



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondents

Miss E Carozzi

v

(1) University of Hertfordshire  
(2) Ms A Lucas

**Heard at:** Watford via CVP

**On:** 21-25, 28-30 June 2021, 1 July and  
(in private) 15 July 2021

**Before:** Employment Judge Hyams

**Members:** Mr D Bean  
Mr A Scott

## Appearances:

**For the claimant:** In person

**For the respondent:** Mr T Sheppard, of counsel

## UNANIMOUS RESERVED JUDGMENT

1. The claimant's claim of direct discrimination because of race, contrary to sections 13 and 39(2)(c) (read with section 39(7)(b)) and 39(2)(d) of the Equality Act 2010 ("EqA 2010") does not succeed and is dismissed.
2. The claimant's claim of harassment within the meaning of section 26 of the EqA 2010, contrary to section 39(2)(c) (read with section 39(7)(b)) and 39(2)(d) of that Act, does not succeed and is dismissed.
3. The claimant's claim of victimisation within the meaning of section 27 of the EqA 2010, contrary to section 39(2)(c) (read with section 39(7)(b)) and 39(2)(d) of that Act, does not succeed and is dismissed.

## REASONS

### Introduction; the claims and the parties

- 1 In these proceedings, the claimant claims that
  - 1.1 she was discriminated against directly because of (1) her race (she is of Brazilian nationality, and of Jewish ethnic origin) and/or (2) religion (Judaism), contrary to sections 13 and 39 of the Equality Act 2010 (“EqA 2010”);
  - 1.2 she was harassed within the meaning of section 26(2) of the EqA 2010, the protected characteristic for that purpose being her race and/or her religion, contrary to section 39 of that Act;
  - 1.3 she was victimised within the meaning of section 27 of that Act, contrary to section 39 of that Act, and
  - 1.4 she was dismissed “constructively”, i.e. within the meaning of section 39(7)(b) of that Act.
- 2 Two claims were made by the claimant (one was presented on 25 March 2019 and the other on 24 April 2020), and they were heard together as a result of an order made by Employment Judge (“EJ”) R Lewis on 11 October 2020.
- 3 The first respondent was the claimant’s employer until the claimant resigned from her employment with immediate effect by email on 14 January 2019. The claimant’s employment with the first respondent started on 4 December 2017. The second respondent was the claimant’s line manager throughout the period of the claimant’s employment.
- 4 The parties had, before the hearing before us, agreed a list of issues by reference to a list of claims which the claimant had, in discussion with the respondents’ solicitors, created, stating the claimant’s claims in a definitive way in preparation for the serving of witness statements and the trial. The list of claims did not encompass all of the factual elements of the claimant’s claims in the first claim, and we were told expressly that those factual elements were no longer pursued by the claimant.
- 5 In fact, as EJ Hyams said at the start of the hearing, and repeated several times during the hearing, the claimant’s list of her claims was in many ways insufficiently precise. In addition in some respects, the list was (it was clear, after discussion with the claimant) repetitious. It contained, we were told by Mr Sheppard, 66 separate allegations of specific ways in which it was claimed that the respondents had acted in breach of the EqA 2010. In fact, we counted 62 separate such allegations, but in addition there were 15 alleged protected acts, all of which had to be considered individually. Accordingly, in reality there were (as we calculated

them; the precise number was not material) 77 separate allegations which had to be addressed by us. Some of them were about the same process, and in two respects it was possible, consistently with the need to consider properly all of the claimant's claims as pressed before us, to group those allegations together and consider them as a group rather than individually. We nevertheless had to determine 36 separate complaints and decide precisely what had been done by way of each claimed protected act, so that we had to make 51 separate material determinations concerning the claimant's claims.

- 6 The claimant was employed by the respondent as "Marketing, Engagement and Partnerships Manager" for the respondent's team headed by the second respondent and called "University of Hertfordshire Arts". The parties called (and we below refer to) that team as "UHA". UHA was part of the first respondent's School of Creative Arts ("SCA"). The claimant's employment was subject to a probationary period which was of six months but was capable of being extended. The claimant's probation period was extended twice, and by the time of her resignation it had not been completed. The first claim related to what happened during the claimant's employment and concerned the fact and manner of the extensions of her probation period.
- 7 After the claimant had resigned, she applied to, and was accepted by, the first respondent as a student on a Masters course in the first respondent's Law School. The second respondent discovered that that had happened and caused the Dean of the School to be asked whether or not the claimant was in fact going to be a student on the relevant course. The fact and manner in which that was done was the subject of the second claim.

**The evidence before us and the procedure which we followed**

- 8 The hearing before us was listed to determine liability only. We heard oral evidence from the claimant on her own behalf and, on behalf of the respondent, from the following witnesses:
  - 8.1 Dr Alana Jelinek
  - 8.2 Ms Samantha Maitland
  - 8.3 Ms Karen Withers
  - 8.4 Dr Megan Knight
  - 8.5 Mr Phil Healey
  - 8.6 Ms Annabel Lucas, and
  - 8.7 Mr Christopher Ivie.

- 9 The witness statements were contained in a bundle which, including its index, was of 235 pages. There was a bundle of 2274 pages (including its index) before us, of which we read the pages to which we were referred or to which, during the course of the oral evidence, we referred ourselves and about which we asked questions of one or more of the witnesses. Several further documents were put before us during the course of the hearing.
- 10 In what follows, we first refer to the relevant legal principles. We then state some findings of fact, after which we state our conclusions on the claims before us, by reference to the list of issues to which we refer in paragraphs 4 and 5 above, and in the course of doing that, we make further findings of fact. Ideally, we would have made findings of fact only in one place, but the number and breadth of issues in the claimant's list was such that it was convenient to make some findings of fact in the course of determining some of the issues.

### **The relevant legal principles**

#### **Time limits**

- 11 The claimant approached ACAS on 14 January 2019 (the day of her resignation) and named the first respondent as a potential respondent. An early conciliation certificate was then issued by ACAS on 27 February 2019. The claimant first approached ACAS in relation to a potential claim against the second respondent on 13 February 2019. The early conciliation certificate in that regard was also issued on 27 February 2019. The first claim form was issued (as we say in paragraph 2 above) on 25 March 2019. Thus, that claim was in time in respect of events occurring on or after 15 October 2018 (including any conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010) unless either
- 11.1 applying *Meikle v Nottinghamshire County Council* [2004] EWCA Civ 859, [2005] ICR 1, they formed part of an accumulation which constituted a breach of the implied term of trust and confidence (to which we refer in paragraphs 33-34 below in more detail) and the claimant, by resigning, terminated the contract in response to that breach, or
- 11.2 we concluded that it was just and equitable to extend time for making the claim outside the primary three-month time limit imposed by section 123(1) of the EqA 2010.
- 12 The second claim was made in respect of events which occurred on or before 11 November 2019. It was made against three respondents, but the claim against the second and third respondents was withdrawn by the claimant in writing in a statement which she made for the preliminary hearing listed for the first of the claims. That statement was dated 31 October 2020. There was a copy of the statement at pages 248-255, i.e. pages 248-255 of the hearing bundle. At paragraph 27, on page 252, the claimant withdrew her claims against the second

and third respondents. No judgment dismissing that claim had been issued by the start of the hearing before us, and we agreed to dismiss that claim on its withdrawal.

- 13 In paragraphs 24 and 25 of the claimant’s statement for the preliminary hearing (page 251), the claimant said this:

“24. The Claimant accepts that she has submitted her claims out of time, but there is a reasonable explanation for that. She didn’t know about the Respondents’ conduct until April 2020. She acted immediately that she became aware of the Respondent’s conduct.

25. The Claimant made a subject access request on 21 December 2019 but did not receive these files until 17 April 2020. Under the data protection laws, organisations must respond to SARs without delay, and within one month.”

- 14 In deciding whether it is just and equitable to extend time, the principles discussed most recently in the decision of the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 and *Caston v Chief Constable of Lincolnshire Police* [2009] EWCA Civ 1298, [2010] IRLR 327 were applicable. As Underhill LJ said in paragraph 37 of his judgment in *Adedeji*:

‘The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J [in *British Coal Corporation v Keeble* [1995] UKEAT 413/94]) notes) “the length of, and the reasons for, the delay”.’

## **The relevant principles in, and the relevant case law concerning, the EqA 2010**

### Harassment

- 15 Section 26 of the EqA 2010 provides:

“(1) A person (A) harasses another (B) if–  
(a) A engages in unwanted conduct related to a relevant protected characteristic, and  
(b) the conduct has the purpose or effect of–  
(i) violating B’s dignity, or  
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.”

Direct discrimination and whether a claim of harassment adds anything to a claim of direct discrimination

- 16 We return to what constitutes harassment within the meaning section 26 below, after considering the meaning of the words “conduct related to a relevant protected characteristic”. In order to do the latter, it is helpful to consider the effect of section 13 of the EqA 2010, which of course was a central provision in this case. Section 13 provides:

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

- 17 The manner in which that section needs to be applied, given section 136 of the EqA 2010 (to which we refer in paragraphs 21-23 below), is now well-established. It may be thought that there is a fundamental difference between sections 13 and 26 of the EqA 2010, in that they use different operative words: “because of a protected characteristic” in section 13 and “unwanted conduct related to a relevant protected characteristic” in section 26.
- 18 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 a very helpful discussion about the impact (or otherwise) of the use of those different words. It shows that only rarely will a claim of harassment add anything to a claim of discrimination. By way of illustration, as Underhill LJ confirmed in paragraphs 83-101 of that judgment, a mental element is required in a claim of harassment as much as in a claim of direct discrimination. The approach which we needed to take here when applying section 26(1) of the EqA 2010 was shown by paragraphs 108-109 and the opening part of paragraph 110 of Underhill LJ’s judgment. That passage is as follows:

**‘Harassment**

108. Mr Carr [counsel for the claimant] submitted that, even if the employed officials’ conduct could not be said to be “because of” the Claimant’s sex, it was on any view “related to” it within the meaning of section 26. I have already explained at paras 96-98 above why that language does not cover cases of third party liability; and for the reasons given at para 104, the present claim is, on the ET’s reasoning, in substance such a case. If the employed officials,

and through them the union, are to be liable for harassing the claimant because of their failure to protect her from the harassment of the lay officials, and (in the case of Mr Kavanagh) for transferring her, that can only be because of their own motivation, as to which the tribunal made no finding.

109. Mr Segal [counsel for the respondent employer, the union] sought in his post-hearing submissions to distinguish between a situation where an employer was “culpably inactive knowing that an employee is subjected to continuing harassment (as on the facts of the *Burton* case)” and one where he was “culpably inactive without [any such knowledge]”; and to show that the employment tribunal’s findings established that the case was in the latter category. I am not sure of the relevance of the distinction; but since we did not hear oral submissions on it I prefer to say no more than that, on the law as I believe it to be, the employer will not be automatically liable in either situation. I repeat, to avoid any possible misunderstanding, that the key word is “automatically”: it will of course be liable if the mental processes of the individual decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic.

### **Conclusion**

110. For those reasons I agree with the appeal tribunal that the reasoning of the employment tribunal was flawed. It found the union liable on the basis of the acts and omissions of the employed officials without making any finding as to whether the claimant’s sex formed part of their motivation.’

### Victimisation

19 Section 27 of the EqA 2010 provides:

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

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

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

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

20 The word “detriment” in that section is applied from the claimant’s and not the alleged victimiser’s perspective: *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [2007] ICR 841. However, it is possible to act without breaching section 27 with a view to preserving one’s position in anticipated or current litigation. That is clear from the preceding decision of the House of Lords in *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065, where a reference for an officer was withheld, not ‘by reason that’ he had brought discrimination proceedings, but because those proceedings were imminent at the time of the reference request and the Chief Constable needed to preserve his position. The full reasoning in that case was departed from in the *Derbyshire* case, but the result of the decision in *Khan* was nevertheless not criticised. By way of illustration, in paragraph 9 of his speech in *Derbyshire*, Lord Bingham said this:

“In *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, para 29, Lord Nicholls propounded a simple, common sense approach to this question. It is to ask why the alleged discriminator acted as he did. What matters is the discriminator’s subjective intention: what was he seeking to achieve by treating the alleged victim as he did? The decisions in *Cornelius v University College of Swansea* [1987] IRLR 141 and *Khan* [2001] ICR 1065 are, I think, consistent with this approach. In *Cornelius*, the applicant complained that the college had not transferred her or given her access to the college’s internal grievance procedure pending tribunal decisions on her complaints of sexual discrimination. There was no finding that she had been the victim of less favourable treatment or detriment or that, if she had, it had had anything to do with her pending proceedings. It appeared (para 33) that the college authorities wished to defer internal steps until the proceedings were over, to avoid acting in a way which might embarrass the handling or be inconsistent with the outcome of the tribunal proceedings. Similarly, in *Khan* the chief constable declined to give the applicant a reference for appointment to another force pending the determination of a racial discrimination complaint not because he wished to obstruct the conduct of those proceedings but because he believed, on advice, that any reference he gave would weaken his defence in those proceedings or aggravate the damages recoverable against him. The contrast with the present case is striking and obvious”.

### The burden of proof

21 Section 136 of the EqA 2010 provides:

- “(1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.



(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

- 22 There is much case law concerning the application of that provision, and we refer to its effect in the following paragraph below. However, we bore it in mind that (as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337) in some cases the best way to approach the question whether or not there has been for example direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.
- 23 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent’s explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey on Industrial Relations and Employment Law*.

#### Harassment in practice

- 24 The provisions of section 26 of the EqA 2010 have been considered by appellate courts on a number of occasions in helpful ways, including (1) by the Employment Appeal Tribunal in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 and (2) by the Court of Appeal in *Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:

“[The claimed] effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”

- 25 In paragraph 22 of *Dhaliwal*, the Employment Appeal Tribunal (Underhill P presiding) said this:

“We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

- 26 In *Betsi Cadwaladr University Health Board v Hughes* (unreported; UAEAT/0179/13/JOJ, 28 February 2014), the Employment Appeal Tribunal (Langstaff P presiding) said this in paragraphs 12 and 13 of its judgment having just set out paragraph 22 of the judgment in *Dhaliwal*:

‘12. We wholeheartedly agree. The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

13. It was agreed, too, that context was very important in determining the question of environment and effect. Thus, as Elias LJ said in *Grant*, context is important. As this Tribunal said, in *Warby v Wunda Group plc*, UAEAT 0434/11, 27 January 2012:

“...we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;”.’

- 27 *Dhaliwal* is authority for the proposition that the intent of the impugned conduct is relevant. That was said in that the end of paragraph 15 of the Employment Appeal Tribunal’s judgment.

### **The possible effect on a claim of direct discrimination or harassment of criticising an employee’s accent**

#### Direct discrimination

- 28 In the case of *Hundal v Initial Security Ltd* UAEAT/0546/05/LA, the Employment Appeal Tribunal (“EAT”), His Honour Judge (“HHJ”) Altman presiding, dismissed an appeal against a decision of an employment tribunal to dismiss the appellant’s claim of race discrimination. In paragraph 3 of the EAT’s judgment, the facts of the case were summarised in this way:

“The essential complaint of Mr Hundal was described in paragraph 24 of the Employment Tribunal’s judgment. Broadly that paragraph states that Mr Hundal said that on the 12<sup>th</sup> May 2004 he was told by his shift manager that he had been taken off the evening shift because of difficulty with his communication skills. He was devastated when told his English was not good enough. The change took effect 5 days later. Mr Hundal was transferred to the day shift, and there was some reduction in the ‘working

week schedule'. Further he lost the advantage of the enhanced evening shift payment."

- 29 In paragraph 32 of the Employment Tribunal's judgment, which was set out in paragraph 28 of the EAT's judgment, this was said:

"has the Claimant proved on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Second Respondent had committed an act of discrimination? On the face of it, yes, because his ability to communicate did relate to his accent."

- 30 However, for the reasons stated in the subsequent passage of the tribunal's reasons, the claim was rejected. That passage included this one, in paragraph 33:

"Has the second respondent proved that its behaviour was in no sense whatsoever on the grounds of race? Having heard all the evidence, the Tribunal accept that it was in no sense whatsoever on the grounds of race but was motivated by the grounds that whoever was manning the switchboard on the busy evening shift needed to be able to communicate clearly and effectively to anyone making calls."

### Harassment

- 31 *Sheffield City Council v Norouzi* [2011] IRLR 897, the EAT (Underhill P presiding) considered an appeal against a finding in favour of a claim of harassment and indirect race discrimination made by an Iranian claimant who had worked (as the headnote stated) "as a residential social worker at a small home for troubled children between the ages of 11 and 15". The headnote continued:

'One of the children ("A") was often abusive and offensive to the staff and was regularly offensive to the claimant on racial grounds. There were a number of incidents in which she made such comments as that he should go back to his own country and, on one occasion, that she wanted to blow up the whole of Asia and all Asians. She mocked and mimicked his accent on most of the shifts when he worked with her.'

- 32 The EAT dismissed the appeal. At the end of paragraph 33 of its judgment, the EAT said this:

"To mock a racial characteristic seems to us plainly analogous with overtly racial abuse."

### **The law of constructive dismissal**

- 33 As we say above, the claimant relied here on the implied term of trust and confidence. That is an obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence which exists, or should exist, between employer and employee as employer and employee. The question whether that term has been breached is determined objectively: see *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481. A breach of that term is (as was confirmed in *Omilaju*) a repudiation or fundamental breach of the contract of employment.
- 34 It is possible for a claimant to rely as part of an accumulation of conduct which, taken together, constitutes a breach of the implied term of trust and confidence, on conduct of the respondent which was in itself a breach of that term the right to rely on which as such has been waived by the claimant affirming the contract: *Mruke v Khan* [2018] EWCA Civ 280, [2019] ICR 1. That case is helpful not only for confirming the correctness of that proposition, but also for the clarity of the manner in which Underhill LJ stated (in paragraph 55 of his judgment, with which Singh LJ agreed) the manner in which a claim of constructive dismissal must be considered and the fact that in that case it was held by the Court of Appeal (in paragraph 75 of the judgment of Underhill LJ) that

“the following through, in perfectly proper fashion on the face of the papers, of a disciplinary process ... cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong; but the test is objective, and a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee.”

### **The assessment of oral evidence**

- 35 We found paragraphs 15-22 of the decision of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) helpful when considering the approach to take when assessing the weight of oral evidence. Essentially, memories are often unreliable, and the best approach to take at least in commercial cases is as Leggatt J described it in paragraph 22 of his judgment, which was this:

“In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness

recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

- 36 While that passage concerned commercial cases, there is, in our view, much to commend its application in all cases, even those concerning claimed discrimination, which concerns the mental state of the alleged discriminator(s).

### **The facts**

- 37 Where we state our findings of fact below, where relevant we do so by stating how we resolved conflicts of evidence on material matters. There were many such conflicts, and they included even one aspect of the manner in which the claimant came to be appointed to the role from which she resigned. As a result, we first state the parties’ evidence about the initial period of the claimant’s employment with UH after which we discuss a number of factors which were relevant to the determination of the various conflicts of evidence. We then state our findings of fact.

### **The evidence about the claimant’s appointment to the post from which she resigned**

- 38 The claimant was interviewed for the post of “Engagement, Marketing & Partnerships Manager (UH Arts Organisation)” on 10 November 2017. The interview panel was chaired by Ms Judy Glasman, who was at the time the Dean of the SCA. There were three other members of the panel, one of whom was the second respondent (to whom we refer from now on as Mrs Lucas; we refer to the first respondent as “UH”). On 10 November 2017, the claimant was offered the post. The offer was communicated in the email at pages 611-612, sent by Ms Judy Glasman. The email was dated 10 November 2017, and in it, Ms Glasman wrote this:

“Your presentation was full of many interesting and appropriate points, which are very much needed as part of the reboot of the UH Arts activity. We also appreciate the professional approach that you are taking. Both Annabel Lucas and the panel, think that your ideas are relevant. There is also the advantage of being part of the larger University and School of Creative Arts, will all the potential for linking in to the local students and the buzz of the School. The international connections and experience that you bring, also have the potential to be used in the post in some capacity.”

- 39 In her witness statement, Mrs Lucas said this about the interview and the decision to offer the post to the claimant:

“15 In October 2017 we advertised for the role of Engagement, Marketing and Partnership Manager. The text for online advert is in the bundle at

**Case Numbers:** 3313342/2019 & 3304194/2020

page 505. I am aware that Elaine believes that the advert she saw is the one that appears at page 520. I have no reason to doubt this. However, it is not the advert I am familiar with. In respect of this vacancy we did go out for advert twice, with Elaine applying in the second process; however, to the best of my knowledge the advert that was used both times was the one at page 505. The emails at pages 495 to 504 and the online adverts at pages 509 to 517 also support this.

