissal letter dated 11 January. In doing so she acknowledged she did not comply with the ACAS Code of Practice. Nor did she refer at any stage to the Respondent's own Disability Policy 2004, agreeing in evidence that this was a fundamental omission on her part: see [79]. The Disability Policy states that the University is required to make any reasonable adjustments to enable a disabled individual to continue in post and identifies as possible options to consider, "continuing in the same post possibly with appropriate adjustment" and "redeployment".

22. The Tribunal found Ms Gupta's justification for failing, not only to progress the Claimant's grievances but also in having no regard to the issue of disability in the termination of the Claimant's employment, was simply that the Claimant was seeking a settlement from the Respondent. The Tribunal found however that such negotiations as there were, were not fruitful

and at no point was a settlement within contemplation. Further, at no point did the Claimant say she wanted to relinquish her Chair with the Respondent and her position as Professor of Chemical Process Engineering: see [80-81]. The Tribunal concluded that "there was no factual basis to support the proposition that the Claimant wished to leave the employment of the Respondents": see [106].

23. By letter dated 16 December 2011 Dr Waldron wrote to the Claimant about a number of matters including the fact that she would have to apply and be successful after external advertisement in respect of any new post because she was employed under a work permit which would expire in April 2012, with potential implications for her continued residence in the UK. She noted that the parties were at an impasse and encouraged the Claimant to consider the offer previously made by the Respondent, among other things, to consider mediation.

24. By letter to the Claimant dated 11 January 2012 June Bell, Head of HR, wrote on behalf of Professor Sir Timothy O'Shea (who the Tribunal found was the decision-maker and dismissing officer) in the following terms:

> "…your work permit expired in April 2012… As it would not be legal for the University to continue to employ you without such a permit and in accordance with your terms and conditions of employment I am writing formally to give notice that your contract of employment with the University will terminate for that reason on 12 April 2012. If the status of your entitlement to remain in the UK changes please let me know ….": [70].

25. The Claimant's employment terminated on 12 April 2012.

26. More generally, the Employment Tribunal accepted the Claimant was a disabled person from January 2010 when she went off work with stress and depression. She remained off work until the termination of her employment on 12 April 2012: see [37] and [197]. The Tribunal found the Respondent knew that she was a disabled person by 14 April 2010: [198].

27. The Tribunal made findings about each of the witnesses who gave evidence at paragraphs 83 to 114. These are not repeated here save for the following particularly relevant points.

28. The Tribunal accepted the Claimant's evidence that her life was her work; this provided an explanation for the devastating effect to her health following the breakdown of her relationship with the Respondent: see [87].

29. In relation to Prof Alan Murray the Tribunal found he was not part of the "insider" group referred to by Prof Shaw and accepted that he made laudable efforts to change the management structure and style of the School of Engineering. Dr Don Glass, on the other hand was a prime example of an "insider". He was one of a group that concluded an injunction should be in place preventing contact with the Claimant as she was in dispute with the Respondent over issues of discrimination.

30. In relation to Prof Sir Timothy O'Shea, the Tribunal found he had significant involvement with the Claimant and was (contrary to the Respondent's case) the decision-maker in the Claimant's dismissal, but yet was not called as a witness.

31. Finally in relation to Prof Lesley Yellowlees, the Tribunal made the following findings:

> "112. The Tribunal heard robust evidence from Prof Lesley Yellowlees that the decision to dismiss the claimant was hers and hers alone. However, this evidence contradicted the evidence of Dr Kim Waldron that the decision to dismiss the claimant was that of the Principal, Prof Sir Timothy O'Shea and that Dr Kim Waldron acted at all times on his instructions.
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> 113. The tribunal believe the evidence of Dr Kim Waldron rather than the evidence of Prof Lesley Yellowlees for two reasons – firstly, Dr Kim Waldron is no longer in post – she left her position with the University of Edinburgh on 8 March 2013 and is now living in the USA. Secondly, it is clear from the evidence of June Bell that Dr Waldron was materially involved in the events leading to the claimant's dismissal. There is no such supporting evidence in respect of the involvement of Prof Lesley Yellowlees at that time.
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> 114. The Tribunal concluded that Prof Lesley Yellowlees chose to be untruthful in this respect due to her continuing employment with the respondents as Vice Principal, Prof Sir Tim O'Shea being the Principal in post at the time of the Tribunal hearing."

32. The Tribunal gave itself legal directions in relation to the relevant claims at paragraphs 117 to 136. There is no criticism of these on behalf of the Claimant, and the applicable legal principles are broadly a matter of common ground.

33. The Employment Tribunal summarised the submissions made on both sides at paragraphs 137 to 191, and in particular set out at [146] the specific steps the Claimant said (in her Closing Schedule) ought reasonably to have been taken by the Respondent to accommodate her disability and avoid the substantial disadvantage she faced. Broadly the same matters were relied on as unfavourable treatment arising out of disability and detrimental treatment arising out of unlawful discrimination (as the Tribunal recognised: see [147], [148], [149], [152] and [155].

34. At paragraphs 192 onwards the Employment Tribunal set out its conclusions under various headings. I shall set out each of the relevant conclusions so far as material to the appeal when I address the particular ground of appeal seeking to challenge that conclusion.

The appeal

35. The Revised Grounds of appeal identify two general grounds and four cause of action related grounds. I deal with the general grounds first.

The burden of proof ground

36. Mr Gorton QC accepts that the Tribunal gave itself correct directions in law on the applicability of the burden of proof provision under s.136 EA 2010: see [131]. Nonetheless, he submits that apart from a passing reference to the burden of proof provision at paragraph 200, the Tribunal failed to apply it to the claims of unlawful direct sex discrimination and victimisation in error of law, and more generally. He submits that on the Tribunal's own findings of fact, the Claimant manifestly proved a prima facie case of victimisation. He relies on findings in relation to the "insider club", the injunction, the sending to Coventry and the criticisms made by the Tribunal about the evidence of the Respondent's senior management team, including the misleading evidence given by Professor Yellowlees.

37. I do not accept this argument. As Mr Reade QC submits, the burden of proof provision is a tool to be used in a case where a tribunal cannot make clear findings about the reason for impugned treatment. However, as was made clear in Hewage v Grampian Health Board [2012] UK SC 37, by Lord Hope (approving dicta of the Employment Appeal Tribunal in Martin v Devonshires Solicitors [2011] ICR 352 (Underhill P as he then was)):

> "… it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the Tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the Employment Tribunal, were in the end of not real importance."

