



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Dr K Fogg

**Respondent:**  
v The Oxford Centre for Islamic Studies

**Heard at:** Reading

**On:** 12-16, 19 October &  
30 November 2020,  
12 February 2021 (in  
chambers)

**Before:** Employment Judge Anstis  
Ms E Gibson  
Mr M Pilkington

## Appearances

**For the Claimant:** Ms G Cullen (counsel)

**For the Respondent:** Mr R Allen QC (counsel)

## RESERVED JUDGMENT

1. The claimant was a permanent employee of the respondent at the time he was dismissed.
2. The claimant was unfairly dismissed by the respondent.
3. The claimant's claim of wrongful dismissal or breach of contract is dismissed.
4. The claimant's claims of age and sexual orientation discrimination are dismissed.

## REASONS

### A. INTRODUCTION

#### The claim

1. The claimant was employed by the respondent as the Albukhary Fellow in the History of Islam in South-East Asia. His employment was for an initial fixed-term of (approximately) five years from 22 October 2012 to 30 September 2017. His appointment was renewed for a fixed term of a further year, but that fixed term expired without being renewed on 30 September 2018.

2. The respondent is a Recognised Independent Centre of the University of Oxford. We understand this to mean that it is an independent institution, not part of the University of Oxford, but with close ties to the university and a strong degree of academic co-operation. As we shall see, many of the respondent's academic staff also held appointments at the university or the university's colleges. The respondent was established in 1985. Dr Farhan Nizami has been its director from the start. The respondent is now a substantial institution with its own purpose-built accommodation and an international reputation as one of the leading centres in the west for the study of Islam and the Islamic world. It was established under a royal charter in 2012, with HRH The Prince of Wales as its patron. It moved to its current premises in 2016-7.
3. The claimant brings claims of unfair dismissal, wrongful dismissal and age and sexual orientation discrimination arising from the non-renewal of his contract and various matters prior and subsequent to that. He also claims that his fixed term contract had become a permanent contract under the terms of regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.
4. The claimant went to some lengths at the start of his evidence to say that he did not want his case to be seen as any criticism of Islam or to give any encouragement to those who may want to criticise or malign Islam. We agree. This case is not about Islam, and we will not be undertaking any consideration of Islam or Islamic doctrines. This case is solely concerned with questions of employment law. Insofar as the claim concerns the claimant's sexual orientation, it is limited to what the claimant says Dr Nizami perceived to be the attitudes of major donors towards those who are not heterosexually married, not any question as to what those attitudes actually were or what (if anything) they derived from.
5. For the purposes of this claim, the claimant describes himself as a bi-sexual male, homosexually partnered. He says that when offered employment with the respondent he was 28 years old, and that he was 29 years old when he started employment and 35 years old when his contract was not renewed. He identifies as being a member of an age group of people who are, or appear to be, 35 or under, and compares himself with a group of people who are (or appear to be) over 35.

### The issues

6. The parties agreed that the issues for determination by the tribunal remained as set out in the order of Employment Judge Hawksworth dated 13 November 2019 – that is:

*“Unfair dismissal*

1. *What was the reason for the claimant's dismissal?*
2. *Was it a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996, either some other substantial reason, namely the expiry of a fixed term contract, or capability? The claimant says he was a permanent employee pursuant to*

*regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.*

3. *If there was a potentially fair reason to dismiss, was the dismissal fair in all the circumstances of the case pursuant to section 98(4) of the Employment Rights Act 1996, including did the respondent follow a fair procedure in accordance with ACAS guidance?*

*Wrongful dismissal*

4. *Did the respondent give the claimant the correct notice in accordance with the terms of his contract?*

*Direct age discrimination*

5. *Did the respondent treat the claimant less favourably than the respondent treated Dr Afifi Al Akiti and Dr Adeel Malik because of his age when:*

- (a) *Richard Makepeace said in December 2016 'someone of your age really cannot be expected to hold this kind of post';*

- (b) *The respondent subjected him to a less favourable review process;*

- (c) *The respondent suppressed reports which were supportive of the claimant from external academics;*

- (d) *The respondent failed to have full regard to the opinion of the history faculty as to the claimant's abilities;*

- (e) *The respondent dismissed the claimant.*

6. *Did the respondent treat the claimant less favourably than the respondent treated Dr Afifi Al Akiti and Dr Adeel Malik because of his perceived age in respect of the allegations at paragraph 5(a) to (e) above?*

7. *Was the discrimination a continuing act or an act extending over a period of time throughout his employment with the respondent?*

8. *Alternatively, if the acts were not continuing or acts extending over a period of time, is it just and equitable to extend time having regard to section 123 of the Equality Act 2010?*

*Indirect discrimination on the ground of sexual orientation*

9. *The claimant relies on the following PCP(s):*

- (a) *That the respondent prefers employees and/or permanent employees to be heterosexually married, in a way which is consistent with the beliefs on gender and sexual orientation*

*of its major donors, as perceived by Dr Nizami. These donors include, but are not limited to, the Royal Family of Saudi Arabia and the Royal Family of Brunei.*

- (b) *The respondent expects its employees and/or permanent employees not to act openly in a way that is contradictory to the beliefs on gender and sexual orientation of the major donors referred to above, as perceived by Dr Nizami.*
10. *Does the respondent operate the PCP(s) listed in paragraph 9 above?*
  11. *Does the PCP(s) put gay or bisexual men at a particular disadvantage when compared with people who are not gay or bisexual?*
  12. *Does the PCP(s) put the claimant at a particular disadvantage?*
  13. *Can the respondent show that the PCP was a proportionate means of achieving a legitimate aim?*
  14. *Was the discrimination a continuing act or an act extending over the course of his employment with the respondent?*
  15. *Is the claim within time? If not, is it just and equitable to extend time pursuant to section 123 of the Equality Act 2010?*

*Victimisation*

16. *Did the claimant do a protected act? The claimant relies on his appeal against his dismissal, taking steps in connection with issuing legal proceedings under the Equality Act 2010 or the respondent believing that the claimant would bring proceedings.*
  17. *Did the respondent subject the claimant to a detriment, namely failing to conduct a full and thorough search of documents pursuant to the claimant's subject access request in September 2018?*
  18. *Was the detriment because of the claimant's protected act?"*
7. Although (13) appears in the list of issues, the respondent did not seek to argue that if it has those PCPs, they were justified.
  8. During discussions at the outset of the hearing the parties agreed (and we accepted) that in order for the evidence to be heard in the time allowed the tribunal should at this stage consider only matters in relation to liability, with any points in relation to remedy being postponed to a further hearing (depending on the outcome of this hearing). We have accordingly omitted any issues in relation to remedy.
  9. Following the tribunal's usual practice, a provisional remedy hearing was set at the end of this hearing in case there was a need for a remedy hearing.

## The hearing

10. The hearing took place in person, during the Covid-19 pandemic. With the permission of the tribunal, one witness (as referred to below) gave evidence by video.
11. The tribunal took the first day of the hearing to read into the case, and then heard evidence from the following witnesses. In many cases the respondent's witnesses held positions in more than one institution, but we have limited ourselves to setting out their role at the respondent.

Monday 12 October: reading

Tuesday 13 October: the claimant

Wednesday 14 October: the claimant

Professor Sir David Clary (Chair of the Academic Committee of the respondent's trustees)

Thursday 15 October: Professor John Sidel (Professor of International and Comparative Politics, LSE) (witness for the claimant) – by video

Dr Farhad Nizami (Director of the respondent)

Friday 16 October: Dr Nizami

Monday 19 October: Mr Richard Makepeace (Registrar of the respondent)

Mr Gordon Brown (Assistant Registrar of the respondent)

Dr Adeel Malik (Globe Fellow in the Economies of Muslim Societies, the respondent)

12. That concluded the time originally allocated for the hearing. By agreement with the parties they then submitted written representations by 6 November 2020, with the opportunity for oral replies to those submissions at a hearing taking place by CVP on 30 November 2020. We apologise the parties for the length of time it has taken to produce this judgment and written reasons following that hearing. This has been caused by a combination of there being little time available to write up the judgment along with the difficulty of scheduling a further chambers meeting for the tribunal panel.

## B. FACTS

### Introduction and background

13. We have set out above some background information in relation to the respondent, along with the claimant's relevant personal characteristics.

### The claimant's appointment and contract

14. The claimant graduated from Duke University in 2005 with a BA in History and Asian and African Languages and Literature with a minor in Religion. He went on to complete a MA in History at Yale in 2009 and a PhD at Yale in 2012. He held various teaching positions while completing his postgraduate work.
15. In 2011, the respondent advertised for applications for the "*Al-Bukhari Fellowship in the History of Islam in South-East Asia*", with appointment to take effect from 1 September 2012. The advertisement is at page 237 of the tribunal bundle, and includes the following:

*"The Al-Bukhari Fellow will be engaged in teaching, research and publication in the History of Islam in South-East Asia and its relationship with the wider Islamic world. The Fellowship is offered in association with the History Faculty at the University of Oxford.*

*The Fellow will be a full-time employee of the Oxford Centre for Islamic Studies responsible to its Director. The Fellow will be actively involved in the Centre's academic and social activities, and will be provided with office accommodation.*

*The Fellow's principal obligations will be to contribute to the Centre's teaching, research and publishing activities. General academic duties comprise engagement in research and publication to an international standard, and the provision of up to 6 hours of teaching (including tutorials) per week for the Centre. This may include the provision of courses. Fellows are expected to undertake a reasonable amount of administration in relation to their role. The Fellowship carries membership of the Centre's Common Room, and Centre Fellows are expected to play a full part in its academic and social life.*

*The Fellow will be recommended by the Faculty of History for appointment as an Islamic Centre Lecturer. This role carries an obligation to give up to 16 hours of lectures a year and a willingness to undertake examining and supervision duties.*

*The Fellow will co-operate in the work of the Faculty of History under the direction of the head of the Faculty. This involvement will include the provision of teaching to undergraduates and graduates on taught courses and the supervision of research students."*

16. The fact that the Al-Bukhari Fellow would also be expected to work at the History Faculty demonstrates the close connection between the respondent and the University of Oxford. However, it is clear that the appointee was to be employed by the respondent, not the University of Oxford.
17. The advertisement said, "*The Fellowship is subject to the satisfactory completion of an initial period of three years.*"
18. Application was to be by way of a letter, CV and the submission of three references. The claimant was interviewed by the registrar of the respondent,

Richard Makepeace, a professor in the history faculty and a professor from Duke University.

19. The claimant was not the first choice for the Fellowship. The respondent's first choice was Dr Feener (of whom more will be heard later), but he could not be appointed as he would not be released by the institution he was then contracted to. On 20 January 2012 Richard Makepeace wrote to the claimant offering him the appointment. He took up the position from 1 October 2012, along with the associated responsibilities in the history faculty. Shortly after taking up his role, he signed a contract of employment containing the following terms (page 286):

*"1.2 you are required to perform such duties as the Director may assign to you from time to time, which duties are consistent with your position as may be determined by the Director, and which are within your capabilities.*

*1.3 without prejudice to the generality of clause 1.2, your primary role and responsibilities will be to:*

- fulfil a central role in the intellectual life of the Centre;*
- make a significant contribution to learning and teaching, consistent with the Centre's learning and teaching priorities, to include the preparation and conduct of designated centre seminars, workshops, conferences and other events and programs in support of the Centre's objectives;*
- provide teaching for the Centre for up to an average of six hours per week in each week of Full Term. This might include tutorials and other supervision;*
- undertake research and publication of an international standard, consistent with the Centre's research priorities and to include the preparation of bids for funding;*
- contribute to the Centre's publishing activities;*
- contribute to the preparation and conduct of Centre research projects, where appropriate securing funding from an appropriate external grant-awarding body in order to conclude the research up to and including publication;*
- supervised research students, as may be assigned by the Centre or the Faculty;*
- serve on the Centre's Committees as invited to do so;*
- participate in and promote academic and social activities which contribute to the collegiate life of the Centre;*

- *be involved in Centre events and assist in its external relations;*
- *cooperate in the work of the Faculty of History, under the direction of the Chair of the Faculty;*
- *fulfil specific obligations relating to your post, as detailed in the Further Particulars.”*

20. The duration of the appointment is described in the following way:

*“your appointment is for a fixed term of five years from 1 October 2012, subject to ... earlier termination in accordance with clause 3. The Centre may, but is not obliged to, offer renewal of your employment for a further fixed term of five years or for such other period as the director thinks fit. Evidence of a satisfactory standard of teaching and of substantial progress in research are prerequisites for an offer of continued employment after the initial period of five years.”*

21. Clause 3 allows either party to give three months’ notice to terminate the appointment, which if given by the claimant must be notice to expire at the end of an academic term. Further provisions allow for the respondent to terminate the claimant’s employment with immediate effect in some circumstances.