- 16 The first page of Elaine's application summary is in the bundle at page 494 (note, I believe the handwriting on this to be Judy Glasman's handwriting, who chaired the interview panel).
- 17 Based on her application, Elaine was shortlisted for interview (the letter inviting her to interview is in the bundle at pages 607 to 608). This took place on 10 November 2017. As well as a formal interview, all interviewees were asked to conduct a presentation. I was on the interview panel, alongside the then Dean of School, Judy Glasman, Chris Dunks, the University's central marketing manager, and an external panel member, Emma Van Nieuwenburgh from the Royal Opera House.
- 18 At interview Elaine demonstrated she had commercial marketing experience and skills, and I was drawn to her energy and passion. However, I did have concerns that she had no arts or cultural marketing experience – as this is a specialist area. I also recall she talked a huge amount during the interview, gave lengthy answers that often went off the point, and I recall at least one occasion when she talked in quite an informal way about a personal subject/anecdote which did not seem appropriate for the forum, I recall feeling a bit embarrassed about this for her. Judy needed to reign her in a few times. I also found it hard to understand aspects/keep track of what she said in her answers. Her presentation was very top-level and seemed impressive, yet she talked at length. I found it hard to follow in places but assumed it was due to specialist marketing language and concepts that perhaps I was not that familiar with. I also recall her telling us she had undertaken theatre training to work on her English pronunciation.
- 19 At the interview discussion I did raise concerns, but Judy reiterated that Elaine had strong digital marketing skills and experience of web/socials analytics that was what UH Arts really needed. On balance we all agreed to appoint Elaine. No notes of the interview have been retained – I understand it is University policy to delete such notes after 6 months.
- 20 The panel decided to offer Elaine the post and she accepted the same day (see emails between Elaine and Judy Glasman pages 611 to 612). There was pressure to appoint as this was the second occasion we had put the job advert out, Hazel Foxon's (Marketing Consultant) contract

had already been extended and Hazel was keen to leave to pursue other freelance opportunities. Further, Judy was keen to leave with UH Arts all set-up before her departure.”

- 40 The claimant’s evidence was that she had not said that she had “undertaken theatre training to work on her English pronunciation”, and on 28 June 2021 she put before us an email to show that she had started a course called “Acting for Beginners”, run by an organisation called “Stage & the City”, in September 2016, and in the email to the respondents’ solicitors under cover of which she forwarded the email from Stage & the City, she said this:

“This is the email confirming when I started theatre classes – 2016. I was no longer attending these classes in November 2017 – due to my work between London and Dubai.”

- 41 Mrs Lucas, when EJ Hyams asked her about that email and suggested that the claimant might simply have referred to going to theatre classes, was adamant that the claimant had specifically referred to having done so with a view to improving her English pronunciation.
- 42 We return to this conflict of evidence below, when considering the related conflict of evidence about what the claimant said to Ms Withers in the meeting of 13 April 2018 to which we refer in paragraphs 74-80 below. We do so after (1) referring to the indisputable evidence about the terms of the claimant’s appointment and then to the disputed evidence about the manner in which Mrs Lucas initially assessed the claimant’s performance and (2) stating and discussing a number of agreed or indisputable factors which were relevant to our resolutions of this and the other important conflicts of evidence.

### **The terms of the claimant’s appointment**

- 43 The claimant’s first day of her employment with UH was 4 December 2017. On that day, she signed the written contract of employment at pages 397-404. Clause 16 of that contract was in the following terms:

**“16. PROBATIONARY PERIOD – see StaffNet**

- 16.1. The first six months of your employment will be a probationary period, allowing the University to assess your suitability for the position to which you have been appointed, and to provide you with appropriate support and assistance in your new job. The University reserves the right to extend your probationary period if, in its opinion, circumstances so require.
- 16.2 During your probationary period your employment may be terminated by the University on giving one week’s written notice.”

- 44 There was on UH's intranet, which was then called its StaffNet, a probation policy. There was a copy of it at pages 405-406. We refer to it further below, but record here that the decision whether or not an employee in his or her probation period had satisfactorily completed that period was stated by that policy to be made by the employee's line manager alone. However, the policy also provided that if the line manager recommended the termination of the employee's contract (i.e. so that the employee's probation period would if the recommendation were given effect end with the employee's dismissal rather than the confirmation of the employee in his or her post) then UH's Secretary & Registrar "will convene a meeting which both parties will be required to attend", after which the Secretary & Registrar

"will ... decide whether to:

- a) confirm the probationer in the appointment, or
- b) to extend the probation period by a further period not exceeding 3 months, or
- c) to terminate the appointment at the end of the current probationary period".

**The parties' evidence about the manner in which Mrs Lucas, as the claimant's manager, initially perceived the claimant's performance**

- 45 The background to the factual determinations that we now record was stated in the following passage in the claimant's witness statement:

6. In February 2018, Judy Glasman retired from her position as the Dean of the School of Creative Arts (SCA).
7. Shortly after, AL and some of my colleagues started a mounted campaign to lead my employment to an end. The Respondents discriminated against me on the grounds of my race (Brazilian, Jewish) and religion (Jewish).
3. [sic] During over 13 months, Annabel Lucas used my accent, religion, and cultural background as a measuring stick to deduct my credibility and professional capability.
8. It all started in March 2018. I asked AL to use my TOIL to attend a Jewish family wedding in Barcelona. When I returned to the office, my line manager changed her attitude towards me.
9. On 26 March 2018, Annabel Lucas called me for a meeting at the Café Rore, main reception.
10. Up to this point, AL never raised any complaint about my work or behaviour. Entirely on the contrary. AL was always paying me



**Case Numbers: 3313342/2019 & 3304194/2020**

compliments. On 15 March 2018, AL messaged me to say that I was doing brilliantly on the Public Relations (PR) side of my role [760].

11. I was concerned about some aspects of my job. After three months, I was still waiting to sort fundamental issues. I was line manager for Joe Fordham – Media Officer. However, AL didn't introduce me as his manager or gave me the autonomy to plan and supervise his workload.
  12. I also didn't know details about the budget. I had no access to a credit card [689] – critical for digital marketing campaigns.
  13. I noticed that the UHArts Visual Arts, namely Elizabeth Murton, Inna Allen and Samantha Maitland, did not inform me about their programme or invite me to meetings with partners.
  14. At this meeting on 26 March 2018, I highlighted that AL made a list of tasks with objectives to achieve each month, ignoring the fact that I needed structure and access to the budget. I pointed out that I wrote her a series of emails and that she didn't reply. Including the email sent on 7 February 2018, where I detailed the issues with her monthly task list [705-707].
  15. I've been a successful marketing manager for 12 years. I never had to work with a task list from my line manager.
  16. I also spoke about her sale targets. AL wanted all ticket sales to rise by 200% without a budget to increase promotion.
  17. I also asked Annabel Lucas why was she introducing me to colleagues as her Social Media Officer.
  18. When I started my job, AL told me that I could always speak freely and that 'UHArts is a family'. However, AL overreacted and started making derogative remarks about my attitude, culture, and my Brazilian accent.
  19. AL told me that 'the team' was having issues with my 'very strong accent', and therefore they didn't want to invite me to important meetings and events.
  20. Annabel Lucas told me that since I asked to go to Spain, she decided to extend my probation period as they had a team meeting, and the girls were not sure if 'I was the face they wanted for the new UHArts.'"
- 46 Much of that passage was denied by Mrs Lucas. We ourselves asked the claimant about the funding of marketing and why she said that she needed to be able to use a credit card in the course of her job, and she said that it was because it would help her by enabling her to pay for an online service that would reduce

the amount of work that she would need to do in order to disseminate online (including via digital social media) marketing communications. However, Mrs Lucas' reasons for (in the circumstances described below) deciding that the claimant's probation period should be extended had nothing to do with the claimant's marketing skills: Mrs Lucas was entirely satisfied with them. Rather, Mrs Lucas' concerns were to do with the claimant's performance in other aspects of her (the claimant's) job.

- 47 The respondent's probation policy for new employees required the carrying out by the employee's line manager of reviews two months and five months after the start of the employment. Mrs Lucas carried out the claimant's first probation review on 14 February 2018. She had written some notes which purported to be a record of that review. They were at pages 719-720. She had sent them to the claimant on 21 March 2018 under cover of the email at page 769 to an email address shown in the recipient line as "recruitment-salaried", copying the email to Ms Withers. She had sent them separately to the claimant on the same day under cover of the email at page 784, saying in the email:

"Please find attached the notes for the 2 month Review Meeting held on 14 February, points that we discussed and noted at that meeting."

- 48 However, as the claimant pointed out, the digital version (in Word) showed that the document was created on 15 March and modified on 21 March 2018.
- 49 Mrs Lucas had, however, sent an email on 21 February 2018, i.e. a week after the first probation review meeting of 14 February 2018, which she had also forwarded to the claimant with the email of 21 March 2018 at page 784. The forwarded email was at pages 784-785, and it started in this way:

"Dear Elaine

As you know I agree monthly objectives with all the team – sorry that this lapsed in February. Here are my suggested objectives for March (there are quite a few, but I know some of this is already in underway)".

- 50 Those objectives did not include any resembling the following three that were in the list of what Mrs Lucas described in the notes at pages 719-720 as "the areas we discussed for focus":

- You are a passionate person and passionate about arts and marketing, continuing working to adopt a suitable style in meetings to reflect the UH FACES values (Friendly, Ambitious, Collegiate, Enterprising, Student-focused)
- Continuing to work at your written style in emails to ensure you come across as 'collegiate' and 'friendly' at all times
- Continuing to work at your accuracy in written and spoken English (especially in presentations/eternal [sic] meetings)".

- 51 In addition, the lists were in quite different terms. Mrs Lucas said that she had made notes on paper (in a bound notebook, which she used for making notes on a daily basis) during the meeting of 14 February 2018 and that she could now no longer find them. There was no doubt that she had produced the list at pages 719-720 by the latest 21 March 2018, so it was reasonably contemporaneous. The possibility that the list had had references to the claimant's "accuracy in ... spoken English (especially in presentations/eternal meetings)" (i.e. external meetings) added to it was material only because the claimant alleged that Mrs Lucas had done that because she (Mrs Lucas) was biased against the claimant because of the claimant's Brazilian national origin and/or her Jewish ethnic origins. There was one development which had occurred between 14 February 2018 and 21 March 2018 on which the claimant relied as justifying that allegation, and that was that the claimant had on Friday 9 March 2018 sent the email at page 746, which was in the following terms:

"Hi Annabel,

I have a family Jewish wedding to attend in Spain, if that is ok I will use my TOIL for that, I will have to come Saturday 17 March for our open day, so I might have more than enough for 3 these days."

- 52 Mrs Lucas said that she had seen that email at the time that it was sent to her, but that it had had absolutely no effect on her perception of the claimant, or the claimant's performance. We state our conclusion on that assertion in paragraphs 268-280 below.

#### **The claimed conversation of 26 March 2018 between Mrs Lucas and Dr Knight**

- 53 The claimant claimed (in paragraph 146 of the details of her claim, at page 77) in support of the proposition that Mrs Lucas was biased against her because of her (the claimant's) race and/or ethnic origins that she (the claimant) had been present at a meeting between Mrs Lucas and Dr Knight when Mrs Lucas made "strong remarks about Jewish people" to Dr Knight. Dr Knight's evidence was firmly to the effect that that had not happened, and when the claimant was cross-examining Dr Knight, we were able to ascertain from the claimant that what she referred to in paragraph 146 on page 77 was the same as what was said in paragraph 63 on page 159, which was this:

'On March 26<sup>th</sup>, Megan Knight visited the office for a second time to talk to Annabel Lucas about the Dean Shaun Borstrock. Megan informed AL that she was going abroad that week and that the Dean was trying to "steal" her job description. They both started to talk about how Judy Glasman was "*crazy on appointing someone like him to replace her as a Dean*" and she said, "*easy for her to hire her community and leave for us to deal with them*".'

- 54 The first of the words in italics in that paragraph were not remotely capable of being regarded as antisemitic. The second set of words was only capable of being regarded as antisemitic if one read them as being hostile to Jewish people. They could only be regarded as relating to Jewish people if they were said by someone who knew that Judy Glasman was Jewish. However, if they were said by someone who knew that she was Jewish, then they could be regarded as being hostile to Jewish people.
- 55 Mrs Lucas also firmly denied saying those words. She was also alleged to have said something else, on 20 April 2018, this time to the claimant directly, that was critical of Jewish people, and she also denied firmly saying what the claimant alleged her to have said on that day. Those were the only two things that the claimant relied on as having been said by Mrs Lucas and as showing that Mrs Lucas was hostile towards Jewish people. They were, however, not the only things on which the claimant relied as showing that Mrs Lucas was biased against Jewish people. In addition, the claimant relied on what she claimed was Mrs Lucas' hostility towards the claimant being involved in any way with the UH Jewish Society. We therefore considered all of the evidence on those things both independently and then reviewed our provisional findings in each regard before coming to a firm view on each one. We record here that, having done that in the manner described in paragraphs 81-100 below in relation to what Mrs Lucas was said by the claimant to have said on 20 April 2018, we concluded that Mrs Lucas did not say to Dr Knight anything that was remotely about or in relation to Jewish people on 26 March 2018.

### **Relevant events in and after March 2018**

- 56 The claimant was on annual leave from 19 February to 2 March 2018 and then from 19 to 21 March 2018.

#### Matthew Shaul's email of 13 March 2018

- 57 On 13 March 2018, Mr Matthew Shaul, the Director of the Departure Lounge, Luton, which is an organisation funded by the Arts Council, sent the email at page 756, copying it to, among others, the claimant. It included this sentence:

“The whole press function really struggled after Hazel left UH Arts and suffered from a lack of focus and a clear and knowledgeable contact point.”

- 58 At the end of that day, Mrs Lucas, aware that that email had been received by the claimant, sent the text at page 760 to the claimant, which she described in paragraph 64 of her (Mrs Lucas') witness statement, where she said this:

“On 13 March 2018 I sent a text to Elaine stating she had done brilliantly that day (page 760). I thanked her for her input and Elaine thanked me for the message and said she was really trying, which she was. I cannot recall the exact context for this text but it relates to her press work regarding the

Kathe Buchler exhibition and I assume that I was praising her efforts to boost morale following the seemingly critical email sent by Matthew Shaul two days previously (page 756).”

- 59 We accepted that evidence of Mrs Lucas, not least because she sent the email at page 755 to Mr Shaul which was supportive of the claimant. We also accepted the subsequent paragraph in Mrs Lucas’ witness statement, which was in the following terms:

“On 16 March 2018 I received an email from Maria Thomas (page 761) which followed a catch-up between Maria and myself, where Maria reported to me that she had found an email from Elaine to be confrontational. Maria was contracted by UH Arts as a specialist consultant with classical music and arts marketing skills/experience (but also worked for UH in other roles), to deliver a specific audience development project around the de Havilland Philharmonic Orchestra. Maria must have mentioned at the meeting she had concerns about how Elaine was communicating with her colleague Simon Morgan regarding JamJar events and sent me the email chain – the relationship with JamJar was important and she would not have wanted this to have been jeopardized. Further – and even more significantly – she suggested to me that Elaine had also approached her colleague at the Student Union in an inappropriate manner; the SU was an extremely important contact for UH Arts in terms of engaging with students. With regards to Maria’s comments about the LCEP, it was a complex project and new territory for UH Arts, and so naturally I was open to offers of advice and assistance as we were shaping it in the early days. Further, aspects of LCEP directly overlapped with Maria’s other student-facing role as Employment & Enterprise Champion, there were potential opportunities for both parties.”

- 60 The full email exchange between the claimant and Ms Thomas was at pages 1516-1517. We concluded that it was in a tone which Ms Thomas could reasonably say was “confrontational”.

The meetings between the claimant and Mrs Lucas which took place on 26 March 2018 and before 13 April 2018

- 61 On 26 March 2018, the claimant sought out Mrs Lucas to raise with her in person her (the claimant’s) concerns about her relationship with her colleagues. They then had a meeting on that day. Mrs Lucas wrote about that meeting in the email dated 16 April 2018 at pages 935-937 (also at pages 931-933) to the claimant. We considered the text of that email very carefully. It was, in our view, a key document, in that it set out what we concluded were (1) Mrs Lucas’ genuine perception of the meeting and (2) her, Mrs Lucas’, genuine concerns at the time of the meeting. It is a long document, but it bears repeating in full. It was in these terms.

“Dear Elaine

In addition to the previous email sent this morning, I wanted to follow-up Thursday’s meeting with an email to track where we have got to and how we look forward to working together, including April objectives/tasks.

3 weeks ago (26 March) we had a conversation in the Chapman Lounge in response to various issues that arose while you had been on annual leave and off sick the previous week, for you this centered on frustrations around the team’s (Joe and Sammy) prioritization of event promotional activity (especially the Railway Film screening) while you were away, which for you undermined your overview of the required tasks and their prioritization. Through our discussion you expressed that you did not feel you had the support, respect of the team and their trust in you to deliver, and you felt excluded from certain meetings/discussions which you felt you should be present at. I responded by saying that I did not think things were working and that the relationship with the team – and Joe especially – was not what it needed to be. I also explained that I did not have the confidence to invite you to external meetings (especially those with delicate partnership relationships eg with Hayward Gallery / St Albans Museums) due to my experience of your contributions, manner and lack of understanding of arts marketing practices/nuances of projects and partnerships in previous meetings (team meetings, meeting with Maria Thomas, email correspondence during Kathe Buchler, Feb LCEP meeting with Hannah Brownlow). You requested that I give you a chance to contribute to these meetings and I invited you to 2 such meetings on 27 March and 12 April. Please can I note that [at] the meeting with Hayward Gallery 27 March you communicated in Portugese with their Marketing Manager and within the few minutes you had to talk to her and Farhana (Marketing Manager, St Albans Museums) you had gleaned what both women earned – which I am afraid I did not think was appropriate. At both meetings you offered very minimal contribution and on at least one occasion appeared not to understand the content of what was being said.

I left our meeting on 26 March reassuring you that I wanted the role to work out for you and I would support you for this to happen.

We had a useful conversation last Thursday. I began by recognizing the effort I have witnessed you putting into the role over the past 3 weeks. I can see how hard you are trying Elaine.

I stated that there were some areas of the role you were now delivering well, but I had concerns as to whether this was the right job for you and that I do not think you have the skills and experience in certain key areas that the team requires, and that I do not think these skills and experience can be acquired quickly enough for us. (I have detailed these areas as below).

**Case Numbers:** 3313342/2019 & 3304194/2020

We then reviewed you[r] March tasks/objectives, 6 of which were not delivered by end of March or flagged up with me in advance of not delivering by agreed deadline. Please find attached annotated March objectives, with your April tasks/objectives (including the March objectives to be rolled-over).

I commended you on the following aspects of the role:

- Significantly increased social media activity for UH Arts and report evidencing this ad website analytics
- Starting to communicate better with the team, both informally and informal meetings
- Starting to establish a better relationship with Joe
- Communication plans now in place for forthcoming events, eg Railway Children
- Positive attitude and appetite for trying to get new audience to our events eg proactive at open days and for our events
- Investigative work into discrete issues arising eg discovering the wrong pricing of Guesthouse, benchmarking of Guesthouse sales at other venues and finding a solution to costs associated with GDPR
- I appreciated receiving an email on my return from holiday entitled: 'important points for next week'

There are a number of areas that you still need to work on in order to deliver the role:

- Your time management: more tasks from the March objectives should have been delivered and you should not be working evenings/weekends – I felt this was due to lack of experience in arts marketing and the sector, you disagreed with this and claimed that social media takes a huge amount of your time and the workload i[s] too heavy. Way forward: you will keep a record of time allocation over the next 2 weeks
- Prioritization: you are not always spending time on the most important tasks. You seem to be responding to immediate/shorter-term tasks, but not working on the longer, more strategic tasks eg the Marketing Plan, website development
- I am often aware in meetings and at times on email, that you do not have sufficient understanding of the content/context for a project or what was discussed at a meeting to translate into delivery of tasks, at times there is miscommunication and misunderstanding (demonstrated by the questions/comments made at meetings and later correspondence). Alternatively, you contribute little or nothing to a meeting – your response was that you need to concentrate more
- You have not yet evidenced that you have acquired the necessary arts marketing required for the role– eg first draft of marketing plan

**Case Numbers:** 3313342/2019 & 3304194/2020

was insufficient; theoretical and did not get to the detail of what activity is to be delivered

- You do not have the skills and experience to lead on the Education Cultural Partnership work
- There have been issues with your interaction with internal colleagues and external partners on email and in meetings, resulting in feedback to me
- If you are unsure, you do not readily ask for help or advice eg March tasks were not completed but you did not talk to me about this
- At manager level I would expect you to be more proactive in coming to me with ideas/direction and leading on projects/tasks – at times you blame others in team/our partners or the lack of UH Arts infrastructure/budget rather than pushing things forward yourself
- Written English can be muddled and grammatically incorrect – written skills are essential for this outward facing ‘marketing, engagement and partnership’ role and I do not feel I can rely on you to proof-read/edit text yet
- I have had feedback that your verbal communication is not strong, that it can be difficult to follow your ideas and points in a logical way in a meeting or presentation
- I am surprised that the website re-vamp has not happened when this was on you[r] Dec/Jan objectives, and you are still not clear what changes can be made free of charge and I have not seen a proposal
- I am surprised you have not taken a great lead on UH Arts brand consistency and development – you still do not seem to grasp the key messages for UH Arts and what we do, despite being provided with vision/mission and other information and exposure to our programmes and discussions over 5 months
- I am not confident in your ability/relevant experience at this stage to lead on the marketing and communications for the St Albans museum project, or to lead on UH Arts rebrand with Daisy Way
- I am not confident that you understand what audience development and audience engagement mean within the arts sector, which is problematic in terms of promoting New Geographies, St Albans and Hatfield arts events

As you know I have arranged a meeting this Friday with our HR representative Karen Withers, you and I so that we can talk through all of the above and for you to have the opportunity to present your perspective and the support/training needs you require.