38. Here, in relation to the claims adjudicated on by the Tribunal, it was able to and did make clear findings of fact on the evidence and in light of its earlier findings, about the reasons for the Claimant's treatment: see in particular paragraphs 193 to 195. There may be other errors disclosed by the Judgment, but I am satisfied that the Tribunal made no error in relation to the burden of proof.

The decision-maker for dismissal

39. The Tribunal held that the person who made the decision that the Claimant should be dismissed was the Respondent's Principal, Professor Sir Timothy O'Shea, who did not give evidence at the hearing. In making that finding, the Tribunal rejected the evidence of Professor Yellowlees who gave evidence at the hearing, that she made the decision. The Tribunal found that the Claimant's dismissal was unfair.

40. The Claimant contends by this ground that the failure by the Principal to give evidence meant that the Respondent did not lead evidence as to what his mental thought processes were and could not therefore determine the question 'why' in relation to dismissal for the purposes of unlawful direct sex discrimination and victimisation. Mr Gorton links this ground to the burden of proof ground, submitting that given the finding that Professor Yellowlees lied in suggesting that she took the decision to dismiss, and given that Ms Gupta materially contributed to the decision to dismiss (expressing the view that as the Claimant was ill she would never return to work) on the footing that the burden of proof passed to the Respondent, the failure to call the actual decision-maker leads to the inevitable conclusion that the Respondent failed to discharge the burden of proof in relation to these two claims.

41. Again, I do not accept this argument. Although, ordinarily one would expect a decision-maker whose treatment is impugned in unlawful discrimination proceedings to give evidence about the reason for such treatment, there is no inflexible principle or rule that requires this to

be done. The failure to call a particular decision-maker to give evidence does not prevent a tribunal from making findings of fact about the reasons for a particular decision where other evidence available enables it to do so.

42. Here, the Employment Tribunal did not overlook the fact that the Principal did not give evidence and made express, critical reference to that failure: see [77] and [115]. Further, the Tribunal heard evidence from a range of other witnesses and had available to it a significant bundle containing contemporaneous documents. It was entitled to reach its conclusions on the basis of all the evidence, including the absence of particular evidence from the Principal which it can be taken to have had well in mind. The mere fact that the Principal did not give evidence does not by itself, or taken with the arguments about the burden of proof, vitiate the Tribunal's conclusions about the reasons for the Claimant's dismissal.

43. For these reasons the two general grounds of appeal fail and I turn to the specific grounds advanced by the Claimant.

The reasonable adjustments claim

44. The Tribunal's essential reasoning in relation to the reasonable adjustments claim is at paragraphs 199 and 200 as follows:

> "199. It is important in a claim for failure to make reasonable adjustments to follow a structured approach. The first consideration is whether the respondent applied a PCP that the claimant should attend work at the School of Engineering. The tribunal were satisfied that it did.
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> "200. The second question is whether that PCP placed the claimant at a substantial disadvantage because of her disability. The tribunal found this a difficult question. It is possible that the claimant found it difficult to work in the School of Engineering, because she believed that she had been discriminated against or because her colleagues may have been hostile to her on her return. However that is not a relevant disadvantage for the purpose of a reasonable adjustments complaint. The claimant has to prove facts from which the tribunal could conclude that the claimant would be placed at a substantial disadvantage by that PCP <u>because of her disability</u>. The lack of medical evidence was a problem. The tribunal could speculate about whether there was a potential disadvantage to someone with the claimant's disability but there was no evidence of that before the tribunal. Further, the claimant's submissions did not address what the disadvantage was said to be. There is merely a bald statement that "That PCP put the claimant at a substantial disadvantage". If it is unable to make a clear finding of what the substantial disadvantage is and that this was because of the claimant's disability, it is simply impossible for a tribunal to assess whether the duty

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> arose at all, whether the respondent knew (or should have known) of the disadvantage and whether the proposed adjustments were reasonable for the respondent to have to take to avoid that disadvantage".

In other words, having accepted that the Respondent applied a PCP that the Claimant should attend work at the School of Engineering, the Employment Tribunal considered whether the PCP placed the Claimant at a substantial disadvantage because of her disability, concluding that there was no evidence of what the substantial disadvantage was and no evidence (including no medical evidence) that the Claimant was placed at such a disadvantage because of her disability. This claim accordingly failed.

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45. Mr Gorton contends that paragraph 200 reveals a number of interlocking errors. First, the Tribunal erred in law in treating the reasonable adjustment enquiry as if the Claimant was required to prove that her disability caused the relevant disadvantage rather than simply conducting a comparison exercise: a causation element is not part of the statutory test. Secondly, as a matter of common sense the PCP put the Claimant at a disadvantage compared to those who are not disabled. The non-disabled are able to attend work in compliance with the PCP, whereas the Claimant was not able to do so (as the Tribunal accepted) and her employment was accordingly at risk. That was more than a minor or trivial disadvantage and the Tribunal must have acted in error in failing to reach that conclusion. Mr Gorton submits that the Tribunal did not actually make a primary finding of fact that what prevented the Claimant from returning to work was fear of discrimination or hostility. Equally, the Tribunal did not find that she was fit to attend work. Moreover, he submits that the Claimant's case was not tied to the reaction of others about the possibility of her returning to the School, but to the adjustments she said the Respondent ought to have made but did not. He submits that the Tribunal's reasoning is intrinsically unattractive and amounts to an acceptance that the conduct of those in the School who made the Claimant ill and caused her disability and the fact of her reluctance to return to that environment because of the conduct, counted against her in her reasonable adjustment claim. This analysis appears to be an explicit finding that the gender-based hostility from colleagues caused her to be absent from work and unable to return and that ought to have constituted victimisation.

