EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102702/2012

Held in Edinburgh on 15th April 2019 and 15th May 2019

Employment Judge: Ms Jane M Porter
Members: Mr Duguid
Ms Zwanenberg

Professor R Sheikholeslami — **Claimant**
Represented by:-
Mr Gorton QC

University of Edinburgh — **Respondents**
Represented by:-
Mr Reade QC

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the Judgment of the Employment Tribunal:

(i) The claim of breach of the duty to make reasonable adjustments under the provisions of sections 20 and 21 of the Equality Act 2010 succeeds in part;

(ii) The claim of discrimination arising from disability under section 15 of the Equality Act 2010 succeeds in part;

(iii) The additional claims of victimisation under the provisions of section 27 of the Equality Act 2010 are dismissed;

(iv) The additional claims of sex discrimination under the provisions of section 13 of the Equality Act 2010 are dismissed;

(iv) The claimant's application to amend the ET1 is refused.

1. In these proceedings the claimant brings claims of sex discrimination, disability discrimination, unfair dismissal and holiday pay. The claimant also claims victimisation.

2. There was a full Hearing on the Merits in the matter between the 14th of September 2015 and 29th of April 2016. By Judgment dated 15th of March 2017 the claimant's claims of sex discrimination, failure to make reasonable adjustments and discrimination arising from disability were dismissed. The claimant's claims of victimisation, unfair dismissal and holiday pay succeeded.

3. The case was appealed. In terms of a Judgment handed down on the 5th October 2018 (the Honourable Mrs Justice Simler DBE, President) the appeal succeeded in part. An Order dated the 31st of October 2018 was thereafter issued by the EAT. That Order stated:

> "*THE TRIBUNAL ORDERS*
>
> *1. The Appeal be allowed in part and the following issues are remitted to the same Employment Tribunal for rehearing:*
>
> *(a) The Appellant's claims that the respondent failed to make reasonable adjustments contrary to section 20 of the Equality Act 2010 ("EqA"); paragraph 200 of the Employment Tribunal Judgment being set aside;*
>
> *(b) The Appellant's claims that she was discriminated against contrary to section 15 of the EqA; paragraphs 204 to 206 of the Employment Tribunal Judgment being set aside;*
>
> *(c) The Appellant's other claims of unlawful sex discrimination and victimisation contrary to the EqA (other than the allegation a threat*

was made by the Principal of the respondent on 23rd January 2012), those claims being as set out in the Schedule to the Appellant's closing submissions before the Employment Tribunal.

2. *The Appellant's remaining Grounds of Appeal are dismissed.*

3. *The remitted matters shall be remitted to the same Employment Judge and two new lay members if practicable for rehearing. The scope of the rehearing is to be determined by the Employment Tribunal so constituted."* **(Bundle 3, pages 37-39).**

4. The Order of 30st October 2018 stated: *"Reasons (4) I consider that this is a case where there is unfinished business to be done. The Employment Tribunal rehearing this case may consider that the original Employment Tribunal was not provided with all the necessary evidence or information to reach conclusions, either because the issues were not clearly identified, or for some other reason. It may consider that further evidence is necessary to enable it to do so. I agree with the Respondent that the Employment Appeal Tribunal should not fetter the discretion of the Employment Tribunal in this respect. The scope of the rehearing should therefore be determined by the Employment Tribunal to which the remaining issues are remitted. It will be for that Employment Tribunal to determine what (if any) further evidence can be adduced, and how the rehearing should proceed."*

5. Following the Order of the 31st October 2018 there were Preliminary Hearings in the matter on the 18th of December 2018, the 20th February 2019 and the 28th February 2019. At the PH on the 18th December 2018 the case was set down for a Hearing on the remitted issues on liability on the 28th February 2019. It was recorded in the Note issued following that PH that: *"5 It was agreed that further Findings in Fact require to be made in order to determine the remitted issues."* The Hearing on the 28th February 2019 was postponed due to outstanding issues regarding the existence or otherwise of a transcript of the Hearing on Liability. At the Hearing on the 18th December 2018 the 15th of April 2019 was listed as a PH on Case Management on the issue of remedy as a precursor to a 5 day Hearing on remedy

between the 15th and 19th July 2019. At the PH on the 28th February 2019 it was agreed that the PH listed for the 15th April 2019 should be converted to a Hearing on liability.

6. After consideration of the parties' submissions on the 15th April 2019 the Tribunal has made the undernoted additional Findings in Fact which it concluded required to be made in order to determine the remitted issues.

7. In making the additional Findings in Fact, the Tribunal referred to the three Bundles of Documentation that were before it at the Hearing on the 15th April 2019 and were numbered **Bundle 1, Bundle 2** and **Bundle 3**.

8. **THE ISSUES**

The parties have produced an Agreed List of Issues which is replicated below in the exact terms in which it was submitted to the Tribunal, including numbering:

1. Whether the R failed to make reasonable adjustments contrary, to Ss 20 and 21 of the Equality Act 2010 (EqA), in that the C alleges that the following were adjustments which the R failed to make[11]

1.1. R failed to apply its procedures not least in respect of sickness absence and specifically its Disability Policy

1.2. R failed to apply or have regard to its procedures including the grievance procedure and dignity and respect policy

1.3. To take all steps to ensure C's immigration status (which was intimately intertwined with her employment status) would not be compromised by C's

[1] The language used for the issues is that of the C, as set out in her closing submissions, and for the avoidance doubt the issue encompassed by any alleged failure includes the issue of whether there was a duty under S.20 to make the alleged adjustment

absences and if necessary to take all reasonable steps to ensure that C would not be at risk of losing her lawful working status

1.4. R failed to maintain C's pay when absent though illness and failed to keep any non payment under review

1.5. R failed to reintegrate C into work

1.6. R failed to contact C's GP in order to assess C's fitness and ability to return to work

1.7. R failed to commission expert medical advice in respect of C's condition, prognosis and return to work

1.8. R failed to provide a brief to C as a condition precedent to C being seen by R's Occupational Health advisers

1.9. R failed to avoid dismissing C

1.10. R should not have dismissed C and/or should have taken all reasonable steps to avoid dismissal

1.11. In dismissing C, R failed to apply any of the relevant procedures applicable including the ACAS code of practice, R's Disability Policy, Dignity and Respect Policy, Absence Management Policy, Unauthorised Absence Policy

1.12. R should have considered moving C to a different place of work (here outside the school of Engineering)

1.13. R should have engaged with C in respect of her work permit status, fully informing C of her and its options all with a view to ensuring C's work status was not lost at the expiration of her 5 year work permit

1.14. R should have, if necessary, created a new role for C R should have engaged with C in respect of the potential of and warned and informed C of the removal of her laboratory

1.15. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her duties as PHD supervisor for Emad.

2. Whether the R acted contrary to S 15 of the (EqA); the C alleges that the R failed to do so in the following respects:

2.1. R failed to apply its procedures not least in respect of sickness absence and specifically its Disability Policy

2.2. R failed to apply or have regard to its procedures including the grievance procedure and dignity and respect policy

2.3. To take all steps to ensure C's immigration status (which was intimately intertwined with her employment status) would not be compromised by C's absences and if necessary to take all reasonable steps to ensure that C would not be at risk of losing her lawful working status

2.4. R failed to maintain C's pay when absent though illness and failed to keep any non payment under review

2.5. R failed to reintegrate C into work

2.6. R failed to contact C's GP in order to assess C's fitness and ability to return to work

2.7. R failed to commission expert medical advice in respect of C's condition, prognosis and return to work

2.8. R failed to provide a brief to C as a condition precedent to C being seen by R's Occupational Health advisers

2.9. R should not have dismissed C and/or should have taken all reasonable steps to avoid dismissal

2.10.R failed to avoid dismissing C

2.11. In dismissing C, R failed to apply any of the relevant procedures applicable including the ACAS code of practice, R's Disability Policy, Dignity and Respect Policy, Absence Management Policy, Unauthorised Absence Policy

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2.14. R should have, if necessary, created a new role for C

2.15. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her laboratory

2.16. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her duties as PHD supervisor for Emad

2.17. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her duties as PHD supervisor for Emad

3. Whether the R victimised the C contrary to S.27 of the EqA. The protected acts relied on by C are identified in C's closing submissions to the ET dated 29/5/16 at paras 84-88 and 152-155:

3.1. R failed to apply its procedures not least in respect of sickness absence and specifically its Disability Policy

3.2. R failed to apply or have regard to its procedures including the grievance procedure and dignity and respect policy

3.3. To take all steps to ensure C's immigration status (which was intimately intertwined with her employment status) would not be compromised by C's absences and if necessary to take all reasonable steps to ensure that C would not be at risk of losing her lawful working status

3.4. R failed to maintain C's pay when absent though illness and failed to keep any non payment under review

3.5. R failed to reintegrate C into work

3.6. R failed to contact C's GP in order to assess C's fitness and ability to return to work

3.7. R failed to commission expert medical advice in respect of C's condition, prognosis and return to work

3.8. R failed to provide a brief to C as a condition precedent to C being seen by R's Occupational Health advisers

3.9. R should not have dismissed C and/or should have taken all reasonable steps to avoid dismissal

3.10. R failed to avoid dismissing C

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3.14. R should have, if necessary, created a new role for C

3.15. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her laboratory

3.16. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her duties as PHD supervisor for Emad

4. Whether the R discriminated against the C because of her gender contrary to S.13 of the EqA, the alleged acts of less favourable treatment being:

4.1. R failed to apply its procedures not least in respect of sickness absence and specifically its Disability Policy

4.2. R failed to apply or have regard to its procedures including the grievance procedure and dignity and respect policy

4.3. To take all steps to ensure C's immigration status (which was intimately intertwined with her employment status) would not be compromised by C's absences and if necessary to take all reasonable steps to ensure that C would not be at risk of losing her lawful working status

4.4. R failed to maintain C's pay when absent though illness and failed to keep any non payment under review

4.5. R failed to reintegrate C into work

4.6. R failed to contact C's GP in order to assess C's fitness and ability to return to work

4.7. R failed to commission expert medical advice in respect of C's condition, prognosis and return to work

4.8. R failed to provide a brief to C as a condition precedent to C being seen by R's Occupational Health advisers

4.9. R should not have dismissed C and/or should have taken all reasonable steps to avoid dismissal

4.10. R failed to avoid dismissing C

4.11. In dismissing C, R failed to apply any of the relevant procedures applicable including the ACAS code of practice, R's Disability Policy, Dignity and Respect Policy, Absence Management Policy, Unauthorised Absence Policy

4.12. R should have considered moving C to a different place of work (here outside the school of Engineering)

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4.14. R should have, if necessary, created a new role for C

4.15. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her laboratory

4.16. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her duties as PHD supervisor for Emad

Amendment Application

5. The C has applied to amend her Claim to claim to include a claim of direct discrimination, contrary to S.13 EqA, on the ground that it is alleged that the R treated the C less favourably than it would have treated others who were not disabled, the acts of less favourable treatment being relied upon being:

5.1. The R failure to apply its policies

5.2. R's failure to treat C's grievance as that

5.3. R's failure to take steps to extend C's work permit

5.4. The C's dismissal C

5.5. dismissing the C without considering other options

6. The R opposes that amendment application

FINDINGS IN FACT

9. Paragraph **67**, **68** and **69** of the Judgment of 16th March 2017 stated: **(Bundle 1 p 224)**:

"*67. On 23 May 2011, the claimant met with Dr Waldron. In an email of the same date, the claimant proposed a "way forward". This included "providing*

an acceptable work condition" for the claimant's 'gradual reintegration to work': full coverage of salary and benefits because of work-related illness: and early retirement package for 2 years time and compensation.

68. On 16 July 2011 Dr Waldron responded. That response included a suggestion that the claimant be referred to Occupational health for an assessment to facilitate any phased return. However on 19 July 2011, the claimant replied that until the respondent had agreed to the "substantive issues" that was not "applicable". On 21 July, Dr Waldron wrote to say that the respondent could not begin a scheme for re-integration until they had a clearer picture of the medical and occupational health issues involved. She understood the claimant might be reluctant to engage with the respondent's own occupational health provider and so she wanted to explore whether the claimant would agree to be examined by an independent occupational health adviser. On 10 August 2011, the claimant said that she would need further information including the list of questions and the brief that would be provided to the examiner. On 19 August, Dr Waldron provided the list of questions. There was then an exchange of correspondence between August and November about wider issues but including the claimant raising concerns about the list of questions and Dr Waldron repeating the need for informed medical guidance if reintegration was to be explored.

69. On 16 December 2011, Dr Waldron wrote to the claimant about a number of matters. In that letter she said that because the claimant was employed under a work permit, the respondent could not simply offer her another post. The claimant would have to apply and be successful after external advertisement for the respondent to support a new work permit. She noted that the claimant's work permit would expire in April 2012 and that this may have implications for the claimant's continued residency in the UK. She noted they were at an impasse and encouraged the claimant to consider the offer previously made by the respondent or to consider mediation."

In respect of the issues covered within these paragraphs the Tribunal additionally finds the following.

10. The claimant's letter of 23rd May 2011 (**Bundle 2, page 24**) stated:

> "*<u>Way Forward</u>*
>
> 1. *Providing an acceptable work condition from a gradual reintegration to work. This measure would allow me to regain my health fully recover from work related illness and to move forward. This reintegration to work needs to be conducted stage wise with my medical doctor's approval and permission, and in absence of the causes of my illness outside of the School of Engineering. I have many skills with which I can contribute in many ways to the academic and University matters as I discussed some examples with you and I would like to establish a dialogue to find a means that will enable me to support the University's mission for recovering my health.*
>
> 2. *Full coverage of salary and benefits lost because of my work related illness.*
>
> 3. *Early retirement package starting in 2 years with jointly agreed provisions that will not result in financial disadvantage to me.*
>
> 4. *Compensation for the losses incurred in the purchase of my flat as calculated by an independent appraisal and some measure of compensation for damages to my career as estimated mutual agreement."*

11. Dr Kim Waldron's response of 18th July 2011 (**Bundle 2, page 26)** provided:

> *"I appreciate your expression of interest in resolving matters in a constructive and amicable way …*

In arranging a phased return to work our normal practice is for the University's Occupational Health Service to obtain a report(s) from those responsible for an employee's medical care so that proper medical guidance can be given to the University on appropriate reintegration to work. I appreciate that your letter suggests that any return to work would be outwith the School of Engineering but I think it would be helpful for us all to have a proper assessment made so that we can all be aware of the issues we need to deal with in designing a phased return. Do you agree to a referral being made to the Occupational Health Unit? The actual referral will be discussed with you before it is submitted and normally this would be handled by your line manager. Given the circumstances an alternative might be for this to be dealt with by a member of the HR team? Do you agree? … I appreciate that you will be keen to make progress on this matter, as am I."

12. On 19th July 2011 the claimant wrote to Dr Kim Waldron and stated **(Bundle 2, page 29)** :

"Once the University has agreed to the substantive issues we can discuss and agree on the peripheral issues for moving forward. I don't see any problem in discussing and addressing the logistics of stagewise return to work with you. Under the circumstances of my situation and causes of my illness, the University's Occupational Health Service review would not be applicable; however, if you wish, we can discuss it further after addressing the substantive issues."

13. By letter dated 21st July 2011 Dr Kim Waldron wrote to the claimant and stated **(Bundle 2 page 30):**

"I can confirm that the University is very keen to reach agreement on the way in which we take things forward, but I cannot expect the University to come to decisions about the extent of any proposal or suggestion that we might make until we have a clearer idea of the medical and occupational

health issues involved. Similarly while we all want to see you recover your health we cannot properly begin any scheme for gradual re-integration until that information is available so that each of us can consider what options will be in your best interests.

While I am sure there is nothing improper in asking you to be examined through the University's usual Occupational Health procedures, I can understand your reluctance to engage with the University's own normal OH provider. With a view to moving things forward I wanted to explore with you the possibility that you might agree to be examined by an independent OH adviser. If you are prepared to do so I would ask that HR contact you (while I am away on leave) and they will arrange to identify a list of three independent OH providers from which you could select one and we could then arrange the referral."

14. The letter from the claimant to Dr Kim Waldron of 10th August 2011 **(Bundle 2 page 31)** provided:

"With respect to your question of being examined by an independent OH advisor I can say that hopefully you would agree that I am a reasonable person and would agree to reasonable requests. For me to be able to make an informed decision I would need to have received the complete and necessary information about the exact purposes of the examination and any report out of it and what they are for and will be used for and also to have the list of questions and the brief that the University would intend to provide to the examiner."

15. The response from Dr Kim Waldron of 19th August 2011 provided as follows **(Bundle 2 page 32-33)**:

"In your letter of 23rd May 2011 and in our meetings and telephone conversations you have expressed your wish for a gradual integration to work and have stated that you see this as a measure that will aid your

recovery. We are keen to see your health improve and the purpose of the Occupational Health referral is to understand how to manage your possible return to work but we cannot begin this scheme of gradual re-integration until the information from an Occupational Health process is available so that each of us can consider what options will be in your best interests. I should reiterate that the University's OH procedures do apply to you as an employee of the University, but in order to progress your case we are willing to look at an external provider and agree who would carry out the assessment with you. We would suggest that any of the following three providers could be approached to see if they would carry out an assessment: BUPA, AXA ICAS or the NHS. It would be helpful if you could indicate your preference of who you would like us to approach.

So, the purpose of the referral is to provide both you and the University with detailed information and advice about facilitating a return to work. I am happy to provide you with the questions that the University would ask and we would also supply a copy of the candidate information relating to your role.

The questions that we would ask are:

1. *What is the nature of the illness from which Professor Sheikholeslami is suffering?*

2. *What are the actual work related causes that Professor Sheikholeslami believes have contributed to her ill health? To what extent, if any, can these be addressed through a reintegration to work programme?*

3. *Given the role that Professor Sheikholeslami is required to fulfil, to what extent may it be possible to re-integrate Professor Sheikholeslami back into the workplace?*

4. *What is Professor Sheikholeslami's current fitness for work?*

5. *What practical support will it be necessary to put in place to assist Professor Sheikholeslami with her return to work?*

6. *Are there any modifications to work that are likely to alleviate the health condition or facilitate Professor Sheikholeslami's return?*

7. *Is there any advice about what the University should avoid?*

8. *What will be the pattern of return? Over what period?*

9. *When will Professor Sheikholeslami be able to return to full time employment?*

10. *How often will the arrangement be reviewed at the beginning of the reintegration process?*

I should emphasise that we would be obliged to comply with the processes of the OH provider that we agree to use. This may involve the need to complete their forms or other documentation, all of which would be shared by you and will be explained to you in more detail once we have engaged the services of the chosen provider."