Many thanks

Annabel”.



62 The claimant's response and Mrs Lucas' response to that response were also relevant. We do not need to set them out in full, however. The claimant's response was sent at 13:46 on Monday 16 April 2018. It was at pages 934–935 and was that

62.1 she believed the “points ... to be wholly unfair”,

62.2 her “knowledge of [Farhana's] salary was learned from the recently advertised post” so that it was an “incorrect assumption” that she had “gleaned” it from the meeting,

62.3 while she agreed that “speaking Portuguese during a meeting would be a problem”, she had spoken in Portuguese only in “informal chat ... during the tour, before the meeting”, and

62.4 “Regarding the Hertfordshire LCEP, you clearly instructed me to step out since first meeting”.

63 Mrs Lucas in her response on page 934, sent at 09:17 on 19 April 2018,

63.1 accepted the latter defence in relation to the Hertfordshire LCEP (which was short for “Local Cultural Education Partnership”; it was subsequently, after a period of time, referred to as the Hertfordshire Cultural Education Partnership, abbreviated to “HCEP”),

63.2 thanked the claimant for her “clarification around knowledge of Farhana's salary” and apologised if she had “misjudged this”, saying, however, “but you did relay the information immediately after the meeting in a discussion of our two marketing partners and so it was easy to assume the information had been gleaned from the interaction we were discussing”, and

63.3 said: “I wish that things were not so challenging for us and I hope we can resolve this very soon to establish a better working relationship for you with me, and other team members.”

64 The claimant's witness statement contained, in paragraphs 19 and 20, these statements about what had happened at the meeting of 26 March 2018 to which Mrs Lucas referred in her email of 16 April 2018 at pages 935-937, which we have set out in paragraph 61 above:

“19.AL told me that ‘the team’ was having issues with my ‘very strong accent’, and therefore they didn't want to invite me to important meetings and events.

20. Annabel Lucas told me that since I asked to go to Spain, she decided to extend my probation period as they had a team meeting, and the girls were not sure if ‘I was the face they wanted for the new UHArts.’”

- 65 Ms Lucas' evidence was that she did not say those things. Mrs Lucas had had a conversation with Ms Withers on the day of her meeting with the claimant of 26 March 2018 (apparently it took place before that meeting), and Ms Withers had on that day (at 11:43) sent an email to Mrs Lucas, recording their discussion. Mrs Lucas had responded in an email of the same date, at 16:41. That email was at pages 781-782, and was in these terms:

“Thank you for this – will Elaine see the summary below or is it for our ref only? (Have tweaked a couple of things below)

I had a frank conversation with Elaine today as she was upset about a couple of things and asked to speak to me. I was honest and said most of the points below – at the very end I did explain that she is on probation and that due to the disruption over the past 3.5 months (5 weeks off/sick out of 15 weeks!), I may need to consider extending her probation to give her more time to be sure this is the right job for her and she was delivering all areas of the role. She was surprised by this and upset by it. I reinforced that I wanted it [to] work and that she and I needed to work together to make it work.

I feel I should leave it a little while before inviting her to the meeting with you and I before the 20<sup>th</sup> April.... Many thanks”.

- 66 The email of Ms Withers sent at 11:43 was in the bundle only at pages 782-783, and therefore was only in its form as “tweaked” by Mrs Lucas. As so tweaked, that email was in these terms:

“Hi Annabel,

Re our conversation about Elaine's progress to date.

Despite a good handover from the previous incumbent, and acknowledging that there were several areas of the job which Elaine did not have experience in, your concerns were/are:

**Communication is a real concern.**

- Elaine's English is not as fluent as it might be, and she has said the wrong things, and has sometimes come over as aggressive in meetings and in emails which have been embarrassing in front of partner organisations/internal colleagues. The impact of this is that you are worried about reputation and are reluctant to expose her to some meetings where you perceive potential risk.
- In one to ones, Elaine is not direct and concise and deflects [i.e. deflects] issues by talking at length about other things as a distraction.
- Elaine is also not pro-active in letting you know that she has completed tasks – you have to ask her each time.

- As a result it is difficult to know if she is managing her work sufficiently and the impact of this is that you are worried about introducing more work (which might be more interesting to Elaine) because you are not sure if she is coping with the basics.

**Due to the above – attitude and fit is a concern.**

- Settling into the UH Arts/University way of doing things is an issue.
- The tendency to come across as aggressive and ill-thought-through in communications is a worry – hard to know whether this is due to communication difficulties or attitude
- In a role that is significantly dependent on interpersonal relationships, these issues may genuinely affect Elaine’s ability to be successful and so further work on them is required.

So, we agreed we should meet with Elaine in advance of her 5 month appraisal – suggested 20th April – to discuss these concerns and consider extension of probation for 3 months with a view to addressing these things.

Hope that helps.

Karen”

- 67 Having (1) considered that contemporaneous email exchange, and the content of Mrs Lucas’ email of 16 April at pages 935-937, the whole of which we have set out in paragraph 61 above, which was written not long after the meeting of 26 March 2018, (2) heard both the claimant and Mrs Lucas give evidence, and (3) considered the rest of the evidence that we had seen and heard, we concluded that paragraphs 19 and 20 of the claimant’s witness statement were not accurate, and that what Mrs Lucas said to the claimant on 26 March 2018 was accurately described in the tweaked version of Ms Withers’ email of 26 March 2018 at pages 782-783.
- 68 There is one further document to which we should refer here. It is the email from Mrs Lucas to Ms Withers of 28 March 2018 at page 781. That, unfortunately from the point of view of the length of these reasons, needs to be set out in its entirety. It was in these terms:

“Dear Karen

Just a question, do I need to extend Elaine beyond the 6 months? Just as every day goes by I feel less and less sure that this will work out.

Having looked back through her JD, she really is not able to deliver on a range of points...do I really need to let this drag on until end of August with a 3 month extension? Just a lot of energy will be expended on making this work and time potentially wasted on support/hand-holding.

This is about her grasp of language/comprehension, her ability to communicate effectively with the team/external partners and to deliver the work she is meant to be doing...it also makes the role of Joe Fordham very difficult who she has a dotted line of management to him.

Thank you for you ongoing support...

Annabel”.

- 69 The claimant relied on that document as showing that Mrs Lucas always wanted to terminate her (the claimant’s) contract of employment. We did not read it in that way, and after hearing from Mrs Lucas we concluded without any doubt that Mrs Lucas had by no means made up her mind, but that to the extent that she had formed a view about the claimant’s competence in all areas of her work (and not just digital marketing, which Mrs Lucas consistently accepted was done by the claimant highly competently), it was based on Mrs Lucas’ genuine and objectively justified doubts about the likelihood of the claimant ever being able satisfactorily (as far as Mrs Lucas was concerned) to complete her probation period.
- 70 The claimant at no time asserted that her accent had anything to do with her Jewish ethnicity, and we therefore consider below as a separate issue the question whether the claimant’s Jewish ethnicity had any effect on Mrs Lucas’ assessment of the claimant’s performance.

The claimant’s evidence about going to Dr Borstrock on 11 April 2018 and what happened in the days before that alleged meeting

- 71 Returning to the chronological sequence of events, in paragraphs 34-40 of her witness statement, the claimant said this:

**“Meeting with the new Dean Shaun Borstrock | 11<sup>th</sup> April 2018**

34. On 8 April 2018, I informed AL that my baby niece unexpected passed on 6 April 2018 [ 906-907].
35. I wanted to use my annual leave to stay at home and support my sister for a few days. AL told me not to take time off due to my probationary period. AL didn’t offer me any support. She didn’t inform the team about my loss.
36. On 10 April 2018, I was in the printing room when I met Alex Jacobs, the Dean’s Executive Assistant.
37. Alex Jacobs (AJ) asked me if I was ok, and I told her that my niece passed away. We spoke for a little while, and I asked her if Judy

Glasman ever commented about my accent. I told AJ about what AL said to me on 26 March 2018.

38. Mrs Jacobs was concerned and asked me to report it to the Dean ASAP. I explained to her that we were instructed by AL to not talk to the new Dean, as AL was having issues with him. Mrs Jacobs said that one thing had nothing to do with another.
39. AJ arranged a meeting with Shaun Borstrock (SB), who immediately called Karen Withers, HR Business Partner, to solve this situation. He told me that he should designate someone to investigate my complaints under the University policies.
40. SB advised me that an informal approach was the best way to get things sorted with my line manager.”

72 In paragraphs 88-93 of her witness statement, Mrs Lucas said this:

- “88 On 8 April 2018 Elaine emailed me with the very sad news that her sister’s baby had unexpectedly passed away (page 906). She said that if I saw her in silence during the week and not very chatty I would know why. This seemed to be the purpose of her telling me about her niece. In the rest of her email Elaine went on to refer to work matters.
- 89 I replied to thank Elaine for letting me know about her niece and expressing my sympathy (page 907). I responded to the work related aspects of her email.
- 90 I am aware that Elaine now claims (point 13 page 315) that “I argued [Elaine] was not in a position to take more holiday whilst on probation”, that “I did not offer her any time off or any kind of support”; that “I did not inform the team that [she] was grieving whilst working”, and she suggests I did or did not do these things because of her race or religion.
- 91 I do not consider this allegation to be fair. Elaine did not ask me if she could take holiday in respect of the passing of her niece. It is correct that I did not offer her any time off, but she did not ask for this and nothing indicated she wanted or needed time off. I did express sympathy but I do not know what other support she has now in mind I should have offered. It is correct that I did not inform the team she was grieving, but I am not sure why I would have done this, indeed it would not necessarily have been an appropriate thing to do, it was a personal matter of Elaine’s and it was not for me to discuss with colleagues.
- 92 I am aware that Elaine seeks to compare how I responded to her news about her niece to a situation with another team member, Asa, when his father died. An email I sent to the team in respect of Asa being off

for a few days following the passing of his father is in the bundle, page 1018. Asa had worked with me and members of the team for over 5 years and we knew his mother from her attending our events, doing short courses in the same building as our office and volunteering with us. We had also met his father a few times at events. As I recall Asa spoke directly of his distress at losing his father and asked to take time off to take care of practical things and support his mother. I recall that the team clubbed together to buy flowers for Asa and I recall he took 5 working days off.

93 I was aware of the University's compassionate leave policy (in the bundle at page 487), which details it is available for bereavement due to the loss of an immediate close relative (parents, partner, sibling, child)."

73 Having (1) heard and seen both the claimant and Mrs Lucas give evidence, and (2) taken into account the email exchange at pages 906-907, which was precisely as described by Mrs Lucas, we concluded that (a) the claimant did not (as she implicitly claimed in paragraph 35 of her witness statement) ask Mrs Lucas for time off in connection with the death of her niece, and therefore that (b) Mrs Lucas did not tell her not to take any time off in that regard because she was in her probation period.

The meeting of 13 April 2018 between the claimant and Ms Withers

74 In her email of 16 April 2018 at pages 935-937, Mrs Lucas said: "We had a useful conversation last Thursday." 16 April 2018 was a Monday, so "last Thursday" was 12 April 2018. On the day after that meeting, i.e. Friday 13 April 2018, the claimant went to see Ms Withers. Whether or not the meeting was the result of a suggestion of Dr Borstrock (as the claimant claimed in paragraph 40 of her witness statement, which we have set out in paragraph 71 above) was in fact irrelevant, so we did not come to a conclusion on that factual issue. However, the email from Dr Borstrock of 20 February 2019 at pages 1884-1885 suggested that it was. That email also showed that the claimant had sought to enlist the help of Dr Borstrock at that time, and that she had subsequently done so on a number of occasions, until Dr Borstrock (who was an interim Dean of the SCA) was replaced by Mr Healey (who was appointed as the permanent Dean), in July 2018.

75 There was a considerable conflict of evidence about what happened at the meeting between the claimant and Ms Withers at the meeting of 13 April 2018. The claimant's evidence about what happened at the meeting was in the following paragraphs of her witness statement:

"41. On 13 April 2018, I met Karen Withers (KW) from HR. KW explained to me that she would take notes and informally investigate all issues.

**Case Numbers:** 3313342/2019 & 3304194/2020

42. Karen Withers took notes of everything and informed me that all information was confidential.
  43. We discussed the accusations around my accent and AL's aggressive remarks about my skills and capability.
  44. The Respondents claim that I raised myself concerns about my accent. That is not true. It is also false that I was attending elocution lessons.
  45. KW confirmed that she was aware that AL wanted a 'probation review meeting' to discuss all issues and that she would bring up all questions to challenge AL during the meeting.
  46. I told KW that Annabel Lucas made discriminatory, false allegations about my ability to understand others during meetings. My English is intelligible. People can understand me, and I can understand people.
  47. KW didn't inform me about any prior contact with AL regarding complaints from AL against me. I was under the impression that KW only got involved because of my informal complaint."
- 76 Ms Withers' witness statement contained this passage about the meeting of 13 April 2018:
- '20 This I believe was the first time I met Elaine. I had no contact with Elaine prior to April 2018.
  - 21 I met Elaine one to one in the Mercer Building. I took some notes for myself of this meeting, but they do not capture the entirety of our conversation or all the topics covered. No formal minutes were produced and these handwritten notes were not intended to be seen by others. However, my handwritten notes of this meeting are in the hearing bundle, pages 915 to 918.
  - 22 My recollection is that Elaine wanted to explain that she really liked the job and working for Annabel but she felt Annabel did not really understand what Elaine's job was and so the things she was being asked to do were not always possible and the things Elaine was doing did not seem to satisfy Annabel. Elaine brought up the subject of her "accent", or pronunciation, as she was very aware of it and knew that her pronunciation was something she wanted to improve upon (note the comment bottom right of page 915: "*concerned about accent – doing elocution lessons to help pronunciation*"). Elaine brought up the matter of her accent completely unprompted during this meeting and explained that she knew that her pronunciation of certain English words was sometimes a problem for her. During this conversation, Elaine gave me the impression that she had this concern for herself, even

before joining the University, it did not seem to me to have been prompted by anything Annabel had said to her. I remember that I told Elaine that I could certainly understand her English, and the written documents she had shown me that she had written were also in good English. I asked Elaine what she wanted to do about her concerns and Elaine said she really wanted the job to work out, so I advised Elaine that when we met with Annabel the following week, she should raise the various concerns that she had.

- 23 I have seen from her claim form, at paragraph 33 (page 61), Elaine claims that at this meeting with me she reported how “*she was feeling threatened, used, intensely bullied, harassed and discriminated by [her] line manager and the Visual Arts team.*” This is not the case. Elaine did not report that she was feeling threatened intensely bullied, harassed and discriminated by Annabel and the team, if she had, this is definitely something I would have written down in my notes and I would also have captured formally the options available and actions Elaine and I should take in a follow-up email. In fact, I recall that very little was mentioned about the wider team at this meeting. It was the first time I had met Elaine and the tone of the meeting was entirely different to how she has described it. Elaine claims that I informed her that a meeting would be scheduled to clarify all issues. Again, this is not accurate: a meeting was already scheduled – we had this meeting already knowing that the probation meeting on 20th April was in the diary and we referenced it in our conversation at the time.
- 24 Had Elaine reported potential bullying and harassment I would have done what I would normally have done in such circumstances, and talked her through the options open to her, I would have provided her with a copy of the policy and encouraged her to make a written complaint. I did not do these things because Elaine did not raise these complaints.
- 25 At paragraph 34 of her claim form (page 61), Elaine says that I said that the contents of our meeting was confidential and that all issues would be reported and investigated. I did not say this.”
- 77 We accepted Ms Withers’ evidence that the notes that she had made at the meeting of 13 April 2018 were at pages 915-918, but we noted that the words “concerned about accent – doing elocution lessons to help pronunciation” were apparently added as an afterthought at the bottom of the first page, as they were on the right hand side at the bottom of the page and were (1) at a slant, which none of the other text was, and (2) fitted into the available space. However, there were other notes which had plainly been added in a similar way, albeit not so quite so obviously. We asked Ms Withers about the notes, and she was adamant that she had made all of the entries on pages 915-918 on the day of the meeting, and that they were accurate records of what had been discussed or said.



78 We therefore first considered what other evidence might be relevant. We found the following factors to be relevant here.

78.1 The claimant accepted (as could be seen in particular from what she said in paragraph 238 of her witness statement, where she said “I claim that my strong Brazilian accent and Jewish culture were the main reason behind AL’s conduct”) that she had at the material time (i.e. three years before we heard her give evidence, and at that time, 2017-2018, was itself only three years since she had come to the United Kingdom) a strong Brazilian (not Jewish) accent.

78.2 Similarly, the claimant said this in paragraph 324 of her witness statement:

“Who is Alana Jelinek to tell me that I don’t have the right skills or personality to perform my chosen profession? Do they know how many foreigners with strong accent are out there, in the real world, working as a marketing manager, doctor, nurses, teachers and even as Vice-Chancellors in universities?”

78.3 The claimant herself said for almost the whole of the period of her employment at UH that she was having problems because of her Brazilian accent (and, incidentally here, not because she was of Jewish ethnic origin). Even in her witness statement, that was the case, as could be seen most clearly from paragraphs 270, 297 and 298, which were in the following terms:

“270. On 10 October 2018, I contacted Leonor Mattos, UH Dignity and Respect Advisor, also a native Portuguese speaker [1373]. I told her that I was having issues because of my Brazilian accent.

...

297. I have a Brazilian accent. I can’t change my background, my ethnicity, and my national origins.

298. I claim that AL wanted to use my Brazilian origins, including my accent, to discredit my character and professionalism.”

79 We then went back to the evidence to which we refer in paragraphs 39-41 above, and we concluded that Mrs Lucas’ memory of being given an indication during the claimant’s interview of November 2017 that the claimant had “undertaken theatre training to work on her English pronunciation” was at least broadly accurate, in that the claimant had referred to her having theatre training, with a view to giving the impression, if she did not say it in terms, that she had done so in part with a view to improving her English pronunciation. We did so in part

because (1) we found Mrs Lucas to be an honest witness, doing her best to tell the truth, (2) the claimant had (as, we say in the preceding paragraph above) implicitly if not explicitly acknowledged, and we ourselves observed, that she had a strong foreign accent, and (3) the claimant plainly had gone to theatre classes during at least 2016, as the email to which we refer in paragraph 40 above showed. In addition, we found Ms Withers to be an honest witness, doing her best to tell us the truth, and after careful consideration, including of the evidently careful records of events and advice given that she had made in the emails in the bundle to which we refer above and below, we accepted her evidence about the accuracy of her notes at pages 915-918. Our conclusion on the likelihood of the claimant having referred at her interview of November 2017 to having sought assistance with her pronunciation was then reinforced by that separate conclusion (at which we arrived independently of our conclusion on the question whether the claimant had referred to seeking help with her pronunciation by going to theatre classes).

- 80 In all of those circumstances, we also preferred Ms Withers' evidence to that of the claimant about what had been said by the claimant at the meeting of 13 April 2018.

The meeting of 20 April 2018

*(1) What happened before the meeting*

- 81 The claimant described what happened before and during the meeting of 20 April 2018 in paragraphs 65-78 of her witness statement. The claimant's evidence there about what Mrs Lucas said before that meeting was in these terms.

“65. I was looking forward to this meeting with AL and KW. AL said that she would go together to the meeting.

66. On the way to the meeting, AL told me that KW told her about our meeting on 13 April 2018. I was astonished as KW said that our meeting was confidential.

67. I pretended that I didn't remember KW's name. AL described KW, and the conversation led to derogatory comments about orthodox Jewish people. AL said that she didn't know I was Jewish as I didn't look Jewish with black clothes, hats, and wigs. I told her that we have different traditions and lifestyle. She replied, *'really? They are so weird'*.

68. The conversation finished. However, I was intrigued with her cynicism, so I started again:

*'You know Judy Glasman is Jewish, and Shaun, Alex, Ben. They don't wear black and wigs....'*

69. AL replied:

*'So Judy knew you were Jewish? Do you know Shaun from outside the school?'*

70. I replied to AL that I didn't know Judy Glasman or Shaun Borstock.

71. I didn't give much attention to AL's comments about Jewish people. I was worried about my career and livelihood."

82 Mrs Lucas firmly denied saying those words. She told us in response to a question asked by EJ Hyams about the allegation that she had made them:

"I grew up just outside north London and I have had a whole life integrated with people who identify themselves as Jewish; this appears to be from someone who knows nothing about Jewish life and culture. It is a fabrication."

83 In order to decide whose evidence to accept on this stark conflict of evidence, we traced the sequence of relevant events relating to the claimant's assertion that Mrs Lucas had exhibited hostility to Jewish persons. The first time that the claimant referred in any written communication to either respondent to the fact that she was of Jewish ethnic origin after sending the email of 9 March 2018 at page 746 to which we refer in paragraph 51 above was in the email to Mrs Lucas of 9 November 2018 at page 1601, where the claimant said this:

"Btw, as a courtesy I am informing that I will be celebrating remembrance day with our local authorities, as special guest, nothing related to UHArts or UH at all. Later going to a celebration at the London embassy in honour our UK Jewish community. Many thanks, Elaine"

84 The next time was when the claimant sent the email of 7 December 2018 at pages 1694-1695, which was addressed to Mr Philip Clarke, who was then UH's Director of Human Resources and copied to (1) Mr Healey, (2) Ms Chizoma Okaro, Ms Withers' line manager, and (3) two members of the UH Equality Office staff. There, the claimant wrote this:

"I would like to take this opportunity to inform you that, as I reported verbally to our Dean and Equality Office, a while ago I contacted Louise from the Community Security Trust (CST) to report antisemitism comments from my line manager. It was not intentionally addressed to me, but Annabel was talking to a colleague about the previous Dean, Shaun. After that, she made derogatory remarks about orthodox Jewish people. It was when I told her that I am Jewish and she said that she was surprised and that I was not the kind of people she was talking about. I decided to do not take this further as I didn't want to cause more problems between us, but I shared with

friends from UH Jewish society and Jewish Young Voice. I would like to also add this to my formal complaint.”