### **The first fixed term**

#### *Introduction*

22. One of the matters the tribunal has to consider in this case is the application of employment law principles to a relationship of employer-employee that did not operate on conventional terms. The claimant was obliged to carry out teaching work for the Faculty of History, which he appeared to undertake entirely to his and their satisfaction. He had obligations to teach at the respondent but it does not appear that he was ever called upon to carry out those obligations. Apart from teaching for the Faculty of History his time was almost entirely his own to do with as he saw fit in pursuit of his own research interests and his development as an academic. He had to submit brief termly reports of his publication and other activities to Mr Makepeace, but these were in the form of brief lists rather than something demonstrating overall development towards a particular goal. His contact with Dr Nizami and Mr Makepeace appears largely to have amounted to contact in the course of social life at the respondent. Even by the time of the hearing there appeared to be some doubt as to who he actually reported to at the respondent – whether that was Mr Makepeace or Dr Nizami. Broadly speaking the position appears to be that up to the point that renewal of his contract was considered the claimant was left entirely to his own devices and without any supervision or accountability within the respondent.

23. What evidence we heard in relation to the period up to consideration of renewal of the claimant’s contract amounted largely to anecdotes relied upon by both parties. These were put forward as evidence in support of their later contentions that the refusal of a second renewal of the claimant’s contract either must have been a matter of discrimination or could not have been a matter of



discrimination given the favourable way in which he had previously been treated. We will consider the detail of this so far as is necessary in our discussion and conclusions.

*Probationary period*

24. The claimant's successful completion of his one year probationary period was confirmed by a letter from Mr Makepeace dated 6 June 2013 (page 296).

*Mid-term review*

25. In summer 2015 the claimant was invited by Mr Brown to submit material and name referees in relation to a "mid-term review". He did so, although no steps were taken in relation to what the claimant then submitted.

*Age-related comments*

26. The claimant gave evidence in relation to a number of occasions in which he said he (and others) had been asked their age by Dr Nizami or others or had had their age commented on by Dr Nizami or Mr Makepeace.
27. The first of these was within a few months of him starting, where he says he was directly asked his age by Dr Nizami. He says that he was so disturbed by this that shortly afterwards he attended a UCU workshop on his rights, making enquiries about age and marital status discrimination.
28. The second is that in January 2013 Mr Makepeace said "*good boy*" to him on learning that he had been listed on the Register of Congregation.
29. The third was that in January or February 2013 on a bus ride into work he had told Mr Makepeace that he was uncomfortable with Dr Nizami having brought up his age, and "*my [that is, the claimant's] reading of his reaction was that he recognised my age as a matter that had been discussed in the building*".
30. The fourth was that in March 2013 a member of the Centre's International Academic Advisory Board had asked him his age and commented on how young he was, along with how young the Centre's staff more generally were. He says that he raised this point directly as a complaint with Dr Nizami.
31. The fifth was that in June 2013 he had been cautioned by both Mr Makepeace and Dr Nizami that, because of his age, he would be "*lead down the garden path*" by Oxford colleges with whom he had been seeking an appointment.
32. The sixth was that in March 2014 in a meeting with Mr Makepeace and Dr Nizami during which the claimant challenged the research support given to academics at the Centre he was told by Dr Nizami that someone of his age was in no position to evaluate the appropriate level of research support.
33. The seventh was that in April 2014 Mr Makepeace "*raised my age in explaining why he considered it inappropriate for me to pursue college affiliations on my own*".

34. A further alleged age-related comment (in December 2016) is itself the subject of a specific allegation of age discrimination and we will address that later in this decision.
35. In response, Dr Nizami denies having asked these questions or making these comments. He points to what he says was favourable treatment given to the claimant, and says that his age was never discussed within the Centre. He refers to correspondence following up on the discussion about research support which makes no mention of the claimant's age or experience. Mr Makepeace responds in a similar manner. We will address these alleged comments in more detail in our discussion and conclusions, when considering the claimant's claim of age discrimination.

*Sabbatical*

36. The claimant applied for two terms of sabbatical leave in the autumn (Michaelmas) term 2016 and the spring (Hilary) term 2017. This was granted by the respondent, albeit with Mr Makepeace commenting that two continuous terms of sabbatical was only granted on an exceptional basis (in this case because of the amount of time needed for the claimant to attend the necessary visas). The claimant spent this sabbatical on field research in Indonesia.

*The book*

37. A central point in the eventual non-renewal of the claimant's contract was the question of progress towards publication of his monograph: *Indonesia's Islamic Revolution*.
38. There was a consensus during the hearing that there would be a number of steps towards publication of an academic book such as the claimant's. These included:
  - a. An expression of interest from a publisher – hopefully a prestigious publisher with an international reputation.
  - b. Delivery of a manuscript to the publisher.
  - c. The publisher sending out the manuscript for review by leaders in the field. These individuals are called “readers”.
  - d. Favourable responses from the readers, or, if not favourable, suggestions for review and resubmission of the manuscript rather than outright rejection of it.
  - e. If suggestions for review and resubmission were made, revision and resubmission of the manuscript with a second round of review by readers.
  - f. On receipt of favourable responses from the readers, acceptance by the publisher for publication.
  - g. Physical publication of the book.

39. It was agreed between the parties that for the purposes of what follows the crucial milestone was (f) rather than (g). Formal acceptance for publication would suffice to demonstrate the academic credentials of the book. It was accepted that the step from that to physical publication of the book was outside the control of the claimant, and he could not be criticised for delays at that stage.
40. This book was to be based on or developed from the claimant's PhD thesis. It had been at least in the background right from the start of his fellowship with the respondent. In a document headed "research program" dated shortly after he joined the respondent (page 282) the claimant sets out:

*"1. Monograph: Indonesia's Islamic Revolution*

*(a) Building from the first half of my dissertation,*

*(b) Currently being edited, with hopes to present the proposal and/or draft to publishers at the AHA Conference 2013"*

In his list of research activities for Hilary and Trinity Terms 2013 he says there are *"ongoing negotiations toward publishing with Yale University Press."*

41. The first documented discussions with a publisher that we saw were in an email dated 18 February 2015 where the claimant follows up on a meeting he had had that same day with Lucy Rhymer of Cambridge University Press. In subsequent correspondence, Lucy Rhymer gives the claimant some pointers on the structure of the book and says, *"I think this is going to be a great book!"*. She asks the claimant for a timescale for submission of his manuscript, and in reply the claimant suggests submission by 1 September 2015. The claimant concludes:

*"In the end, what I aspire to is a book either out or coming out when I go up for review in summer 2017."*

42. On 23 February 2015 Lucy Rhymer agreed to this suggested timetable, saying, *"there's no rush from our perspective"* and *"all being well you should be in good time for publication by summer 2017."*
43. Thus by February 2015, the claimant had achieved the first milestone on the route to publication – he had had an expression of interest from a prestigious publisher.
44. On 17 August 2015 the claimant wrote to Lucy Rhymer to say that he would not be able to meet his 1 September 2015 deadline. Lucy Rhymer immediately replied to say that the delay was not a problem, but that he should aim to submit his manuscript by early 2016 if he wanted to be published by summer 2017. Remarkably, the claimant's next email to Lucy Rhymer was on 1 October 2017, over two years later, at which point he says the manuscript is ready for submission.

#### **The renewal of the claimant's fixed term**

45. On 8 February 2016, about 3½ years into his initial five year fixed term, the claimant wrote to Mr Makepeace, saying:

*“Dear Richard*

*It is my understanding that I am about one year out from a review of my performance so as to determine whether my employment with the Centre will be renewed. My contract specifies that ‘evidence of a satisfactory standard of teaching and of substantial progress in research are prerequisites for an offer of continued employment’ and designates that the activities listed as ‘my primary roles and responsibilities’ will ‘be considered as part of any appraisal system’, but does not make any clarification about the mechanisms or procedures of evaluation.*

*... I am requesting to know the standards by which I will be evaluated and the procedures that will be used in the evaluation. This seems especially relevant because no formal or informal feedback was given at the end of my probationary period, nor did I receive any formal or informal feedback from the mid-term review ...*

*... I have great hopes that you or the Assistant Registrar will be able to provide clarification on this issue before the start of Trinity Term 2016. I think it is important for me to receive timely notice of the standards and procedures of evaluation, first so that I can reach the standards to the best of my abilities, and second so I can work to follow the procedures despite the fact that I will be on sabbatical research in Indonesia throughout most of the 2016-17 academic year.”*

46. Mr Makepeace replied two months later, on 4 April 2016:

*“Dear Kevin ...*

*The fundamental constitutional position is that the Director manages the Centre on behalf of, and under the direction of, the Trustees. This applies to all aspects of the Centre’s work, including decisions relating to academic appointments ...*

*The Director normally deems it in the Centre’s best interests to consult and seek the advice of outside experts on academic matters, whether through the Centre’s range of standing advisory committees ... or on an ad hoc basis.*

*... it is the Director’s practice to canvass a wide range of opinions and to seek advice, formally and informally, though he is not required to do so, nor is he bound by such advice as he may receive.*

*In considering the extension of an academic appointment, it is the Director’s practice to take into account a number of broad considerations, including but not limited to:*

- *The academic achievements of the Fellow whose appointment is under review, including progress in research, publication and, where applicable, teaching;*
- *The value placed on the Fellow's work by any faculty, department or college with which the appointment may have an association;*
- *The Fellow's contribution to the Centre's broader interests and development, including its academic management;*
- *Any specific contributions to the Centre's academic activity, for example through the initiation of externally funded research projects and collaborations;*
- *The Fellow's potential future contribution to the Centre's work and academic reputation.*

*... the precise terms of your employment by the Centre are to be found in your contract of employment, which runs until 31<sup>st</sup> October 2017, after which the Centre may choose to renew the appointment."*

47. A couple of weeks later, on 20 April 2016, Mr Makepeace wrote to the claimant saying:

*"Further to my email of 4<sup>th</sup> April, it would be timely now please to provide (to the Assistant Registrar) any updates or supplementary information about your academic activities and achievements, which would wish to be taken into account in addition to the materials you submitted to him on 4<sup>th</sup> June 2015 [the mid-term review materials referred to above]"*

48. The claimant replied to this on 22 April 2016, expressing concerns as to how the Centre would assess his teaching, but saying, *"I will happily pass on material to Gordon to fill out his file. I will make those submissions, along with my termly report, by next Friday."*

49. On 3 May 2016 the claimant submitted his updated materials, including an updated CV, new reports about his work and articles either published or under review. In respect of his book, he says:

*"For the reviewers' further consideration: my manuscript should be ready for submission to Cambridge University Press (it has been invited by the Asia editor, Lucy Rhymer) by the end of June 2016. I am happy to provide the current draft if they find that useful."*

50. It is true that the manuscript had been invited by Lucy Rhymer, although the idea that the claimant would be in a position to submit it within a couple of months of 3 May 2016 appears at best to be hopelessly over-optimistic, given that it was not ultimately submitted until around a year and a half later.

51. The claimant sent a further update on his activities to Gordon Brown on 2 June 2016.

52. Unbeknownst to the claimant, on 3 June 2016 Mr Brown sent the claimant's CV and accompanying materials to four external reviewers for their opinion on the claimant's work. The reviewers were Professor John Sidel of the LSE, Professor Michael Laffan of Princeton University, Professor Nicholas Stargardt of Magdalen College, Oxford and Professor Tim Harper of Magdalene College, Cambridge. For reasons which are not clear to us, they were instructed to confine their review to the period from December 2012 to December 2015. Professors Sidel, Laffan and Stargardt replied during August and September 2016 respectively. These responses, and their equivalents on the second review, were subject to detailed analysis by the parties during the course of the hearing. On the whole Professor Sidel praises the claimant's scholarship, but more in the context of what he has the potential to achieve as opposed to what he had achieved to date. Professor Sidel says:

*“Overall, in my view, Kevin Fogg stands as a young scholar who has great potential to make significant contributions to our understanding of the history of Islam in Southeast Asia ... But it seems clear that Kevin still has some ways to go before he has firmly established himself ... To this end I would strongly recommend that the ... Centre ... try to identify ways to assist and enable him in terms of focussing his energies on the task of publishing his PhD thesis as a book with a respected university press ...”*

53. Professor Sidel recommends that the claimant be assigned a more senior scholar as a mentor.
54. Shortly prior to submitting his review, Professor Laffan wrote to ask Mr Brown if there was a copy of the claimant's manuscript in the materials, to which Mr Brown replies *“there was no draft”*. In his review, Professor Laffan describes himself as *“anxious”* and *“worried”* about the claimant's progress, and says that the claimant has focussed too much on publication in Indonesian journals as opposed to western peer-reviewed journals. He says that he would have expected to see parts of the book manuscript, and that *“based on what I have seen, Fogg's dossier would raise questions if he were up for renewal here [Princeton]. And while I don't doubt he would be renewed, if he were to continue producing work of this level then he would probably not obtain tenure.”*
55. The response from Professor Stargardt is much more limited than the response from the other two, and it does not appear that Professor Harper replied at all.
56. These reviews were not shared with the claimant.
57. On 1 November 2016 the claimant (while on his sabbatical in Indonesia) wrote to Mr Makepeace asking for progress on the review. On 15 November 2016 Mr Makepeace wrote to say *“I ... understand that the review process is well underway with the objective of reaching a conclusion by the end of this term.”* The claimant says that he will be breaking his Indonesian trip after the end of term to return to the UK, and suggests meeting with Mr Makepeace during the week of 12 December 2016. Mr Makepeace agrees to meet the claimant at 11:00 on 13 December 2016.