16. By letter dated 25th August 2011 **(Bundle 2 page 36)** the claimant responded to the letter from Dr Kim Waldron. In that letter the claimant stated:

"...Secondly, I note that the letter provided me with a general list of questions, however, a copy of the intended brief to the OH examiner that I had specifically requested was not provided to me. Further, the letter stated that the University would supply a copy of the candidate information relating to the "role" to the examiner but that candidate information for the role was not provided to me either. I must say that: (a) the answers to most, if not all, of those questions were already given to the University; (b) it is very

ambiguous what the letter means by "a copy of the candidate information relating to your role" which I have not been provided with its copy; and (c) particularly in light of the history of the matter and also as it was requested furthermore as a copy of "candidate role" was also not provided, a copy of the intended brief to the examiner must have been supplied."

17. Dr Kim Waldron responded by letter dated 13th October 2011 **(Bundle 2 page 57)** . That letter stated:

"1. Providing an acceptable work condition for (your) gradual reintegration to work

As we have discussed before and with respect to our related correspondence, we would be very happy to explore a reintegration to work with you but this will have to be managed through an Occupational Health (OH) referral, because we would need informed medical guidance on how such a reintegration can be achieved. The OH route remains open to you, and if you wish to explore a reintegration to work at the University, please advise me which OH provider you would feel most comfortable using and we can begin the OH process. My letter of 19th August 2011 lists the names of three external OH providers who can carry out the referral.

In our discussions, you have said to me and to Professor Lesley Yellowlees that you cannot envisage returning to work in the School of Engineering. Therefore any reintegration would need to be into a role which is different from your current duties under your contract of employment. That may in itself present challenges over and above those involved in your getting back to full health."

18. The claimant responded to Dr Kim Waldron by letter dated 22nd November 2011 **(Bundle 2 page 57)**. In that letter she stated:

"1. Re: Gradual Work Reintegration issue: I refer to our conversation of 5th July (see Annex 1) during which you informed me that HR had advised

you that it would not be possible for the UoE to provide me with work reintegration sought in my 23rd May letter. I also refer to my letters of 19th July, 10th August and 25th July in which I addressed in detail the OH matter raised by the University since its 18th July letter. This correspondence is a test to the inaccuracies and misrepresentations in the 13th October letter."

19. In conclusion of her letter of 22nd November 2011 (**Bundle 2 page 60)** the claimant stated:

"Our options

Since 23 May 2011 I have been patiently waiting for you and in good faith relying on the fact that the University agrees in essence in terms of my 23 May 2011 letter and the only two concerns to be the length of "stage-wise" reintegration and fate of the "Chemical Process Engineering Laboratory." Regrettably, the 13 October letter appears to suggest that the University may not have been dealing with me in good faith and in fact may have been toying with me and with this seriously grave issue- I hope this portrayal has been inadvertent and incorrect.

Summary

In summary:

1. *The 13th October letter is an insult to injury.*
2. *The proposed offer does not justify a reply.*
3. *The 13th October letter's discussion of the 4 points is disingenuous and has inaccuracies/misrepresentations.*
4. *The course of events suggests that my good intentions and constructive attempts may have been mistaken.*
5. *The University's letters so far have not been constructive; they have been inflammatory, unhelpful and futile.*

6. *The way forward constructively and amicably by agreement is preferable but other alternatives available."*

20. In her letter of 16th December 2011 **(Bundle 2 page 72)** Dr Kim Waldron referred to matters being at an *"impasse" after* the claimant's letter of 22nd November 2011.

21. Following the claimant's letter of 22nd November 2011 the parties did not correspond further on the issue of the referral to Occupational Health. The Tribunal finds that the respondents' request that a referral be made to Occupational Health (made by letter dated 18th July 2011 and repeated thereafter) was a reasonable request against the background of the claimant's absence from her employment with the respondents from January 2010 with work related stress and depression. In reaching this conclusion the Tribunal had regard to the fact that the respondents were willing to engage with an external OH provider as they understood that the claimant may be unwilling to engage with their own normal OH provider (letter of 21st July 2011). In the letter of 19th August 2011 from Dr Kim Waldron, a suggestion of 3 alternative OH providers (one of whom was the NHS) was made to the claimant. The Tribunal also had regard to the fact that, in correspondence, the respondents repeatedly said that a referral to Occupational Health would be with a view to the claimant's gradual re-integration to the workplace.

22. The Tribunal finds that the request that the claimant engage with Occupational Health was a genuine attempt by Dr Kim Waldron to engage with the claimant and the University to obtain further information with a view to what was described in the correspondence as "reintegration to work." Support for this finding is to be found in the letters of 18th July 2011, 21st July 2011, 19th August 2011 and 13th October 2011. The Tribunal further finds that the claimant failed to engage constructively with the proposal that a report be obtained from Occupational Health. To this end, the letter of 19th August 2011 from the respondents to the claimant not only provided details of three alternative providers of Occupational health but also set out the questions that would be asked of any OH provider and assured the claimant that any forms or other documentation completed by the respondents for the purpose of an OH report would be shared with her.

23. In response, the claimant's letter of 25th August 2011 made reference to the respondents' failure to supply a copy of the "intended brief", notwithstanding the assurances by Ms Waldron in her letter of 19th August 2011 about the provision to the claimant of copies of any documentation supplied to the chosen OH consultants. The claimant did not clarify to the respondents what further documentation would satisfy her request for sight of the "intended brief". The respondents' final letter on this issue (13th October 2011) reiterated that the respondents were "very happy" to explore reintegration to work and reiterated the fact that this would have to be managed through an OH referral as they needed "informed medical guidance" on how such a reintegration would be achieved. The letter of 13th October 2011 repeated that: *"The OH route remains open to you and if you wish to explore a reintegration to work at the University please advise me on which OH provider you would feel most comfortable using and we can begin the OH process."*

24. In making these Findings in Fact , the Tribunal was mindful of the fact that in cross examination it was put to Dr Sheila Gupta that the claimant requested a copy of the brief to Occupational Health which was never provided and therefore the claimant could not be criticised for the lack of progress in relation to Occupational Health. In response, Dr Sheila Gupta stated: "*As I understand it, Dr Waldron did write to Professor Sheikholeslami and tried to make that clear. I think it was just not clear.*" **(Bundle 3 p226).** Notwithstanding this, on examination of the correspondence the Tribunal finds that the issue of the claimant's reintegration to work via a referral through Occupational Health was repeatedly raised by Dr Kim Waldron in the correspondence of 18th July 2011, 21st July 2011, 19th August 2011 and 13th October 2011. The Tribunal also finds that the letter of 19th August 2011 was clear in its terms in that a choice of three OH providers was given and full details of the questions that would be asked of these OH providers were provided. The letter of 19th August 2011 also provided the claimant with reassurance that any forms or other documentation submitted to her chosen OH provider would be shared with her.

25. In all of these circumstances, the Tribunal finds that notwithstanding a view among the respondents that the claimant was never going to return to the employment of

the respondents (as found in para **107** of the original judgment, **Bundle 1** p**234**) the issue of a referral to OH was a genuine attempt on the part of Dr Kim Waldron , acting on behalf of the respondents to "reintegrate" the claimant to her employment within the respondents; and that the reason that the issue of an OH referral was not progressed at that time was because the claimant never identified her choice from the three OH providers as set out in the letter of 19th August 2011.

26. Accordingly the Tribunal finds that prior to the correspondence of 16th December 2011 (as narrated in paragraph 69 of the Judgement) the respondents were unable to progress an attempt to re-integrate the claimant into the workplace due to an "*impasse*" reached as a result of the claimant's failure to respond constructively to a reasonable request from the respondents that she engage with Occupational Health.

27. Paragraph 74 of the judgment **(Bundle 1 page 226)** provides: *"74 The evidence of Sheila Gupta was that her understanding was that the claimant was seeking a settlement from the University and would not be returning to her previous position. For these reasons she did not explore possible options to extend the claimant's stay in the UK and did not invoke the grievance policy despite communications made by the claimant which were (by her own admission in evidence) clearly grievances."*

28. Paragraph 81 of the Judgment provides: **(Bundle 1 page 228)** *"Sheila Gupta's justification for her failures in not only progressing the claimant's grievances but also in having no regard to the issue of disability in the termination of the claimant's employment was simply that the claimant was seeking settlement from the respondents. However, such negotiations as there were between the claimant were not fruitful and at no point could it be said that a settlement was within contemplation."*

29. Paragraph 106 of the Judgment provides **(Bundle 1 page 233)** : *"Sheila Gupta gave evidence that she dismissed the claimant without considering other options under the respondents Disability Policy as she was of the view of the claimant was only interested in a settlement with the respondents. However, there was no evidence to support the proposition that settlement discussions with the claimant ever came*

close to fruition. Further, in evidence, Sheila Gupta admitted that the claimant never expressed the view that she wished to relinquish her position as the Chair of PetroChemical Engineering. In considering this issue the Tribunal concluded that there was no factual basis to support the proposition that the claimant wished to leave the employment of the respondents."