- 85 The claimant’s reference there to her “formal complaint” was to her long and detailed email of 23 November 2018 at pages 1644-1652, which she had sent to Mr Healey and copied to the other persons to whom we refer in the preceding paragraph above (i.e. so that it was addressed to Mr Healey and copied to Mr Clarke and to the other persons to whom the email at pages 1694-1695 was copied). The formal complaint of 23 November 2018 was about the manner in which the claimant’s performance had been assessed by Mrs Lucas and (after the hearing of 18 October 2018 before Mr Healey to which we return in paragraphs 152-164 below) Mr Healey, and alleged discrimination in only general terms (simply “discrimination”). It also made no reference to the possibility of discrimination because of religion. The only thing that could be regarded as having particularised the complaint of “discrimination” was the references in the email to the claimant’s “accent” having been criticised. It was not referred to in the email as her “foreign” or “Brazilian” or any other kind of accent. It was referred to only as her “accent”. The email of 7 December 2018 at pages 1694-1695 was therefore the first place in any written communication from the claimant to the respondents in which the claimant asserted in any way that she might have been discriminated against because of her religion or her Jewish ethnic origins. That email ended in this way:

“FYI, I am not engaging or replying to Karen from now on”.

- 86 That statement was made after the meeting of 6 December 2018 to which we refer further in paragraphs 188-190 below, where Mrs Lucas and Ms Withers told the claimant that the fact that she had made a formal complaint about the manner in which her performance had been assessed, including by asserting that she had been discriminated against, did not affect the operation of the probation policy since the two processes of dealing with the complaint and determining whether the claimant had satisfactorily completed her probation period ran in parallel.

- 87 In addition, the claimant’s aim in making her emailed complaint of 23 November 2018 and supplementing it on 7 December 2018 was, as she wrote in her email of 6 December 2018 at pages 1695-1696 to Mr Clarke and Mr Healey (only):

“I spoke to Phil today, on my intentions to get things solved through my formal complaint.”

- 88 When we, through EJ Hyams, asked her whether she meant by that complaint to bring about a determination that she had positively completed her probation period, she said that yes, that was correct.

- 89 That she believed that that was a correct approach was shown by what she said in paragraphs 169 and 170 of her amended particulars of claim, which concerned

the decision of Mr Healey following the hearing of 18 October 2018 to which we refer in paragraphs 152-164 below. Paragraphs 169 and 170 of the amended particulars of claim were on page 178 and were in the following terms:

'169. The statement continued:

*"You must understand that Annabel is your line manager and she is entrusted by the University to make decisions about the management of UHArts and so it is important that you find a way to work with her, rather than seeking direction from elsewhere."*

170. Perhaps the above statement is one of the most shocking pieces of evidence. When before direct evidence of discrimination, Phil Healey coerces the Claimant to accept the discriminator's action. Once again, the University of Hertfordshire decide to empower and legitimise Annabel Lucas' unlawful conduct and behaviour. This statement leaves no doubt that racism is institutionalised inside the School of Creative Arts, probably propelled by its rotten HR department.'

90 The next (after 7 December 2018) reference by the claimant to Jewish people or the Jewish faith in relation to Mrs Lucas' treatment of her, was in the claimant's email to Mr Healey of 7 January 2019 at page 1802, which was written response to Mr Healey's queries about the claimant's grievance of 23 November 2018. At page 1802, the claimant said this:

"I want Annabel to be away from interview panels until unconscious bias training. I have evidence discrimination against my nationality. Annabel also made comments about Jewish people, the only reason I never mentioned this during our meetings and hearings was because the first comment was when we were going to the first meeting with Karen, she made comments on Karen's wig and said that she looked like weird Jewish...how could I repeat it front of Karen? But I shared with friends and I placed a complaint with the National Jewish Voice so it is recorded. I also included the comments that she did about Shaun."

91 Then, on 10 January 2019, the claimant sent the email at pages 1841-1844 to the Deputy Vice-Chancellor of UH, Mr Ian Campbell, where, at page 1842, she said this:

"At the same time, I tried to hire a male student as casual staff, he was recommended by the Students' Union and UH Jewish Society, the job was just to distribute flyers across the campus. She said that she would interview him before I could go ahead. After the interview, she informed that he was weird, not good English, and without any background in art. The student is from Romania and arrived in UK last recently. He was the perfect fit to deliver flyers, and the University should support students when they

need. The role was not filled, no one else applied. However, the visual arts team got all their five casuals from Fine Arts approved without an interview with Annabel.”

92 At page 1843, the claimant said this:

“I placed a complaint months ago with the National Jewish Young Voice and with our UH Jewish Society. Annabel said horrible things about a Jewish colleague and then another time inside her car on the way to a meeting. I informed her that I Jewish [sic] and she said that she didn’t know that. I have reported both episodes to our Dean and Equality Office.”

93 On the same day, 10 January 2019, the claimant sent the email at pages 1867-1869 to Gillian Rathjen, in which the claimant said this:

“I met people who worked in the SCA and had the same problems. I reported that I witnessed Megan and Annabel talking bad things about Jewish people. Alana sent that nasty message about my talk. They are like ‘Mean girls’, untouchable, fighting for their miserable territory. Promoting explicit favouritism. No law prevents companies from having lousy managers like Annabel, who runs a workplace like a schoolyard. However, in my case, the favouritism is rooted in discrimination, harassment, and retaliation. She crosses the line from poor management to illegal behaviour.”

94 The claim form in the first claim was presented on 25 March 2019. In paragraphs 146 and 147 of the details of the claim, at page 77, this was said:

“146. In March 2018, the Claimant witnessed AL making strong remarks about Jewish people while AL was speaking to Megan Knight.

147. On 20th April 2018, before the meeting with KW, AL said to the Claimant that she didn’t know that the Claimant was Jewish, as she was Brazilian, with no ‘Jewish’ Surname, and like other Jewish, ‘weirdos’ with strange black clothes and wigs.”

95 The claimant’s explanation for not referring to these things before she did at that time was stated in paragraph 149 of the details of the claim, at page 78 (it was the second paragraph numbered 149, and it followed numbered paragraph 152), in the following manner:

“The Claimant contends that she didn’t like when AL made negatives remarks against Jewish people in March and April 2018. However, the Claimant didn’t feel that she was direct discriminated on the grounds of her religion at that moment. The Claimant contends that she considered, at first, that AL was just very ignorant about Jewish people. The Claimant never requested any different treatment because she was Jewish, and, therefore,

she didn't feel in disadvantage because of her religion. However, after August 31st 2018, when AL said that there was a culture in UHArts that the Claimant would never fit, the claimant felt deeply harassed, and, after the hearing in October 2018, the antisemitism factor in the Respondent actions was more evident."

- 96 In paragraph 74 of the claimant's proposed amended particulars of claim of April 2020, at page 162, in paragraph 74, the claimant said this:

'On the way to the meeting, Annabel Lucas asked about the Claimant's sister, when she said:

*"I was so surprised when Sammy told me that you were Jewish. You are Brazilian, your name is Italian, and you don't dress like the weirdos' Jewish people we see around. So, we were wondering if Judy Glasman knew you were Jewish ... "*

- 97 In paragraph 128 of those proposed amended particulars, the claimant said this:

"When the Claimant showed hearing documents to the Equality Office team, including the statement from Megan Knight, the Head of Equality informed the Claimant that Megan Knight was facing a Formal Complaint from another staff member for antisemitism, and that she was under investigation. The Claimant contends that she knows who this staff members might be as she witnesses Megan and Annabel talking about Jewish staff members back in March 2018."

- 98 We pause to say that (1) Dr Knight firmly denied that she had been the subject of a complaint of antisemitism, (2) the claimant put before us no documentary evidence relating to such a complaint, and (3) we accepted Dr Knight's evidence that she had not been the subject of any complaint, let alone a formal complaint, of antisemitism.

- 99 The final version of the claimant's allegation that Mrs Lucas had said words that were evidence of hostility towards Jewish people was in paragraphs 65-71 of the claimant's witness statement, which we have set out in paragraph 81 above. Thus, the words allegedly used by Mrs Lucas in the car on the way to the meeting of 20 April 2018 were first stated on 7 January 2019 but only as a reference to "weird Jewish" people, because of what the claimant referred to as Ms Withers' wig (see paragraph 90 above; we heard no evidence as to whether or not Ms Withers did in fact wear a wig), and then (see paragraph 94 above) in slightly more detailed terms on 25 March 2019. The alleged words used were then (see paragraph 96 above) in April 2020 the subject of significant additions when at the same time (see paragraph 97 above) the claimant alleged (falsely, as we have found) that Dr Knight had had a formal complaint of antisemitism made against her, and then, finally, in the claimant's witness statement (which was, we saw, signed on 14 May 2021), the words were (see paragraph 81 above) in a significantly different form from either of the two earlier versions.

100 In addition, the words used were not ones which (we concluded, after careful and anxious deliberation, but after that careful deliberation, without any doubt at all) Mrs Lucas would have used if she had said anything negative about Jewish people. In any event, having heard and seen both the claimant and Mrs Lucas give oral evidence, and having regard to the documentary background to which we refer in the preceding paragraphs above, we came to the clear conclusion that Mrs Lucas did not say any words on 20 April 2018 (or, indeed, at any other time) that were evidence of hostility on her part towards Jewish people or the Jewish religion.

*(2) What happened at the meeting of 20 April 2018*

101 Mrs Lucas prepared a script for use at the 5-month review meeting of 20 April 2018. It was at pages 1500-1503. The whole of the first page and a half is of particular relevance, not least because the rest of the document contained text from the email of 16 April 2018 that we have set out in paragraph 61 above, albeit slightly tweaked. However, we do not set out all of the first page and a half. We note in particular two passages. The first was about the claimant's working relationship with her fellow team members and her oral communications:

“There were also issues with your working relationship with Joe and also interactions with other team members, that did not fit with the UH values of being collegiate and friendly. There had also been a few instances of negative feedback from our partners about your manner being inappropriate in meetings and that people had found it difficult to understand you and you had not seemed to understand aspects of meetings. You have a very strong accent, and although your English language is very good it can be difficult for you to be understood, and this is an issue when your role is [sic; i.e. is] one of communication, engagement and partnership. I also found it challenging in conversations with you to keep you to the agenda we were discussing and lost track of what you were saying as it could be tangential/anecdotal. With this in mind I lost confidence in your participation in meetings with internal/external partners and how you were communicating generally externally – which is a big issue in your role.”

102 That passage was on page 1500. The second passage was on page 1501 and was this:

“I have seen how hard you have been trying and I am delighted to have seen evidence of improvement over the past 2 weeks (I listed a number of these areas at our meeting 12 April and commended you on these)

I would like to see more improvement.

And I would like to see this across:

1. delivery of all aspects of marketing



2. your working practices
3. your communication with the team
4. your manner/content when interacting with partners
5. I need you to work on your accent / logical delivery of information so that you can be easily understood
6. Your comprehension in meetings
7. Ability to proof read text
8. specific areas of missing expertise (including LCEP/aspects of Arts Marketing)

(can go into more detail about this later in the meeting)

As I said at the start, I am committed to supporting you and working with you to get us back on track to give you the best chance of being a permanent member of the UH Arts team.”

- 103 The outcome of the meeting was recorded in an email that Ms Withers sent to both the claimant and Mrs Lucas with a record of the meeting on 2 May 2018. The email was at pages 981-982. The outcome was recorded in the last substantive paragraph, which was in these terms:

**“Next steps:**

- Next formal probation review to take place at approx. end of May.
- Suggest that further formal review takes place around 6 weeks later (around w/c 9<sup>th</sup> July).
- Another meeting may or may not be required in August.
- End of Probation 3<sup>rd</sup> September 2018.”

- 104 Ms Withers had made handwritten notes during the meeting, and they were at pages 944-948. Her email was more detailed than her handwritten notes, but her handwritten notes were consistent with the content of the email at pages 981-982 and included this passage (at page 945):

- ‘ – Few instances – negative feedback in partner meetings “aggressive”.  
2/3 ext
- Some people found it difficult to understand you
- I find accent easier now – English lang good, but the accent is a concern.’

- 105 Ms Withers’ notes at page 946 included this:

“I need to see more improvement.

...

- communication with team
- manner + content
- some work on accent? Clarity + logic”.

106 Ms Withers' email at pages 981-982 included this passage:

“Apologies for the delay in writing this up for you, but thank you for participating positively in the meeting on 20<sup>th</sup> April 2018 where we reviewed Elaine’s probation.

Annabel started by explaining the timeline of events so far, her commitment to working with Elaine and her genuine concerns, all of which I summarise below:

... Relationships with Jo and interactions with other team members did not fit with the UH values of being friendly. Feedback from partners to Annabel was that Elaine’s manner was inappropriate at times in meetings, and that Elaine did not seem to have understood some of the meetings held (LCEP). Elaine has a very strong accent, and although her English is very good, it can be difficult for her to be understood and this is an issue when Elaine’s role is one of communication, engagement and partnership working. Annabel also felt that on conversations she had with Elaine it was challenging to keep Elaine on track with the agenda being discussed and she had lost track of what Elaine was saying as it could be tangential/anecdotal. Annabel said that as a result, she felt she had lost confidence in your participation in meetings with partners and how you were communicating generally and felt that this was a big issue for the success of your role. Annabel was also very clear in stating that she knew how hard Elaine had been working and was delighted to see improvements in recent weeks, but that she needed improvements to continue and was keen to support you with this.”

107 The claimant relied on the parts of that email which referred to her accent as if they were evidence of discrimination because of her race which, by implication and as a matter of logic, had to mean her Brazilian national origin or (if it was different) her nationality. We came to the clear conclusion that the references made by Mrs Lucas during the meeting of 20 April 2018 (and, in fact, at all other times) to the claimant’s accent had nothing whatsoever to do with the claimant’s race in the sense that the motivation (in the sense discussed by Underhill LJ in the paragraphs of his judgment in *Unite the Union v Nailard* to which we refer in paragraph 18 above) for making them was in no way or to no extent the claimant’s race. They were all to do with the claimant’s intelligibility or comprehensibility when communicating orally.

108 We pause to say that the claimant’s response in her witness statement to the email of Ms Withers of 2 May 2018 at pages 981-982 in so far as it related to her (the claimant’s) performance otherwise than in relation to communication was to say (in paragraph 84):

“AL falsely accused me of not delivering in all aspects of marketing, despite empirical evidence showing that I was delivering outstanding results [891-894]. Despite the hostile workplace, I was doing my job.”

109 Whether or not the claimant was “doing [her] job” was not the issue for us here: rather, as EJ Hyams pointed out to the claimant in the early stages of the hearing before us, it was whether or not Mrs Lucas’ view of the claimant’s performance was to any extent tainted by direct discrimination within the meaning of section 13 of the EqA 2010, namely, here, less favourable treatment because of the claimant’s race (Brazilian and Jewish) or her religious beliefs (i.e. Judaism). However, our conclusion on that question was capable of being affected by our view of the evidence before us concerning the claimant’s capability. We therefore considered whether or not there was before us cogent evidence to support Mrs Lucas’ concerns about the claimant’s capability and, in the circumstances to which we now turn, we concluded that there was such evidence. It was the claimant’s case that that evidence was tainted by direct discrimination because Mrs Lucas had procured that evidence with a view to, it was the claimant’s case, having sufficient overt or purported justification for ending the claimant’s employment with the respondent, and that Mrs Lucas had procured that evidence at least in part because of the claimant’s race and/or religious beliefs.

**The next relevant event: a meeting between the claimant and Ms Withers on 7 June 2018 and the claimant’s resulting email of 9 June 2018**

110 The claimant did not write in response to Ms Withers’ email of 2 May 2018 at pages 981-982 until after she had had a meeting with Ms Withers on 7 June 2018. There was a conflict of evidence about the manner in which that meeting came about, its purpose, and what happened at it. In her witness statement, the claimant said this about those things:

“88. The Respondents claim in their ET3 Form that I raised no concerns about the notes or any content at the time [Para 17, Page 100].

89. That is not true. I contacted the Dean, Shaun Borstrock (SB), to arrange a second meeting. SB immediately called Karen Withers to set up a new discussion. It took a while for KW to arrange this meeting. That is why I took so long to reply to this email.

90. Karen Withers did not inform me in her email that I had the right to appeal this decision. KW also did not notify me about the probation Policy or any existing support inside the University, such as Equality Office or Dignity Advisor. It is my claim that she did it intentionally to victimise me.

91. I spoke to Karen Withers on 7 June 2018. I was deeply concerned.

92. During this meeting, I asked Karen Withers what I could do about the extension of my probation. She said that it was too late to revert it. KW said that AL was quite positive that things would improve with time.

**Case Numbers:** 3313342/2019 & 3304194/2020

93. KW advised me not to place a Grievance as it would extinguish any changes to secure my permanent contract.
94. It is my position that KW was misleading me. She knew that AL didn't want to confirm my contract. The evidence shows that AL wished to terminate my employment."
- 111 In Ms Withers' witness statement she described the manner in which the meeting of 7 June 2018 came about, its purpose and what happened at it, in this way:
- "43 On 31<sup>st</sup> May 2018 Elaine phoned me to ask if she could meet me again. I set up a one to one meeting for 7<sup>th</sup> June.
- 44 On 7<sup>th</sup> June 2018 I met Elaine in one of the small interview rooms in Hillside House. My very brief notes of this meeting are in the bundle at page 1002. At this meeting, Elaine was talking to me about how she was feeling. She had some concerns about Annabel's line management and the way she organised her team, she discussed her personal opinions of how Annabel allocated work to people – that Annabel's staff were her friends and so she gave more work hours to people she liked, and other similar anecdotal stories that Elaine wanted to tell me about.
- 45 This meeting did not seem to me to have a particular purpose, other than for Elaine to say how she was feeling about Annabel on a personal level. Initially I thought that Elaine was talking about her concerns in order to make some form of formal complaint about Annabel for the way she was managing the UH budget, however it quickly became apparent to me that these were Elaine's feelings and speculations, for which she did not seem to have proof.
- 46 I did not make notes of this conversation because it was all about how Elaine was feeling and Elaine did not want it to be placed on record because she recognised that these were potentially serious allegations to make.
- 47 I recall that at the end of the meeting, I also asked Elaine about her lack of response in the 20<sup>th</sup> April meeting and why she had not challenged what Annabel was saying as per our initial meeting on 13<sup>th</sup> April. Elaine said that she wasn't sure what to do for the best and was just going to leave it.
- 48 I suggested that Elaine reply to my email containing the notes (as indicated in my brief notes) – even at this late stage (because almost 7 weeks had already gone by), to set out her objections/mitigation. She said she would do this. I confirmed to Elaine (as I always do in these

circumstances), that I had not made any notes of our conversation because Elaine had asked me not to, and the meeting ended.

49 At paragraph 44 of her claim form (page 62), Elaine states that in this meeting she reported to me that Annabel was cancelling all her on-to-one meetings. As far as I can recall she did not say this to me. If she had, I would have noted this concern and followed this up with Annabel.

50 Elaine also states at paragraph 44 of her claim form (page 62) that she complained to me about the lack of follow up of her complaints and that I assured her that all of her complaints were noted and under investigation. This is a fabrication. Elaine had not made any complaints for me to be able to follow up on and she did not ask me about this. Elaine also did not discuss a printed grievance form with me and I did not advise her at this meeting to not go ahead with a grievance while she was on probation – this story (which I note Elaine is stating amounts to direct discrimination and victimisation – see issue 4. page 310) is completely fabricated – this conversation never happened. We did later, in September 2018 have an email conversation about a possible grievance (see later – paragraphs 66 and 68), and please note, my advice in this later conversation had nothing to do with Elaine’s race or that she was complaining of discrimination), but it certainly wasn’t a topic of conversation this early.”

112 Ms Withers’ handwritten note of the meeting at page 1002 said merely this:

“7/6/2018  
Elaine Carrozzi

- Reply to email.
- I’ll arrange a catch-up meeting.”

113 The claimant was cross-examined on what happened at the meeting, and stood firmly by her account of it (as set out in paragraph 110 above). We (through EJ Hyams) asked Ms Withers about it and in particular her allegation of fabrication. She too stood firmly by her witness statement evidence (as set out in paragraph 111 above).

114 The claimant had, after the meeting of 7 June 2018, sent to Ms Withers and Mrs Lucas the email of 9 June 2018 at page 1005. Its contents were all material. They were as follows:

“Sorry for the delay in getting back to you.

I just need to clarify some points regarding my marketing tasks. I have evidence that I have been delivering outstanding work on the marketing side and I don’t feel comfortable having my probation extended based on

**Case Numbers:** 3313342/2019 & 3304194/2020

this. Our last meeting was too much focused on LCEP and minor points that I believe don't sustain my probation to be extended.