58. In a letter dated 9 December 2016 Mr Makepeace provides the claimant with the outcome of the review. The letter says:

*"[The reviewers] suggested that you would be well advised to aim to achieve more output and in more prestigious, internationally recognised journals, where your articles would be subject to more rigorous criticism and peer review. The reviewers also noted that it would be important in due course to be able to assess also the monograph planned on the basis of your doctoral thesis ...*

*The reviewers judged overall that, while you had made a positive start in academic work in Oxford in the period reviewed, there was more evidence required to demonstrate that you had fully established your academic status in the field, in particular in terms of your published work and that it was too early to offer a considered assessment of your academic contribution to the Centre.*

*The Centre has therefore considered how to take matters forward, given that your current contract runs until October 2017 and the reviewers have indicated that a further review should be undertaken before a firm conclusion on your academic performance can be reached. It is our view that it would not be practicable to achieve this in the timescale and in a manner fair to all parties.*

*I am therefore authorised to offer you an extension of your current contract for a further year i.e. until October 2018. This would enable a further, more conclusive, review to be undertaken in January 2018, which would enable the reviewers to take account of your additional academic activities, contribution and achievement over the two full calendar years of 2016 and 2017."*

59. Mr Makepeace's notes of his subsequent meeting (on 13 December) with the claimant show that he emphasised the need for the claimant to publish in "respected major international peer-reviewed journals". He encouraged the claimant to approach Dr Feener (who by then had taken up another position at the Centre) to act as a mentor for him and said that there would be a further review in January 2018. He records the claimant as replying that he had lacked "clear criteria on exactly what timelines he should be achieving in terms of these points", and contrasting the approach taken to that in the Centre which what he was used to from institutions in the USA.
60. The claimant's witness statement contains the following allegation in respect of what occurred at that meeting:

*"Seeing that I was upset, Mr Makepeace said "I know that this is a sensitive issue," and, as I recall his words that have haunted me in intervening years, "someone of your age cannot really expect to hold this kind of post." I believe that his intent was to calm the situation by suggesting that the poor review was a matter out of my control and not something for me to be ashamed of, as though I was never going to be able to fulfil the expectations for a much more senior scholar. The words indeed did not calm me down, but rather upset me more ... I believe I*

*even raised my voice in my response that he could not possibly be suggesting that my age was an appropriate consideration in this evaluation, and that perhaps he meant to suggest that he was concerned about my time since terminal degree (i.e., doctorate), but even this was a spurious justification for not making me permanent as a result of this review.”*

61. This allegation has been denied by Mr Makepeace since it was first raised by the claimant in correspondence from his solicitors in July 2018 (after he had been notified that his contract would not be renewed for a second time). In his witness statement, Mr Makepeace says that a comment of this nature (if made) made no sense in the context of that meeting, and that the claimant may have been mis-remembering a conversation he had with him about his prospects of getting a fellowship at an Oxford college. As this is one of the claimant's allegations of direct age discrimination we will address in our discussion and conclusions whether it occurred.
62. The claimant was plainly upset that his contract had not been fully renewed, and sought advice from his mother and father on the correct terms in which to respond to the offer of renewal for one year. During the course of these discussions he writes to his parents saying: *“I am feeling pretty sour about the idea that I have been held back in this process because I am not Muslim enough, straight enough, or British enough (unlike the previous fellow who sailed through the process on fewer publications and less teaching).”*
63. On 16 December 2016 the claimant wrote to Mr Makepeace, saying:

*“I regret very much that the reviewers were unable to recommend my research record ... and I especially regret that this has come out now in my fifth year in post. As you will recall, I have previously made formal requests to you and to the Centre's Assistant Registrar for the standards by which I will be evaluated in post. Unfortunately, these standards have not thus far been provided, so I hope it is understandable that I was not able to align my research agenda in accordance with them ... I continue to seek clear standards from the Centre so as to make this process more transparent ...*

*Notably, your letter of 9 December also constitutes the first formal (or, to my memory, informal) feedback on my teaching and research since arriving in Oxford ... One wonders if the disappointing outcome of this year's review might have been cleanly avoided had standards or feedback been provided at an earlier stage.*

*In light of the concerns on each side about the level of my research activity and the nature of this review process, I accept the Centre's proposal to extend my contract for another year and conduct a further external evaluation of my teaching and research as the best path forward.*

*In the coming year, I will endeavour to secure a contract on my book manuscript, publish in western journals ... and expand the breadth of my research ...”*



64. Mr Makepeace responded briefly, enclosing his notes of his meeting with the claimant.
65. We note that at this point:
- (a) The claimant has sought but not been given any real indication of the standards he was supposed to meet in his work.
  - (b) The respondent has taken no steps to review the claimant's work with him or provide any feedback ahead of this review.
  - (c) The claimant has been very slow to make progress on his book, apparently prioritising his work in Indonesia over his development of the book.
  - (d) The extension was said to be to allow a further period of time for assessment of the claimant's work, without any indication being given of what was required of him in order for a further extension to be granted. The only mention of the book (which later became the central point of concern) by the respondent in Mr Makepeace's letter is where he says "*The reviewers also noted that it would be important in due course to be able to assess also the monograph planned on the basis of your doctoral thesis*".
66. On 22 May 2017 Gordon Brown wrote to the claimant to formally extend his contract by a year to 30 September 2018.
67. As referred to above, on 1 October 2017, after a break of more than two years, the claimant resumed his correspondence with Lucy Rhymer about his book, saying he had now completed the manuscript. Lucy Rhymer was still willing to accept submission of the book, and on 9 October 2017 notified the claimant that she had commenced the peer review process for the manuscript. Points (b) and (c) of the publication milestones outlined above had now been achieved.

### **The decision to refuse a further renewal of the fixed term**

#### *The Faculty of History and the claimant's teaching*

68. In anticipation of the further review of the claimant's position, the Chair of the Faculty of History wrote in October 2017 to Dr Nizami in praise of the claimant's teaching at the faculty and offering assistance in any review of the claimant's position. Dr Nizami replied with some questions, to which the Chair replied in November 2017, concluding:

*"It is always invidious to make comparisons between colleagues, but I would confidently grade Kevin's performance as equivalent to our postholders reaching the conclusion of their initial period of office (normally a five-year period). The one anxiety which I did have was about the speed of the transition of his research to published form; but the acceptance of his article by Modern Asian Studies and the completion of his book manuscript for CUP have categorically dismissed that anxiety. In particular, I was very pleased when Kevin informed me in October that*

*he has submitted the book manuscript. I imagine it might be a period of time before CUP responds, but I have always been confident that, once it was submitted, the manuscript would proceed to publication without difficulty.*

*I do of course appreciate that you will have your own criteria for assessing ... performance ... but I would like to emphasise that, in terms of his role in the Faculty, I have no hesitation in recommending his reappointment. He has been an exemplary member of this Faculty, and one who we have come to appreciate enormously."*

69. It is not in dispute that the claimant's teaching work was of high quality and he was highly regarded by the Faculty of History for his work with them.

*The claimant's contribution to the review process*

70. On 11 December 2017 Gordon Brown wrote to the claimant asking for a copy of his CV, published material and "a formal report on your activities" by 5 January 2018. This was accompanied by a one-page outline of the appraisal process. This provided for the appointment of a review committee, the provision of a report by the post-holder and reviews by external assessors, which would then be discussed between the post-holder and the review committee. The review committee would then provide a written report to the Centre. The process says that:

*"Assessment will be against the criteria of (i) research and scholarship, (ii) teaching and support for learning and (iii) contributions to the Centre. In assessing (i) research and scholarship, evaluators will consider peer review, books and articles published, reviews, conference papers, acting as a referee for papers and receipt of research grants."*

71. The claimant appears to have been taken by surprise by this, and again sought advice from his parents. Following this, he wrote to Mr Makepeace on 13 December 2017 criticising the process (which he said he had not been notified of before) both in terms of the short period of time he had been given to reply (especially over the Christmas and New Year holiday period) and on the basis that it appeared to be a review of his entire period of work (rather than just his work since the previous renewal and feedback given then) and added in further criteria not previously mentioned, such as "contribution to the Centre". Nevertheless, he committed to produce the materials required by Mr Makepeace. Mr Makepeace replied with a brief acknowledgement.
72. On 5 January 2018 the claimant submitted his portfolio in response to the request from Mr Makepeace. Mr Brown asked for this to be reordered, and the claimant resubmitted it on 16 January 2018. This included a detailed CV setting out his publications and research activities.

*The external reviewers*

73. On 19 January 2018 letters were sent from Dr Nizami to Professors Laffan and Sidel with requests for review of the claimant's work. The same letter was also sent to Professor Anthony Reid of the Australian National University. On 7

February 2018 Gordon Brown wrote to these individuals asking for a response by mid-March.

74. Prof Sidel says that he was directly approached by Dr Nizami about this review towards the end of 2017, with Dr Nizami phoning him to ask if he would be willing to undertake this review. He then says:

*“Dr Nizami said something highly unusual, irregular and, to my thinking at the time ... highly inappropriate. I cannot recall the exact wording, but it was something along the lines of ‘there is no need to soft-soap it’ or ‘there is no need to be overly diplomatic in my assessment of Dr Fogg’s scholarly work. Dr Nizami then specifically invoked Dr Johan Meuleman ... noting that he had provided ... a dismissive or derisive set of comments about Dr Fogg’s work, something along the lines of ‘he doesn’t think much of ... [him/it]’. The clear implication of this highly unusual verbal communication was that he was encouraging me to provide a critical or negative assessment of Dr Fogg’s scholarly work. It was clear from the tone, the substance and the nature of the conversation that this was the message he wished to convey (and the purpose of the telephone call in the first place).”*

75. He similarly describes Dr Nizami as “*trying to influence me in a negative way*” in an email exchange with the claimant on 10 June 2019.
76. Prof Sidel goes on to say that he was not paid for this second review, although he had been for his first review (he regarded being paid for this work as being unusual).
77. In response to this, Dr Nizami said that Prof Sidel was a professional acquaintance who he had met a couple of times and who was an occasional contributor to the journal Dr Nizami edited. He accepted that he had phoned Prof Sidel about this second review, but put the date of this as being some time after a meeting of the Centre’s personnel committee on 7 January 2018. He denied having used the expressions attributed to him, but accepted that he may have asked Prof Sidel to give a frank opinion on the claimant’s work. He said that he (Dr Nizami) was keen that any reviews should be with the Centre in time for the review process to be completed. He said that Johan Meuleman was an academic who had previously held the Albukhary Fellowship but who had returned to the Netherlands around 2005/6, since when he (Dr Nizami) had had no contact with him other than learning that he had died in late 2015 or early 2016.
78. It is therefore agreed that there was a phone call between Dr Nizami and Prof Sidel prior to the formal invitation for review being sent to Prof Sidel. We also accept that during that call Dr Nizami invited Prof Sidel to give a frank opinion on the claimant’s work. We note that Dr Feener approached Prof Laffan in very similar terms in email that appears at p106 of the tribunal bundle. However, we do not accept that in doing so Dr Nizami invoked the adverse opinion of Dr Johan Meuleman as described by Prof Sidel. It was not disputed at the hearing that Dr Meuleman had died as described by Dr Nizami, and so would not have been in a position to offer any recent view on the claimant’s scholarship. In this

specialised field, Dr Meuleman may have been known to Prof Sidel, and Dr Nizami would not have taken a chance in invoking the opinion of a scholar who Prof Sidel may well have known to be dead.