30. Notwithstanding the fact that there was no evidence to support the proposition that settlement discussions with the claimant ever came close to fruition or indeed that the claimant wished to leave the employment of the respondents, the Tribunal finds that as a matter of fact that Sheila Gupta believed that the claimant was seeking settlement with the respondents. In reaching this conclusion the Tribunal had regard to Sheila Gupta's evidence in cross examination where she said on more than one occasion that her understanding and belief was that the claimant was seeking a settlement from the respondents. To this end, at the end of her cross examination Ms Gupta stated: *"I think what I want to say is the intention was to genuinely try and achieve a satisfactory resolution to the situation, that is not to say on reflection there are not aspects in this case that we could have managed differently."* Simon Gorton then stated: *"Satisfactory resolution as far as you were concerned was exiting the claimant from the university."* Sheila Gupta replied by stating: *"I would wish to reiterate my earlier point I thought that Professor Sheikholeslami asked the University to seek a settlement and I really wanted to engage positively with that."* **(Bundle 3 p 227)**

PARTIES' SUBMISSIONS

The submissions are exactly as provided by the parties

The numbering in the parties' submissions accords with the numbering in the submissions provided by them.

31. **Submissions for the Claimant**

The Claimant (C)

The Respondent (R)

1. The ET has indicated that it would welcome a summary outline of each party's case in order for the ET to record and embody the same in its Reasons.

2. C's previous summary is set out in B1 p183.

Structure of C's case

3. The core structure of C's case:

    3.1. Pre dismissal matters relating to procedures and policies . Taking para 1 of the list of issues on B3 p57-62 (but this applies to identical issues under the different causes of action), this includes 1.1, 1.2 and 1.4;

    3.2. Matters relating to C's absence and steps that could have been taken to reintegrate C into work, this embraces 1.5-1.8;

    3.3. Dismissal in terms of what process and procedure ought to have been followed and how it should never have taken place and/or steps that R should have taken to avoid dismissal – this embraces 1.9-1.12 and 1.14;

    3.4. Dismissal and work permit issues that are embraced by 1.3 and 1.13;

    3.5. Steps that should be been taken in respect of the removal of C's lab and PHD supervision.

4. The ET is invited to approach deciding the remitted issues in this above form.

Key findings

5. While C refers to its submissions on the facts as to those which the ET has found or are invited to find, as set out under Part B paras 8-20 in C's submissions for the hearing on 28/2/19 (B3/78-92), there are a number of findings made by the ET that are critical if not determinative.

6. First, the steps R did and didn't take in respect of C's immigration status and imminently expiring work permit. This was the expressed reason for C's dismissal and is therefore at the core of this case. This is set out in paras 70, 73 and 105 of the ET reasons: Gupta could and should have taken steps to contact C and ensure her immigration status was not lost and thereby her employment also not lost. Gupta did neither.

7. Second, why did R and Gupta not take those steps? Beyond admitting she should have done, her rationale (save as identified below under para 9) was that (i) C was seeking a settlement – which the ET emphatically rejected paras 81/106, and (ii) because C was relinquishing her Chair (in other words wanting another job) which was similarly dismissed by the ET – para 82. Note, the rationale was never that there was an impasse – that is R's case post the EAT and not before the ET; it was not the evidence or the thrust of the evidence of the witnesses for R not least Gupta.

8. Third, the applicable and eminently relevant suite of policies not applied by R and followed through. Those policies most applicable were (i) the Disability Policy (ii) The Grievance procedure dealing with gender and disability complaints, as well as the procedures set out under para 12 of the submissions (B3/78-92) for the remitted hearing. Those policies were entirely relevant to all of the applicable problems and issues that C was concerned with: her ill health; her grievances concerning her treatment because of her disability status and mistreatment because of her gender; the need for steps to be taken that were reasonable adjustments to assist C to retain her employment not least under the Disability Policy. R accepted that not to apply the Disability Policy was a "fundamental omission" – paras 73/103/106. Again, why were those policies not applied and again the rationale and defence was never that there was an impasse.

9. Fourth, the actual rationale of R (as opposed to the latterly deployed confection of impasse) in fact makes things worse for R and proves C's case:

9.1. C's employment could have been retained and not lost through the immigration issue as Gupta accepted – paras 73/105;

9.2. C's grievances were never progressed because of C's ill health – paras 103/104/107. In other words C was being penalised for being ill and absent – the clearest example of a discriminatory mindset. Again, note no suggestion was made that this was due to an impasse;

9.3. The Disability Policy was not only relevant and applicable (reasonable adjustments and avoiding dismissal being at its core) but R's failure to apply it was a "fundamental omission". The impasse argument again was never raised. This has even more resonance here: if R thought an impasse caused the policy to be rendered ineffective, this was its opportunity to state this; R did not;

10. Fifth, it is overwhelmingly obvious from the above that the reason for C's dismissal was R's lighting (or perhaps more appropriately seizing) on the expiration of the work permit issue as the dismissal letter of 11/1/12 makes explicitly clear - see para 70, as means of exiting C. The ET has already found that this was done unfairly. It is quite clear that it was done without any justification and no defensive rationale as paras 73/105 make clear.

11. Sixth, the ET can draw the necessary inferences that the dismissal was an act of avoidance by R to (i) apply its Disability Policy (ii) investigate and adjudicate on C's grievances (iii) avoid having to grapple with C's serious allegations of discrimination on the grounds of sex and disability.

12. Seventh, here are a series of matters that assist the ET in drawing those necessary inferences as follows:

12.1. The insider club within the School that was materially influenced by gender discrimination and the group's adverse reaction to C on and after the 15/2/11 meeting;

12.2. The attempt negatively to influence the Prof Shaw investigation as the ET records in paras 45/46 that came from within the School;

12.3. McCloskey's assault on Prof Shaw's professionalism that was extraordinary but critically betrayed the mindset of the School closing ranks against anyone who raises issue against the School – see para 99;

12.4. The injunction against contact with C and sending C to Coventry that again came from within the School and that was never revealed until Dr Glass inadvertently revealed it. That formed the basis of the finding of victimisation which C has succeeded on;

12.5. The findings of retaliation against C for having raised complaints that form the basis of the ET's victimisation findings against R;

12.6. The deeply murky evidence of who issued the injunction and precisely to whom as exemplified by McCloskey's evidence.

12.7. The clear suspicion that Ingram had been colluding with other witnesses while giving his evidence – para 111;

12.8. The fact that the Head of the College intentionally and deliberately lied to the ET about the critical issue of who was the decision maker. Given the importance of the issue of who made the decision and the absence of the Principal (O'Shea) from the ET proceedings, this was rightly exposed by the ET as being a fabrication. It was a fabrication that represented R closing ranks against C and attempting to mislead the ET;

12.9. The fact that both Gupta and Glass made incriminating admissions that once they realised what they had done, they both attempted to retract their evidence. This is clearly recorded by the ET for both at para 109. That is redolent of matters being concealed from the ET. R has not given the ET the full and truthful picture, as it should have done. At times the truth has

spilled out only for R to then to try and retract. That ought to make the ET deeply suspicious of R and its motives;

12.10. The seriously negative and wholly unjustified slur on C by Gupta in her memo as recorded in para 196. Plainly, prejudicial views against C for having raised complaints, demonstrating that the animus and hostility to C was not reserved to the School;

12.11. How that continued into R's XX of C that was severely criticised by the ET. The senior advocate conducting the XX is not criticised, as she was plainly acting on instructions – see para 85.

13. Eight, if necessary the ET can rely on the switching of the burden of proof in respect of all of C's claims. Based on the above and the admissions made already by R e.g. policies were not applied because C was believed to be unwell and would not be thought to want to go through it, or the Disability Policy was not applied and no reason given for it not being applied, the burden switches to R and R's evidence either condemns it or it has no defence i.e. rationale non discriminatory reason for the mistreatment of C.

Findings applied to the claims

14. On reasonable adjustments:

14.1. The PCP was the obligation to work at the School;

14.2. All that was happening to C (absence, grievances, dismissal process) arose from the PCP or where closely connected with it e.g. grievances;

14.3. That clearly put C at a significant disadvantage next to a non disabled comparator;

14.4. Making the adjustments would have made a significant difference e.g. the policies would have been followed, C's grievances investigated, reasonable adjustments to return to C to work would have been explored and implemented, C dismissal would have been avoided. Gupta's evidence was to that effect. It is overwhelmingly clear that not only were the adjustments sought, they were sensible and practical and practicable;

14.5. Note that R does not argue that they were not reasonable;

14.6. Instead R argues that they adjustments would not have been relevant to the PCP because of the alleged impasse. Aside from the fact that this in an impermissible argument (as below) it is also misconceived: all the adjustments would have assisted in relieving the disadvantage flowing from the PCP which was the threat of dismissal as C felt she could not return to the School;

14.7. Moreover, R's arguments conspicuously avoided making any submissions on avoiding dismissal as a reasonable adjustment. That is for the obvious reason that R's argument becomes absurd when considering the PCP and dismissal: not dismissing was the obvious step to take so as to avoid the PCP; R's case is that the PCP was not relevant to dismissal, but how can that possibly be right when the adjustment sought is to avoid dismissal when the entire basis of the PCP is one framed in dismissing C for not being able to return to the School? The core of the PCP is that C must return to work at the School and if not she is at risk of being dismissed; how can not dismissing C not be a reasonable adjustment?

15. On s15 claims:

15.1. The unfavourable treatment could not be clearer: as is exemplified in schedule, things that should have been done to and for C were not culminating in dismissal;

15.2. The something arising in consequence was C's absence from the School and C's inability to return to it – see EAT para 63;

15.3. Again, as much as C followed the argument, R's contention appeared to be that either the impasse broke the chain of causation or that the Gupta rationale did the same. Both are completely misconceived: as the EAT noted at para 64, the ET has already made a finding on this in para 203/205. Manifestly both were linked in a clear causative sense to C's disability and absence.