In addition, the text indicated that I have a poor relationship with partners and internal staff, which is not true. I have a list of important partners, members of the press and internal departments that I have been building a solid relationship for the past months. I still don't understand how what Hannah and Maria Tomas said about me can be more relevant than what I had achieved.

For clarity, I think we should book a second meeting to finalise this matter. I am sure that Annabel and I can now raise these points in a proactive way, avoiding surprises in the future. I must confess that I was really surprised when I was informed that instead a huge thank you for my hard work developing a marketing system for UH Arts in such short time and unstable conditions, instead I was informed my probation was going to be extended. I never had any similar problem during my entire career, quite the opposite.

I would like to discuss all points of my job description that Annabel expects me to delivery. For e.g., there are points such as LCEP and fundraising goals that we need to clarify and formalise terms and expectations.

To conclude, I would really appreciate if we could put an end on this matter about my accent. Annabel, Judy, Chris and Emma from LCEP interviewed me for one hour and my accent didn't stop Judy calling me to offer the job just one hour after the interview. I was really surprised that, after working for 2 years as a marketing manager in the UK, I have for the first time negative comments on my accent, especially here, at the University of Hertfordshire, a place that welcomes more than 4,000 students from overseas, makes 30 million a year with international students (not included EU students), and hold so many important international partnerships.

I would like to remind you that it is not easy to change someone's accent after 12 years old, as after this age the brain doesn't assimilate new songs easily. Although, as I am relatively new in this country, I really appreciate any comment and feedback related to my English pronunciation, something I want to improve to perfection.

Hope that it is ok for you both."

115 Ms Withers' evidence in relation to that email was in the following paragraphs of her witness statement:

'51 Elaine took my advice from this meeting and on 9<sup>th</sup> June 2018 she wrote to Annabel and me (page 1005). I was included in the email but I did not take it that the email was for me because it was responding to the original meeting back on 20<sup>th</sup> April. Elaine asked for operational details

about her role that she felt were lacking. Elaine raised the topic of her accent in this email. Elaine said: *“I would like to remind you that it is not easy to change someone’s accent after 12 years old, as after this age the brain doesn’t assimilate new sounds easily. Although, as I am relatively new in this country, I really appreciate any comment and feedback related to my English pronunciation, something I want to improve to perfection.”* Elaine’s response in this email was in keeping with the tone and approach that our conversations at that time had been taking, and it showed, I thought, that she not taken any offence at this point in our discussions. It is my belief that only after many months had passed did Elaine choose to take offence at this conversation, but at the time we were speaking, she accepted it in the spirit it was delivered.

- 52 Of course, Annabel had not been asking Elaine to change her accent, but just wanted her to consider how she could deliver messages to stakeholders that would be clearly understood.”
- 116 We asked the claimant what she meant by the words in the email at page 1005: “finalise this matter”, as we suspected that by them she meant: “confirm my contract of employment as permanent, by ending my probation period with the conclusion that my performance is satisfactory.” She did. That was, we concluded, a completely unrealistic request. However, it was consistent with the rest of the first part of the email on that page, which showed that the claimant was refusing to accept that there was anything wrong with her performance. It was a stance which, if maintained, was likely to lead to the eventual conclusion that her employment should be terminated on the basis that she had not satisfactorily completed her probation period, since if she maintained that stance then she would probably not seek to improve any aspect of her performance.
- 117 In any event, at the end of paragraph 94 of her witness statement (which is at the end of the extract set out in paragraph 110 above), the claimant said: “The evidence shows that AL wished to terminate my employment”. That stance was consistent with what the claimant said in paragraphs 302 and 303 of her witness statement, namely:
- “302. Why would AL take me from my job in London, my livelihood, if she didn’t want to confirm my contract?”
303. During the disclosure, the Respondents confirmed that AL never sent any email to colleagues and external partners informing my appointment. That is unusual. I believe that AL never wanted to secure my contract.”
- 118 Those things were also unrealistic if only because they failed to take account of the purpose of the probation process.

119 In any event, we saw that while the claimant devoted half of her email of 9 June 2018 at page 1005 to the topic of her “accent”, she did not at any stage before making her first employment tribunal claim say that she had made an informal complaint to Ms Withers on 7 June 2018. The closest that she came to saying anything remotely similar was in her email to Mr Healey of 14 January 2019 by means of which she resigned, where, among other things, she said (page 1860):

“The University ignored my complaints and used a non-factual Job Description to evaluate my results. The University didn’t carry out my informal complaints and advised me by email to not place formal grievance procedures, allowing the situation to escalate and impact my health.”

120 However, even that was inaccurate since there was no email of that sort in the bundle, or at least if there was, our attention was not drawn to it.

121 Given all of the factors to which we refer in the preceding paragraphs above, and having heard all of the evidence, we accepted Ms Withers’ evidence about what happened at the meeting between her and the claimant of 7 June 2018 and to the extent that it differed from that of the claimant, we preferred Ms Withers’ evidence.

### **What else happened during the 3-month extension of the claimant’s probation period**

122 The relevant events after the claimant sent her email of 9 June 2018 at page 1005 up to 29 August 2018, which was shortly before the ending of the three-month extension of the claimant’s probation period, were in our view completely accurately described by Mrs Lucas in paragraphs 122-132 of her witness statement. In so far as paragraphs 132-133 of Mrs Lucas’ witness statement consisted of a description of the content of the document at pages 1099-1101, we regarded that document itself as the best evidence of what was in Mrs Lucas’ mind when she sent it (29 August 2018), and we concluded from her evidence to us that it was an accurate statement of her perception of the claimant’s strengths and of the areas in which improvements were required for the claimant satisfactorily to complete her probation period. We saw nothing in the evidence to which we refer in this paragraph from which we could draw any inference which supported the claimant’s claims of less favourable treatment of her because of her race and/or her religion.

### The review meeting of 31 August 2018

123 Mrs Lucas’ witness statement described in paragraphs 136-148 what happened next. Mrs Lucas had a telephone discussion with Ms Withers on 30 August 2018, and Ms Withers followed it up with the email of the same day at page 2241. That email was in our view the best evidence of what was in the minds of both Mrs Lucas and Ms Withers at the time. In the email, Ms Withers said this:



**Case Numbers: 3313342/2019 & 3304194/2020**

“Hi Annabel – following our brief conversation earlier, I promised to respond to your emails with my advice, which I have done below.

In talking it through on the phone, you appear to be in two minds about how to proceed; on a personal level you want the relationship to work and for Elaine to perform well, and so if you had more time, you’d like to see things improving, however, we don’t have more time, and from the business point of view you are not confident that Elaine can perform well in the role without you diverting a lot of your time and efforts to making things work, which will mean other things are affected. On balance, you would rather someone else made the decision for you – which is exactly what taking the case to a Probation Hearing will do. As I mentioned, the options for the decision maker (ultimately, the Secretary & Registrar, but more likely to be delegated to the Dean) are: further extension for up to 3 months, confirmation in post, or dismissal.

So, in looking at the documents you sent me, it certainly appears that you have put together some clear targets and objectives for Elaine to achieve in the time, but some of these things have either not gone to plan, or do not appear to have been done, with little or no explanation. The full review of the JD is helpful, and the summary of concerns at the end is also useful.

I do think that you have a clear argument to put before a Hearing, however, you need to be prepared for Elaine’s counterargument. I am unable to predict how things will go at the hearing, but if you approach it with the right intentions – which I feel that you are, then whatever the outcome, I think you will be able to deal with the outcome of that hearing.

Some of the questions I ask below, to be devil’s advocate and to pre-empt what might be her counter-argument –

Has Elaine actually had the opportunity to be involved with or do the things you have identified that she has not yet done? For example, I recall that she has managed large budgets in previous posts she has had – has she been given responsibility for a budget? Could she argue that she has been excluded from things so she has been unable to deliver on them?

The items about relationships – so professional network and work with the AD for recruitment and partnerships, & LCEP – how is this measured? Could she demonstrate at the Hearing that she does have these relationships? Could she argue that you have in some way hampered her ability to network/develop relationships?

Anyway, I hope that helps.

Next steps are to tell Elaine that this is what you intend to do. I suggest you see her as soon as you can. I know you said you wanted me to come too, and that’s fine – but I suggest you confirm to her asap that you want to meet for a final review and that you have invited me along too. Elaine did contact me while you were away and asked that I was present for the final review meeting, so I’m sure she will be ok with this.”

- 124 The claimant contended that Ms Withers’ acting as “devil’s advocate” was in some way wrongful. We disagreed, understanding that Ms Withers was acting as Mrs Lucas’ adviser, and that Mrs Lucas was at that time not sure what to do

about the claimant's employment, which is why she was happy for the issue to be put before a third party, in a formal hearing. We regarded the email as a completely accurate reflection of what was in Mrs Lucas' mind at the time.

125 Mrs Lucas then had a meeting with the claimant on 31 August 2018, and Mrs Lucas, as she put it in paragraph 137 of her witness statement, "explained that [she was] not confident to move forward to make [the claimant's] position permanent" for the reasons stated in the subparagraphs of paragraph 137, namely:

"137.1 Elaine had not had sufficient time to put into action the areas that I still needed her to work on as detailed at her Review Meeting on 10 July 2018.

137.2 There were some documents/information I had requested that I had not received (1) final draft of UHArts Annual Report (due by 1 Sept), (2) Final draft of UHArts Marketing Policy + Plan (due by 1 Sept), (3) her Development Diary for the period I was away, and (4) list of key deliverables for the period I was away.

137.3 Some issues that were brought to my attention on my return from holiday (including team members feeling she had not taken a lead for Freshers Fair and they had had to step in again, and professional relationship with Farhana was not established, resulting in confusion and complaints from the Museum Team and Elaine not taking ownership over the Press Breakfast)."

126 Mrs Lucas sent the claimant the email of 3 September 2018 at pages 1128-1131 summarising the meeting. We found the following short extract from it (at page 1129) to be an accurate summary of what Mrs Lucas said at the meeting:

"I explained that since April I had been between thinking you were doing a very good job (across areas of digital marketing) and having concerns around other aspects of the role (principally around communication and relationship building, also project management, clarity of thought, planning and prioritisation – and the area of press that you are developing).

I emphasised strongly your areas of strength and what you were delivering successfully – that I recognised these, valued them and appreciated them. These aspects [are] a real asset to UHArts, including: increased traffic to website, digital marketing and increase in social media activity, positive impact on ticket sales and systems you now have in place to deliver communications plans for events. And I referred back to the areas of concern highlighted in April and July's Review Meetings, especially focussing on communication and relationship building with team, UH colleagues, external partners and stakeholders."

127 The whole of that email was highly material. We saw the following paragraph at the bottom of page 1130 as being a completely accurate description of what was in Mrs Lucas' mind by the end of the meeting of 31 August 2018 with the claimant. Under the heading "Next steps:", Mrs Lucas wrote this:

"The confusion, frustration and resistance you expressed through this 'discussion' demonstrated again for me some of my ongoing concerns and as a result of this, backed up with the issues (listed above) and the past 3 months, I am not confident at this moment in time to make you a permanent member of the team. Our working relationship is challenged currently and – for both of us – I need to seek the advice of a Senior Manager for the best way to proceed."

128 Paragraphs 142, 143 and the first sentence of paragraph 144 of Mrs Lucas' witness statement were also relevant. We accepted them completely. They were in these terms:

"142 I concluded by requesting again the 4 documents due and that I needed these to make a full assessment of progress since the Review Meeting 10 July. I was disappointed that they had not been emailed to me without Elaine being prompted as they had been requested or had clear deadlines attached. I referred back to Karen Wither's advice to her in April where she requested Elaine 'manage up' to me to give the confidence that tasks were on track and I reiterated that I had limited management capacity as I was currently managing 8 people and she needed to be proactive in providing me with information I need without prompting and to flag up if there are any issues/barriers to her delivery.

143 At this point in the meeting I thought we were getting somewhere positively, but then unfortunately the discussion about the 4 documents turned into more of an argument, that continued onto the St Albans High Street with Elaine:

143.1 challenging the need for doing them;

143.2 claiming she had been too busy to do them;

143.3 claiming that I had not been clear that I needed them;

143.4 questioning the Annual Report, stating that it had been her idea to do it and she wished now she had never done it, that I had not given her feedback, then that the new structure I had suggested meant re-writing the whole document; and

**Case Numbers:** 3313342/2019 & 3304194/2020

143.5 saying she was confused whether the report should cover the last season / whole year (I was clear it was an annual report as requested by Judy Glasman in January).

144 This was a disheartening meeting and experience.”

129 On 5 September 2018, the claimant sent the email at page 1168 to Ms Withers. It was in these terms:

“Hi Karen,

Can HR please advise me on how to formalise my complaint relating to harassment and bullying from Annabel. I cannot take more comments on my verbal skills and accent.

As I said before, I was interviewed by a panel of 4 people, including Dean, external partner, Annabel and a member of the Central Marketing. Once I was offered the job of Marketing Manager, I acquired responsibilities and rights to execute my work as per my job description. There is no way that people cannot understand me or think less of me because of my accent. I would not take UHArts marketing where I took if I could not communicate. She has [been] depreciating me with cruel comments since April, excluding me, introducing me as an officer, saying that I am not the face she wants for UHArts, among others.

I come to UHArts to have a great workplace environment, to excel, not to be morally harassed.

Please let me how to proceed”.

130 Ms Withers responded to that email (and those which preceded it, including the one on pages 1123-1125, to which we refer in paragraphs 217-218 below) on 10 September 2018, in the following manner (page 1167):

“Hi Elaine,

I have just seen the last few emails (I didn't pick them up whilst I was on leave, sorry.), including the one where you are threatening to go to the Vice-Chancellor directly. I do not think that would be a very wise course of action, as this would undermine the management processes we have in place, and will potentially alienate some senior managers along the way, including your Dean of School and the Deputy Vice-Chancellor. I do understand your frustration and your reasons for feeling aggrieved, though. In response to your query below - the first thing to consider, is what your ideal outcome from such a grievance process would be.

At present, you are going through the probation process, and will have the opportunity to state your counter-arguments and raise your concerns

formally with the Dean of School during that process, which will inform any decisions he makes on the matter. He will either: confirm you in post, authorise a further extension of your probation, or dismiss you from employment. If you remain in post, you will still have to report to the Head of UH Arts, and work with her. Only you will know whether this is something you would want to do.

The staff grievance policy is here: [link given]. You will see that your formal complaint would go to your line manager's line manager – which is the Dean of School. The Dean may then decide to deal with the matter separately or together with the probation. As the issues are very linked-up, the Dean is likely to look at it all together.

I hope that helps.”

### **The review meeting of 11 September 2018**

131 At the end of her email to the claimant of 3 September 2018 at pages 1128-1131 to which we refer in paragraphs 126 and 127 above, Mrs Lucas wrote that she had arranged for a meeting for her, the claimant and Ms Withers to take place on 11 September 2018 “to discuss this further”. Mrs Lucas described that meeting in paragraphs 152-159 of her witness statement, which we accepted. We did not understand the claimant to be making a specific complaint about what happened at that meeting (although we understood that she contended that it was tainted by direct discrimination within the meaning of section 13 of the EqA 2010 because of race and/or religion), so we do not refer here to the content of that meeting except to say that we were completely satisfied (after hearing all of the evidence, and then stepping back and reviewing it all when considering this issue; where we state a similar conclusion below, it was after the same kind of careful review) that Mrs Lucas’ concerns expressed at the meeting, and Ms Withers’ involvement at that meeting, were in no way affected by the claimant’s race or her religion.

### **Dr Knight’s email of 9 September 2018, Dr Jelinek’s email of 17 September 2018, Ms Newley’s emails of 20 and 26 September 2018, and Ms Maitland’s email of 3 October 2018**

132 In paragraphs 149-151 of her witness statement, Mrs Lucas referred to an email (it was at pages 1236-1237) that she was sent by Dr Knight on 9 September 2018. She said that Dr Knight “had mentioned to me verbally her concerns about Elaine’s contribution to an LCEP meeting and I asked her to follow-up with the full details in an email.” The email started in this way:

“I am writing to you to raise some concerns I had after the meeting on Thursday to discuss HCEP plans. Your colleague Elaine Carozzi was at that meeting, and I feel that her behaviour during the meeting was not conducive to building good working relationships with the stakeholders

present. As you well know, this is a new project, and its success depends on collaboration and goodwill among various sectors of the university, and of the local community (not just those present). I felt that Elaine's approach to the meeting was adversarial and competitive, and have concerns that this will damage the relationships we have and need to build and maintain."

- 133 Dr Knight gave evidence, and we were completely satisfied that that email was the result of genuine concerns on her part about the claimant's "contribution to an LCEP meeting" of the previous Thursday, which, since 9 September was a Sunday, was probably Thursday 6 September 2018. The claimant asserted that Mrs Lucas had in this and other respects sought out evidence to support the proposition, which she was planning to advance at a formal meeting held by either UH's Secretary & Registrar as provided for in the probation policy (as we describe in paragraph 44 above) or a nominee of the Secretary & Registrar, that the claimant should be dismissed. We concluded that in all respects, Mrs Lucas did not seek out that evidence, but, rather, asked for what she had been told first by each individual from whom she received written supportive evidence to be put into writing. We concluded that Mrs Lucas' asking Dr Knight to follow up "with the full details in an email" was to no extent whatsoever the result of, i.e. "because of" the claimant's race, or her religion. The same was true of all of the other evidence that Mrs Lucas gathered to support the proposition that the claimant's probation period should not be extended any further and that the claimant's employment should be terminated, namely that of
- 133.1 Dr Jelinek (in her email to Mrs Lucas dated 17 September 2018 at page 1235; it was also at page 1810, and we have, for reasons which will be apparent, set it out in paragraph 231 below) about the claimant's contribution to a "UH Women's Day Event" held in February 2018 (to which Mrs Lucas referred in detail in paragraphs 164-175 of her witness statement, all of which we accepted);
- 133.2 Ms Catherine Newley's emails of 20 and 26 September 2018 to Mrs Lucas at pages 1239 and 1287, to which Mrs Lucas referred in paragraphs 176-177 of her witness statement, which we accepted; and
- 133.3 Ms Samantha Maitland's email to Mrs Lucas of 3 October 2018 at page 1452, to which Mrs Lucas referred in paragraphs 178-179 of her witness statement, which we accepted.
- 134 We concluded from the oral evidence of Dr Jelinek and Ms Maitland that their concerns relating to the claimant as expressed in their emails to which we refer in paragraphs 133.1 and 133.3 above were genuine and were to no extent stated because of the claimant's race or her religion. We concluded from Mrs Lucas' oral evidence that Ms Newley's emails were genuine expressions of her (Ms Newley's) perception of problems arising from or in relation to the claimant's work done for UH: Ms Newley was an employee of the local authority, and not UH,

and the authority and UH were working in partnership in relation to exhibitions in the local authority's area.

- 135 Mrs Lucas' intention was to advance the case for the termination of the claimant's employment, and to let the Secretary & Registrar, or the latter's nominee, decide whether or not that should occur. Her reasons for doing that were clear from the email of 15 October 2018 at pages 1405-1406 from her to Ms Withers, where she wrote this:

"I am finding this situation very challenging Karen – according to Elaine she has had a number of meetings with Phil. I am anxious about what is being discussed and feel pretty vulnerable as she has a very different perspective on her abilities and what is going on here.

Please could we meet briefly so that I can have a bit more support in preparation for Thursday's hearing – I have nearly completed my statement. I would also appreciate having the structure of the hearing too that you mentioned was available to me.

I am really hoping not to be put in a position that Elaine continues working within my team. This situation is untenable for me and it will seriously affect my ability to do my job."

### **The claimant's exclusion from the formal appraisal process in September 2018**

- 136 In paragraphs 160-162 of her witness statement, Mrs Lucas said this:

"160 I am aware that Elaine has accused me of directly discriminating against her on the grounds of her race, and/or victimising her by excluding her from appraisals.

161 Elaine's appraisal was in the diary for 24 September 2018. As this was shortly before her probation hearing where her performance and suitability for continued employment would be discussed it appeared that an appraisal at this time was not appropriate. I asked Karen whether the appraisal should therefore be postponed. Karen said yes, as Elaine was still on probation an appraisal did not make much sense (page 1212). I informed Elaine of this (page 1285).

162 This was the reason she did not have an appraisal, not because of her race, or any complaint of discrimination (which I am told is what victimisation is in his context)."

- 137 We accepted the Mrs Lucas' reason for not carrying out a formal appraisal of the claimant in September 2018 was purely because the claimant was still in her probation period. That is both on the balance of probabilities (not least because there would have been no point in carrying out an appraisal of the usual sort at

that time) and because we were completely satisfied from Mrs Lucas' evidence that that was her reason for not carrying out a formal appraisal at that time. In addition, Ms Withers approved that decision. Ms Withers was not challenged on her reason for such approval, but there was nothing in the circumstances which suggested that she might have been influenced by the claimant's race or religion, or the fact that the claimant had objected to her treatment (including by, if and in so far as it was relevant, having her accent criticised). In any event, we concluded that Ms Withers' approval of that course of action was in no way influenced by any of those things.

### **Laptop computer and mobile telephone**

138 The claimant was given at the start of her employment with the respondent what we concluded was the same by way of information and communications technology equipment as she would have been given if she had been of any other race or she had had any other religion. During the first part of October 2018, the claimant asked for a lighter laptop computer and followed up that request with a written one sent by email on 8 October 2018 (page 1347).