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46. Mr Reade submits that there was no error of law in the Employment Tribunal's approach and findings. First, he accepts a comparative exercise is necessary but the practical

effect of it is that there must be a causative connection between the PCP and the substantial disadvantage. That is implicit in the comparison exercise. Secondly, the Tribunal made clear factual findings in this case. This was a difficult issue to resolve because the Claimant was saying she could not work at the School of Engineering but could work elsewhere. For that reason the Tribunal was required to identify what the operative effect of the PCP was; this was difficult. The Claimant produced no medical evidence on the point. Furthermore he submits that the Tribunal found that the Claimant's day-to-day activities (such as exercise, shopping, having little social life) were impacted substantially by her disability but the Tribunal did not find, and there was no apparent evidence to this effect, that the disability prevented her attending work at the School of Engineering. He relies on the finding that during this period she was supervising a PhD student, travelling, lecturing and attending conferences and submits that the Tribunal's thinking is revealed by the conclusion it reached in relation to the s.15 claim where at paragraph 205 the Tribunal expressly found:

> "There is no evidence before the tribunal that there was a causal link between the claimant's disability and her refusal to return to her post in the School of Engineering. This was not a case where the claimant was absent and unable to return to work because of her disability. It appears she was able to return to work (or at least was asserting that she was) but that she would not return to her previous role based in the School of Engineering. The critical question was whether that was because of her disability or because of some other reason, such as she considered she had been badly treated in that department. The tribunal considers that there was insufficient evidence before it to make the necessary link with her disability.…".

Mr Reade submits that these conclusions reached by the Tribunal were open to it and fundamentally destroyed the Claimant's case on reasonable adjustments and in relation to her s. 15 claim.

47. I prefer the submissions made by Mr Gorton in relation to this part of the appeal and have concluded that the appeal must accordingly succeed on this ground. My reasons follow.

48. It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question as the Employment Tribunal appears to suggest at paragraph 200 (repeatedly

emphasising the words "because of her disability"). For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.

49. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s. 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see paragraph 8 of Appendix 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.

50. In this case the question for the Tribunal, having accepted that there was a PCP applied to the Claimant requiring her to work at the School of Engineering, was whether that requirement placed her at a substantial disadvantage in comparison with non-disabled people. On the Tribunal's findings, the Claimant was disabled through anxiety and depression (diagnosed conditions amounting to a mental impairment). She was on medication during the relevant period and the effect of the impairment was likely to have been more substantial if she had not been on medication: [197]. Sick notes were received throughout the period from 2010 to 2012 stating the reason for absence was stress and depression: [198]; and by implication on the Tribunal's findings, she remained unfit to return to work at the School of Engineering throughout the period under consideration albeit that she raised the possibility of a gradual return to a post in a different School. As a matter of fact, and in light of the events that occurred, her inability to return to work at the School of Engineering put the Claimant at risk of dismissal. As a matter of logic, an able bodied person who could attend work at the School of Engineering would not be at risk of dismissal.

51. The reasoning in paragraph 200 is quite compressed and not altogether easy to follow, but I am satisfied a number of errors occurred here. First, in holding that there was no relevant

disadvantage (or that the Tribunal was unable to make a clear finding of what the substantial disadvantage was), the Tribunal appears to have overlooked the substantial disadvantage in fact relied on by the Claimant in her evidence. It was her case that as a disabled person with depression, she was unable to return to work at the School of Engineering (where she was subjected to the treatment that caused her illness on her case) and this meant her future employment was put at risk; non-disabled people who could attend work at the School of Engineering would not be put at that risk. That was in essence, her case on "substantial disadvantage". Whether the Claimant feared hostility on return as well or believed she had been unlawfully discriminated against does not alter this, or mean that the substantial disadvantage she relied on was not a relevant one. The appropriate comparators are therefore other employees of the Respondent who are not disabled, can continue working in the School of Engineering and are, accordingly, not liable to be dismissed.

52. It may be that the Tribunal fell into the trap of requiring a comparator who meets the requirements of being in the same or materially similar circumstances as the disabled person (except for the disability) and was therefore wrongly focused on comparing the Claimant with an individual suffering stress following a course of perceived discrimination, who requests a transfer to a different School in consequence. It was not necessary for the Claimant to satisfy the Tribunal that someone who did not have a disability but whose circumstances were otherwise the same as hers would have been treated differently since a like-for-like comparison is not required in a reasonable adjustments claim. Even in a case where disabled and non-disabled employees are treated in the same way and are both subject to the same sanction when absent from work, that does not eliminate the discrimination: if the PCP bites more harshly on the disabled employee, putting that employee at a substantial disadvantage compared to the non-disabled, that is sufficient (see Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 (Court of Appeal)). Here, the Claimant's case was more straightforward: she compared herself with fellow non-disabled employees who could attend work and were not exposed to the risk of termination; but it is not difficult to see how a requirement to return to the place where perceived discrimination occurred might bite more harshly on a mentally impaired person than on a person with stress but who is not mentally impaired.

53. Secondly, the Tribunal held that it was necessary for the Claimant to prove facts from which the Tribunal could conclude "that the claimant would be placed at a substantial

disadvantage by that PCP because of her disability." That is not what the statutory test requires: s. 20(3) EA 2010 does not contain a strict causation test to be established in this way. Rather, a comparison exercise is required by it to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability. The Tribunal was therefore wrong to impose this requirement on the Claimant.

54. Thirdly, in determining what operative effect the PCP has, medical evidence is not a pre-requisite in every case (though there may be cases where the particular facts do make it necessary). Here, the Tribunal did have evidence from the Claimant that her ill-health (mental impairment by reason of depression) continued throughout, and that she felt unable to return to work at the School of Engineering, albeit she wished to and said she felt able to return elsewhere. Her evidence was not expressly rejected by the Tribunal, and there is no primary finding of fact made by the Tribunal that she was fit to return but refusing to do so. Rather, her absence throughout was supported by doctor's notes, as the Tribunal found. Further, the Tribunal did not expressly find an alternative (non-disability related) reason for her failure or refusal to return. I can see that medical evidence might have been required if the disability relied on was, for example, a complex fractured arm that did not repair. In such a case, without medical evidence, a claimant might struggle to establish that a requirement to work in one place rather than another (where the work done was otherwise the same) was a PCP that put her as a disabled person at a substantial disadvantage in comparison with non-disabled people, and a tribunal might justifiably conclude that this was a matter of personal preference or choice rather than being disadvantaged as a disabled person. In this case however, in addition to the above findings, the Tribunal found that the breakdown of relationships in the School of Engineering had a devastating effect on the Claimant's health ([87]) and the Judgment as a whole makes clear that her stress related disability was strongly connected with the School of Engineering, to which she felt unable to return. As already stated, the Tribunal found that her disability endured all the way through to termination ([197]). It would not have been speculation on the facts and in the circumstances of this case, to find that her mental impairment prevented her return, irrespective of why that was or what caused it. Such a conclusion would have been a matter of common sense inference from the evidence and factual findings made. I cannot see any justification for requiring medical evidence here.