15.4. Even if the impasse argument was correct to a degree (it is not to any degree), it is irrelevant to the first causation question which the EAT analysed at para 64: R's considerations were all directed to C's absence and therefore disability status. C's treatment was related or because of her disability absence;

15.5. And on the second causation question, it is absolutely clear that on the looser causation test, again C's absence and R's treatment of her in respect of this, which was at the heart of the issues, was because she was disabled. Again as clearly analysed by the EAT in para 65-66;

15.6. The submission that Gupta's rationale, which was an inherently discriminatory rationale i.e. she didn't deal with C because she was ill, somehow breaks the chain of causation (first or second question) is wholly misconceived: Gupta precisely didn't deal with C in the way that she should have done because C was ill;

15.7. No objective justification defence has been pleaded, it was not argued before the ET at the substantive hearing, no application having been made to amend the defence to plead this, the ET simply does not have jurisdiction to entertain the defence. Even if it did, as para 111 records, no evidence was led on this and therefore no such defence can be sustained.

16. On victimisation:

16.1. C submits that what to a material extent explains R's seemingly irrational conduct of not following procedures and policies, not exploring with C the eminently sensible steps to avoid the immigration cliff edge with C, were not pursued and were not pursued in respect of a reasons for justification that were rejected by the ET: settlement and giving up Chair;

16.2. What therefore explains (materially – it does not have to be wholly) R's actions is a desire to see the end of C and her disputes without having to address them or follow procedure(s). This is where the work permit rationale is introduced. It is no more than a convenient device to side step difficult and demanding issues. That unquestionably is because of C's protected acts and those protected acts materially influenced R;

16.3. That answer can be given by way of drawing inferences from primary facts or by way of the application of the burden of proof. Either way, C should succeed in her claims.

17. On sex discrimination. This is explained in C's substantive submissions. Avoiding complaints about gender discrimination is not only victimisation, it is also direct discrimination if the reasoning is to avoid and side step gender based complaints.

R's post EAT arguments

17. Finally, R has raised 2 post EAT defences that are entirely impermissible and should be rejected.

18. First, the objective justification defence under s15. See para 15.7 above.

19. Second, the impasse argument. Briefly, this should be rejected:

20.1. It is entirely new and was not raised previously before the ET. It cannot be raised now as the EAT remission statement makes clear B3 p39 para 1 Reasons – the ET is finishing off its task and not embarking on new matters.

20.2. It was neither R's case nor its evidence. R's case and evidence was that it not take certain steps that it ought to have done because (i) C was unwell and/or (ii) she wished to settle and/or (iii) relinquish her chair. The ET rejected the latter 2 and the former was inherently discriminatory so could not assists R in any event. Nowhere did R argue that it did not apply the relevant polices nor take steps it should have done because matters had reached an impasse. If there had been reached an impasse Gupta would have said this but her evidence expressly was not this. Waldron would have said the Disability Policy could not be applied because of an impasse, but she did not say that. Finally if there was an impasse, Gupta would have told the ET that the work permit issue was triggered by the impasse; she did not say that;

20.3. It is wrong as a matter of fact. As the transcript of the evidence makes clear in respect of Gupta's evidence, the brief that C required was never provided by R i.e. the instruction letter to the proposed expert - see B3 p226227. There was a failure to progress matters because C wanted certain procedural safeguards applied i.e. a written brief. But that was hardly an impasse. And it would not have prevented the other policies applying i.e. Disability and Grievance. And as the ET found in para 196, that was not an impasse but simply R not progressing matters once the expiration of the work permit raised its head;

20.4. It is also abundantly clear from Waldrons's testimony and Para 69 of the ET that the issue for R was the return of C to the School and Work Permit and not any currently confected impasse as a result of OH.

20.5. Finally, the argument as to impasse, as the ET identified yesterday, conflicts with the ET's previous findings in paras 78/101/106/107/196. Those findings were not appealed to the EAT. They cannot be challenged or implicitly set aside.

32. **Submissions for the Respondents**

1. At the request of the Tribunal the R has prepared this executive summary of the R's submissions, original submissions, responsive submissions and the further factual findings the Tribunal is invited to make.

2. As submitted in oral argument the R invites the Tribunal to complete the factual findings which the Tribunal partially addressed at paragraphs 67 to 68.The R submitted the sequence of correspondence from the 23rd May to the C's rejection of the R's proposals, specifically its' willingness to engage in looking at the steps necessary for the C's re integration into the workplace. The University in the letter of 13th October 2011, page 57 bundle 2, were open to reintegration back to the workplace, as they had been from April, but took the reasonable position that this would require a referral to occupational health for "informed medical guidance on how such reintegration can be achieved". The C is given the choice of OH from three providers and it is clear that route is open to her. Her response of 22nd November 2011, page 60, simply does not take that up.

3. The R's position is that in so far as it is necessary for the C to establish that any of the alleged reasonable adjustments would have avoided the PCP relied on it is for the Cl to show that the proposed adjustments would have had this effect. In this respect it is R's case that the R's reasonable attempts at addressing her rehabilitation to work and thus avoiding the effect of the PCP rested upon obtaining occupation health guidance.

4. R's position is that further findings of fact can be made on the documents that:

   4.1. The University were willing to explore the C's reintegration to work but took the reasonable position that an Occupational Health referral, which it was happy should be an by external provider selected from a list by the C, should be taken to obtain informed medical guidance on how such a reintegration could be achieved.\The C did not agree to progress that proposal;

4.2. An impasse was therefore reached that meant her reintegration to work could not be advanced.

5. <u>The Alleged Failure to Make Reasonable adjustments contrary to Ss 20 and 21 of the Equality Act 2010</u>

6. The original Judgment found that the R had applied a “provision, criterion or practice”, “PCP”, that the C should attend work at the School of Engineering. The second question is then whether that placed the C at a substantial disadvantage, in relation to a relevant matter, in comparison with persons who are not disabled. If it did then the duty is engaged so as to take such steps as it is reasonable to take to avoid the disadvantage.

7. Whether or not a step will remove the substantial disadvantage is a critical aspect in determining whether the asserted step is reasonable. In an extreme position if there is nothing the employer can do, that will have the effect of getting the disabled person back into work, it cannot be reasonable for him to have to do anything at all. Thus in *HM Prison Service v Johnson [2007] IRLR 951, EAT* where the stage had been reached that the consequences of the disability were irretrievable and the duty to make adjustments was therefore said to have fallen away. Similarly, in *Conway v Community Options Ltd UKEAT/0034/12*, *[2012] EqLR 871* it was held that if an adjustment would not enable a return to work, it will not be 'reasonable' for it to be made.

8. Here on the facts the C’s position was that she was not willing to engage with the offered steps to avoid the impact of the PCP by looking to reintegrate her into the workplace.

9. Once that is understood none of the proposed reasonable adjustments avoid the PCP.

9.1. (15) *R should have engaged with C in respect of the potential of and warned and informed C of the removal of her duties as PHD supervisor for Emad.* Has no relationship to returning to work;

12.2 (14) *R should have, if necessary, created a new role for C. R should have engaged with C in respect of the potential of and warned and informed C of the removal of her laboratory.* The removal of the laboratory issue has no relevance, the new role (addressed in 12) is considered below;

12.3 (13) *R should have engaged with C in respect of her work permit status, fully informing C of her and its options all with a view to ensuring C's work status was not lost at the expiration of her 5 year work permit.* To the same effect (3). These alleged reasonable adjustments bring nothing to the point on addressing the substantial disadvantage the C advances;

12.4 This is equally true of the alleged adjustments around dismissal, (9), (10) and (11). They might have continued the employment relationship but they would not have addressed the substantial disadvantage.

12.5 "(4) *R failed to maintain C's pay when absent though illness and failed to keep any non-payment under review."* Has no engagement at all with removing the substantial disadvantage. There are no exceptional circumstances in this case, of the nature contemplated in *O'Hanlon v Commissioners for HM Revenue & Customs [2007] IRLR 404 (CA)* and *Royal Bank of Scotland v Ashton [2011] ICR 632* such that maintaining sick pay would have removed what is alleged to be the substantial disadvantage, that the C should attend work in the School of Engineering.

10. This reasoning addresses the C's case on alleged adjustments 1.1, 1.2, 1.3, 1.5, 1.6, 1.7, 1.8 and 1.12

11. The C's case on reasonable adjustments should be dismissed.

12. Whether the R acted contrary to S 15 of the (EqA); the C alleges that the R failed to do so in the following respects:

13. The list of issues reflects again a broad brush approach apparently being a recast of the case on reasonable adjustment. This reflects a fundamental misconception about the application of S.15. It is clear from *Trustees of Swansea University Pension & Assurance Scheme v Williams* [2015] IRLR 885, EAT – upheld by the Court of Appeal [2017] EWCA Civ 1008, [2017] IRLR 882, [2018] ICR 233 and now by the Supreme Court (17th December 2018) that the C not being treated as beneficially as she would wish is not to be equated with the C being treated unfavourably. Thus the C may seek more favourable treatment in the continuation of pay beyond normal sick pay, but that not happening is not being treated unfavourably, it is not being treated as favourably as the C would wish. That does not make out a claim under S.15.

14. The EAT in this matter set out, following the approach *City of York Council v Grosset [2018] EWCA Civ 1105*, *[2018] IRLR 746*, the correct approach. Firstly it is necessary to identify the specific act of **unfavourable** treatment alleged, a tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B, that is clear from Simler J's Judgment in *Pnaiser v NHS England [2016] IRLR 170, EAT.* and then it is necessary to consider two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?