139 Mrs Lucas described this matter in paragraphs 180-189 of her witness statement, all of which we accepted in so far as it related to the sequence of events relating to the claimant's request for a lighter laptop computer.

140 The claimant claimed in these proceedings that she had also asked for a mobile telephone to be provided for her use by UH, and that the failure by the respondents to ensure that she had such a mobile telephone or a lighter laptop computer was direct discrimination and/or victimisation within the meaning of section 27 of the EqA 2010. In regard to the mobile telephone, Mrs Lucas said this in paragraph 188 of her witness statement:

“Elaine refers at paragraph 140 of her claim form (page 76) to asking for a work mobile phone. I do not believe she ever asked for a phone individually. I do recall that one of the team, Asa Miller, had researched costings for team phones and we had jointly decided it was not a good use of the budget and was not aligned with other colleagues within the School of Creative Arts.”

141 There was in our view nothing in the evidence before us from which we could draw the inference that the claimant, in not being provided with a mobile telephone or a lighter laptop, was treated to any extent less favourably because of her race or her religion, or to any extent as a result of her having expressed a desire not to have her accent criticised.

### **Student assistance with the distribution of flyers and posters**

142 In paragraphs 190-194 of her witness statement, Mrs Lucas gave evidence about another complaint of the claimant to this tribunal, which concerned a decision,



made by Mrs Lucas during October 2018, not to recruit as a casual employee a student proposed by the claimant. The first two paragraphs of that passage referred to emails which were in the bundle. We set out in the following paragraph below the other two paragraphs. The claimant's evidence on this matter was in paragraphs 566-574 of her witness statement, which we re-read with care when deciding whose evidence to accept on this issue. The claimant did not interview the student: Mrs Lucas did. The claimant's witness statement included this passage:

“571. Joe Fordham told me that AL asked him how I got the casual student. Once Joe Fordham said to her that Victor [the student] was from the UH Jewish Society, AL asked Faye to not go ahead with his documents, as she wanted to interview Victor first.

572. On 4 December 2018, I wrote to AL again:

*‘Re casual - what else can I report? I developed a distribution plan. The focus group report with students clearly states that we need more posters. What do you mean by tasks? I will instruct the person to distribute as per distribution plan. I don't understand why you didn't hire the boy recommended by the Jewish society and SU. I don't understand why it has to be so difficult to get someone to help Joe and me on this. The winter is coming, and we need to distribute also around Hatfield as well. Joe and I distributed 60 posters last week.’ [1683]*

573. Annabel Lucas stated that I don't have communication skills. One thing I can admit. I couldn't comprehend her logic. I felt like talking to a toddler.

574. On 6 December 2018, when I complained about the situation to Karen Withers, AL said that she didn't call Victor 'a weirdo', but she said that she didn't like him because there was a 'weird vibe' between them. I said that Victor was needed for distribution, and she wouldn't have to interact with him, and, therefore, AL was creating a hurdle without a valid reason.”

143 In paragraphs 193 and 194 of her witness statement, Mrs Lucas said this:

“193. I do recall that Joe Fordham and I interviewed informally a student nominated by Elaine in the Gallery Café (as we would do for all casuals we were appointing, unless we already had a working relationship with the individual). I think Elaine was also due to interview him but was not in work that day. I recall that the student had no understanding of the job he was applying for with us, and did not understand what we did or seem comfortable talking about art with us. He did not seem particularly interested in the work. Having

consulted with Joe, we decided he was unsuitable for the role. I emailed the student to advise him of this.

194 I did not tell Elaine that the student was a wierdo as she has alleged (para 183 page 180).”

144 We preferred Ms Lucas’ evidence on this issue. Her reason for not employing the student proposed by the claimant was, as she said in paragraph 193 of her witness statement, solely because, having, with Mr Fordham, interviewed that student, she concluded that the student was not suitable for the role because he “had no understanding of the job he was applying for with us, and did not understand what we did or seem comfortable talking about art with us [and] did not seem particularly interested in the work.”

### **Mrs Lucas’ failure to support the claimant’s application to be a school governor**

145 In paragraphs 195-196 of her witness statement, Mrs Lucas said this:

“195 I am aware that Elaine is claiming I directly discriminated against her, harassed her, and victimised her on the grounds of her race and religion by being opposed to her being a local school governor.

196 I was not opposed to her being a school governor as such but I did have some concerns about giving her a reference:

196.1 Given my concerns about Elaine’s performance I was worried about providing her with a reference because of this.

196.2 UH Arts had worked closely with the school she was looking to be a governor with and I was worried there might be a conflict of interest.”

146 We accepted that evidence of Mrs Lucas. The claimant separately approached Mr Healey for a reference for the position of school governor, and he gave one.

147 Mrs Lucas’s witness statement continued:

“197 I am aware that Elaine alleges that I emailed her to say I was not happy about her being a school governor – I do not recall the content of this email if I did send it.”

148 There was no such email in the bundle or, at least, if there was such an email, our attention was not drawn to it.

### **UHA website new events page**

149 In numbered row 22 of the claimant's schedule of allegations at pages 310-321, it was said that the following was the result of direct discrimination because of race and/or religion, harassment and/or victimisation:

“R2 orally, and in an email copied to members of the UH Arts team, said the Claimant was unprofessional and not a team player due to problems with the UH Arts website's new events page.”

150 Mrs Lucas' evidence in response was in paragraphs 200-201 of her witness statement, where (in paragraph 201) she said this:

“I am not clear what she is referring to, but perhaps it is my email in the bundle at page 1355, although no-where [sic] do I say she was unprofessional and not a team player. The email does however outline that Elaine should have been aware of a large event we were hosting at the Weston Auditorium and present in the office to support the team with the fallout. She was out of the office a lot and I did not always know where she was.”

151 We accepted that evidence of Mrs Lucas. The email at page 1355 was dated 9 October 2018 and it was responded to by the claimant in an email of the same day which was at the top of page 1355. The final sentence of paragraph 201 of Mrs Lucas' witness statement was relevant to another allegation of the claimant's, in numbered row 19 of the schedule of her allegations, which was stated to relate to what happened in “November 2018”, and which we return to below.

### **The probation review meeting of 18 October 2018**

152 Of far greater significance was the hearing of 18 October 2018 which was conducted by Mr Healey as the person to whom UH's Secretary & Registrar formally delegated responsibility (in the letter dated 13 September 2018 at page 2242) for conducting the meeting of the sort required by the probation policy to which we refer in paragraph 44 above.

153 The claimant's witness statement contained this passage about her first meeting with Mr Healey, which happened on 14 August 2018:

“155. I told Phil Healey about everything. He was surprised. PH asked me if everything was sorted. I replied yes and no. I said that I didn't believe that AL would try to fire me. However, I was being harassed, undermined and bullied by AL. I explained to PH that AL would always report negative comments by the visual arts team. However, I didn't know if it was true. There were never details.

156. I didn't ask Phil Healey to do anything. I didn't want to cause troubles. I just wanted my contract confirmed to breathe and start looking for

another job, even inside the university. Phil Healey said that it was a shame as he wished for more people like me, not less.

157. I told PH to speak to Karen Withers in case he wanted more details about my informal complaint. I was naïve.”

154 Mr Healey’s witness statement (on which he was firmly pressed by the claimant, but by which he stood equally firmly) contained this passage:

“7 I first met Ms Carozzi in her marketing and promotion role for UH Arts, in the summer of 2018 when I joined the University of Hertfordshire.

8 I have been shown the outlook calendar invite at page 1064 which refers to a meeting between Elaine and myself with the subject “Elaine Carozzi – UH Arts Marketing introduction”. According to my diary I was away on annual leave from 30 July 2018 until 10 August 2018. I had an introductory meeting with Elaine on 14 August 2018 from 9.30am-9.45am. My recollection is that we simply discussed Elaine’s marketing role for UH Arts.

9 I am told that Elaine says that around this time she spoke to me about all her issues, including race discrimination and anti-Semitic comments (paragraph 61 page 65). I have no recollection of her mentioning these matters to me in our meeting on 14 August 2018, and I believe I would remember if she had, my notes also make no mention of these matters (see page 2237)”.

155 We considered those notes carefully, and we considered carefully the oral and witness statement evidence of both the claimant and Mr Healey. We found Mr Healey to be an honest witness, doing his best to tell the truth. The claimant, it was clear from her and Mr Healey’s other evidence, on several occasions subsequently approached Mr Healey directly. For example, in paragraphs 14 and 15 of his witness statement, Mr Healey said this:

“14 Prior to the hearing Elaine sent me a couple of emails, setting out some concerns she had in respect of her treatment by Annabel (pages 1309 to 1312 and 1317 to 1321).

15 I note the outlook invite in the bundle at page 1339 with a date of 5 October 2018. I did have a meeting with Elaine in my diary on 8 October 2018, as far as I am aware no notes were taken at that meeting.”

156 The emails at pages 1309 and 1317 (sent on 2 and 3 October 2018 respectively) constituted what could be characterised as lobbying. The whole of the latter email bears repeating, as it was an unusual email to send to a person whom the sender knows is about to make a decision on the sender’s future employment.

'Dear Phil,

Please find below my response from the e-mail that Karen sent in April.

This e-mail was never replied. I booked a meeting with Karen to reinforce that I was not happy about this and very suspicious about Annabel intentions.

The list of things that Annabel asked to improve is nonsense, she never substantiates any evidence that I was not delivering. I never did anything wrong that shows that I need to improve written content/documents (that is because she wants to indicate that my language is impacting on my work). My press release is published on local press in full, Annabel barely read or approves it. Joe is the one who, sometimes, posts with minor grammar errors. I am very attentive to details, especially when I publish content.

The last meeting, Annabel said that Farhana, Marketing Manager from St Albans Museum, complained about me. I spoke to Farhana last week, asked her why she said that she was not happy about my work after I got a BBC presenter friend of mine to post about the museum...She said that she never said it, that she is not happy about we are not close. I said: "but I invited you to have a coffee meeting and catch-ups, you are always busy" and she said "but your boss told us to don't contact you, not get you involved in marketing. She asked to contact always Liz, Sammy or herself".

Farhana also added that they are not happy with UHArts as a whole, that the exhibitions are being criticized by the local community, not engaging. She also said that Annabel compromised [sic; probably meant to be "promised"] to supply volunteers, which didn't happen. She asked if we could have marketing meetings without Annabel, so we can create ideas and ways to improve things ourselves.

I am bringing this up now because I don't want to make accusations during the hearing, compromising Annabel's image in front of people. Because if it is true that she asked Farhana to contact her not me, and after all use this poor collaboration to say that I can't build relationships, it is not just undermine my position, it sounds more like sabotage.

Many thanks,

Elaine'

- 157 That email was sent only to Mr Healey, i.e. it was not copied to Mrs Lucas or Ms Withers. He did not say how he dealt with it at the meeting of 8 October 2018 of which he had made no written record, but he did refer in paragraphs 16 and 17 of his witness statement to several other allegations of the claimant which were

pressed as part of her claims to this tribunal, and we need to refer to that further evidence of his because of those allegations. The paragraphs were as follows:

‘16 I am told that Elaine has alleged that she “required the hearing to be cancelled, by the fact that some of the content was discriminatory, aggressive, and not relevant” but that I denied her this (point 21 in the table at page 317). I cannot recall Elaine asking for the hearing to be cancelled, but even if she had I suspect I would have considered it appropriate for it to go ahead – when a manager has performance concerns about an employee during probation it is important this is considered at a formal hearing under the process so that the views of the manager and the employee can be given and considered before a decision is taken about the employee’s probationary period.

17 I am also told that Elaine has alleged that I was involved in a request from Elaine to record the probation hearing which she says was declined (point 24 page 318). I have no recollection of receiving a request from Elaine to record the hearing and have no knowledge that she did make such a request.’

158 There was no written record of a request for the hearing to be recorded. Ms Withers referred to this issue in paragraph 78 of her witness statement, which we also accepted:

“At paragraph 72 of her claim form (page 66) Elaine says that she asked for this hearing to be recorded, but that HR declined it. I am not aware that Elaine asked for the hearing to be tape-recorded. However, the University’s policy is very clear that hearings are not recorded. Elaine could have been talking to my colleague Carol Bernard, about this matter, and I note the email from Elaine at page 1845 where Elaine, after the hearing had taken place, asked Carol if HR had recorded the hearing. I have checked with Carol, and she does not recall a conversation about recording the hearing prior to the hearing.”

159 The email at page 1845 was dated 11 January 2019, i.e. long after the hearing of 18 October 2018. It was in these terms:

“Dear Carol,

Could you please provide a complete description of my hearing on 18 October covering all points raised by line manager?

Also, did the HR recorded it. If not, could you reply why

Thank you”.

160 There was no suggestion there that the claimant had asked for the meeting to be recorded and had the request refused.

161 In those circumstances, we accepted paragraphs 16 and 17 of Mr Healey's witness statement in their entirety. We also, having done so, accepted paragraphs 7-9 of Mr Healey's witness statement (set out in paragraph 154 above) in their entirety, preferring that evidence to that of the claimant about what she had said to Mr Healey when she first met him, which we concluded was 14 August 2018. One result of the first of those conclusions is that we concluded that the claimant did not in fact ask for the hearing of 18 October 2018 to be recorded, but that if she had done so then her request would have been refused because of the policy to which Ms Withers referred in paragraph 78 of her witness statement, which we have set out in paragraph 158 above.

162 In paragraph 76 of her witness statement, Ms Withers described what happened at the hearing of 18 October 2018 and what was usual practice for such a hearing. We accepted that paragraph in its entirety. It was all material and was in these terms:

“On 18<sup>th</sup> October 2018, the probation hearing took place, chaired by Phil Healey (Dean) as the secretary and Registrar's nominee, as was common practice, supported by Carol Bernard, HR Business Partner. I was present at the hearing, supporting Annabel. It is common practice for the School's Business Partner to attend all types of staff hearings with the presenting manager, and as usual, my role at the hearing was to listen, observe and help the manager to organise their papers, take notes as needed and formulate appropriate questions. As part of the hearing the HR Advisor supporting the manager may also ask and/or answer questions if appropriate to do so.”

163 Ms Withers' evidence was the best evidence in our view of what occurred at and after the hearing as far as Mrs Lucas' approach was concerned. In paragraphs 80-83 of her witness statement, Ms Withers said this:

“80 Notes from the probation hearing are in the bundle pages 1522 to 1526. I did not take the notes, there was a separate note-taker. I contributed very little during the hearing.

81 At the hearing, Elaine made various accusations about Annabel which were hurtful, and Annabel had provided statements or emails that others had made about Elaine which Elaine was affronted by. In the summing-up, Elaine asked the Dean if he could find her another line manager because she did not want to work for Annabel any more. This was different to the statement in her written submission for the hearing in which she had stated “*Annabel and I have a great professional and amicable relationship*”. A response to this was incorporated into the Outcome letter (pages 1534 to 1535). The outcome was to extend the

probation by a further 3 months and it was stated that at the end of January there would be another formal meeting to review Elaine's progress during the extension period. Elaine was warned that, whilst the hope was she would be confirmed in post, if she failed to make satisfactory progress against the action plan, this may result in her contract being terminated at the end of the extended period.

82 Given the hurtful remarks made at the hearing by Elaine, Annabel must have been disappointed on a personal level that their now rather strained relationship would have to continue, however she approached the task at hand in a measured and professional way and was accepting of the Chair's decision in this matter.

83 On 22<sup>nd</sup> October 2018, Elaine was signed off sick for 2 weeks until 2<sup>nd</sup> November. At paragraph 94 of her claim form (page 69) Elaine says that after she got influenza in November 2018 Annabel "*started to harasses and bullying the Claimant again*". I saw no evidence of this. What I witnessed was Annabel sticking carefully to the instructions that she had been given following the hearing outcome, namely to actively monitor Elaine's performance. Elaine clearly did not like to be monitored but that does not to my mind make the monitoring inappropriate – it was appropriate given the performance concerns and the actions set out in the hearing outcome letter."

164 We accepted those paragraphs in their entirety. The words "*Annabel and I have a great professional and amicable relationship*" were on the final page of the undated document at pages 1419-1423.

### **What happened after the probation review hearing of 18 October 2018**

165 The outcome of the hearing was stated in the letter dated 25 October 2018 at pages 1534-1535. On page 1535, Mr Healey said this:

"At the end of January 2019, I will arrange for us to reconvene formally to review your progress during this extension period. I am hopeful that we will be in a position to confirm you in post at that time. However, I must inform you that failure to make satisfactory progress against the action plan may result in your contract being terminated at the end of the extended period.

You have the right to appeal against this decision. To do so, you should submit your reasons in writing to the Head of Human Resources within ten working days of receipt of this letter (by 8th November 2018). If you have any questions about the appeal process, please contact Carol Bernard directly."

166 In fact, the probation policy to which we refer in paragraph 44 above (i.e. the one at pages 405-406) did not confer a right of appeal against a decision of the sort



which Mr Healey took after the hearing of 18 October 2018, so in giving the claimant a right to appeal against his decision, Mr Healey was generous to the claimant. Nevertheless, the claimant did not appeal against Mr Healey's decision as set out in his letter dated 25 October 2018 at pages 1534-1535.

- 167 In so far as Mr Healey decided that the claimant's probation period should be extended for a further three months, he also gave the claimant something for which there was no provision in the UH probation policy at pages 405-406. That policy stated this about the options open to the Secretary & Registrar at a hearing of the sort which Mr Healey conducted on 18 October 2018:

"The decision of the Secretary & Registrar will be either to confirm the appointment or to terminate the employment."

- 168 We doubted whether it was in fact in the interests of anyone to make the decision which Mr Healey made, namely to give the claimant a further three months to show that she was capable of doing all aspects of the post to which she was recruited. In our view it might well have been better if Mr Healey had "grasped the nettle" and decided that since he was not going to confirm the claimant's employment (which he plainly genuinely believed, we concluded, he should not), her employment should be terminated. However, that decision was not made in the belief that it would be to the claimant's detriment. Rather, it was made with a view to helping her. Thus, while in our view it was misguided, that decision was made with only good, and not in any way unlawfully discriminatory, motivation.

- 169 Ms Withers' witness statement contained, in paragraphs 84-96, a helpful and in our view completely accurate description of what occurred after 25 October 2018 (and Ms Withers' own, mental, response to it) and before the claimant, on 23 November 2018, sent to Mr Healey the email at pages 1644-1652, which enclosed with it a number of appendices. For the avoidance of any doubt, we accepted that Ms Withers did not, as she said in paragraph 87 of her witness statement, at a meeting of 7 November 2018 which took place between the claimant, Mrs Lucas and her (Ms Withers), suggest that the claimant left the past behind and did not make a formal complaint, so that the respondents could "mitigate all issues informally". Rather, we regarded the email that Ms Withers sent at 17:04 on 7 November 2018 at pages 1572-1573 as an accurate record of the material things that were said on that day, which included so far as relevant only that "all parties agreed ... that we must draw a line on past matters and as of today, move forward positively", and "that we would not revisit or go over again any matters covered by or discussed at the hearing or incidents/issues which predated this".

- 170 We do not need to refer here to all of the events which occurred between 25 October and 23 November 2018. We do, however, need to refer further to what happened at that meeting of 7 November 2018, to which the claimant referred in paragraph 493 of her witness statement as "a nightmare". In paragraphs 499-501, the claimant said this:

“499. As I said in my ET1 Form, during this meeting, AL complained about my attendance at events as part of the Jewish Society and said that *‘I couldn’t go around campus making badges with these students’*.”

500. Both KW and AL told me that I should inform AL before attending these events, despite them being not work-related and outside my working hours.

501. I asked KW if it was legal, and she said that it was acceptable due to the circumstances. KW said that AL didn’t trust me, and therefore I needed to observe these rules until AL feels confident that I could be trusted.”

171 In paragraphs 237 and 238 of her witness statement, Mrs Lucas said this:

“237 It is fair to say the meeting was tense and we had disagreements in the meeting. Karen made it clear the future review meetings had to be different, constructive and should not require her mediation.

238 I note that Elaine alleges that at this meeting I complained to Elaine, in front of Karen, that Elaine attended an evening event in the University as part of the Jewish Society (paragraph 148 page 77 and issue 9.n. page 314) – I do not recall doing this.”

172 This was another important conflict of evidence. The claimant had sent an email to Ms Withers (only) on 9 November 2018 of which there was a copy at pages 1596-1597. Ms Withers referred to it in paragraph 92 of her witness statement, saying:

“This email really should have gone to her line manager, but for some reason Elaine chose to direct it to me. I did not respond to it because I planned for us to pick this up at our next scheduled review meeting.”

173 It was, we concluded, sent by the claimant to Ms Withers only (and not also Mrs Lucas) because the claimant was seeking to undermine Mrs Lucas’ position. We came to that conclusion not least because of the first paragraphs of the email, at the top of page 1596, which were in these terms:

“Dear Karen,

Just finished the list of task. So basically, I will have to work like a slave to delivery my JD + all these tasks in about 50 days? Some of these tasks are not parts of my job, such as event evaluation, website and database. It is a programme manager task to fill their evaluation form.

How can I write a press release three months before if the media package arrives as per contract, sometimes less than two months before the event? For visual arts, for example, I only got the text for Imprinted weeks ago.

For the season guide is printed on time I need content ASAP with good texts. Moreover, I am not a copywriter. I have no idea of what they are programming for the next term. They don't have to discuss with marketing.