55. For these reasons this ground succeeds and paragraph 200 cannot stand.

56. Because the Employment Tribunal concluded that it was impossible to assess whether the duty to make reasonable adjustments arose at all, it did not address the Respondent's knowledge of the disadvantage and whether the series of adjustments relied on by the Claimant were reasonable for the Respondent to have to make to avoid that disadvantage. In light of my conclusions that the Employment Tribunal was in error in this respect, it follows that the Tribunal was also in error in failing to adjudicate further on the reasonable adjustment claims set out in the Claimant's Closing Schedule.

57. Mr Gorton invites me to substitute findings of failures to effect reasonable adjustment on the basis that the outcome is obvious that the Respondent breached its duty to make reasonable adjustments in light of the Tribunal's clear findings as to knowledge of the disability and the clear acceptance by the Respondent of what reasonable steps should have been taken. After anxious consideration, I do not accept this submission. The Tribunal plainly had reservations about certain aspects of the evidence it received (on both sides) and was not persuaded by some aspects of the Claimant's case. Although I have concluded its reasoning was in error as to whether the duty arose here, I am acutely conscious of the limited evidence I have seen on appeal in the context of a case involving substantial evidence, both oral and documentary; and of the difficulties that arose in finalising the reasons and conclusions given in the Judgment. In my judgment, a factual assessment together with an evaluation of the merits of the reasonable adjustment issues is required, and I have concluded that this is not a case where I can say only one conclusion is possible on all the material available. It seems to me in accordance with the principles set out in Lincoln College v Jaffri [2014] EWCA Civ 449, this part of the case must be remitted, but I will permit further submissions on the precise issues to be remitted and the nature of the remitted hearing.

The claim of unlawful discrimination arising from disability.

58. The Employment Tribunal identified the unfavourable treatment at paragraph 203 as: dismissal; failure to address the Claimant's work permit and seek an extension; failure to apply the Respondent's own procedures. The Tribunal then reached conclusions on these allegations at paragraphs 204 and 205 as follows:

> "204. The Tribunal does not consider there is any evidence that would allow it to conclude that the Respondent did not seek an extension of the Claimant's work permit because of her disability (or because of anything arising in consequence of it such as her period of absence) nor that it failed to follow its procedure because of her disability. On

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the contrary, the Tribunal accepted that the Respondent believed that the Claimant was not prepared to return to work in the position for which the work permit had been granted and that, in these circumstances, it believed that there was no possibility of the Claimant's work permit being extended.

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"205. With regard to her dismissal, the Claimant submits that she was dismissed because she was absent and she was absent because of her disability and this is therefore covered by s.15. If that were a true description of the factual position, then that would be discrimination arising from disability. However, the Tribunal does not consider that the Claimant was dismissed because she was absent. She was dismissed because she was unwilling or unable to return to work in her existing post and this triggered issues with her work permit. In considering any causal connection, the Tribunal is faced with the same difficulty as it was when considering whether the duty to make reasonable adjustments was triggered. There is no evidence before the Tribunal that there was a causal link between the Claimant's disability and her refusal to return to her post in the School of Engineering. This was not a case where the Claimant was absent and unable to return to work because of her disability. It appears that she was able to return to work (or at least was asserting that she was) but that she would not return to her previous role based in the School of Engineering. The critical question was whether that was because of her disability or because of some other reason, such as she considered she had been badly treated in that department. The Tribunal considers that there was insufficient evidence before it to make the necessary link with her disability. The claim for disability arising from disability is dismissed".

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59. Paragraph 7 of the Revised Grounds challenges these conclusions on a number of different bases. In oral argument Mr Gorton made two fundamental points. First, at paragraph 203 the Employment Tribunal unduly narrowed the scope of the unfavourable treatment relied on by the Claimant and failed accordingly to consider a number of other matters raised in her Closing Schedule. Secondly in relation to those claims it adjudicated on, he submits that the Tribunal adopted an incorrect causation test, including by using the causation language of direct discrimination when dealing with the s.15 claim for which there is a range of causal links that ought to have been considered.

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60. By contrast, Mr Reade submits that the necessary causal connection between the something and the disability, which must be objectively assessed, was not made out on the evidence in this case, and the Tribunal was entitled to reach the conclusion it did, having made findings of fact that were open to it. As to the language used by the Tribunal (because of the disability) Mr Reade submits that this does not mean that the Tribunal failed to apply the proper test. He relies on the fact that the test was accurately set out in the Tribunal's self-direction on the law and also at the beginning of paragraph 205. In the remainder of that paragraph and at paragraph 204 the reasoning as a whole shows that the Tribunal applied the appropriate test and

made no error. Furthermore, the reason the Tribunal did not engage further with the s.15 claims (as with the reasonable adjustment claims) was because of its conclusions both at paragraphs 205 and 200 seen against the context of the whole claim.

61. The Claimant's case on unfavourable treatment ranged from the failure by the Respondent to apply its policies and procedures to her case, to taking steps short of dismissal (concerning the work permit and other matters) and to dismissal itself (see paragraph 146 where each allegation is separately recorded by the Tribunal). I am satisfied that the Tribunal unduly narrowed the Claimant's case to three allegations only; and failed as Mr Gorton contends, to deal with her full case under this section. My reasoning as set out in relation to the omitted sex discrimination allegations (see below) applies equally here.

62. On causation, 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. (See City of York Council v Grosset [2018] EWCA Civ 1105).

63. Adopting that approach, the first question accordingly was whether the alleged unfavourable treatment (or any of it) occurred and was because of the Claimant's ongoing absence from her existing post at the School of Engineering and/or her failure to return to it (the identified 'something' on the Claimant's case). That question involved a consideration of the reasons why each relevant decision-maker acted as he or she did in treating the Claimant unfavourably. Different treatment might have involved different decision-makers or different reasons, but the Tribunal did not descend into this sort of detail.

64. The Tribunal, as indicated, focused on the three aspects of unfavourable treatment identified at [203] and implicitly accepted that unfavourable treatment occurred in these respects. In relation to these, the Tribunal accepted that *the Respondent* believed "that the Claimant was not prepared to return to work in the position for which the work permit had been

granted and that, in these circumstances, it believed that there was no possibility of the Claimant's work permit being extended" ([204]). Leaving aside criticisms made by Mr Gorton of this finding (particularly in light of the evidence and factual findings made by the Tribunal earlier, especially at paragraphs 73, 74 and 104, 105 and 107, and the failure to identify who at the Respondent held that belief), the second question for the Tribunal was whether the Claimant's absence or failure to return to her existing post (which might have been viewed as two sides of the same coin) was as a matter of objective fact 'something arising in consequence of [her mental health] disability'.