15. The first issue one considers is the alleged discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for the tribunal to decide in the light of the evidence. As to the second it does not have to have a direct causative connection and there may be causative links but it remains the case that it must be possible to say that it is something arising in consequence of the disability.

16. It is then necessary to tease out of the issues advanced by the C what is said to be the unfavourable treatment and then to consider whether it can be said to meet the necessary causative steps.

17. Applying a more analytical approach to the claims

18. *"2.1 R failed to apply its procedures not least in respect of sickness absence and specifically its Disability Policy"*

    18.1. The R did not apply its' sickness absence and disability policy. From Paragraph 81 of the Judgment it is clear that Ms Gupta, whose was responsible for considering this, did not do so because she believed the C was seeking a settlement from the R, this dates back to proposals made by the C in May 2011. The Tribunal find that at no point could it be said that a settlement was in contemplation but that does not mean that Ms Gupta reason was not subjectively the reason for the "something" complained of. This is a subjective question not a question of whether the view was reasonable.

    18.2. The belief that the C was seeking a settlement is then not something arising in consequence of the disability, it is a consequence of the overtures that the C made in May 2011 to seek resolution. The dispute with the R is not the disability and critically, as set out in the case on reasonable adjustment, the R has acted reasonably in addressing a position on needing a medical assessment on a phased return to work. That effectively became a break in the chain of causation between the disability occasioning the C's absence and the events after the R has reasonably engaged on how that might be addressed.

19. "2.2 R failed to apply or have regard to its procedures including the grievance procedure and dignity and respect policy."

20. The same reasoning applies to these policies.

21. "2.3 To take all steps to ensure C's immigration status (which was intimately

intertwined with her employment status) would not be compromised by C's absences and if necessary to take all reasonable steps to ensure that C would not be at risk of losing her lawful working status".

22. This as noted is not actually unfavourable treatment it is the R not treating the C as beneficially as she wished, the clue is the formulation "to take all steps", there was no duty on the R to take any steps in respect of the C's immigration status.

23. "2.4 R failed to maintain C's pay when absent though illness and failed to keep any non-payment under review"

"2.5 R failed to reintegrate C into work"

"2.6 R failed to contact C's GP in order to assess C's fitness and ability to return to work"

"2.7 R failed to commission expert medical advice in respect of C's condition, prognosis and return to work"

"2.8 R failed to provide a brief to C as a condition precedent to C being seen by R's Occupational Health advisers"

24. As outlined above on the point relating to the continuation of pay none of these "somethings" are unfavourable treatment, the C is not being treated as favourably as she wanted. This is equally true of the following:

"2.12 R should have considered moving C to a different place of work (here outside the school of Engineering)"

"2.13 R should have engaged with C in respect of her work permit status, fully informing C of her and its options all with a view to ensuring C's work status was not lost at the expiration of her 5 year work permit."

"2.14 R should have, if necessary, created a new role for C"

"2.15 R should have engaged with C in respect of the potential of and warned and informed C of the removal of her laboratory"

"2.16 R should have engaged with C in respect of the potential of and warned and informed C of the removal of her duties as PHD supervisor for Emad"

"2.17 R should have engaged with C in respect of the potential of and warned and informed C of the removal of her duties as PHD supervisor for Emad"

25. Properly analysed these are all assertions of beneficial treatment which the C desired and not unfavourable treatment. This is reflected in the fact that the C, although unsuccessfully so, seeks to advance these matters as reasonable adjustments.

26. This leaves the dismissal and these issues:

"2.9 R should not have dismissed C and/or should have taken all reasonable steps to avoid dismissal"

"2.10 R failed to avoid dismissing C"

"2.11 In dismissing C, R failed to apply any of the relevant procedures applicable including the ACAS code of practice, R's Disability Policy, Dignity and Respect Policy, Absence Management Policy, Unauthorised Absence Policy"

27. These are capable of being unfavourable treatment but what is the "something". It is simplistic to say it is the C's absence, she had been absent since 2010. What leads to this process is the impasse, an impasse that's reached by the end of 2011, as set out

above, because the C is not accepting of the way forward to re integrate her into the workplace.

28. Even if then there is a causative connection for the purpose of S.15(1) on the objective test the treatment was a proportionate means of achieving a legitimate aim. It plainly must be a legitimate aim to regularise the contractual position of an employee in respect of whom an impasse has been reached and there is a simply a sterile employment relationship. The means are clearly proportionate as termination is the only mechanism by which that can be resolved.

Conclusion on S.15

29. The C's claims under S.15 should be dismissed.

30. Whether the R victimised the C contrary to S.27 of the EqA. The protected acts relied on by C are identified in C's closing submissions to the ET dated 29/5/16 at paras 84-88 and 152-155:

31. On C's case the alleged protected acts are articulated in the broadest way at paras 84-88. Paras 152-155 do not assist with any degree of refinement. That is not to assert that it is denied that there were protected acts, the Tribunal found a protected act, but the lack of precision leaves the C with a broad brush assertion that they are said to be materially causative of acts which we find both in the reasonable adjustment and the S.15 claim. Ultimately this is a matter for the Tribunal who heard the witnesses but it is observed above the R's reasonable engagement with the C in 2011, on the way forward, negates the suggestion that of the alleged acts or omissions were causatively motivated by the earlier protective acts.

32. It is noted that the C refers back to the shifting burden of proof on the claims of sex discrimination and or victimisation, addressed below. It will be noted that the C unsuccessfully appealed the Tribunal's original self direction on the burden of proof and it is respectfully submitted that the Tribunal make reference back to that self-direction, at para 131 of the Judgment. Not adopting the "2 stage" process in

considering the burden of proof is not an error of law, as the C's unsuccessful appeal demonstrates. The central question is the reason "why" alleged acts of discrimination have occurred and a tribunal may proceed to address that question directly and that it is typically the more satisfactory approach.

33. Lord Hope, in *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054, at paragraph 32, approved dicta of the former President Underhill J, as he then was, in *Martin v Devonshires Solicitors:*

> "The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance [*nb he was there referring to the guidance in the cases of Igen and Madarassy*]. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, paragraph 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance.

34. There is no basis for the burden of proof in that the matters alleged are not of themselves give rise to the inference that the specific decision makers around the objects of the C's complaints were motivated by the fact that the C had carried out protected acts.

35. These claims of victimisation should be rejected.

36. Whether the R discriminated against the C because of her gender contrary to S.13 of the EqA, the alleged acts of less favourable treatment

37. The same reasoning applies in relation to sex discrimination, this is no more than an unsubstantiated bare assertion.

38. These claims of direct sex discrimination should be rejected.

39. <u>The Amendment Application</u>

40. The C has applied to amend her Claim to include a claim of direct discrimination, contrary to S.13 EqA, on the ground that it is alleged that the R treated the C less favourably than it would have treated others who were not disabled, the acts of less favourable treatment being relied upon being:

    40.1. The R failure to apply its policies

    40.2. R's failure to treat C's grievance as that

    40.3. R's failure to take steps to extend C's work permit

    40.4. The C's dismissal C

    40.5. dismissing the C without considering other options

41. This amendment is made now, substantially out of time. It is open to the Tribunal to exercise a discretion to allow a claim substantially out of time under the EqA, on the basis that it is just and equitable to do so, s.124.

42. It can neither be just nor equitable to permit this here.

    42.1. The amendment is proposed after the R has closed its case, the C resisted the leading of further evidence, and R would be deprived of the ability to conduct its case knowing that it had to meet this claim;

    42.2. No explanation has been provided as to why the application is being made

now. The claims were first pleaded by lawyers instructed on behalf of the C in 2012. Previous applications were made to amend, in relation to holiday and notice pay, and the possibility of amendment was clearly known;

42.3. Even if material became known, through productions in the case, the application could have been made before the commencement of the evidence;

42.4. Even if it formulated on the basis of the oral evidence before the Tribunal the application could have been made before submissions and at a point when it was open to the R to lead evidence in rebuttal;

42.5. The C instead does nothing. She maintains her position on the pleaded case, on which there was judgment and an appeal and the matter is only before the Tribunal on the basis of the remitted matters.

43. The application should be refused.

DISCUSSION AND DECISION

(i) Failure to make reasonable adjustments

S20 and s21 of the Equality Act 2010 insofar as material provide:

"20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A. (2) The duty comprises the following three requirements (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 Failure to comply with the duty

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

33. In their determination of the claimant's case on failure to make reasonable adjustments the Tribunal was guided by the decision of the EAT in this case and the terms of the remit from the EAT. In doing so, the Tribunal reminded itself that this case only involves consideration of the first requirement as set out in **s20**(**3**).

34. In terms of the claimant's submissions, as recorded in paragraph 144 of the Judgment, the PCP is the respondents' requirement that the claimant attend work and fulfil her role. The EAT accepted the C's argument that it is her case that, as a disabled person with depression, she was unable to return to work at the School of Engineering and this meant her future employment was put at risk and by comparison non-disabled people who could attend work at the School of Engineering would not be put at that risk.

35. In the Joint List of Issues, the claimant's representative lists 15 steps that the respondents should have taken. These steps are set out in the Agreed List of Issues, replicated in paragraph **8** of this Judgment.