79. Prof Sidel submitted his review on 19 February 2018. He warmly praises the claimant's work, describing his forthcoming article in the prestigious journal "Modern Asian Studies" as being "*something of a 'coup' for Kevin*", and commends the claimant's as yet unpublished book manuscript as "*a coherent and compelling picture of Islam as integral to the making of Indonesian independence*" and says "*there is no doubt in my mind that the book will be published, that it will become the definitive account of Islam in the Revolusi and that it will mark Kevin Fogg as one of the handful of most important historians of Islam in modern Indonesian history*". Despite his praise of the manuscript, Prof Sidel goes on to express some reservations. He says:

*"... it is clear that there is a major lacuna in his profile and record, namely the delayed revision, submission and publication of the book manuscript based on his Yale PhD thesis ... it is awkward and unfortunate that the timing of the current evaluation is such that the publication of Kevin's first book still hangs in the balance. It seems to me that there may well be an argument for an extension of the renewal process [pending publication of the book]."*

80. Prof Sidel concludes:

*"... the review process for the renewal of Kevin's appointment should be extended to allow for the decision on publication of the book by Cambridge University Press, with the reviewer's letters hopefully providing assurances as to the prospects not only for publication but for reception and recognition of the book among specialists in the field."*

81. The extent to which the claimant should have realised the need to press on with publication of his book became a central issue on the subsequent non-renewal of his contract. The respondent appeared to be relying on an unwritten principle that a historian such as the claimant should have a monograph published (or formally accepted for publication) within their first period of employment. This received strong support from Prof Sidel in his oral evidence, where he described such publication as "*crucial*" and said "*I would have expected [the book] to be published by the end of his review period.*"
82. On 27 February 2018 Dr Nizami wrote to Prof Aspinall in the same terms in which he had written to Profs Sidel, Laffan and Reid. Dr Nizami said that this (and the later letter to Prof Liow) were done as a precaution in case any of the original three reviewers did not respond or did not respond in time.
83. On 3 March 2018 Prof Reid replied to Dr Nizami. Prof Reid praised the claimant's work with Indonesian institutions and journals, and his engagement more generally with institutions in south-east Asia. He said that his book "*will undoubtedly give him the impact in global scholarship that he deserves*" and "*he fully merits renewal in this position*".

84. On 13 March 2018 Dr Feener wrote to Prof Laffan – apparently at the request of Dr Nizami – pressing him for a response on the claimant’s review, and saying “*there is ... no need for you to draw out your report to be very long. ... we need ... just an honest assessment as to how you see his work having progressed since your last review of his file, and what you would envision his prospects to be for future work – something short and honest.*” Prof Laffan replies saying that he will get to the review.
85. Around this time, Dr Nizami wrote to Professor Joseph Liow of the Nanyang Technological University, Singapore, in the same terms as he had written to the other academics, asking him to review the claimant’s work.
86. On 23 March 2018 Prof Aspinall provided his review to Dr Nizami. This contains strong praise of the claimant’s work, but also with some reservations about his publication record. He says:

*“I see from the documentation submitted by Dr Fogg that he was directed at the end of 2016 by the Centre to focus on publications in leading international journals and publishers. It is certainly true that his output in this regard has not been prolific. Within five years of submission of a PhD and beginning a postdoctoral fellowship in my department ... we would expect a book based on the dissertation either published or in press, significant progress towards a second book, as well as, on average, at least one article in a highly-regarded journal or an edited volume in a university press per year, in addition to a steady flow of outputs in less international recognised venues. Between 2012 and 2017 Dr Fogg produced one article in a leading international journal ...*

*Such a publication profile would not be regarded as ideal in my institution. However, there are several important ameliorating factors here, the most obvious and important of which is the quality of the outputs he had produced. The book manuscript is the lead example ...”*

87. Prof Aspinall goes on to commend the claimant for his commitment to collaboration and publication in Indonesia, and says “*it is obvious from the documentation submitted for this review, that he took the Centre’s instruction in late 2016 very seriously and that he dramatically changed the nature and pace of his output from that point*”. He concludes that there are “*strong grounds for a renewal of his fellowship, and I would certainly recommend such an outcome were he undergoing evaluation at my own university.*”
88. On 27 March 2018 Prof Laffan writes informally to Dr Feener saying “*Been trying to read Fogg again [this must be a reference to the claimant’s manuscript] ... it is bad. Really poorly written and not convincing. Every few pages I have to stop. There is no critical distance. I don’t understand how he got the job at Oxford.*” Dr Feener replies that the Centre simply wants “*your honest evaluation*” of the claimant’s work.
89. On 30 March 2018 Prof Laffan replies to Dr Nizami. While noting that since the previous review the claimant had written two “*quite good articles*”, Prof Laffan focuses on the book manuscript as “*little else has changed since I last examined his file*”.

90. Prof Laffan is not happy with the book manuscript, and says “*I was not very satisfied with much of what I read*”, and offers a page-long critique of the work including identifying “*frequent mistakes*” in terminology. Prof Laffan does not offer a view on whether the claimant’s fellowship should be renewed. The closest he comes to that is saying “*Dr Fogg knows his history, but he needs more help to make it legible to the rest of us. Whether he has that time is very much in your gift, I would imagine.*” He says “*I was perturbed by the occasional scrappiness of his CV which, like much of the first half of the book manuscript, needs more care and attention.*”
91. On 4 April 2018 Prof Liow responds with his review. In contrast to some of the others, he says “*a completed draft of a book manuscript within five years of an American PhD dissertation is ... a decent accomplishment*”. In saying this he distinguishes between the traditional American PhD and one prepared under British traditions as applied in the UK, Australia and Singapore. He says a PhD in the British tradition lends itself more readily to conversion into a book manuscript. He describes the book as “*impressive*”. He says that the claimant must focus on getting that published and to present at international conferences outside Indonesia. He concludes “*I recommend strongly that he be renewed*”.

*Developments with the claimant’s book*

92. On 5 February 2018 the claimant received some bad news in relation to his book. Lucy Rhymer wrote to the claimant enclosing the reports of the two readers she had sent his manuscript to, anonymised as “Reader A” and “Reader B”. She says:

*“As you will see, the readers come to two different conclusions – which is not unusual. I hope you will find the reports useful as you continue to think about the ms. I’m afraid that I need two reports supporting publication in order to move to the next stage and so I am unable to do so on the basis of the reports we have. In those circumstances we would usually go to a third reader, noting that this will take time and there is no guarantee as to the outcome.”*

93. As Lucy Rhymer says, the readers are divided over the manuscript. Reader A criticises it in terms similar to the criticisms expressed by Prof Laffan, concluding “*this work would require major revisions to be considered an original research contribution*”. By contrast, Reader B considers the book to be “*a superlative piece of scholarship*”.
94. The claimant accepted in his oral evidence that this was a blow to his hopes of a commitment to publication ahead of his review. He replied to Lucy Rhymer the same day suggesting that he produce a revised draft for consideration by a third reader, and submit that draft by 15 April 2018. Lucy Rhymer agrees to this.
95. The claimant did not meet this self-imposed deadline, eventually submitting his revised manuscript on 18 June 2018.

*The review committee*

96. On 23 April 2018 letters were sent to the three individuals who would make up the review committee. The review committee was given the task of making a recommendation to the Director on renewal, with the options being no renewal, renewal for the standard period of seven years or renewal for a shorter period. Various supporting materials were provided to the committee by Gordon Brown, but so far as the reviewers were concerned the committee was only provided with the reviews produced by those originally invited to review the claimant's work – Profs Sidel, Laffan and Reid, and not those later invited to review the claimant's work – Profs Aspinall and Liow.

97. At the same time the claimant was sent a letter inviting him to a meeting with the review committee on 10 May 2018. On receipt of this he sought support from his union, saying:

*“The Centre has done numerous dodgy things through this process. For example, at both of my previous reviews, my age had been raised; the Centre has refused to let me see external evaluations or the instructions given to external evaluators; the Centre only set its guidelines for this reappointment review less than a month before I had to submit my dossier – therefore too late for me to add anything substantive to treat the new categories introduced in the guidelines.”*

98. This is the first reference the claimant has made to his age being an issue for the Centre.

99. The review committee comprised Dr Feener and Dr Afifi Al Akiti – colleagues of the claimant at the Centre – and Professor Bruce Lawrence of Duke University.

100. The UCU assigned Terry Hoad (formerly a senior official of the union) to assist the claimant. They met on 4 May 2018 to discuss the situation.

#### *The review committee's report*

101. The review committee met on 23 April 2018 for private discussions, and then on 10 May 2018 with the claimant. They produced what to us appears to be a thoughtful and fully considered report, dated 21 May 2018. The claimant does not criticise the review committee, reserving his criticism for Dr Nizami's response to the committee's report, and the limited information (three reviews rather than five) that the committee were provided with.

102. The committee say, amongst other things:

*“... we ... devoted considerable attention to the state of his monograph, as that appears to be the major expectation which he has not yet met ...*

*When asked about the current state of his monograph, he informed us that since submitting his original file for review he has heard back from Cambridge University Press on the two peer reviews that they received on the MS, but at a very slow rate. While one was very favourable recommending publication the second asked for some significant revision and resubmission for further review, and that second review was not submitted till end of Feb 2018. (The manuscript had been sent out*

*mid-October 2017). Dr Fogg has since worked to address the critical comments of the second reviewer. As they were extensive, he did not resubmit the text to CUP for further review till early May. As it is currently with the Press, we are not yet able to determine the final decision on publication, but we are encouraged by the progress of the project – pending further information on the review process.”*

103. Pausing there, we note that the dates the committee were given (which can only have come from the claimant himself) were wrong. The claimant had been notified of the views of the readers in early February 2018, so it was not true that the second review was not submitted until the end of February 2018. The report also appears to suggest that the claimant had already at that point resubmitted his text, when this did not happen until the middle of June, a month after the committee met with the claimant.

104. The committee goes on to address the claimant’s achievements by reference to the job description set out in his terms and conditions of employment. Their only criticism is in relation to the claimant’s research output – primarily the book. They say:

*“Concern remains, however, over the state of his monograph. This was something signalled prominently in the report of the Registrar on his meeting with Dr Fogg as part of his interim academic review in 2016. The Centre has agreed to extend Dr Fogg’s term by an extra year (to 30 September 2018) to allow him to publish his monograph. Since then, Dr Fogg has submitted a complete MS to Cambridge University Press, where it has been under peer review since October 2017. Since it is understood that the timeframe for review and publication with such a major academic press can cause some delay, the Committee now requires further information on the status of this publication in order to formulate its recommendation on his case.”*

105. The committee go on to note the “*inconclusive picture*” presented by the differing opinions of the three reviewers whose reviews they have been provided with. They say:

*“The Committee considers the publication of the monograph to be an absolute requirement which would need to be met in order for Dr Fogg to be confirmed in his present position at the ... Centre.”*

106. The Committee’s formal recommendation to the Director is expressed as follows:

*“Taking into account all of the above as well as the substance of our conversation with Dr Fogg during the Review Committee interview on 10 May, we would recommend an extension of his contract for a period of one further year, but with a strong caveat. During the next year the onus would be on Dr Fogg to have his monograph published. The Committee should be kept up to date on progress toward this, and would need to have some confirmation of the situation by April 2019 so as to be able to advise on whether or not he would be confirmed in his post at the Centre.”*



*Dr Nizami's decision*

107. On 11 June 2018 the claimant was provided with a copy of the Committee's report. He was summoned to a meeting with Dr Nizami to discuss the report, to be held on 14 June 2018. The accompanying notes made it clear that the purpose of the meeting was to consider the continuation of his contract with the Centre.
108. The meeting took place on 14 June 2018 as intended. Gordon Brown was present to take notes. From the notes it appears that the meeting was a brief one. Dr Nizami gives the claimant the opportunity to comment generally on the Committee's report, and asks him "*what is the progress of the manuscript?*" to which the claimant replies "*the manuscript was submitted in December 2017. Feedback was split and I have taken time to make provision now to prepare for a third review. I believe it may be a two to three month timescale.*" There is further discussion about the work of the Centre more generally. The claimant later says "*the book should now be with the third referee*", to which Dr Nizami replies "*it may not go to plan*". The claimant agrees with this observation.
109. As with the previous examples, the claimant is at best disingenuous in his response on progress with the book. Nothing had been submitted in December 2017, and he cannot have thought that the book was with a third referee as he had, at the time of that meeting still not submitted his redraft of the book. It was submitted a few days after his meeting with Dr Nizami.
110. On 24 June 2018, following receipt of the notes, the claimant prepared some corrections to the notes, including a comment that "*the report omits Dr Fogg's note that he has already completed revisions on the manuscript in light of reviews and resubmitted the manuscript to Cambridge University Press*". That was not true at the time of either the Review Committee's report or his meeting with Dr Nizami.
111. Dr Nizami wrote to the claimant on 22 June 2018 with his decision. While he makes other points, the book is clearly the central issue in the letter. We set out Dr Nizami's comments on this in full:

*"... my major concern is that your first book remains unpublished. One of the main purposes of the initial period of appointment is to enable you to display sufficient progress in research; a crucial element of which involves the publication of books. Your interim review in October 2016 recognised that it would be important to be able to assess your monograph in order to make a decision on whether to renew your appointment to the Fellowship on the expiry of the initial period of appointment. Your initial appointment was extended by one academic year to give you an opportunity to address this issue and, I note, you took a sabbatical over the academic year 2016/17 to give you time to focus on research.*

*When I asked you about the progress on your manuscript, you informed me that it had been submitted towards the end of last year to Cambridge University Press, but feedback was split. As a consequence you made revisions to the manuscript and are awaiting a third review. You could*

*not provide an exact time estimate for when it was likely to occur, but stated it could be 2 to 3 months. In reaching my decision I have taken particular note of the comments of the three external reviewers in relation to the non-publication of the book namely:*

*Reviewer 1:*

*'... I was perturbed by the occasional scrappiness of his CV which, like much of the first half of the book manuscript, needs more care and attention. I must confess that seeing Dr Fogg admit to having articles rejected was already disheartening, and was particularly confused by the contradictory statements about where his book might find a home. There was some initial confidence about Yale University Press, though now I see it is under consideration with Cambridge. Not wishing to gainsay the reviewers' reports for either press, or to place too dark a cloud over Dr Fogg, I have to say I was not satisfied with much of what I read. The chapters are often short and underdeveloped, and not necessarily offered in a way to give a clear sense of the overall arc of the project.'*

*Reviewer 2:*

*'If he had been an untenured Assistant Professor desperate to get time from teaching to prepare for his tenure review, he would undoubtedly have been more self-centred and focused on publishing the thesis and getting a few articles into prestigious journals.'*

*Reviewer 3:*

*'... it is clear that there is a major lacuna in his profile and records, namely the delayed revision, submission and publication of the book manuscript based on his Yale PhD thesis. There may be reasons for the delay on this front, but they have not been made clear to this reviewer, and they were likewise not flagged at the time of the earlier request or an interim evaluation of this work in mid-2016. But it is certainly awkward and unfortunate that the timing of the current evaluation is such that the publication of Kevin's first book still hangs in the balance.'*

*In the light of the above, I considered the Review Committee's recommendation to extend the initial period of appointment by a further year to give you further time to get the monograph published. However, for the reasons set out below, I have decided not to adopt this recommendation.*

*Ordinarily I would expect an academic working at your level to have achieved publication of their first book within the normal five year term of an initial appointment. I am mindful that you have:*

- had an extended initial period of appointment of six years;*
- during your six-year term benefited from a sabbatical to enable you to focus on research; and*

- *have not put forward any personal mitigating circumstances to explain why your monograph has not been published within the extended fixed term.*

*I note that you are not able to provide any definitive time estimate as to when Cambridge University Press might publish your monograph or confirm that it definitely will be published.*

*In the circumstances I have reluctantly come to the conclusion that, in respect of the research element of your role, you have failed to display sufficient progress over the initial period of appointment to enable me to justify extending your fixed term appointment.*

*Your employment with the Centre will therefore end on the expiry of your current fixed term of appointment with your last day of employment being 30 September 2018.”*

112. On receipt of this the claimant sought advice from his trade union, submitting a summary of his employment along with a “confidential addendum”. In the summary he says:

*“Despite my repeated written and oral requests for the standards and expectations for reappointment, no standards were provided. The requirement to publish a monograph was not in any standards from OCIS, nor was it made clear at the conclusion of my probation nor after my mid-term review, nor has it been applied to my two immediate predecessors reviewed for reappointment as ... Centre Fellows. Only in the Director’s dismissal letter of 22 June 2018 did OCIS present the publication of a monograph as a sine qua non for reappointment.”*

113. The claimant went further in his “confidential addendum”, saying:

*“I find it relevant that I am a white, American, Christian man in a homosexual relationship. The Director ... has in the past publicly and repeatedly raised my race, age, national origin and religion in the assignment and evaluation of my work in OCIS. Other employees have experienced similar treatment. He has not explicitly raised my sexual orientation, but he has made statements disparaging homosexuals to staff members and undertaken actions discriminatory towards homosexuals in his administration of OCIS.”*

114. At the request of the claimant his time to appeal Dr Nizami’s decision was extended to 9 July 2018, and he submitted his appeal on 9 July 2018.

### **The claimant’s appeal**

115. Little depends on the claimant’s appeal. No complaint is made of discrimination in respect of the conduct of the appeal. The claimant criticised various aspects of the appeal process on questions of fairness, but as will appear from our discussion and conclusions, we consider these are not significant when compared to questions in relation to the fairness of the original decision to

dismiss the claimant. We will therefore only briefly address the facts in relation to the appeal.

116. The claimant submitted his appeal on 9 July 2018. It was to be heard by Prof Sir David Clary, a distinguished scientist who was chair of the academic committee of the Centre's trustees. The claimant sets out his appeal under three broad headings:

- "1. The Director's decision contravenes the recommendations of the Faculty of History, the majority of the external reviewers, and the Director's own internal review committee.*
- 2. The standard that the Director has used to justify the dismissal is not only against precedent but also was not communicated in advance of the review.*
- 3. The process of the review has been highly irregular and problematic."*

117. In his appeal the claimant indicated that he considered himself to be a permanent (rather than fixed term) employee of the respondent, by virtue of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. His appeal was accompanied by lengthy supporting materials.

118. On being contacted by Mr Makepeace about his availability to hear the appeal, Sir David gave two dates in July and two in August when he could hear the appeal, but with a preference for September where he had much better availability. Mr Brown wrote to the claimant offering a hearing on 6 or 7 September 2018.

119. On 16 July 2018 lawyers instructed by the claimant wrote to the Centre's lawyers with details of his appeal and also intimating for the first time that he considered the decision to be a matter of age discrimination. Correspondence continued between the lawyers.

120. On 9 August 2018 Dr Nizami prepared a lengthy response to the claimant's appeal.

121. The appeal took place on 7 September 2018. The claimant was accompanied by his trade union representative, Robert Gildea. Dr Nizami attended the hearing. Sir David had a bundle of around 1,000 pages for the purposes of the appeal hearing. The respondent's lawyers provided a notetaker. On 14 September 2018 Sir David prepared a document dismissing the claimant's appeal. It concludes:

- "1. Was there evidence before the Director, Dr Nizami, from which he could reasonably conclude that Dr Fogg had not fulfilled the objectives of his fixed term appointment as the Al-Bukhary Fellow.*

*The original terms and conditions of Dr Fogg's appointment stated that he was expected to 'undertake research and publication to an international standard consistent with the Centre's research priorities'. It*

*is clear, particularly from the reports of the external referees and the Review Committee, that there were concerns about Dr Fogg's inability to publish a monograph. This is the expected international standard in Dr Fogg's research field. I conclude that there was evidence for Dr Nizami to reasonably conclude that Dr Fogg had not fulfilled all the objectives of his fixed-term appointment as the Al-Bukhary Fellow.*

2. *If there was such evidence, was it reasonable to conclude that the fixed term appointment should not be renewed.*

*Dr Nizami needed to consider all the evidence available including the reports of the History Faculty, the external referees and the Review Committee. He also needed to make sure the international standard of Dr Fogg's research output was consistent with the Centre's research priorities as stated in the original contract. Another factor in the decision was that Dr Fogg had already been granted a one year extension of his contract to allow for the publication of his book. It was therefore reasonable for Dr Nizami to conclude that the fixed term appointment should not be renewed for another extra year.*

3. *Was a fair process followed in reaching the decision not to renew the appointment.*

*Appropriate procedures were applied including reviews and external assessment. The process followed in reaching the decision not to renew the appointment was fair.*

4. *Was the decision not to renew the appointment discriminatory on grounds of age.*

*Neither Dr Fogg nor his representative put any evidence before me to suggest that the decision not to renew the fixed term appointment was discriminatory on grounds of age. I had invited them to advance such evidence given the allegation of age discrimination had been made on Dr Fogg's behalf by his solicitor. I am satisfied that Dr Fogg's age has no relevance or bearing on the Centre's decision not to renew his fixed term appointment when it expired on 30 September 2018."*

### **The data subject access request and subsequent matters**

122. On 20 September 2018 the claimant made a data subject access request to the respondent (a "SAR" or "DSAR").

123. On 25 September 2018 Mr Brown wrote protesting at the breadth of the SAR. He asked for "*additional information about the context in which other information about you may have been processed and about the likely dates when processing data in which you are interested occurred*". The claimant replied, and on 16 October 2018 Mr Brown replied, enclosing five files of personal data but saying:

*"We are unable to provide you with a copy of the personal data you requested in accordance with our obligations under the law, namely*

*because disclosure would disclose person data about you and because we have been preparing to defend the Centre against legal claims threatened by you.”*

124. The claimant complained about this but Mr Brown stood his ground and no further material was provided in response to the claimant’s SAR.
125. The claimant undertook early conciliation between 21 September and 4 November 2018 and submitted his employment tribunal claim on 16 January 2019.

### **The book**

126. Following a positive review from the third reader, the claimant’s book was published by Cambridge University Press in late 2019.

### **The respondent’s equal opportunities policy**

127. The respondent has a two-page “*equal opportunities policy*” which is at pages 620-1 of the tribunal bundle. This broadly sets out a prohibition on less favourable treatment in respect of various protected characteristics (including age and sexual orientation). Despite being described as a “living document” it is dated June 2012 and appears to have been unamended since then. We were told there was a December 2017 version but were not provided with a copy of this.
128. As well as covering the usual protected characteristics, the equal opportunities policy extends to a prohibition on less favourable treatment due to “*length or type of contract (e.g. part-time or fixed-term)*”. During the course of the hearing Mr Brown accepted that he was the individual with responsibility for the policy, but was unable to give us any example of how that prohibition on less favourable treatment due to length or type of contract may actually be applied in practice.
129. Finally, we note that the respondent’s Royal Charter, prepared in 2011 and entered into in 2012, contains specific prohibitions on certain forms of discrimination, but not including age or sexual orientation discrimination.

## **C. THE LAW**

### **Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002**

130. Regulation 8 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 provides:
  - “(1) *This regulation applies where:*
    - (a) *an employee is employed under a contract purporting to be a fixed-term contract, and*
    - (b) *the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been*

*employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a).*

- (2) *Where this regulations applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph 1(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee if:*
- (a) *the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and*
  - (b) *the employment of the employee under a fixed-term contract was not justified on objective grounds:*
    - (i) *where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;*
    - (ii) *where that contract has not been renewed, at the time when it was entered into.*
- (3) *The date referred to in paragraph (2) is whichever is the later of:*
- (a) *the date on which the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed, and*
  - (b) *the date on which the employee acquired four years' continuous employment."*

131. This somewhat complex provision has the effect that the claimant is to be considered to be a permanent employee from the date his fixed-term contract was extended where that extension (on a fixed-term basis) was not objectively justified at the time it was entered into.

132. Ms Cullen referred us to Duncombe v Secretary of State for Children, Schools and Families [2011] IRLR 840 and the Supreme Court's reference there to recital 14 of the underlying directive setting out as its purpose to:

*"improve the quality of fixed term work by establishing the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed term employment contracts or relationships."*

133. By contrast, Mr Allen relies on what follows directly after that comment in the same judgment, where Lady Hale says:

*"... the substantive provisions of the Framework Agreement do not attempt to define the circumstances in which fixed term employment is*

*acceptable. Instead they concentrate on preventing or limiting the abuse of successive fixed term contracts, the abuse being to disguise what is effectively an indefinite employment as a series of fixed term contracts ...*

134. Mr Allen's point is that fixed term contracts, and even successive fixed term contracts, are not inherently an abuse of employee's rights. As he puts it, "*fixed term contracts can suit both employers and employees*".
135. Ms Cullen describes the question of objective justification in terms of proportionality (by reference to guidance given by the Department for BEIS) – was there a legitimate objective, is it necessary to adhere to that objective and is the measure adopted an appropriate way to achieve that objective.
136. Enforcement of this provision is by applying to the tribunal for a declaration under regulation 9(5). The question of whether the claimant is a permanent employee also arises in the context of his unfair dismissal claim (as one of the reasons for his dismissal relied upon by the respondent is the expiry of his fixed-term contract (which is said to amount to some other substantial reason justifying dismissal)) and his wrongful dismissal claim (as to which see below).