65. In concluding (at paragraphs 204 and 205) that there was in effect no evidence of any link between the Claimant's disability and her absence or refusal to return to her post in the School of Engineering, I consider that the Tribunal erred in law. The reasoning at paragraph 204 is very compressed, but the same error in reasoning appears to be present in both paragraphs. Although the causal connection between the something that causes unfavourable treatment and the disability for s.15 purposes, may involve several links depending on the facts of a particular case, the Tribunal appears not to have contemplated this possibility. In other words, more than one relevant consequence of the disability may require consideration, but this does not appear to have been considered: even if the Respondent mistreated the Claimant on the work permit issue because it believed she was not prepared to return ([204]), the Tribunal did not consider why the Claimant was not prepared to return to her existing post. In fact, on the Tribunal's findings, it was the Claimant's mental health disability that caused her to be ill and absent from the School of Engineering (as certified by doctor's notes); and this continued until termination of her contract. Further, there was evidence from the Claimant that she believed her discriminatory treatment in the School of Engineering caused her disability, and she perceived hostility from those at the School of Engineering as a result of it. Although the cause of the disability might be irrelevant in many cases, in a case like the present one, where the disability, its cause, and its effects are all so interlinked, it seems to me, in agreement with Mr Gorton, that the broad causation question in s. 15 was capable of being satisfied on this basis.

66. Further, it seems to me contrary to the arguments of Mr Reade, that the incorrect language of causation used by the Tribunal at paragraph 205 ("because of her disability") fed into the Tribunal's error, so that too strict a causation test was imposed by the Tribunal in error. The Tribunal described the critical question (at [205]) to be answered as whether the Claimant's

refusal to return to her previous role was "because of her disability or because of some other reason, such as she considered she had been badly treated in that department", but this was not a binary question. Both reasons might be in play: her disability caused her to experience anxiety, stress and (on her case) an inability to return to the place where she perceived the mistreatment and hostility to be located, leading to her refusal. The critical question was whether on the objective facts, her refusal to return arose in 'consequence of' (rather than being caused by) her disability. This is a looser connection that might involve more than one link in the chain of consequences. The Tribunal did not approach it on that basis. The correct question was not asked in either paragraph; nor was it correctly answered by the Tribunal.

67. In light of these conclusions, the Tribunal's conclusions at paragraphs 204 and 205 cannot stand and it is unnecessary to consider the further errors identified by Mr Gorton in writing. For the same reasons as I have given in relation to the s.15 claims and the reasonable adjustment claims, the conclusions at paragraph 206 (relating to the reductions in pay during sickness absence) also cannot stand, and will have to be revisited. The reasons given at paragraph 57 above for remitting the reasonable adjustments claims apply equally here. These claims will have to be remitted. The parties may make submissions on the precise issues to be addressed and the nature of any remitted hearing.

The unlawful direct sex discrimination and victimisation claims

68. I deal with the unlawful sex discrimination and victimisation claims together since there is a broad overlap in the arguments raised in relation to these claims.

69. The Tribunal reached its conclusions on these claims in three shortly stated paragraphs, 193 to 195, as follows:

> "193. The Tribunal finds that the Claimant did a protected act on 14 April 2010 and that the Claimant was subjected to a detriment in a number of instances because she had done that protected act. Specifically, after the meeting on 15 February 2011, the Claimant was regarded by a number of colleagues in the School of Engineering as an individual to be distrusted and disliked. The Respondent issued an instruction that no contact was to be made with the Claimant other than through her solicitors. This meant that when it was decided that the Claimant was to be replaced as supervisor for Emad Alhseinat and when it was decided that laboratory space would be allocated to others, these decisions were not communicated to her. The Tribunal has found as a fact that the failure to communicate the decisions was because there was an instruction

not to contact the Claimant and that instruction came about because the Claimant had done a protected act.

194 However, the Tribunal did not consider that these decisions themselves were influenced by the allegations of discrimination that had been made by the Claimant. The Respondent appointed another supervisor for Mr Alhseinat because it did not expect the Claimant to return to work and it had a duty to assist the student to complete his PHD. There was a need for a supervisor to be present for health and safety reasons. The lab space was reallocated due to the operational needs of the Respondent.

Direct sex discrimination

195 As is evident from the findings in fact, the Tribunal finds that the treatment of the Claimant during her employment with the Respondent was not because of her sex. There was a mismatch of expectations between the Claimant and the Respondent as to what each expected from the Claimant in her role as a Professor within the School of Engineering and miscommunication between the parties involved. This was found by the Tribunal to be because of a different in culture and expectation, specifically the shared collective of academia within the UK by the incumbents in the School of Engineering and the fact that the Claimant had no experience of UK academia. As the Tribunal was able to make positive findings as to the "reason why" the alleged less favourable treatment took place, and that this was not the Claimant's gender, there is no need to consider further the shifting onus of proof. The claim of sex discrimination is dismissed."

70. The first ground under this heading challenges the Judgment on the basis that the Tribunal failed altogether to address a series of claims advanced by the Claimant in her Closing Schedule (attached to her written Closing Submissions). Although there was no joint list of issues prepared in this case (as the Tribunal observed at paragraph 8), in its summary of the Claimant's submissions at paragraphs 137 to 161 inclusive, the Tribunal set out in full the 16 specific matters pleaded in the Closing Schedule as steps that the Respondent should have taken by way of reasonable adjustment in relation to the disability discrimination claim (see paragraph 146 and the Closing Schedule attached to this judgment as annex A). At paragraph 147 the Tribunal recognised that the s.15 disability complaint applied to all 16 matters identified as reasonable adjustments. At paragraph 152 the Tribunal recognised that all of those matters were relied on by the Claimant by way of less favourable treatment on grounds of sex, albeit the Tribunal suggested that her focus was on two particular aspects, the removal from her lab and supervisory duties, and her dismissal. At paragraph 155 the Tribunal recognised that all of those matters were relied on by the Claimant as acts of victimisation.