36. It is necessary to consider whether each step would be effective in preventing the substantial disadvantage. **(Conway v Community Options Ltd (UK EAT/0034/12; EHRC Code of Practice on Employment at para 6.28)**. The Tribunal also bore in mind that it is important to consider whether a combination of steps could avoid the substantial disadvantage (**Burke v The College of Law and anor 2012 EWCA Civ 87, CA**; **Home Office (UK Visas and Immigration) v Kuranchie EAT 0202/16)** . There does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one; it is sufficient for the tribunal to find that there would have been a prospect of it being alleviated (**Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10.**

37. In this case, the substantial disadvantage is that the claimant, as a disabled person with depression, was unable to return to work at the School of Engineering which meant her future employment was at risk. The Tribunal therefore has to look at the reasonable adjustments directed at overcoming the alleged substantial disadvantage and achieving the claimant's return to work. To this end the Tribunal agrees with the submissions of Mr Reade QC that several of the alleged 'reasonable adjustments' are not steps or actions which would have been effective in preventing the substantial disadvantage in question – in particular the proposed 'reasonable adjustments' to engage with the claimant in respect of the potential of and warn and inform the claimant of the removal of her duties as a PHD supervisor; to engage with the claimant in respect of the potential of and warn and inform the claimant of the removal of her laboratory; and to maintain the claimant's pay when absent through illness and to keep non-payments under review. The claim in respect of these adjustments fails.

38. S20(3) of the Equality Act 2010 imposes a duty *"to take such steps as it is reasonable to have to take to avoid the disadvantage. "* The question whether proposed steps are reasonable is a matter for the Employment Tribunal and has to be determined objectively **(Griffiths v Work and Pensions Secretary (CA) (2017) ICR 160** (at para 73) citing **Smith v Churchill Stairlifts plc (2006) ICR 524** at paras **44-45)**.

39. After consideration of the Tribunal's Findings in Fact, and given the conclusion that the respondents were unable to facilitate the claimant's return to work as an impasse was reached due to the claimant's failure to respond constructively to a reasonable request to engage with Occupational Health, the Tribunal came to the view that (1) it was not reasonable to expect or require the respondents to take any further steps to reintegrate the Claimant into work; (2) it was not reasonable to expect or require the respondents to take the step of contacting the claimant's GP in order to assess the claimant's fitness and ability to return to work; (3) it was not reasonable to expect or require the respondents to take any further steps to commission expert medical advice in respect of the claimant's condition, prognosis and return to work; (4) it was not reasonable to expect or require the respondents to create a new role for the claimant and (5) it was not reasonable to expect or require the respondents to

provide a 'brief' beyond the scope of what they had already provided and indicated they were willing to provide, to the claimant as a condition precedent to the claimant being seen by the respondents' Occupational Health advisers. In this respect the Tribunal concluded that, because of the impasse reached, which was caused by the claimant the respondents were unable to obtain the medical information they required in order to attempt to re-integrate the claimant in an appropriate manner into the workplace. To this end the Tribunal was mindful of the fact that the claimant had been absent from her employment with the respondents since January 2010 with work related stress and depression. Against that background the course of action proposed by Ms Waldron was an eminently sensible and reasonable one.

40. The Tribunal considered that the proposed reasonable adjustment of *"failing to avoid dismissal of the claimant"* (as set out in the Agreed List of Issues at 1.9 (paragraph **8**)) is not a "reasonable adjustment" in itself. To this end, the Tribunal was collectively of the view that the "reasonable adjustment" of failing to apply the respondents' own procedures and policies (and thus potentially avoiding or reducing the risk of dismissal) is the appropriate adjustment in this context.

41. After having regard to the evidence and the guidance given by the Employment Appeal Tribunal in this case the Tribunal finds that it was reasonable to expect and require the respondents to take the following steps, in order to fulfil the duty to make reasonable adjustments; (a) to apply the respondents' own procedures and policies in respect of sickness absence and disability; (b) to apply their grievance procedure and dignity and respect policy; (c) to take steps that they reasonably could to try to ensure the claimant's immigration status would not be compromised by her absences caused by her disability and if necessary to take all reasonable steps to ensure that the claimant would not be at risk of losing her lawful working status; (d) to apply all of the respondents' relevant procedures in connection with the claimant's dismissal and (e) to engage with the claimant in respect of her work permit status, informing her of all its options with a view to trying to ensure her work status was not lost at the expiration of her 5 year work permit. By so engaging there was a prospect that the substantial disadvantage would be alleviated. These were all steps which the respondents failed to take but which they should have taken in order to comply

with their duty to make reasonable adjustments within the meaning of section 20(1) of the Equality Act 2010.

42. In determining that, objectively speaking, such adjustments were reasonable the Tribunal had regard to the fact that many of the proposed adjustments consisted only of the respondents applying their own policies and procedures. Other adjustments consisted of engaging with the claimant in respect of her work permit status to avoid or minimise the risk of her right to remain in the UK and her work status being imperilled. The Tribunal were at one in finding these were reasonable steps to expect the respondents to take given that the claimant remained an employee of the respondents and given the consequences to her of losing that status.

43. Accordingly, and in respect of these adjustments specified in paragraph 41 only, the claimant's case of failure to make reasonable adjustments under s20 and s21 of the Equality Act 2010 succeeds.

(ii) Section 15 Complaint

S15 of the Equality Act 2010 provides:

"15 Discrimination arising from disability (1) A person (A) discriminates against a disabled person (B) if- (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

44. In determining the claimant's claim under s15 of the Equality Act 2010 the Employment Tribunal was guided by the decision of the EAT in this case and the dicta in the recent case of **Iforce Ltd v Ms E Wood (2019) UK EAT 0167-18-0301** (at paragraph 20). It is there stated:

"The correct approach to section 15 was considered by the Court of Appeal in ***City of York Council v Grosset (2018) EWCA Civ 1105*** *where Sales LJ provided the following guidance from paragraphs:*

> *"36 On its proper construction, section 15 (1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability? 37 The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something"....38 The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" "*

45. The Tribunal also had regard to the authority of **Williams v Trustees of Swansea University Pension and Assurance Scheme and Another (2018) UKSC 65** in finding that insufficiently advantageous treatment does not equate to "unfavourable" treatment.

46. In advancing the claimant's case under s15 of the Equality Act 2010 the claimant relies upon the same steps set out in advancing the case of failure to make reasonable adjustments. Insofar as the first two matters on that list are concerned (namely the respondents' failure to apply their own procedures in respect of sickness absence and apply their disability policy, and failure to have regard to their procedures including their grievance policy and dignity and respect policy), the Tribunal has found that Sheila Gupta believed that the claimant was seeking settlement and it was for this reason she did not apply the university's policies and procedures. The chain of causation is broken in that the failure to apply those policies and procedures was not 'something arising in consequence of (the claimant's) disability'.

47. Insofar as the issue of 'unfavourable treatment' is concerned it is the view of the Tribunal that the requirements to

a. "ensure that the claimant's immigration status would not be compromised by her absences and to take all reasonable steps to ensure that the claimant would not be at risk of losing her lawful working status"
b. to "maintain the claimant's pay when absent through illness and to keep non-payments under review";
c. to "reintegrate the claimant into work";
d. to "engage with the claimant in respect of her work permit status fully informing her of options with a view to ensuring the claimant's work status was not lost at the expiration of her 5 year work permit";
e. to "create a new role for the claimant if necessary"
f. to "engage with the claimant in respect of the potential of and warn and inform the claimant of the removal of her laboratory" and
g. to "engage with the claimant in respect of the potential and warn and inform the claimant of the removal of her duties as PHD supervisor for Emad"

all constitute advantageous treatment in that in these propositions the claimant asserts that she was not treated as favourably as she considered she should be treated. To this end the Tribunal agreed with the proposition of Mr Reade QC in stating that this is reflected in the fact that the claimant seeks to advance these matters also as reasonable adjustments.

48. Insofar as it is asserted that the need to " provide a brief to the claimant as a condition precedent to the claimant being seen by the respondents' occupational health advisors" is concerned, the Tribunal had regard to its findings that in the letter of 19th August 2011 that the respondents undertook to share with the claimant all forms and other documentation that would be supplied to the chosen OH provider - in effect, the "brief" to the OH provider chosen by the claimant. In these circumstances the Tribunal concluded that there was no unfavourable treatment. Likewise with the need to "re-integrate the claimant into work" and "consider moving the claimant to a different place of work outside the school of engineering," the Tribunal found that the respondents were unable to commence what they described as a "gradual scheme of re-integration" into the workplace due to the failure on the part of the claimant to respond to their reasonable request to refer her to OH. That is not something arising in consequence of the claimant's disability. For the same reason the claimant's case

under s15 in respect of contacting the claimant's GP in order to assess the claimant's fitness and ability to return fails as on the facts as found by them the Tribunal were unable to conclude that this was something arising in consequence of the claimant's disability.

49. So far as the claimant's dismissal is concerned, Mr Gorton identified the following as unfavourable treatment: the respondents failed to avoid dismissing the claimant; the respondents should not have dismissed the claimant and/or should have taken all reasonable steps to avoid dismissal; in dismissing the claimant the respondents failed to apply any of the relevant procedures applicable. As the Tribunal understood Mr Gorton's position it was that the unfavourable treatment consisted of a failure on the part of the university to take all reasonable steps to avoid dismissal and that failure in turn led to the unfavourable treatment of dismissal. In determining whether there had been unfavourable treatment, the Tribunal were guided by the **EHRC's Code of Practice in Employment**, paragraph **5.7** of which provides: *"For discrimination arising from disability to occur, a disabled person must have been treated "unfavourably". This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment."* After having regard to this guidance, the Tribunal were of the view that the claimant's dismissal (and the prevention of her dismissal) were capable of constituting "unfavourable treatment" and observed that this a matter which was not disputed by the respondents.