#### **Unfair dismissal**

137. Neither party suggested to us that this claim requires anything other than the application of orthodox unfair dismissal principles. It is accepted that the claimant was dismissed, within the meaning of section 95 of the Employment Rights Act 1996, so that under section 98(1) it is for the respondent to show the reason for the dismissal, with the tribunal then assessing fairness in accordance with section 98(4).

#### **Wrongful dismissal**

138. The question for determination in the wrongful dismissal claim is whether the claimant has shown, on the balance of probabilities, that the non-renewal of his contract was a breach of contract. As will appear from our discussion below, that involves consideration of whether his contract was fixed term or not.

#### **Direct age discrimination**

139. Section 13(1) of the Equality Act 2010 provides:

*"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."*

140. "Because" in this context means "*what ... is the "effective and predominant cause" or the "real and efficient cause" of the act complained of*" (O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372).

#### **Indirect discrimination on the grounds of sexual orientation**



141. The claimant's claim in respect of indirect discrimination (at least so far as 9(a) is concerned) depends entirely on him establishing that the respondent has the claimed PCP. If it does, the respondent does not seek to justify that PCP, and the respondent does not appear to dispute that a preference for employees to be heterosexually married puts the claimant at a substantial disadvantage.
142. As will appear below, we have some difficulties with the way in which point 9(b) is put by the claimant.

### Victimisation

143. Under section 27 of the Equality Act 2010:

- “(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:*
- (a) bringing proceedings under this Act,*
  - (b) giving evidence or information in connection with proceedings under this Act,*
  - (c) doing any other thing for the purposes or in connection with this Act,*
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.”*

### The burden of proof in discrimination claims

144. Under section 136 of the Equality Act 2010:

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

145. We note from Hewage v Grampian Health Board [2012] UKSC 37 (para 32) that: *“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.”*

## D. DISCUSSION AND CONCLUSIONS

**Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002**

146. We accept Mr Allen's proposition that fixed-term contracts are not necessarily an abuse of rights. We also accept that they will have a valid role to play in the employment of academics where, for instance, there is time-limited funding for a post or the individual is being engaged for a research project of limited duration. The question for us is whether there was objective justification for the renewal of the claimant's contract for a fixed-term of one year.
147. A feature of the claimant's contract was that it was always terminable by either side giving three months' notice. The fixed term did not take the form of a guaranteed minimum period of employment on either side. The provisions for termination were much the same as may be expected in a contract which is not time-limited. The only advantage that accrued to either side through the use of the fixed-term was that if no steps were taken to renew it, it would expire on 30 September 2018 and neither party would have to go to the trouble of giving notice. In fact, as we shall see, the respondent gave three months' notice that the contract would not be renewed, and in practice gained no legal benefit from the renewal being for a fixed term, other than the right to argue that the expiry of the fixed term was the reason for the termination of the claimant's employment.
148. No justification was put forward by the respondent at the time for the original contract being for a fixed term – it just seemed to be taken for granted that everything would be on a fixed term basis. There is no obvious justification such as restricted funding or a time-limited research project. The Fellowship appears to have been a permanent endowment and the claimant's research activities were always understood to be open-ended. Subject to the question of his book (as to which see below) he was never given any deadlines or end dates for his research.
149. On renewal it was said that the renewal would "*enable a further, more conclusive, review to be undertaken in January 2018 ...*". There is nothing in that which requires the renewal to be on a fixed term basis. Such a review could perfectly well have taken place in circumstances where the claimant was a permanent employee on a three month (or even longer) notice period.
150. When originally challenged by the claimant about the position under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 Mr Brown gave the following justification in an email of 25 July 2018:

*"An extension of your fixed-term was ... made:*

- *To allow you extra time to demonstrate substantial progress in the area of your research ...*
- *To allow you time to publish the monograph; and*
- *To allow you to achieve more output in more prestigious and internationally recognised journals.*

*The extension and the targets were necessary for you to fulfil the objectives of your role and were appropriate in light of the comments made by you and the panel about the status of your work and your monograph at that time.”*

151. The problem with this is that while it may be the justification for the extension of the claimant's contract, what is in dispute is not the extension of the contract but the extension of the contract on a fixed term basis. There is nothing in that justification that requires the extension to be on a fixed term basis. All of those objectives could have been achieved with the claimant on a permanent contract terminable on notice.
152. In response to questions from the panel during his evidence, Mr Brown said that all the respondent's Fellows were on fixed term contracts and appeared to regard this as being entirely normal. There appears to have been no means (other than a challenge under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002) for an academic employed by the respondent to be a permanent employee.
153. In his submissions, Mr Allen says:

*“the use of this 1-year fixed term contract was objectively justified in the context of:*

- a. The academic freedom granted to researchers in particular by OCIS,*
- b. The particular situation of an ‘Early Years Researcher’ as the claimant was described to be,*
- c. The particular situation in which the claimant has not yet published his book ...*
- d. His particular situation.”*

154. There are two difficulties with this. First, we are given a context but no actual justification, and second, as before, this appears much more directed at why there was an extension, not why there was an extension on a fixed term basis. There is nothing in that which could not have equally well been achieved with a contract that was not time-limited. The respondent could still have carried out the intended January review and, if the claimant did not meet its standards, dismissed him on notice.
155. The extension of the claimant's contract on a fixed term basis was not objectively justified, and under regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 takes effect as employment on a contract with no restricted duration.

### **Wrongful dismissal**

156. The claimant has established that under regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 he

was, at the time of his dismissal, employed on a contract that had no restricted duration.

157. In her submissions, Ms Cullen describes the claimant's claim in respect of wrongful dismissal as:

*"... a simple point. If the Tribunal finds that the Claimant was a permanent employee, then the claimant was entitled to three months' notice from the date of his dismissal, namely the 30<sup>th</sup> December 2018, in accordance with his contractual terms."*

158. The contractual term Ms Cullen references in respect of this is clause 3.1.1, which provides that *"either you or the Centre may end your employment by giving the other party at least three months' prior written notice"*.
159. Ms Cullen's argument appears to be that this notice could only take effect from the date the claimant's purported dismissal took effect: 30 September 2018. We do not think that is correct. The instrument that ended the claimant's employment was Dr Nizami's letter of 22 June 2018. The effect of regulation 8 is to lift the restricted duration of the claimant's contract, but the respondent remains free to give the appropriate contractual notice – three months – to terminate it, and Dr Nizami's letter in fact does give sufficient notice of the termination of the claimant's employment. If the claimant's contract no longer contains a restricted duration, the only sensible interpretation of Dr Nizami's letter is that it is giving notice to end the contract on 30 September 2018. The letter gives the claimant more than three months' notice of the end of this contract and there is no wrongful dismissal or breach of contract by the respondent.

## **Direct age discrimination**

### *Background discriminatory comments*

160. The claimant placed reliance upon what he said was a history of references to his or others' age by Dr Nizami, Mr Makepeace and others. We have set out above the positions adopted by the parties in their evidence on these points.
161. As will appear below, it is accepted (at least partially) by the respondent that there were some discussions relating to the claimant's age. The respondent says that this arose in the context of informal guidance given by Mr Makepeace to the claimant about his aspirations for a fellowship at an Oxford college. The claimant was ultimately appointed to what was called a "Junior Fellowship" at Brasenose College. This accords with the advice that Mr Makepeace accepts he gave to the claimant about the kind of appointment that may be appropriate for someone in the early stages of an academic career. Discussions in relation to college appointments cover the fifth and seventh alleged comments.
162. We accept that the claimant's age was raised by the respondent during the course of advice given about seeking a college appointment. It was done not because of his age as such, but as a way of expressing his relative lack of experience in academia, and setting out what a realistic expectation would be for someone at his stage of his career. This was advice given in good faith about

the claimant's prospects of appointment at another institution, rather than in relation to his ongoing employment with the respondent.

163. As regards the other alleged comments:

- a. As set out below, we have considerable difficulty with the idea that the claimant was on his guard about age discrimination from the start of his career, and sought advice at an early stage. If so, we do not see how it would have taken him so long to eventually raise age discrimination. We also do not see why Dr Nizami would have had at that point to ask the claimant's age (with sinister motives) when he would have had full access to the Centre's HR records and would be able to find out his age for himself, rather than raising it with the claimant and sparking suspicions in the claimant's mind. We find that the first alleged age-related comment was not made.
- b. For the second alleged age-related comment, as with the later comment attributed to Mr Makepeace, we do not see that he can be expected to remember one way or another whether he made such a throwaway remark around five years prior to the point being raised with him. We do not feel it necessary to form a view on whether this comment was made, as if it had been made – as a brief comment many years prior to the events the claimant's complained of – it would not have been material from which we would have found we could draw conclusions in relation to age discrimination.
- c. Similarly we do not find the bus journey to be helpful in determining whether there has been age discrimination in this case. The claimant's memory of an unspoken impression created five years before the relevant events is not a sound basis from which we can infer age discrimination.
- d. There is no suggestion that the board member who made the fourth alleged comment ever had any input into the later events or the claimant's career more generally, so we do not consider that this point assists us.
- e. As for the sixth comment, we note the exchange of emails referred to by Dr Nizami in his evidence. There is nothing in that to suggest anything other than a constructive discussion between the claimant and the respondent, with the claimant referring to Dr Nizami's "*careful consideration of the research document submitted to you last term*" and referring to himself as being "*heartened*" by Dr Nizami's response. Given this, we find it unlikely that Dr Nizami made a critical comment on the claimant's age during the meeting, and prefer Dr Nizami's evidence that no such comment was made.

*Age discrimination generally*

164. The claimant's case on age discrimination is put by Ms Cullen in this way in her closing submissions:

*“The claimant submits that he has been directly discriminated against on the ground of his age ... At the time he started his employment he was 29 years old and he was 35 years old when he was dismissed. It is the claimant’s case that he looked much younger. It is the claimant’s case that Dr Nizami’s perception of his age, in that Dr Nizami considering him too young and therefore immature and this formed the reason or part of the reason for Dr Nizami’s decision to dismiss the claimant.*

*The claimant’s comparators are Dr Adeel Malik and Dr Afifi Al Akiti. Dr Malik was born in 1976 and Dr Al Akiti was both in 1975. They are 8 and 7 years older than the claimant.*

*The claimant’s age categories is the group of individuals 35 years and below as opposed to those 35 years and above.”*

165. The question of maturity was also the central point to his complaint about indirect sexual orientation discrimination, in which his status as an unmarried person was said also to be taken by Dr Nizami as indicative of a lack of the maturity required for his role. In his witness statement the claimant says:

*“I was concerned that the Centre was using invocation of my age ... not simply as a comment on my youth, but also as a euphemism for the fact that I was not yet married ... It was my understanding, especially from Dr Nizami’s comments, that he saw my unmarried status as demonstrating immaturity and irresponsibility.”*

166. Thus the claimant’s case is that both in relation to his age and sexual orientation discrimination claims the reason for any discrimination by the respondent (and Dr Nizami in particular) was that his age and marital status demonstrated that he had insufficient maturity and responsibility for the role.

167. While we were given full details of the Centre’s faculty’s marital status (albeit provided by the claimant rather than the respondent) we were not given any such information in relation to age, except for the claimant’s specific comparators, who are discussed below. We were not told what might be the typical age for a fellow at the Centre. The list of fellows appears to suggest a diversity of fellows, from the claimant at the start of his career, through to the likes of Dr Feener, who was clearly a senior and well-established academic, with others who had established themselves with distinction in other careers and appeared unlikely to hold full-time positions of the kind that the claimant did. The Centre does not seem to offer “junior fellowships” of the kind we heard may be offered by other institutions to academics at the start of their careers. We were not referred to anyone younger than the claimant who held an academic appointment so take it that he was, in fact, the youngest academic employed by the respondent. However, as will appear from our discussion in relation to his comparators, his age was not unprecedented. Dr Malik had been around the same age when appointed (and renewed). Dr Al Akiti was 2-3 years older.