'Provide solutions for the barrier that parking on campus presents to our audiences (in liaison with Faye and what Spektrix can offer) by the end of November?' Is it NOT a marketing task? So if has no solution I am fired?"

174 Ms Withers' witness statement continued:

"In addition, Elaine did provide comments on the task list directly to Annabel on 12 November 2018 (page 1609 and 1612 to 1621). As can be seen she was very resistant to what she was being asked to do."

175 That was, we concluded, apt. More importantly for the purpose of resolving the conflict of evidence to which we refer in paragraph 172 above, we saw that there was nothing in any of the documents to which Ms Withers referred in those paragraphs as having been written by the claimant which related in any way to the claimant's activities with the Jewish Society or amounted to an allegation of any kind that Mrs Lucas had criticised the claimant for attending an evening event at UH as part of the Jewish Society. Given the highly critical tone of those documents, we concluded that if that had in fact happened at the meeting of 7 November 2018 then the claimant would have mentioned it at least in the email at pages 1596-1597.

176 In addition, in her email of 23 November 2018 to Mr Healey at pages 1644-1652, as we indicate in paragraphs 84 and 85 above, the claimant made no reference to her religion or Jewish ethnic origins.

177 In those circumstances, we concluded that Mrs Lucas did not criticise the claimant at the meeting of 7 November 2018 for attending an evening event at UH on behalf of the Jewish Society.

178 We saw that in paragraph 502 of her witness statement, the claimant said this about what had happened at the meeting of 7 November 2018:

"I told AL and KW that the Equality Office said my Brazilian accent is part of my race and protected by law. I wanted to take further steps to protect myself from further discriminatory conduct."

179 Mrs Lucas' evidence was that after the claimant asked, in her email of 9 June 2018 at page 1005, for comments on her accent to cease, she did not again refer to the claimant's accent, and we accepted that at least consciously she did not

again refer to the claimant's accent until responding to the claimant's claims in these proceedings. In addition, the claimant was sent the email at page 1323 on 3 October 2018. It was from a member of the staff of the UH Equality Office, Ms Sarah Bowes-Phipps. It contained this paragraph:

"You also queried whether submitting a formal complaint in advance of the hearing would be appropriate and whether the comments about your accent would be unlawful. Your accent *may* be directly associated to your race/ethnicity and these are protected characteristics covered under the Equality Act 2010 Legislation." (Original emphasis.)

180 So, if the claimant did indeed say to Mrs Lucas and Ms Withers on 7 November that "the Equality Office said [her] Brazilian accent [was] part of [her] race and protected by law", then she made an untrue statement. The word "may" in the extract set out in the preceding paragraph above was clearly deliberately emphasised by the writer of the letter, and in our view rightly. In any event, to move from such a deliberately emphasised use of a conditional statement to an absolute statement in the circumstances would in our view have been at best evidence of wishful thinking. This point was not in fact put by the claimant to either Ms Withers or Mrs Lucas. In those circumstances we concluded on the balance of probabilities that the claimant did not say on 7 November 2018 the words in paragraph 502 of her witness statement that we have set out in paragraph 178 above.

181 As for badge-making, we, through EJ Hyams, ensured that Mrs Lucas responded to the allegation that she had told the claimant that she could not go round making badges with "these student". Mrs Lucas' response was, as noted by EJ Hyams and tidied up for present purposes, as follows:

"There was a period of time when Elaine was doing badge making workshops as part of a way of introducing the Jewish Society to UHA. I had no objection to Elaine introducing us to that or any other societies. But two other members of the [UHA] team had responsibility for developing workshops, not Elaine, and Elaine's plan was piecemeal or ad hoc. It was not part of a broad plan of engagement with students or the students' union. Engagement with students was one of her responsibilities but it had to be part of a planned engagement."

182 We accepted that evidence of Mrs Lucas, and concluded that if and to the extent that she spoke about the claimant's badge-making activities, she did so in that way and in that way only. She did not, we concluded, criticise the claimant's badge-making activities because they were done to promote the UH Jewish Society.

183 It is convenient here to refer to the email exchange dated 10 December 2018 in the bundle at page 1716 which commenced with an email from the claimant to "colleagues", starting:

“The University of Hertfordshire, in partnership with Students’ Union and UH Jewish society, is delighted to invite everyone to the first ever menorah lighting in the campus, to celebrate the Jewish festival of Chanukah.”

184 Mrs Lucas said that she had queried that in her email on the same page, sent to Ms Withers, because she thought that the claimant had used her “UH email for this promotion”. As she wrote there:

“Can I just check what you think about Elaine using her UH email for this promotion – I don’t want UHArts to be seen as supporting particular religious or cultural groups more than others? Although as she has not put here UHArts signature on this, would it be seen as the individual rather than team? I imagine many UH staff wear a range of hats like this?”

Many thanks for your advice”

185 The claimant put it to Mrs Lucas that the email had been sent from an email address which did not show the position of the sender (the Staff Q address), so that she was wrong to query it. Mrs Lucas said to us that she did not realise that at the time, but in fact the email exchange showed (as can be seen from the extract set out in the preceding paragraph above) that it was clear that the claimant was not using her “UHArts signature on this”, so that statement of Mrs Lucas could be thought to have been evasive. However, we did not think that it was. We thought that the query was objectively justified, given that the email purported to be an invitation from “The University of Hertfordshire”. In any event, the content of the email set out in the preceding paragraph above was objectively justifiable.

**The manner in which the claimant’s email of 23 November 2018 to Mr Healey was first responded to**

186 Mr Healey responded (in the email at the top of page 1663) promptly (on the same day) to the claimant’s email of 23 November 2018 at pages 1644-1652. Mr Healey wrote that he was “currently away from the University at a conference in Rotterdam” and that he would “talk to colleagues about your complaint on Monday and let you know how we will proceed from that point going forwards”.

187 Mr Healey did not, however, write to the claimant about her email at pages 1644-1652 again until 19 December 2018 when he sent the email to her at pages 1743-1744, where he wrote that it appeared that the majority of her emailed complaint was about “matters already aired and considered as part of the formal Probation Hearing which took place on 18<sup>th</sup> October 2018” and asked her some specific questions about “things which have happened since the hearing”.

**Meetings with and communications from the claimant in December 2018**

188 On 6 December 2018, there was what Ms Withers called in paragraph 98 of her witness statement “the second scheduled review meeting” concerning the claimant’s probation, that is to say, the second one after the hearing of 18 October 2018. Ms Withers described that meeting in paragraphs 99-103 of her witness statement. The claimant at 5:07pm on 6 December 2018 wrote to Mr Clarke and Mr Healey the email at pages 1695-1696 to which we refer in paragraph 87 above. In that email, the claimant did not say that she mentioned her formal complaint to Ms Withers before the start of the meeting. Rather, after the words which we have set out in paragraph 87 above, the claimant wrote: “Today, during the meeting, Annabel reported to Karen many untruth events and details ...” and then said:

‘What surprised me today was Karen Withers reaction. I informed her that I placed my formal complaint and she started to challenge asking “what do you want to achieve?” “Did [you] place a complaint against me?” “Do you want your manager to be fired?”. I was under the impression that Karen was trying to help, why would I [place] a complaint against her?’

However, she said that she will inform the Dean that I am the one not trying and ask another hearing ASAP. I said that, quite on contrary, I just want to be treated fairly. I have been, since March, trying to understand why I didn’t get my full contract on March and all I got was rage from my line manager.

I am sorry that I mentioned the formal complaint. I thought that Karen knew about it.”

189 The final sentence in that extract shows that the claimant did not think that when she “mentioned the formal complaint”, she was telling Ms Withers something which was confidential. In part for that reason, but also because we preferred the evidence of Ms Withers to that of the claimant in this regard, we found paragraph 99 of Ms Withers witness statement to be an accurate description of what happened at the start of the meeting of 6 December 2018. Paragraph 99 was in these terms:

“Elaine told us both at the beginning of this meeting that she had raised a formal complaint to the Dean and so she did not see why we had to have this meeting. Please note, I am clear that she did not tell me about this in private before Annabel arrived as she alleges at paragraph 101 of her claim form and in issue 36 page 320, Annabel was already seated with us when she talked of this. Privately, prior to Annabel arriving what Elaine did say to me was that she was planning to challenge Annabel in the meeting because she knew she had been quiet and accepting of things in previous meetings. I said that this was the right thing to do because the meetings were designed to be a two-way discussion. We did not get very far into discussing the action plan, when, as per my note of this meeting (again, not minutes), Elaine refused to continue with this meeting or any subsequent ones because she said she did not believe that Annabel was trying to make

things work since the incident on 8<sup>th</sup> November. Elaine refused to discuss the action plan or her progress against it.”

- 190 At the end of the hearing, after hearing all of the evidence, we concluded that the claimant said and did those things which Ms Withers described in paragraph 100 of her witness statement, and that Ms Withers responded to those things in the manner described in that paragraph for the reasons she gave in that paragraph, which was in these terms:

“Whilst Elaine said that this was constructive dismissal, she stated that she was not leaving and would do her work by email, effectively without Annabel. This was not sustainable. At the end of the meeting, as Elaine had refused to continue with the probation review meetings, I explained that it was likely therefore that the formal probation hearing would be scheduled earlier than expected. This was not a threat as Elaine now alleges, but as Elaine was refusing to work as per the outcome of the previous hearing, action would need to be taken to progress matters. It is my job to provide HR advice, and I was simply explaining to her, and trying to get a sense of whether she understood, that if she was not prepared to take part in the probation review meetings as she had stated, then it was likely that this would mean the formal hearing would go ahead sooner because there would be nothing further to report on. I do recall Elaine talking about victimisation, but this was earlier when she was talking about why she had made her complaint about Annabel. It seemed to me that Elaine did not understand what victimisation or constructive dismissal actually meant, but she was using the words to emphasise the strength of her feelings.”

- 191 Ms Withers was made aware of the words which the claimant had written in her email dated 7 December 2018 which we have set out in paragraph 85 above, namely that the claimant was not going to engage with or reply to her (Ms Withers) “from now on”. It appears that that occurred soon after that email was sent. Ms Withers was in addition asked by Mr Healey to respond to him (not the claimant) about the claimant’s emailed complaint of 23 November 2018 at pages 1644-1652. Ms Withers responded in her email of 10 December 2018 with its enclosures at pages 1706-1714. She ended her email at page 1706 with the expression of a view that “regardless of the outcome this relationship is likely beyond repair”. That was, we concluded, an objectively-justified view. The rest of Ms Withers’ email on that page was, we concluded, balanced and objective.
- 192 A meeting had been arranged to take place on 19 December 2018 between the claimant and Mrs Lucas, and Ms Withers had been expected to be present at it. However, given the claimant’s stance that she was not going to take part in any subsequent review meeting, Ms Withers and Mrs Lucas regarded that meeting as having been cancelled. Nevertheless, the claimant attended it, and afterwards sent the email of that date at page 1740 to Mrs Lucas, complaining that

“By cancelling our meetings, not talking to me or not attend to meetings that you organise, you are subjecting me to a detrimental treatment, putting me in a worse position than I was before. In light of the situation, It is victimisation, unlawful under the Equality Act 2010.”

193 Ms Withers was asked by Mrs Lucas to reply, and did reply, to the claimant in her email of the same day at page 1739, in the following terms:

“Elaine – when you told us at our meeting of 6th December (my note attached) that you would not take part in any further meetings and would wait for the outcome of your formal complaint which was lodged with the Dean of School, Annabel and I took this to mean that you would not be attending any further meetings. As you know, you were not prepared to discuss Annabel’s observations/concerns regarding the action plan in the meeting of 6<sup>th</sup> December, to the extent that you ended the meeting. Annabel has not cancelled the meetings, therefore; you have.

I’m not sure what else to say.”

### **The relevant events of January 2019**

194 The final sequence of events to which we need to refer concerning the claimant’s employment, up to her resignation, was succinctly summarised, in our view accurately, by Ms Withers in the following paragraphs of her witness statement.

“109 On 2<sup>nd</sup> January 2019, Elaine was invited to a final probation hearing scheduled for 16<sup>th</sup> January 2019 (page 1788). She was sent a copy of Annabel’s management report.

110 On 7<sup>th</sup> January 2019, Elaine provided a response to the Dean’s clarification questions (pages 1797 to 1803). Unfortunately these did not provide very much additional clarity. Phil shared these with me so that I could advise on how he should proceed.

111 Elaine also emailed me on this day setting out various things (bottom of page 1792). I responded with some corrections to her statements (top of page 1792), for example that I did not call a hearing in response to her formal complaint, and to confirm what I had previously said, that submitting the complaint did not derail the probation process. I included a copy of the probation procedure for her information.

112 I am aware that on 8<sup>th</sup> January 2019, Elaine wrote to Head of Equalities to ask them to intervene in her case (pages 1806 to 1807). No reply was provided to my knowledge.



**Case Numbers: 3313342/2019 & 3304194/2020**

- 113 On 9<sup>th</sup> January 2019, the Dean sent the grievance information to Annabel for her response. Elaine was signed off sick from on this date (pages 1830 and 1834). Her GP certificate expired on 23rd January 2019.
- 114 On 9 January 2019 my colleague Carol Bernard asked Elaine to confirm whether she would be attending the probation hearing scheduled for 16 January 2019 (page 1834). In a later email that day Carol advised Elaine that her complaint would be dealt with separately and would not delay the probation process (page 1833).
- 115 On 10<sup>th</sup> January 2019, Elaine wrote to the Deputy Vice Chancellor to ask him to intervene in her case. The Deputy Vice Chancellor emailed this to the HR Director, Phil Clarke (page 1841). A response was sent to her by the Director of HR on the DVC's behalf on 17<sup>th</sup> January (page 1864). He explained to Elaine that he would not have been in a position to cancel or postpone the scheduled final probation hearing, although this was irrelevant as Elaine had resigned by this point (see below). The Director of HR has since left the employment of the University. I have asked him if he remembers anything about this matter, but he does not.
- 116 On 11<sup>th</sup> January 2019, Annabel provided her responses to the grievance by email.
- 117 On 14<sup>th</sup> January 2019, Elaine emailed the Dean to resign with immediate effect (page 1856). Her trade union representative was due to attend the probation hearing on her behalf (I believe this was accommodated because she said she did not feel up to attending). Elaine had not informed her trade union rep of her resignation and I was left to let the rep know what had happened. I also note that Elaine was due to attend Occupational Health on 14 January 2019 but did not attend."

**What was done subsequently about the claimant's complaint of 23 November 2018**

- 195 Mrs Withers' witness statement also helpfully and in our view accurately summarised the events relating to the claimant's complaint of 23 November 2018 which followed the claimant's resignation. In paragraphs 118 and 119, Ms Withers said this:

"118 On 18<sup>th</sup> & 28<sup>th</sup> February 2019, interviews with the UH Arts team took place with the Dean following up Elaine's grievance (see typed up notes pages 1876 to 1883 and 1884 to 1891). I also attended as HR support and note-taker. These interviews did not provide any evidence to support Elaine's complaint, indeed they provided support

in respect of Annabel's concerns about Elaine's ability to do the role she had been employed to do.

- 119 On 13<sup>th</sup> March 2019, I confirmed to Annabel that Elaine's grievance was not substantiated (page 1892). As Elaine had already left employment by this point no formal investigation report was produced as it was not considered necessary."

**Events relating to the fact that the claimant became a student on a post-graduate course in the UH Law Faculty**

196 Ms Withers described in paragraphs 120-123 of her witness statement the sequence of events which led to the claimant's second claim in these proceedings, namely of victimisation in regard to her becoming a postgraduate student on a UH Law School course. However, we saw the sequence as being sufficiently evidenced by the emails which she described there. That sequence was as follows.

197 On page 1955 there was the following sequence of emails, all of which were sent on 20 September 2019:

197.1 Mrs Lucas to Ms Withers and Mr Healey:

"Dear Karen and Phil

The team informed me that Elaine is starting an MA at the Law Faculty this academic year. I am obviously concerned about the potential impact of this on the School, UHArts and me personally.

I am surprised given the background that she has been accepted onto a UH course, especially when the case is still open.

Many thanks

Annabel"

197.2 Mr Healey to Ms Withers, copied to Mrs Lucas:

"Dear Karen,

Would you mind speaking to Penny about this situation?  
All the best Phil"

197.3 Ms Withers to Mr Healey and Mrs Lucas:

**Case Numbers:** 3313342/2019 & 3304194/2020

“Hi both – I have managed to ascertain that she’s on the list to register next week on the LLM course – I’ll just speak to the employment lawyers about this!  
Karen”.

198 We wondered whether that exchange was covered by legal professional privilege, but noted that such privilege had not been asserted.

199 The only other sequence of events about which the second claim was made was the email chain of 11 November 2019 at pages 1957-1958, which was in the following terms:

199.1 Mrs Lucas to Mr Healey and Ms Withers:

“Dear Phil and Karen

Elaine attended a UHArts concert yesterday (which of course is fine, it was a public event) – however, she spoke to one of the team and brought up the tribunal, related issues and explained she was on a law course here which would help her in representing herself against the University in January.

This obviously makes me very uneasy.

I remain very uncomfortable that Elaine is enrolled here – that the institution has accepted her as a student despite the tribunal and background, it seems to undermine the whole process – and my team. It puts me in a very difficult position.

I am also very concerned about the trouble Elaine may continue to cause on social media (as we have circumstantial evidence she is responsible for number of negative tweets on @HertsNow), especially when the fabulous new Marketing Manager and Marketing Assistant start in December. Obviously I will have to give Hayley and Stephanie minimal background to this situation as it is ongoing situation and effects our social media activity – and yet again, [it] feels very undermining to me and the team when I have to explain she has been accepted as a UH student. The risk here is that these new starters will assume UHArts is the issue, not Elaine!

Please can confirm what action has been taken to this point regarding Elaine’s enrolment. And please, can I ask you to review this situation with the lawyers and the Dean of the Business School.

Many thanks

Annabel”

199.2 Ms Withers in reply, copied to Mr Healey:

‘Hi Annabel – I have sent your email below to the lawyers for advice. The fact remains that we can’t “ban” people from being students without a very strong justification, or we are likely to be facing some form of discrimination case for that, too!  
Karen’

199.3 Mrs Lucas in reply, copied to Mr Healey:

“Many thanks Karen”.

200 We also wondered whether or not that sequence of emails was covered by legal professional privilege, but, again, saw that there was no claim that it was so covered.

### **The rest of this document**

201 The claimant’s separate allegations of factual matters which were claimed to be unlawful in that they contravened the EqA 2010 are not all covered in the above findings of fact. If we had included all of our required findings of fact in the above sequence then it would have made these already very long reasons somewhat less easy to follow. We therefore make some more findings of fact below, when stating the individual allegations, where, if the factual assertion in the allegation has not already been addressed, we address it in stating our conclusion on the allegation. Before doing those things, we refer to one discrete question which it is convenient to address at this stage.

### **Did Mrs Lucas at any time say that the claimant’s accent was “embarrassing”?**

202 The claimant claimed that Mrs Lucas said at one point at least during the period of the claimant’s employment that she, the claimant, had an “embarrassing accent”. The first time that the claimant is recorded in the contemporaneous documents to have said that Mrs Lucas had said that her accent was embarrassing is at page 1525 in the notes of the meeting of 18 October 2018 to which we refer in paragraphs 162 and 163 above. In no place did Mrs Lucas say in writing that the claimant’s accent was embarrassing, although she did say, or was recorded to have said, in several places that the manner in which the claimant had acted or written to external partners was “embarrassing”. That occurred in the document at page 782 (which was the email sent by Ms Withers to Mrs Lucas on 26 March 2018, which we have set out in paragraph 66 above) and the email at page 1405 which was sent by Mrs Lucas to Ms Withers and copied to Mr Healey on 15 October 2018. That email was headed “re Elaine”. It followed on from the email from the claimant to Mrs Lucas at pages 1406-1407, in which the claimant wrote that she had spoken “to Nick Denham to apologize the way I addressed the question regarding Stevenage during the HCEP meeting

last month” and referred to him saying that her “communication plan” was excellent. Mrs Lucas’ email to Ms Withers at page 1405 contained this passage so far as relevant.

“Dear Karen

I feel uncomfortable about her speaking to Nick directly about this (see below), but what can I do... surely all of the material I supplied for the hearing is confidential at this stage? I hope she did it with professionalism and was not as indiscrete about our current HR issues as she has been with other colleagues and a partner. Of course Nick would respond like this, he is such a nice guy and grateful that anything the UHArts team are doing for the HCEP and HYC projects, and yes her Marketing Plan was good (as you know I am not disputing that Elaine is a capable marketeer).

I have just come out of a HCEP meeting where Elaine spoke rudely over me in front of colleagues and partners – I found this embarrassing and undermining.”

- 203 Having heard evidence from both the claimant and Mrs Lucas, and bearing in mind the absence of a contemporaneous complaint by the claimant of Mrs Lucas saying before the hearing of 18 October 2018 that she had referred to the claimant’s accent as being embarrassing, we came to the conclusion on the balance of probabilities that Mrs Lucas at no time said to the claimant that her accent was embarrassing.

### **The claimant’s claims and our conclusions on them**

- 204 We were obliged to start our detailed statement of our findings on the claimant’s claims by dealing with the alleged protected acts relied on by the claimant in paragraph 5.1 of the document headed Final List of Issues starting on page 305.