50. The Tribunal then addressed itself as to whether dismissal arose from "something" arising from the claimant's disability and guided themselves that this question has to be answered as an objective matter of fact. In finding that the dismissal, avoiding dismissal and taking steps to avoid dismissal (including applying all relevant procedures) did arise from "something" arising from the claimant's disability the Tribunal had regard to the guidance from the EAT in this case. After consideration of this guidance, the Tribunal concluded that the claimant's absence was due to her disability; and that the view that the claimant was never going to return to the

employment of the respondents due to her health was reflected in the material part played by Sheila Gupta in terminating the claimant's employment without consideration of other options as admitted by her in evidence (all as recorded in paragraph 107 of the Judgment) **(Bundle 1 p234)**.In reaching this conclusion the Tribunal had regard to the arguments of Mr Reade QC that the claimant's absence alone was not enough to constitute 'something' as the claimant had been absent since 2010. However, the Tribunal considered that the evidence of Sheila Gupta (as reflected in paragraph 107 of the Judgment) together with the fact of the claimant's absence provided a sufficient causative link to conclude that her dismissal was "something arising in consequence of" her disability.

51. In these respects the claimant's case under s15 succeeds. In reaching this conclusion, the Tribunal had regard to the respondents' arguments on objective justification, as set out in their submissions.

52. The Tribunal observed that there were no such arguments made in the original proceedings, as recorded in paragraph 116 of the original Judgment **(Bundle 1 p236)**. In the absence of amendment the Tribunal concluded that it was not open to them to consider such arguments made at this stage of proceedings.

(iii) Victimisation and Sex Discrimination

53. The Tribunal proceeded to consider the claimant's claims of victimisation and sex discrimination, insofar as not already dealt with in the original judgment. In this respect the Tribunal were guided by the Joint List of Issues which set out the acts of victimisation and direct sex discrimination founded upon by the claimant all of which are reflected in the list of failure to make reasonable adjustments.

54. In determining these issues, the Tribunal firstly concluded that the claimant had done a number of protected acts, not least of which were her letters of 14th April 2010, 23rd May 2011 and 22nd November 2011.

55. In addressing whether the respondents' failure to apply their policies and procedures including their sickness absence, disability policy, grievance procedure and dignity and respect policy was because of the protected acts, or alternatively because of the claimant's sex, the Tribunal had regard to their finding that these policies were not invoked due to Sheila Gupta's genuine belief that the claimant was seeking settlement from the respondents.

56. The Tribunal then proceeded to consider the respondents' failure to maintain the claimant's pay when absent through illness. The Tribunal observes that there is no evidence that the decision in respect of failure to maintain the claimant's pay (which was taken in late April 2010) was anything other than the respondents following their usual policies and procedures in this respect. The Tribunal finds support for this proposition in their findings arising from the evidence of Professor Alan Murray, Head of the School of Engineering at the material time (cf para **52** letter of 4th February 2011 and paras **91**-**94** of the Judgment, **Bundle 1** pages **219** and **230**). At paragraph 91 the Tribunal finds: *"91 The Tribunal were of the collective opinion Professor Alan Murray came across as an inherently reasonable and measured individual. In his dealings with the claimant the Tribunal concluded that Professor Alan Murray had only attempted to resolve situations and assist the claimant albeit that at times the claimant perceived his correspondence to be patronising".* These findings were unsuccessfully challenged on Appeal. In circumstances where, at the time the decision was made to reduce the claimant's pay the Head of the School of Engineering was attempting to resolve matters between the claimant and the respondents the Tribunal is of the collective opinion that the claimant's claims of victimisation and sex discrimination based on her reduction of pay in late April 2010 must fail.

57. The respondent's failure to engage with the claimant in respect of the potential of and warn and inform her of the removal of her laboratory and engage with her in respect of the potential of and warn and inform her of the removal of her duties as PHD supervisor for Emad are all issues of victimisation that are already covered in the Judgment at paragraph 193 **(Bundle 1,** page **253**). The Tribunal finds that these acts are solely acts of victimisation which arose from the claimant's protected act of 14th April 2010, being a grievance the subject matter of which was sex discrimination

(Finding in Fact **43**, Bundle 1 page **215**). The claimant's claims of sex discrimination in this respect are therefore dismissed.

58. The Tribunal then considered the claimant's claims of victimisation and sex discrimination in respect of the respondents' failure to create the claimant a new role, failure to consider moving the claimant to a different place of work, failure to reintegrate the claimant into work, failure to contact her GP in order to assess her fitness and ability to return to work, failure to commission expert medical advice in respect of her condition, prognosis and return to work and failure to provide a brief to the claimant as a condition precedent to the claimant being seen by the respondents' Occupational Health Advisers. In view of the Tribunal's additional Findings in Fact the Tribunal are of the collective opinion that these claims must fail. To this end the Tribunal finds that in December 2016 there was an impasse with regard to the claimant's re-integration into the workplace due to lack of medical information; that the request for medical information was a reasonable request, given the claimant's absence from the workplace since January 2010; and that that impasse was occasioned by the claimant's failure to select one of the three OH providers set out in the letter from Dr Kim Waldron to the claimant of 19th August 2011. Insofar as the respondents' failure to provide the "brief" was concerned, the Tribunal were of the collective view that the offer to show the claimant all relevant forms and documentation submitted to the chosen OH provider (as contained within the letter of 19th August 2011) would, in effect, be the 'brief' to the chosen OH provider. For these reasons the Tribunal considers the claimant's claims of victimisation and sex discrimination in these respects must fail.

59. The Tribunal then considered the claimant's claims of victimisation and sex discrimination in respect of the respondents' failure to take all steps to ensure the claimant's immigration status would not be compromised by the claimant's absences; failure to engage with the claimant in respect of her work permit status; failure to take all reasonable steps to avoid dismissing the claimant; failure to avoid dismissing the claimant; failure to apply any of the relevant procedures applicable in dismissal including their disability policy, dignity and respect policy, absence management policy and unauthorised absence policy. In this respect the Tribunal had regard again to the Tribunal's Observations on the Evidence insofar as Sheila

Gupta was concerned and to the observations in paragraph 107 where it is stated: *"The view that the claimant was never going to return to the employment of the respondents due to her health was reflected in the material part played by Sheila Gupta in terminating the claimant's employment without consideration of other options (as freely admitted by her in evidence)."* (**Bundle 1 p107**). This observation was unchallenged on Appeal and accordingly led the Tribunal to conclude that the dismissal of the claimant by letter dated 11th January 2012 on the grounds of the expiration of the her work permit (para 70 of the Judgment **Bundle 1 p 224-225**) arose from the view that the claimant was never going to return to the employment of the respondents due to her ill health. In these circumstances it is the unanimous decision of the Tribunal to dismiss the claimant's claims of sex discrimination and victimisation on these grounds.

60. The claimant's additional claims of sex discrimination and victimisation are therefore dismissed.

(iv) Burden of Proof

61. The challenge to the Tribunal's findings on the application of the burden of proof was unsuccessful on Appeal. As the Tribunal have again been able to make positive findings as to the "reason why" any less favourable treatment took place, the Tribunal is collectively of the view that there is no need to consider further the shifting burden of proof.

(v) The Amendment

62. Finally, the claimant's counsel, Simon Gorton QC moved to amend the claim to include a further claim of direct disability discrimination under s13 of the Equality Act 2010. In support of his application to amend, Mr Gorton submitted that the claim arises directly out of admissions made by Sheila Gupta as to why certain steps that the respondents were expected to take were not taken. Mr Gorton submitted that the comparator was Professor Brandini or a non-disabled hypothetical comparator.

63. Mr Reade for the respondents opposed the amendment on the basis that the amendment is substantially out of time; that it cannot be just and equitable to permit

an extension of time under s123 of the Equality Act 2010 as the claimant has had the benefit of legal advice since 2012; there have been previous applications to amend to include cases of notice pay and holiday pay; and the application, coming as it does after the respondents have closed their case, comes too late in the day. In this respect, Mr Reade submitted that it would have been open to the claimant to make the application to amend prior to submissions in the case when there was still opportunity for the respondents to lead evidence in rebuttal.

64. The Tribunal considered the application to amend. In doing so, it was guided by the well-known principles in the case of **Selkent v Moore (1996) ICR 836, EAT**. To this end the Tribunal considered the fact that such claims come some 7 years out of time and that there is force in the argument that even if the claimant had sought to amend her claim before submissions then the respondents would have been able to answer such amendment. In all these circumstances the Tribunal concluded that the balance of hardship and injustice favours the respondents in being faced with an additional claim that it is too late to answer, and accordingly the amendment is refused.

(vi) Further Procedure

65. On joint application, the Hearing on Remedy listed for the 15th July 2019 was discharged on the basis that there will be insufficient time to prepare for the same. Date Listing letters will be sent out to re-list the Hearing on Remedy. In the meantime, the parties undertook to co-operate and liaise with one another in obtaining additional psychiatric evidence from Dr Scott, in updating the issue of loss and in preparing for the Hearing on Remedy generally.

Employment Judge: **Jane Porter**

Date of Judgment: **15 May 2019**

Entered in Register and Copied to Parties: **15 May 2019**