71. Having done so, Mr Gorton submits that the Tribunal's Judgment on the unlawful direct sex discrimination claim at paragraph 195 omits to deal with anything but the historical complaints made by the Claimant as acts of unlawful sex discrimination. Nowhere did the Tribunal deal with the 16 acts of less favourable treatment specified in the Closing Schedule and summarised at paragraph 152; and critically in his submission, the Tribunal failed to address the complaint that the Respondent failed to apply applicable procedures, including the grievance procedure, failed to address the complaints arising out of the Claimant's immigration status and retention of her employment, and failed to address the reason for her dismissal in the context of this discrimination claim. Similarly, in relation to the Tribunal's conclusions on the victimisation claim at paragraphs 193 and 194, although the Tribunal found that the Claimant did a protected act and was subjected to certain detriments because of that protected act (specifically in that she came to be regarded by a number of colleagues in the School of Engineering as an individual to be distrusted and disliked, an instruction not to contact her other than through solicitors was issued and she was not consulted on decisions about her laboratory and supervisory duties) Mr Gorton submits that the Tribunal failed to address all other claims set out in her Closing Schedule. Mr Gorton recognises that the Closing Schedule in relation to victimisation included an additional claim not pleaded in the claim forms about a threat made by the Principal on 23 January 2012. This was factually addressed at paragraph 49 but was not relied on as a detrimental act until its inclusion in the Closing Schedule. The Claimant invited the Tribunal to address it as a formal allegation, it having been aired in evidence, but it was not adjudicated on.

72. This ground is resisted by the Respondent on the basis that the two claim forms lodged by the Claimant did not embrace the full range of allegations made in the Closing Schedule and together were limited in relation to unlawful sex discrimination and victimisation, to claims relating to the laboratory and PhD supervision, the giving of notice on expiry of the Claimant's work permit without consultation and dismissal (see paragraphs 53 and 55 of the first ET1 and paragraphs 12 and 14 of the second ET1). The only application made by the Claimant to amend her claims once the full hearing commenced related to the notice pay issue; there was no wider application. The Tribunal's jurisdiction was limited accordingly to the claims made in the claim forms (see if necessary Chapman v Simon). On that premise, although Mr Reade accepts the Tribunal's conclusions are not as particular as they could have been, he argues that they embraced all of the treatment complained of in the claim forms as unlawful sex discrimination,

especially when seen with the other findings and in particular the Tribunal's conclusions on the claims for unfair dismissal at paragraph 196 (where the Tribunal found a potentially fair reason for dismissal was a belief that the Claimant could no longer legally continue to work in the UK) and the disability discrimination findings. Read as a whole, he submits that the Judgment makes clear that there was no unlawful direct sex discrimination in the decision to dismiss. As for victimisation, he accepts that the Tribunal did not expressly address dismissal, but contends that the unfair dismissal finding in relation to the reason for dismissal is inconsistent with a finding of victimisation.

73. Persuasively as Mr Reade's submissions were advanced, I do not accept them, and have concluded that this ground of appeal should succeed, broadly for the reasons advanced by Mr Gorton. In summary, my reasons are as follows.

74. First, it seems to me that the claims particularised in the Closing Schedule are broadly embraced by the claim forms. In particular at paragraphs 61 and 62 of the first ET1, complaint is made about the arbitrary issuing of notice, the fact that the Claimant's employment was terminated without consultation and the fact that there was no extension of her work permit. Paragraphs 9 and 10 of the second ET1 identify the following matters as issues of unfavourable or less favourable treatment: the arbitrary issuing of notice and the work permit issues, together with dismissal.

75. Secondly, and even if the wider claims are not embraced in the claim forms, having made an order that the parties produce written closing submissions, followed by responsive submissions together with an executive summary, and having received those submissions together with the Closing Schedule particularising specific claims, the Employment Tribunal did not say that it would not adjudicate on specific claims as a matter of jurisdiction. Nor was that a point made by the Respondent in its responsive submissions addressing the Claimant's written closing submissions with attached Closing Schedule. In fact it seems to me to be apparent that the Tribunal accepted jurisdiction in relation to the specific victimisation and sex discrimination complaints set out in the Closing Schedule from the fact that it referred to the Closing Schedule in summarising the Claimant's complaints without criticism or challenge; and proceeded to address the claims advanced without any reference to jurisdiction or any suggestion that the matters raised were in fact new claims. Furthermore, paragraph 203 of the

Judgment expressly identified the wider matters as unfavourable treatment albeit in the context of dealing with discrimination arising from disability. If, the Tribunal was implicitly refusing jurisdiction in respect of these claims, I agree with Mr Gorton that it was incumbent on it to say so and give the Claimant the opportunity to argue that she should be entitled to amend to include the wider matters given the way in which the hearing was conducted and the fact that the issues were all ventilated in evidence.

76. Thirdly, having failed before the Employment Tribunal to advance any objection to the Closing Schedule as containing new matters that should not be adjudicated on, the Respondent has neither filed a respondent's notice nor served a cross appeal seeking to uphold the Tribunal's decision on the basis that it had no jurisdiction to address the wider claims or to cross appeal on that basis. It is now too late for it to do so.

77. Fourthly, I am not persuaded that the three paragraphs of the Judgment (read as generously as they can be) dealing with the unlawful sex discrimination and victimisation claims, deal adequately with all of the claims advanced by the Claimant. I agree with Mr Gorton that paragraph 195 focuses on the historical complaints relating to the delay in installing and commissioning the Claimant's laboratory (see [27] and [31]) and the appointment of Professor Brandani to the post of Chair of the Board of Examiners (see [33]). The Tribunal did not adjudicate on the claims that the Respondent failed to apply its written policies and procedures, including the grievance procedure, failed to address the complaints arising out of the Claimant's immigration status/work permit issue and the failure to take steps to achieve retention of her employment, and failed to address the reason for her dismissal in the context of this claim. The position is even clearer in relation to paragraphs 193 and 194 where these matters are not addressed at all. Although it is true that the Tribunal dealt in the context of unfair dismissal with the reason for dismissal, the Claimant's case was that the work permit issue was latched onto by the Respondent as a way of getting rid of her because she had raised and was continuing to pursue her complaints, but the Tribunal did not engage at all with the possibility that, in addition to the reason found at paragraph 196, a more than trivial reason for dismissal was also the unlawful sex discrimination/victimisation she alleged.

78. Mr Gorton submits that the findings made by the Tribunal and the failure to call the decision-maker in relation to dismissal (or address the mental thought processes of other

potential decision-makers) mean that the EAT can substitute findings of unlawful discrimination in relation to these claims. That is an exceptional course to take and I am not persuaded that I should take it here. There was a substantial amount of evidence in this case that is not before me and has not been canvassed on this appeal. The Employment Tribunal made careful findings on victimisation that distinguished between those claims found in the Claimant's favour and those rejected. Looked at as a whole, I am not satisfied that this is a case where only one outcome is possible in relation to the claims that have not been adjudicated upon, and accordingly, it would be wrong for me to substitute my own conclusions on these issues. They will have to be remitted. As before, the parties may make submissions on the precise terms of the remission.