*The allegation of direct age discrimination arising prior to dismissal*

168. One allegation of direct age discrimination arises prior to the second review process. This is 5(a) (and as subsequently repeated in 5(b)): *“Richard Makepeace said in December 2016 ‘someone of your age really cannot be expected to hold this kind of post’”*.
169. There are three notable features of this allegation.
170. First, it arises a very long way outside the usual time limit for bringing such a claim. No explanation has been given as to why it was not submitted within time. Subject to any question of it amounting to a continuing act (which as we will explain below, it does not) it can only be considered by the tribunal if we consider it just and equitable to extend time. It seems to us that an allegation such as this, involving an incidental verbal comment, is the kind of allegation for which time limits are particularly important, so that the matter can be addressed nearer the time of the alleged comment when the parties recollections will be better. By the time the point was first raised the claimant and Mr Makepeace were recalling a fleeting moment that had occurred 18 months previously. No reason has been given why this claim was not brought within the usual time limit. We do not consider in these circumstances that it is just and equitable to allow this claim to be brought outside the usual time limit.
171. Second, although the claimant says he was hurt by the remark at the time, he did not raise it even privately until seeking advice from his trade union about a year and a half later. This is shown most strikingly by him not having referred to it even in his private correspondence with his parents directly after the meeting. In that email he refers to possibly being discriminated against on the basis of three protected characteristics that were not mentioned by Mr Makepeace, but not the one protected characteristic he says was raised in a particularly hurtful way by Mr Makepeace. That is surprising, particularly given the vivid terms in which the claimant now recollects the conversation.
172. Third, as Mr Makepeace says, for him to make this comment in the context of the meeting would have made little sense. If it was a slip revealing that the Centre felt that the claimant simply was too young for the role then the Centre had every opportunity at that point to not renew his contract, rather than offer him a year’s extension. If, as the claimant suggests, these were intended as words of comfort or consolation, that makes little sense either, since instead of encouraging the claimant during his one year extension it would have suggested he had little prospect of remaining at the Centre.
173. The first point leads us to the conclusion that the complaint is not within the jurisdiction of the tribunal, and the second and third point lead us to conclude, on the balance of probabilities, that the comment was not made at that meeting. As Mr Makepeace says, the claimant may have been confusing it with another discussion relating to a completely different matter.

## **Dismissal generally**

### *Introduction*

174. Aside from the allegations of discrimination, the claimant relies on the following (taken from Ms Cullen’s closing submissions) as matters of unfair dismissal:

- a. *The respondent failed to provide the claimant with clear and consistent guidance as to the expected level/standard for work that was required under his contract.*
- b. *The respondent gave insufficient weight to the claimant's overall performance in terms of teaching, research and publication.*
- c. *The respondent placed undue reliance on the fact that the claimant's book had not been published, a criterion which was not included in the claimant's terms and conditions.*
- d. *The respondent failed to have due regard to the recommendations of the review committee.*
- e. *The respondent failed to have due regard to the report and recommendation of the Chair of the Faculty of History.*
- f. *The respondent failed to have due regard to the external assessors who reviewed the claimant's work and either negligently excluded positive and supportive reviews, or deliberately suppressed the same.*
- g. *The respondent was inconsistent in its decision to terminate the claimant's employment but did not terminate other employees including Dr Afifi Al Akiti and Dr Adeel Malik (neither of whom published a book, yet both were retained).*
- h. *The respondent failed to undertake a full and fair appeal, including appointing an impartial chair, and failed to consider key aspects of the claimant's grounds of appeal, including whether he was a permanent employee.*
- i. *... a fair procedure would have entailed a further period of review within which to measure the claimant's performance."*

175. These seem to us to break down into three broad categories:

- a. Undue emphasis on the book (ignoring the claimant's other achievements) when the claimant was never warned that publication of the book was a requirement of his role. (We will take this point to also include the allegation of inconsistent treatment of Drs Al Akiti and Malik.)
- b. The "missing" reviews, and Dr Nizami not following the recommendation of the review committee.
- c. The appeal.

### **Dismissal as direct age discrimination**

*Aspects that are alleged to be direct age discrimination*



176. Three aspects of the process are specifically alleged to amount to direct age discrimination, with the claimant relying on Dr Afifi Al Akiti and Dr Adeel Malik as comparators. They are:
- The respondent subjected him to a less favourable review process,
  - The respondent suppressed reports which were supportive of the claimant from external academics, and
  - The respondent failed to have full regard to the opinion of the history faculty as to the claimant's abilities.
177. Beyond that, the claimant's dismissal is itself said to be an act of direct age discrimination.

*The comparators: Dr Afifi Al Akiti and Dr Adeel Malik*

178. Dr Al Akiti and Dr Malik were colleagues of the claimant's and both are fellows at the Centre. Both are older than he is (7 and 8 years older respectively). Both are currently married although as will appear below Dr Malik was single and divorced at the time of the most recent renewal of his contract.
179. The respondent is a multi-disciplinary centre, carrying out research in a number of different areas, with the common strand being a focus on Islam and the Islamic world. Dr Al Akiti is a theologian and Dr Malik is an economist. It is not in dispute that both of them have had their fellowship renewed for full (rather than abbreviated) fixed terms despite neither of them having published monographs. We also note that it is not in dispute that Dr Nizami (a historian, as was the claimant) has not published a monograph.
180. In principle the processes that the claimants comparators and the claimant were subject to were the same (they appear at p159 and p650 of the bundle respectively). However, we accept the criticism set out in Ms Cullen's written submissions that in practice the procedure applied to the comparators was much less rigorous. As she says, Dr Al Akiti was re-appointed without reference to external assessors in 2013, and the subsequent assessments raised points of concern. Dr Malik had only two reviews on his reappointment in 2009, and relied on unpublished papers in his reviews.
181. Having said that, the claimant has a considerable problem in showing that this different treatment was because of age. That is because the comparison with Drs Al Akiti and Malik must be based on their ages at the time of their reviews, not at the time of the claimant's review.
182. We have dates of birth for Drs Al Akiti and Malik at page 883 of the tribunal bundle. This also gives us the date they were initially appointed to their roles, at which point they would have been 33 and 30 respectively. They were given letters confirming their reappointment on 17 September 2013 and 2 September 2010 respectively, when they would be aged 38 and 35 respectively. The actual decision on the renewals must have been made some time ahead of that (for

Dr Malik the actual decision had been made by 16 June 2010 at the latest (see p153) and the review process had started in 2009).

183. This gives us the following table:

	Claimant:	Dr Malik:	Dr Al Akiti:
Start of appointment:	Oct 2012	Oct 2005	Oct 2008
Age at start of appointment:	29	30	33
Date of first reappointment:	May 2017	Sept 2010	Sept 2013
Age at first reappointment:	34 (partial)	35 (full)	38 (full)
Date decision made not to reappoint:	June 2018	-	-
Age when not reappointed:	35	-	-

184. Thus Dr Malik would have been 35 at the time of his full reappointment, the same age that the claimant was when his reappointment was refused. This puts the claimant in the difficult position that one of his comparators was the same age as him at the time of his renewal.

185. There remains the question of age discrimination by reference to perceived age. We accept that as at the date of the hearing Drs Al Akiti and Malik would be perceived as older than the claimant – hardly surprising given they are several years older - but the difficulty for the claimant is that there is no evidence before us as to the age they would appear to have been at the time of their renewals. We do not consider the claimant’s allegations in respect of the perception of his age add anything to his claim when we have no indication of what ages others would be perceived as at the relevant times.

186. We will consider the other allegations of age discrimination when considering unfair dismissal more generally.

**Dismissal as indirect sexual orientation discrimination**

187. There are two elements to this: 9(a) – which Mr Allen calls “the heterosexual marriage PCP” and 9(b) – “the open conduct PCP”. In each case, the application of the PCP is said to have “*put the claimant at a particular disadvantage in respect of the review process and the decision to dismiss him and/or failing to renew his fixed term contract*”. We will deal first with 9(b).

188. There is a clear problem with the claimant’s case on 9(b). As Mr Allen says, if this was a PCP there is nothing to suggest that the claimant ever offended against it or fell foul of it or that it had any influence on the review and decision not to renew his contract. The claimant was not open about his sexual orientation or the fact that he had a male partner during his employment with

the Centre. It is not suggested that Dr Nizami ever knew that the claimant was bisexual or had a male partner. Even setting aside the possible view of those within the Centre towards his sexual orientation, he had good reason not to be open about his sexual orientation. If he was known to be bisexual or to have a male partner this could have caused him considerable difficulties in travelling to or living in some of the countries in south-east Asia that he was committed to studying and would need to make research trips to. In her submissions on the indirect discrimination point Ms Cullen concentrates on the heterosexual marriage PCP. There is nothing in relation to the open conduct PCP. While it was not formally withdrawn, we do not see how the claimant can succeed in the circumstances of this case on the open conduct PCP, and his claim in respect of indirect discrimination for the open conduct PCP is dismissed.

189. As regards the heterosexual marriage PCP, it was accepted by Dr Nizami that many of the countries that were donors to the Centre would prefer a man of marriageable age to be heterosexually married, as opposed to single or in a same-sex relationship. However, it was his position that there was no PCP in respect of this, and that the donors did not influence the appointment of Fellows.
190. Ms Cullen was critical of the lack of disclosure from the respondent in respect of communication between the Centre and donors in respect of the appointment of staff, and invites us to draw an inference against the respondent on account of that. She suggests that there must be more correspondence than has been disclosed. Dr Nizami's position was that the most that donors may be entitled to is an annual report and possibly notification of who has been appointed to a fellowship granted in their name – but perhaps not even that.
191. The lack of disclosed communications with donors gives rise to two possible implications – either that there are no such communications, or that there are communications that are being suppressed in an attempt to mislead us. We find the former is correct – there are no such communications. This is most obviously the case with the claimant's appointment. We have seen the documents surrounding his appointment and there is nothing to suggest that the Albukhary Foundation had any say in the appointment. Ms Cullen has not pointed us to documents that may suggest undisclosed communications in respect of the claimant or any other appointment. We accept that there are no communications and the donors do not take part in the appointment of staff to the Centre.
192. The claimant led evidence by which he sought to suggest that the Centre was at best squeamish about sexual orientation or actively suppressed references to the topic. At times it appeared that the claimant would much rather have brought a direct discrimination claim based on his sexual orientation, but found himself unable to do so given that he could not show that Dr Nizami or anyone in a position of influence at the Centre was aware of his sexual orientation. We are, however, not dealing with such a claim. The specific point that the claimant must prove is that the respondent had a provision, criterion or practice of preferring employees to be heterosexually married. On this point the evidence was much more limited.

193. The claimant himself had compiled a document which was not substantially disputed by the respondent showing that in 2018, of 15 fellows at the Centre, 13 were heterosexually married, one was not (himself) and the status of one fellow as unknown to him. Dr Nizami confirmed that the person whose marital status was unknown to the claimant was married – making the claimant the only person who was unmarried. However, as the claimant’s table made clear, Dr Adeel Malik – a comparator for the purposes of the claimant’s age discrimination claim – had been divorced before remarrying. It emerged in evidence (and was not disputed by the claimant) that Dr Malik had been single (divorced) at the time of the most recent renewal of his contract.
194. Other evidence relied upon by the claimant specifically in relation to marriage was a question asked on the form for visiting fellows as to whether they were married or single. Dr Nizami explained that this was asked so that any accommodation need could be established. The claimant had taken steps to amend the form so as to remove this question, and it appeared that Dr Nizami had no difficulty with this being removed and did not seek to reintroduce it.
195. Unlike with his age discrimination claim, the claimant does not suggest that his marital status was ever commented on by Dr Nizami or anyone else within the Centre. In his evidence Dr Malik referred to the successful appointment of a visiting fellow who was in a same-sex relationship – albeit this would seem not to rule out the alleged PCP for “*employees and/or permanent employees*”, as a visiting fellow would not be considered a “*permanent employee*”, and maybe would not even be an employee.
196. We have discussed the process and decision of Dr Nizami in relation to the non-renewal of the claimant’s contract below when considering his claims of unfair dismissal and direct age discrimination. We do not see anything in the evidence that should lead us to conclude that there was a PCP of preferring employees to be heterosexually married. For the reasons given below we accept the respondent’s explanation as to why it was that the claimant’s contract was not renewed, which does not involve consideration of whether or not he was heterosexually married. There was no “heterosexual marriage PCP” and the claimant’s claim of indirect sexual orientation discrimination is dismissed.