79. My conclusion above does not extend to the allegation that the Claimant was threatened by the Principal at the meeting on 23 January 2012. Although this issue was canvassed in the evidence (and the meeting was described in the Claimant's ET1), it was not identified as an act of unlawful discrimination, still less one alleged against the Principal. Its mere inclusion in the Claimant's Closing Schedule did not mean that it had to be addressed as such, particularly in circumstances where no application to amend was made. In the absence of any pleaded allegation regarding this meeting, and in the absence of any application to amend, I can see no error of law in the Employment Tribunal's failure to address this issue.

80. The Claimant also challenges as in error of law the Employment Tribunal's conclusions on the adjudicated unlawful sex discrimination and victimisation claims. I have already dealt above with the burden of proof ground and rejected it.

81. As for the victimisation findings about the lab and PhD supervision, the Claimant contends that there was a failure to find who made the decision on these issues and in the absence of a named decision-maker there could be no examination of the thought processes engaged or whether they were tainted by proscribed grounds. Moreover she submits that there was no evidence that the student in question needed on the ground supervision, and in any event, he was in fact being properly supervised by her so that the conclusions (including that a supervisor needed to be present for health and safety reasons) are perverse. It is also argued that the finding that Professor Murray was not part of the "injunction" instruction was in error and an unsupportable finding in light of Dr Glass' evidence that "Professor Murray was

involved and gave the instruction" and the fact that Professor Murray was not recalled to deal with that evidence. Finally there is a Meek argument in relation to the unlawful sex discrimination claims that were adjudicated on by the Employment Tribunal.

82. I am not persuaded that the Employment Tribunal fell into error by reference to any of these grounds.

83. First, I am not persuaded by Mr Gorton's description of a generalised sex discriminatory context against which the Claimant's claims fell to be addressed. As the Employment Tribunal recognised, Professor Jo Shaw reported an unacceptable state of affairs that existed in 2006 as reported on previously by Dr Wendy Faulkner. Professor Jo Shaw also referred in her report (as summarised by her at paragraph 34) to gender as "one of the vectors along which judgements about whether an individual belongs or not is transmitted" but, leaving aside what that actually means, her actual conclusions are more nuanced and equivocal than Mr Gorton's characterisation suggests. In particular, she expressly said that in her view negative judgments about individuals recruited to the School of Engineering were "not caused by gender bias as such". (She had earlier referred to a focus group of men from the School of Engineering who expressed the view that there was positive discrimination in the appointment of four female professors in the School: see [47]). Professor Shaw appears to have concluded that the culture of distinguishing between different groups as "insiders and outsiders" was based in other features. She also described "laudable efforts to change the school…at least with its management structure and style and with a new leadership" in 2008, while acknowledging that these had not borne fruit so far as the working experience of some members of staff were concerned.

84. Secondly, the Employment Tribunal accepted that Professor Murray acted appropriately on that report, commissioning a review by an external company: [51]; and was shocked to hear (for the first time as the Employment Tribunal accepted) of comments reported by Dr Faulkner, as described in Professor Shaw's report. He felt compelled to write to the Claimant having read the report about the "distasteful and indefensible" views referred to in it, and did so by letter dated 4 February 2011: [52].

85. Thirdly, the conclusions reached by the Employment Tribunal about the removal of the lab and the supervisory duties are supported by findings of fact at paragraphs 63 to 66 where the Employment Tribunal found that:

(a) Professor Sefiane approached Professor Murray with a view to allocating part of the Claimant's laboratory to a new carbon capture consortium led by Professor's Gibbins and Brandani.

(b) A decision to accept that move was taken (in all likelihood by Professor Murray in light of Professor Sefiane's approach to him, and the fact that Professor Murray was Head of the School of Engineering, but the Employment Tribunal made no express finding that this was so).

(c) Professors Ingram and Sefiane decided that Dr Glass should supervise the PhD student, and after discussion with both Dr Glass and the student, the change was agreed.

86. That the Claimant gave conflicting evidence and/or does not agree with or accept these findings does not mean that they are in error of law. The findings made were available on the evidence and the high hurdle for establishing perversity is not even arguably met.

87. Moreover, at paragraph 61 the Employment Tribunal expressly rejected the Claimant's case that Professor Murray was involved in the "injunction" instruction. The Employment Tribunal explained that it did so based on an assessment of his evidence and demeanour, particularly in relation to the letter of 4 February 2011 written by him. It seems to me that a broader inference may be drawn from that finding, namely that Professor Murray was not involved more generally in the hostility towards the Claimant adverted to by Dr Glass.

88. The Claimant's challenge to the finding about Professor Murray is unsustainable. The agreed notes of the evidence given by Dr Glass in this regard make clear that Dr Glass did not know as a matter of fact that Professor Murray gave the instruction. His evidence as the notes show was that he supposed that the instruction came through Professor Murray (paragraph 393). I agree with Mr Reade that the Employment Tribunal was not bound to accept his supposition. The Claimant did not require Professor Murray to be recalled so that he could be cross-

examined about Dr Glass' evidence. Moreover, the Employment Tribunal had other evidence that it considered enabled it to make findings exonerating him of wrongdoing in this regard.

89. The express conclusions reached at 193-195 applied the law to the facts found without apparent error, and in a manner that cannot in my judgment be interfered with on appeal. Although the conclusions on unlawful sex discrimination are dealt with shortly, as far as they go they are Meek compliant and sufficient to explain to the Claimant why she lost on these issues.