**The reason for dismissal, and the fairness of the dismissal (including age discrimination issues in relation to the dismissal)**

197. The respondent puts forward two reasons for dismissal. The first is “*some other substantial reason*” – the expiry of the claimant’s fixed term contract. The second is capability.
198. It will be clear from our findings in relation to the Fixed Term Employees Regulations that the first reason cannot succeed. Even if we had found that the claimant was on a fixed term contract, to say that the reason for the dismissal was the expiry of his fixed term cannot of itself amount to some other substantial reason for dismissal. Section 95(1)(b) of the Employment Rights Act 1996 defines the non-renewal of a fixed term contract as being a dismissal for unfair dismissal purposes, so to say that the claimant was dismissed because his fixed

term contract came to an end is simply to say that the claimant was dismissed because he was dismissed. It is not (without more) some other substantial reason justifying dismissal. As we have previously found, there was nothing more (such as the expiry of a research project, or expiry of funding) in this case.

199. The second reason put forward by the respondent for the claimant's dismissal is capability. As it was put in Dr Nizami's letter: "*you have failed to display sufficient progress over the initial period of appointment to enable me to justify extending your fixed term appointment*". It is clear from that letter that the decisive factor in this assessment was the non-publication of the claimant's book. The reason put forward by the respondent for the claimant's dismissal is that he had not, in either his initial term nor the subsequent one-year extension, secured a contract to publish his book. The significance of this was that (whatever his other achievements were) it demonstrated that he was not making sufficient progress in research and publication.

200. We find the following:

200.1. Dr Nizami was concerned above all with promoting and demonstrating the academic credentials of the Centre. This was done through research and publication by its fellows. The teaching and other worthy work they may do was of much less significance. It was expected that they would teach to a high standard as well as making other contributions to the field, but these points appeared to be taken for granted and to matter little in advancing the centre's reputation.

200.2. The way in which an ambitious academic at a prestigious institution demonstrated their credentials would vary depending on their discipline. It depended on research and the publication of that research by prestigious presses to the acclaim of their peers. Exactly what that might mean was not documented or made explicit either by the Centre or any external organisation. In some disciplines, such as economics, the publication of articles in journals was what would be required. In other disciplines, such as history, the publication of a monograph was what would count.

200.3. The progress of a junior academic depended on their work being recognised and endorsed by senior academics in their field. Senior academics in the claimant's field, including Dr Feener and others on the review committee, the reviewers who were consulted and notably Prof Sidel, who gave evidence for the claimant, formed a broad consensus that publication of a monograph was required for a historian in the early stages of their career such as the claimant. They appeared to take this as being obvious, although it was never documented anywhere, and it appears simply to have been the unwritten tradition and expectation in the field.

200.4. The claimant was never told of this by the respondent and appears, going by the limited progress he had been making on his monograph, to have been unaware of its potential significance other than as something that it would be good to have done at some point. It became, as the claimant

put it, the *sine qua non* for his subsequent reappointment by Dr Nizami, although as the claimant also says, he was first told of this at the point of Dr Nizami refusing to reappoint him.

201. This brings us to the first broad point of unfairness: undue emphasis on the book when the claimant was never warned that publication of the book was a requirement of his role.
202. Addressing questions of fairness concerning academic achievement at a prestigious institution is perhaps a slightly different task to the questions of fairness in the areas of work that the tribunal is used to, but that difference only arises as a matter of context. The overall standards of fairness are the same regardless of the particular circumstances in which they arise. It has long been the case that to dismiss someone for something they had not previously had any warning or notice of will be unfair, except in the most obvious cases where no such warning or notice is necessary. It would certainly be considered unfair to dismiss an employee for not meeting a particular target without having first spelled out to the employee what that target was and what requirement they had to meet. That is what happened to the claimant in this case. In many instances the requirement of fairness would go beyond that, with the employer being required to coach and support the employee through to achievement of the particular objective. Beyond the informal appointment of Dr Feener as mentor, nothing like that was done for the claimant.
203. The unfairness is this is all the more apparent given that the claimant had previously been given a one year extension to his contract. This was the perfect opportunity for Mr Makepeace to set out clearly to the claimant that further renewals would depend on the acceptance of his book for publication. Instead, he said, "*The reviewers also noted that it would be important in due course to be able to assess also the monograph planned on the basis of your doctoral thesis*" which is very far from the *sine qua non* that Dr Nizami later adopted. It appears from the review committee's recommendation of a further year's extension that they did not read the terms of the first extension as giving the claimant any kind of ultimatum to have his book accepted for publication within the initial extension period.
204. We do not dispute Dr Nizami's right to be ambitious for the Centre and demanding in his standards for Fellows, but this can be done without compromising basic principles of fairness. To dismiss the claimant without ever having given him a warning that acceptance of his book for publication was necessary for renewal of his contract was unfair.
205. The claimant's point on unfairness here is broader than simply that he was not told of the requirement to publish his book. He says that the failure to publish the book ought to have been considered against his other achievements while in post, including the high praise for his teaching and other work.
206. We accept that in an institution such as the Centre Dr Nizami was entitled to prioritise achievement in research and publication above other matters such as teaching. Good teaching and other activities appeared simply to be a baseline expectation for the role or "nice to have", with research and publication valued

above all. It was not unfair for Dr Nizami to prioritise research and publication above other work done by the claimant or his colleagues.

207. It may be the case that the claimant intended his reference to a “*less favourable review process*” to be a reference to Drs Al Afifi and Malik having their contracts renewed without having published monographs. We do not accept this is a relevant comparison. They operate in different disciplines to which different publication standards would apply. As for Dr Nizami being a historian but not having published a monograph, we do not accept that he is an appropriate comparator for the claimant. As long-term director of the Centre (and, as we understand it, editor of the Centre’s journal) he was in a very different position and stage of his career to the claimant. It was not necessary for him to publish a monograph to demonstrate his academic credentials, nor, it appears, was he on any kind of fixed term contract that may come up for renewal.
208. The second point of unfairness is the “missing” reviews and Dr Nizami not following the recommendation of the review committee.
209. The Centre originally sought three reviewers for the claimant, then later sent out a further two requests for review. Dr Nizami said that this was in case the earlier reviewers failed to respond, and was an effort to ensure that three reviews were received for consideration by the review committee. We accept that this is the reason for the Centre having sought the further two reviews.
210. In fact what happened was that each of the reviewers replied in time so that the Centre had five reviews available to it. Of these, only the reviews of the three reviewers initially appointed were supplied to the review committee. The review committee was unaware of the existence of the other two. It is said by the claimant that this is unfair, and that this amounts to the discriminatory “suppression” of two of the more favourable reviews. The respondent says that the final two reviewers were only invited to review the claimant on a precautionary basis, and there was no need for these reviews once the respondent had received reviews from the three reviewers originally sought.
211. The two “suppressed” reviewers are Profs Aspinall & Liow. Both recommend the renewal of the claimant’s contract, although Prof Aspinall expresses some reservations about his progress in publishing his monograph.
212. In discrimination terms, the claimant says that because of his age, someone (presumably Dr Nizami) suppressed these more favourable reviews in an attempt to get the review committee to come up with an outcome that disadvantaged the claimant.
213. We do not accept this, and prefer the respondent’s explanation that once they had the original three reviewer’s responses they considered that to be sufficient and effectively discarded the two reviews they had sought as insurance against the original reviewers not replying. It is clear that in this situation there was a hierarchy of preferred reviewers, with those first chosen being thought to be the most prominent and influential scholars in the field. Given that, we do not see it as suspicious that the respondent set aside the second-choice reviews when the first-choice reviews became available.

214. Likewise, we do not see anything sinister or underhand in Dr Nizami's approach to Prof Sidel. We have not accepted that he sought to affect Prof Sidel's consideration of the claimant by reference to the opinion of Johan Meuleman. What we are then left with is Dr Nizami urging Prof Sidel to give a frank opinion. That is unobjectionable, and is very similar to Dr Feener's approach to Prof Laffan. There may well be a tendency in such reviews for reviewers to feel uncomfortable in criticising professional peers or aspiring academics. The respondent only benefits from the reviews if they are the reviewer's honest opinion, and we do not see anything wrong in Dr Nizami or Dr Feener making these approaches to the reviewers.
215. The review committee appear to have reached a fair balance – making explicit the significance of the claimant's monograph being accepted for publication, but on doing so allowing him further time to achieve the objective.
216. Dr Nizami's decision to dismiss the claimant was unfair, but the fact that he did not follow the review committee's recommendation does not make it any more unfair. He had the final say and was not bound to accept the review committee's recommendation.
217. The final point of unfairness relates to the appeal. There are a number of aspects to this, including the appeal process being undocumented, Sir David being biased as a colleague of Dr Nizami's at Magdalen College, Sir David not receiving the two "suppressed" reviews and Sir David not fully addressing the matters raised by the claimant in his appeal.
218. We can deal briefly with those matters. An appeal process being undocumented does not necessarily make a dismissal unfair. It is not unusual nor unfair for the dismissing officer and appeal officer to have some knowledge of each other or association with each other. That would be the norm in the typical case where the appeal officer is the line manager of the dismissing officer. We do not see that the contact between Dr Nizami and Sir David at Magdalen College made him unsuitable to hear the appeal. We have dealt previously with the "suppression" of the reviews and do not consider that Sir David's lack of access to those affected the fairness of the claimant's dismissal, nor do we see any material omissions from Sir David's consideration of the appeal that would add to the unfairness of the claimant's dismissal.

*Conclusions on direct age discrimination*

219. We have dealt with the individual allegations of age discrimination and matters relied upon by the claimant above. As well as looking at them individually it is incumbent on us to combine the matters relied upon by the claimant to see whether collectively they allow us to make an inference that any of the alleged treatment amounted to age discrimination. Having done so, we do not find that there was any age discrimination, and find that the reasons put forward by the respondent for the alleged acts of age discrimination are the true reasons for the claimant's treatment.
220. The claimant was not subject to direct age discrimination.

*Conclusions on unfair dismissal*



221. The claimant was dismissed for a reason relating to his capability. His dismissal was unfair because he was never warned that in order for his contract to be renewed it was necessary for him to have his book accepted for publication by the time of the review.

### Victimisation

222. It is not in dispute that prior to the claimant having made his SAR he carried out a protected act. He has made allegations of age discrimination by the time of his appeal.
223. The allegation made is that the respondent failed to conduct a full and thorough search of documents under his SAR, that that was a detriment and that it was because of the allegations of discrimination that had been made by the claimant.
224. Mr Allen deals with this point only briefly in his submissions, saying that the claimant was not subject to any detriment, that *“there is not the slightest evidence of any material that should have been included but was not”* and the allegation of a detriment arising from his protected act is *“fanciful in the extreme”*.
225. In her submissions Ms Cullen identifies the 2016 external review assessor reports as being missing from the five files of material submitted in response to the claimant’s SAR. She also says that Sir David was not asked to provide any materials – so the failure to conduct a full and thorough search was in not asking Sir David for any emails he held, and in not identifying the 2016 external review assessor reports. This is against the background of what Mr Allen identified as being 2,000 pages of disclosure.
226. Mr Brown gives the claimant something to go on in respect of this allegation by specifically saying, *“we are unable to provide a copy of some of the personal data you requested ... because disclosure would disclose personal data about you and because we are preparing to defend the Centre against legal claims threatened by you.”*
227. This wording is hard to understand. It makes no sense to say that they could not disclose material that disclosed personal data about the claimant, since the entire point of the SAR was to obtain personal data about the claimant. It may be best understood as a reference to material covered by legal privilege or some other exemption in relation to litigation under the Data Protection Act. No-one has identified what this material might be. The deficiencies identified by the claimant would not seem to relate to the litigation – reviews in 2016 and emails received by Sir David (as opposed to held directly by the Centre or sent by people such as Dr Nizami) can’t be said to be covered by any legal privilege.
228. The question for us is whether these materials were omitted because the claimant had threatened litigation or for some other reason, for instance, simply being missed.
229. The 2016 reviews and any emails found by Sir David (it is not clear if there were any such emails) do not appear to have any special significance for the

claimant's allegations. They are not documents which the respondent would have a particular interest in suppressing in litigation (at least not compared with other documents which had been disclosed in response to the SAR). It does not seem to us that these materials were withheld because of the claimant's protected act. Far more likely is simply that they were missed in the difficult task of responding to the SAR which, as Mr Allen points out, generated thousands of pages of material.

230. The claimant's claim of victimisation is dismissed.

E. REMEDY

231. At the conclusion of the hearing, a provision remedy hearing was listed for 17 June 2021. That will now take place, and a separate case management order is made in respect of that hearing.

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**Employment Judge Anstis**

Date: 23 February 2021

Sent to the parties on: 26 February 2021

For the Tribunals Office

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