The notice pay issue

90. There was an application at the beginning of the full hearing in September 2015, by the Claimant to amend her claims to include a claim for failure to pay notice pay (based on breach of contract/unlawful deduction from wages). It is common ground that this was a new claim not encompassed within either of her two claim forms (although Mr Gorton submits that the factual basis for the claim is pleaded and this is merely a case of "re-labelling"); and that it was substantially out of time in the tribunal jurisdiction in September 2015, though the Claimant remained in time then to pursue it as a claim in the civil courts. The application was refused by the Employment Tribunal. No appeal was lodged against that decision. The case proceeded and the question of notice pay was nevertheless explored in evidence and Ms Gupta made certain admissions to the effect that it was payable and should have been paid. At the end of the hearing (in April 2016) the Claimant sought reconsideration of her application to amend. For reasons that are now immaterial, the reconsideration application was ultimately dealt with in the Judgment at [208] to [210] as follows:

> "208. The Claimant's application to amend the claim to include a claim for notice pay was refused at the start of the hearing as the Respondent had not come prepared to deal with the matter. The Claimant applied for the decision to be reconsidered on the grounds that the proceedings had been delayed and so there was no disadvantage to the Respondent. The Claimant also submitted that, as the Respondent has accepted through its witnesses that the Claimant should have been paid notice pay and she was not, there is no rational reason why the application should be resisted.
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> 209. The Respondent contends that the Claimant has not demonstrated that it would be in the interests of justice that the decision to refuse the amendment be reconsidered. The Respondent's position is that the Claimant was in fact given notice. Further the claims were brought in 2012 and only in 2015 did the Claimant seek to amend. The Respondent's witness statements did not deal with a claim for notice pay because none

was made. To carry out investigations at this late stage would not be proportionate and not in accordance with the overriding objective. At the time the claim was lodged the Claimant was represented by senior counsel and solicitors. If they failed to include this complaint in the claim the Claimant's remedy lies against them. Further, the Claimant has the option to raise the claim in another forum.

210. The Tribunal's decision is that it is not in the interests of justice to vary the earlier decision. The application to amend came very late and there has been no explanation for that delay. The Claimant was legally represented when the claims were presented, the Claimant has another remedy in the civil court or, potentially against her advisers. Further the claim is disputed and additional evidence would be required. For all these reasons, the Tribunal does not consider it is in the interests of justice to vary its earlier decision and the application is refused."

91. The Claimant contends in the Revised Grounds that the Employment Tribunal's conclusion is in error of law or perverse because the claim to notice pay was no longer disputed by the time of the reconsideration decision. It was therefore wrong in the absence of a defence to the claim to find that the claim was made late; and the suggestion that there was another remedy in the civil courts was perverse in circumstances where the Employment Tribunal was seized of the matter and the Respondent had no defence to the claim. This ground is resisted by Mr Reade on the basis that the Tribunal made no error of law.

92. Tribunals undoubtedly have discretion to grant leave to amend a claim form to add a new claim at any time during proceedings. The discretion must be exercised judicially by taking account of all the circumstances (including timing, the nature of the amendment and the applicability of any relevant time limits) and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it: see Selkent Bus Co Ltd v Moore [1986] ICR 836 EAT (Mummery P). Tribunals can also reconsider their own earlier decisions where the interests of justice require this, but the principle of finality means that the availability of reconsideration is limited.

93. Mr Reade also relies on Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16/RN where the EAT (HHJ Hand QC) (by a decision that post-dates the Judgment) reviewed the legal principles as to whether an amendment once granted is treated as if brought at (or as "relating back" to) the date of the original claim; or whether the amendment introduces a new claim with effect from the date of the application so that any limitation argument would have to be addressed by reference to the relevant applicable statutory

provisions. The EAT held that the latter approach was to be preferred, and although Mr Gorton reserved his position in relation to Galilee, he did not invite me to depart from it suggesting instead that if it changed the landscape, the issue should be remitted to be reconsidered in light of Galilee. It seems to me that it is unnecessary to enter the Galilee debate. I do not consider that it changes the landscape for the purposes of considering the exercise of discretion undertaken here. It remains clearly the case that limitation (whether it is determined at the time of the application or subsequently) is one of the factors to be considered in determining whether an amendment should be granted.

94. Mr Reade submits that the approach of the Employment Tribunal to the exercise of its discretion cannot be impugned as in error of law. Albeit without enthusiasm given the admissions of Ms Gupta in evidence, I am driven to agree. The view I might have taken if dealing with this application at first instance is nothing to the point in circumstances where the EAT's power to intervene is limited to correcting errors of law. The Employment Tribunal approached the exercise of discretion in an orthodox manner, and had regard to the relevant factors. Its assessment of the various considerations is sustainable and not arguably perverse.

95. The Tribunal was entitled to conclude that the application was made very late and that the Claimant had given no explanation for the delay in pursuing it: she was advised by solicitors who drafted both claim forms and provided no explanation why it was not included in the second claim when it could have been. She advanced no case to the Employment Tribunal (in evidence or in her Closing Submissions or Response) that it was not reasonably practicable for her to include it, and although I agree with Mr Gorton that this is not a test of impossibility, I cannot on the basis of the material I have seen, see how she meets that test (which is narrow and difficult to meet). It seems to me that the Employment Tribunal was also entitled to conclude (as at September 2015) that the Claimant had alternative means of effecting recovery in relation to this claim, and to rely on this as a factor in balancing the relative hardship and injustice.

96. In addition, the Tribunal's conclusion that the claim was disputed is sustainable on limitation grounds (albeit not on any other basis); the Respondent had (or would have if the amendment were granted) a limitation defence to the claim but no other defence. Further, although it is true that the Employment Tribunal referred to additional evidence that would have to be explored, in all the circumstances this could only relate to the question of reasonable practicability.

97. It seems to me that the Tribunal was entitled to conclude that the factors weighing against the Claimant's application to amend were strong and the interests of justice did not require the original decision to be varied. I do not consider that there is any misdirection betrayed by the Tribunal's reasoning, nor any arguable perversity. Accordingly, there is no basis on which I can interfere with the conclusion reached by the Tribunal in exercise of its discretion, to refuse to reconsider its earlier exercise of discretion refusing to permit the amendment sought. This ground of appeal accordingly fails.

Conclusion

98. I have focussed in this judgment on the main arguments and submissions advanced on both sides. The parties can however be assured that I have considered all written and oral submissions made in reaching my conclusions, even where these are not specifically referred to

99. In conclusion:

(a) The appeal is allowed in relation to the reasonable adjustment claims and paragraph 200 is set aside.
(b) The appeal is allowed in relation to the s. 15 (disability-related) claims, both those adjudicated on and those omitted (including the reduction in pay claims advanced as reasonable adjustment and s.15 claims). Paragraphs 204 to 206 are set aside.
(c) The appeal is allowed in relation to the unlawful sex and victimisation claims set out in the Closing Schedule that were not adjudicated on by the Tribunal.
(d) All other grounds of appeal fail and are dismissed.

100. I will hear further from the parties as to the precise orders to be made by way of remission in light of the conclusions I have reached on this appeal.