#### The claimed protected acts

*(1) Complaining to Dr Borstock between the end of March 2018 and the beginning of April 2018*

- 205 The claimant alleged in paragraph 5.1.1(i) on pages 306-307 that she had orally complained to Dr Borstock “between the end of March and beginning of April 2018 ... about her meeting with R2 on 26 March 2018 at which the Claimant alleges R2 became aggressive and informed the Claimant that the Claimant’s accent was a major problem and that the team could not trust the Claimant because of her strong accent, that the Claimant’s accent was embarrassing, and that she was not sure the Claimant was [t]he face they wanted for UHArts”. We heard no evidence from Dr Borstock about such a meeting, and we concluded that the claimed words were not used. That was because of

- 205.1 our conclusion in paragraph 203 above that at no time did Mrs Lucas say to the claimant that her accent was embarrassing,
- 205.2 our conclusion stated in paragraph 277 below that Mrs Lucas did not say that she was not sure the claimant was “the face [she and/or anyone else on behalf of UHA] wanted for UHArts”, and because
- 205.3 the allegation that Mrs Lucas had said either of those two things was not borne out by any of the many long contemporaneous records of the things that she had said to the claimant during the period of the claimant’s employment by UH.

*(2) Complaining to Ms Withers after that meeting with Dr Borstrock but before 20 April 2018 orally of unfair treatment and harassment “on the grounds of the Claimant’s Brazilian accent”*

206 The meeting at which it was alleged, in paragraph 5.1.1(ii) on page 307, that the claimant had claimed about unfair treatment and harassment of her because of her Brazilian accent, was the one of 13 April 2018 to which we refer in paragraphs 74-80 above. Given our conclusions stated in paragraph 80, we concluded that this claimed protected act did not occur.

*(3) Complaining to Dr Borstrock in May 2018*

207 The allegation in paragraph 5.1.1(iii) on page 307 was that the claimant had complained in a meeting in May 2018 with Dr Borstrock “about an email from Karen Withers that extended the Claimant’s probation and allegedly affirmed negative remarks about the Claimant’s accent”. Ms Withers’ email would not have extended the claimant’s probation period: only Mrs Lucas could (we found as a fact) and (we found as a fact) was the person who made all decisions about the claimant’s probation period up to 18 October 2018, when Mr Healey made his decision that the claimant, instead of being dismissed or confirmed in her post, should continue to be on probation for a further period of three months.

208 We heard no evidence from Dr Borstrock, but we did have the email to which, it appears, the claimant was referring in paragraph 5.1.1(iii). That was Ms Withers’ email of 2 May 2018 at pages 981-982, to which we refer in detail in paragraphs 104-107 above. We could not see in that email anything about which the claimant could conceivably have complained on the basis that it was a breach of the EqA 2010.

209 For the avoidance of doubt, we concluded that the words “Elaine has a very strong accent, and although her English is very good, it can be difficult for her to be understood and this is an issue when Elaine’s role is one of communication, engagement and partnership working” when read either alone, or in the context of the whole of the email at pages 981-982, were not overtly at least any kind of indication of either direct discrimination because of race, or harassment within

the meaning of section 26 of the EqA 2010, the protected characteristic for that purpose being race. The same was true of these words stating one of the areas of improvement that Mrs Lucas was requiring:

“Consider how your accent affects the delivery of your verbal communication, and work on ways to compensate for this by presenting information logically so that you can easily be understood”.

*(4) Complaining to Ms Withers orally in a meeting with her “on or around 9 June 2018” of “unfair treatment and harassment on the grounds of the Claimant’s Brazilian accent”*

210 The fourth alleged protected act (stated in paragraph 5.1.1.(iv) on page 307) was the claimed communication to Ms Withers in the meeting of 7 June 2018 to which we refer in paragraphs 110-121 above. Given our finding on the facts in paragraph 121 above, read against the background of its preceding paragraphs, we found that this claimed protected act did not occur.

*(5) The email of 9 June 2018 (page 1005) set out in paragraph 114 above*

211 If the claimant had at any time said that by referring to her accent, Mrs Lucas was harassing her because of her Brazilian ethnic origin, then that would have been a protected act within the meaning of section 27 of the EqA 2010. However, the claimant did not do that. We concluded that the claimant referred to her accent in her email of 9 June 2018 at page 1005 because by then she had realised that she was not going to be able to satisfy Mrs Lucas that she was going to be capable of doing all of the aspects of her job properly (although she was, and Mrs Lucas acknowledged, good at the marketing side of it), and she was planning to use a complaint of discrimination contrary to the EqA 2010, including a claim of victimisation within the meaning of section 27, as a weapon to try to force UH to confirm her in her post. We came to that conclusion in part because we accepted (as stated in paragraphs 79 and 80 above) Ms Withers’ and Mrs Lucas’ evidence about the claimant acknowledging, by referring to her seeking to improve her elocution, the strength of her foreign (in fact, Brazilian) accent and Ms Withers’ evidence in paragraph 22 of her witness statement, set out in paragraph 76 above, in these terms:

“During this conversation, Elaine gave me the impression that she had this concern for herself, even before joining the University, it did not seem to me to have been prompted by anything Annabel had said to her.”

212 Thus, the claimant’s stated concern about references to her accent was, we concluded not sincere. If and to the extent that she later appeared to be sincere about references to her accent being upsetting for her, we concluded that that was because she had by then convinced herself that she was upset by such references.

213 We also came to the conclusion that the claimant had referred to her accent in her email of 9 June 2018 with a view to making a complaint of discrimination (including victimisation) because, as we say in paragraph 100 above, we concluded that Mrs Lucas did not in fact say anything that was remotely critical of Jewish people and because we drew the conclusion, after hearing all of the evidence and assessing it carefully, that the claimant well knew that she was making a false allegation against Mrs Lucas. The words which she alleged were used by Mrs Lucas were, as we say in paragraph 100 above, not ones which Mrs Lucas would have used if she had been hostile to Jewish people. Rather, they were the sort of thing that the claimant thought would be said by someone who was hostile to Jewish people. They were, in short, a fabrication on the part of the claimant.

214 In addition, as we say in paragraph 98 above, the claimant asserted, in our judgment without any factual foundation, that a complaint of antisemitism had been made against Dr Knight.

215 In any event, the email of 9 June 2018 at page 1005 spoke for itself. The email was sent.

*(6) Complaining to Mr Healey in a meeting with him in July 2018 of “unfair treatment and harassment on the grounds of the Claimant’s Brazilian accent”*

216 Given our conclusion in paragraph 161 above about the content of Mr Healey’s witness statement set out in paragraph 154 above, we concluded that this claimed protected act, numbered paragraph (vi) on page 307, did not occur.

*(7) Complaining “By email to Phil Healey and Karen Withers on 31 August 2018 alleging unfair treatment, harassment on grounds of the Claimant’s Brazilian accent and complaining also about the second extension of the Claimant’s probation and about alleged false accusations regarding the Claimant’s performance”*

217 This seventh allegation, numbered (vii) on page 307, had to be read as a reference to the claimant’s email to Ms Withers dated 2 September 2018 at pages 1123-1125, which, in the email to Ms Jacobs in the middle of page 1123 of 2 September 2018, the claimant asked Ms Jacobs to forward to Mr Healey. That email was sent. The only thing in it which could remotely be regarded as a reference to unlawful conduct within the meaning of the EqA 2010 was this short passage on page 1124, written about Mrs Lucas:

“She tried to get me tired with her comments on my communication skills, at least she didn’t say accent this time, and I refused to accept this mental torture again. I am honest, I am talented, I am hard worker, I am hands-on. I plan and execute all our marketing workload without wait for someone to ask. She doesn’t understand our work and, since March when Judy left, she has being trying to extinguish my importance.”



218 However, the purpose of complaining in the email was clear from the following passage on page 1125:

“I would appreciate if you and Phil could intervene on this and help me find out what is really going on and how can I get my permanent contract. It is essential for me to feel recognised and safe so I can keep doing my work. I still can’t believe that after eight months delivering consistent results I am still on probation. I have been marketing manager for 12 years and I’ve had an incredible track record of excellent results and relationships.”

219 Again, the claimant was lobbying two people who she thought could override Mrs Lucas in relation to the extension or otherwise of her, the claimant’s contract of employment. The claimant was mistaken in thinking that, of course, except to the extent that Mr Healey was going to make his own, potentially final, decision on the matter under the respondent’s probation policy, but that is not the point. In our judgment, the claimant was referring again to her accent because she was planning to make a claim of unlawful discrimination and victimisation, not because she genuinely believed that she had been harassed within the meaning of section 26 of the EqA 2010 but because she wanted to obtain the result of being made a permanent employee of UH.

*(8) Complaining “By emails to Phil Healy in September or October 2018 alleging unfair treatment, bullying and harassment”*

220 The allegation numbered (viii) at the top of page 308 was in the terms set out in the heading to this paragraph precisely. Nowhere did the claimant identify those claimed emails, despite EJ Hyams pointing out at least once to her during the hearing that the allegation was insufficiently specific. If and in so far as we could glean from the allegation and the rest of the material before us what it was about, it was in our view a reference to the emails which were the subject of the preceding allegation, namely those at pages 1123-1125. Those emails were sent, for the reasons stated as a finding of fact in the preceding paragraph above.

*(9) Complaining “By emails to R2 in September 2018 alleging unfair treatment, harassment on grounds of the Claimant’s Brazilian accent and complaining also about the second extension of the Claimant’s probation and about alleged false accusations regarding the Claimant’s performance.”*

221 The allegation numbered (ix) on page 308 was, we guessed, a reference to the claimant’s email to Mrs Lucas of 3 September 2018 at pages 1126-1128 and the claimant’s email to Mrs Lucas of 5 September 2018 at pages 1156-1157. The most that the claimant did so far as relevant in the first of those emails was complain about past references by Mrs Lucas to her (the claimant’s) accent. There was no reference by the claimant in the email at pages 1126-1128 to the fact that her accent was a Brazilian one. An allegation that Mrs Lucas’ judgment on the claimant’s performance was based on, or constituted, “false allegations”, was not one which could be regarded in our judgment as a reference to the EqA

2010. The claimant's email of 5 September 2018 at pages 1156-1157 was written in response to Mrs Lucas's email at page 1157 of that day in which Mrs Lucas said: "During a period that I have concerns about the manner, content, clarity and accuracy at times of your communication – especially verbal communication – I ask you to please keep me closely informed and involved in your meetings with UH colleagues and external partners." The claimant's response (which she copied to Ms Withers) was principally this (at page 1156):

"Manners? Can you please elaborate what do you mean? And what is the problem with my verbal communication?"

Karen, can you please take notes on this for further discussion on next Tuesday on how can I fill a grievance procedure. It is harassment and coercion.

One more approach like this and I will contact the Vice-chancellor directly reporting discrimination. I am not a disabled. [Sic] I am a professional. I already have in written one e-mail about my accent. I think that I had enough."

222 That email referred, we noted, to "discrimination" and "verbal communication", but it did not refer to the claimant's accent. We therefore did not in the circumstances see anything more in the claimant's ninth alleged protected act than in the seventh and eighth ones.

*(10) Complaining "By emails to Phil Clark [sic] September to December 2018 alleging unfair treatment and harassment"*

223 Again, this (paragraph (x) on page 308) was an insufficiently specific allegation. It was also inaccurate, as the claimant sent no email to Mr Clarke before she sent the one dated 5 October 2018 at page 1332-1336. She sent only one more email directly to Mr Clarke, and it was the one dated 7 December 2018 at pages 1694-1695, to which we refer in paragraph 84 above. The claimant did, it should be said, copy to Mr Clarke her email to Ms Okaro dated 18 December 2018, at pages 1732-1733, in which the claimant alleged that Ms Withers had victimised her. The claimant also wrote in that email:

"I am sure that the Vice-chancellor would appreciate knowing this before any legal actions, not only because of the unfair circumstances but also because I am a citizen in three countries, and the way my line manager treated me during this year was NOT what I expected from an international, friendly and inclusive higher education institution."

224 The email to Mr Clarke at page 1332 enclosed a long one from the claimant to Ms Withers dated 4 October 2018. As with the claimed protected acts numbered (by us) (7) to (9), the email at page 1332 referred only to the claimant's accent, not to her nationality. By way of illustration, the claimant wrote in that email:

“Dear Phil,

Can we have a chat about my case? I have many concerns regarding the support provided by HR department during this process since April.

...

I trusted that Karen was addressing all problems formally with the Dean since April. I found out this week that the Dean Shaun Borstrock, who I involved in the case during April, was not informed that my probation was extended.

I reported during my meetings with Karen discrimination, management harassment and intimidation. Since Judy Glassman left, my line manager started to replace me for her friend and colleague who works part-time and needs a full contract (she said that, I need to get Liz more money). She excluded me from meetings and has introducing me as an officer since I started. Since I have started to contest her attitudes in March, she is trying to get me fired.

Because she can't contest my marketing expertise and results, she is claiming that I can't communicate verbally because of my strong accent, alongside vague accusations that she can't ever substantiate evidence. Because no one internally complains about me, quite on contrary, she brings some vague accusations from external partners. Things like “someone is not fully satisfied with your marketing”.

I have an accent. That is right. But I am polite. She cursed two of our Deans twice front of our partners, using low-cut words.”

225 We concluded that claimed protected act number (10) was of the same sort as claimed protected acts (7) to (9).

*(11) Complaining “In meetings with R1’s Equality Office in October 2018 (first meeting on 3 October 2018) alleging unfair treatment, harassment on grounds of the Claimant’s Brazilian accent and her religion.”*

226 There was no record of what the claimant said to anyone from UH’s Equality Office beyond the email at page 1323 from Ms Sarah Bowes-Phipps from which we have in paragraph 179 above set out the only relevant part. That email contained no reference to religion. We did not understand on what basis it was said by the claimant that that email was seen by the respondents before the claimant resigned. The reliability of the claimant’s evidence about it was illustrated by what she said in paragraphs 267 and 268 of her witness statement, which were in these terms.

“267. On 3 October 2018, I contacted the Equality Office. I spoke to Sarah Bowes-Phipps, Equality Officer. I showed Mrs Bowes-Phipps all emails, and she said that it was disgusting.

268. Later, Mrs Bowes-Phipps wrote me an email [1323] asking me to challenge the HR department about extending my probationary period to *‘ensure that due diligence has been followed.’*”

227 The words “ensure that due diligence has been followed” were not in the email at page 1323. Nor was there anything remotely like those words.

228 In that circumstance and the circumstance that (as we record in paragraph 85 above), the claimant did not refer to the possibility of discrimination because of religion until 7 December 2018 in the email of that day to Mr Clarke to which we refer in paragraphs 84 and 85 above, we concluded that the claimed protected act number (11) (paragraph (xi) on page 308) did not occur as claimed by the claimant, and that in so far as it did occur, it added nothing to claimed protected acts (7) to (10).

*(12) Complaining “In a formal complaint against R2 submitted on 23 November 2018 alleging unfair treatment, harassment on the grounds of the Claimant’s Brazilian accent and religion.”*

229 That (paragraph (xii) on page 308) was a reference to the email at pages 1644-1652 to which we first refer in paragraph 85 above. As we make clear in that paragraph, there was no reference in email at pages 1644-1652 to the claimant being Brazilian. Nor was there any kind of reference there to religion. The letter spoke for itself. It was sent. The allegation that it included the things claimed in paragraph (xii) on page 308 was not made out.

*(13) Complaining “In a formal complaint against Alana Jelinek submitted in December 2018 complaining about an email from Alana Jelinek sent on 17 October 2018.”*

230 This was protected act number (xiii) on page 308. The claimant did not identify the alleged formal complaint. We found what we thought the claimant was referring to at pages 1790-1791. That was an email to the UH “Equality Office team”, and was sent (to Ms Bowes-Phipps and Ms Shahzad Choudhry) on 5 January 2019. It was, we saw, copied to Mr Healey, and on 7 January 2019 he forwarded it for information to Ms Withers, who asked Ms Choudhry to speak for “a minute”, “to touch base on this”. Ms Withers did not refer to that email in her witness statement, and she was not cross-examined on it. In the email at pages 1790-1791 the claimant said so far as relevant only this:

“I would like to place a formal complaint against Alana Jelinek, who never spoke to me after the event, never got to know me, never worked with me, but didn’t hesitate to support Annabel against me during the hearing, using

discriminatory remarks, false allegations and bully words. Please see attachment.”

- 231 The attachment was an email dated 17 September 2018. It was at page 1810 (and we have already referred to it in paragraph 133.1 above) and was in these terms:

“Dear Annabel

I remember being rather alarmed at the presentation by Elaine Corrozi of UHArts at last year’s International Women’s Day UH event. I was alarmed because I wondered how she was capable of doing her job in marketing, an important and pivotal role. Her accent made it difficult to follow what she was saying, but most alarmingly, what she said was ill-informed, vacuous and self-aggrandizing. She took comments to heart even when they were gentle and positive and was clearly unable to learn from her peers.

I am sorry to have to report this because I find Elaine friendly and very personable, but I fear she doesn’t have the right skills or personality for her role.”

- 232 This, claimed protected act (number (13)) added nothing to claimed protected acts (7) to (10) and (12). In any event, its potential effect was somewhat limited given that the claimant resigned 9 days after sending the email on which she relied as claimed protected act (13).

*(14) Complaining “In an email to R1’s Equality Office, Phil Healey and Phil Clark in December 2018 (around 6 December 2018) alleging victimisation and detriment.”*

- 233 Claimed protected act number (14) (paragraph (xiv) on page 308) was the email at pages 1694-1695 to which we first refer in paragraph 84 above. The email included the passage set out in paragraph 84 above, alleging for the first time the possibility of discrimination against Jewish people.

*(15) Complaining “In an email to the Deputy Vice-Chancellor in January 2019 alleging race and religion discrimination and victimisation”*

- 234 Claimed protected act (15) (paragraph (xv) on page 308) was the email at pages 1841-1844 referred to in paragraphs 91 and 92 above.

#### The claimed unlawful conduct

- 235 We now turn to the series of claimed instances of unlawful conduct set out in the “Schedule of Allegations” at pages 310-321 (“the Schedule”).

*(1) Paragraph 1: “R2, without any prior warning or notification, and the presence of any colleague or member of the HR, informed the Claimant that her probation period was going to be extended.”*

- 236 This was said in paragraph 1 of the Schedule to have occurred on 26 March 2018 and to be direct discrimination because of race and/or religion and harassment. We have in paragraph 61 above set out in full Mrs Lucas' email of 16 April 2018 which in part described what happened at the meeting of 26 March 2018 to which paragraph 1 relates. We accepted the relevant part of that email as being an accurate summary of what occurred at that meeting.
- 237 We have stated our factual conclusion on what precisely happened at the meeting of 26 March 2018 in paragraph 67 above, which has to be read with paragraphs 64-66 above.
- 238 Mrs Lucas was aware by 26 March 2018 that the claimant was Jewish, but only because of the text of the email of 9 March 2018 at page 746 that we have set out in paragraph 51 above. We were completely satisfied that she was not consciously motivated against the claimant in any way because of the claimant's Jewish ethnicity.
- 239 In order to decide whether Mrs Lucas was subconsciously or unconsciously biased against the claimant to any extent because of the claimant's race or her religion, and whether that led to discriminatory conduct towards the claimant especially (but not only) by referring to the claimant's accent, we refer now for the first time to the things that were said by the claimant's colleagues during the course of the investigation of the claimant's complaint stated in her email of 23 November 2018 at pages 1644-1652 as amplified by her email of 7 December 2018 at pages 1694-1695. They are referred to by Ms Withers in her evidence to which we refer in paragraph 195 above. We took into account, in assessing the reliability of Mrs Lucas' evidence about the claimant's communications to her colleagues, the following extracts from the records of interviews in the pages in the bundle to which Ms Withers referred and which (1) she and Mr Healey attested to as being accurate records and (2) we accepted were indeed accurate.
- 239.1 On page 1879 there was this record of what Ms Inna Allen was asked by Mr Healey and said in reply on 18 February 2019:

“PH: Do you have any comments or observations of your own to make which might help us understand Elaine and Annabel's relationship?”

IA: “It didn't seem to be functioning well. I really genuinely never saw Annabel act in a way that looked like she was treating Elaine differently to the rest of us. Honestly. We would have to ask Elaine to repeat herself because we would need to check what she meant. We'd say 'What do you mean by that?' English isn't my first language and so extra clarity would often be needed.”

239.2 On page 1883, there was this record of what Ms Liz Murton said to Mr Healey on 18 February 2019 in reply to the same question:

“Elaine could often be difficult to understand. I’d often come away not really knowing what she meant. She was quite confusing. When Elaine started Annabel made a lot of time for her and Joe [Fordham] to make sure that they could understand what they needed to do. Elaine often brought in stuff that wasn’t relevant; there was such a lack of clarity from her.”

239.3 Unprompted by that question, Mr Asa Miller was recorded to have said on 28 February 2019 to Mr Healey (in fact in answer to the question “How does [Mrs Lucas] communicate with you at [times of emergency]”:

“With Elaine and Annabel, there was a breakdown. I didn’t really know what Elaine’s job was. I liked Elaine, but to be honest I couldn’t always understand her. It required a lot of effort on my part to follow her. If I was asked to relay a conversation I had with Elaine, I couldn’t. I often got the complete wrong end of the stick with her. There was the potential to have some massive misunderstandings. I remember saying to each of them individually, ‘this isn’t life and death stuff, let’s just get on with it, shall we?’. But there were times when Annabel would say to Elaine – this isn’t the time, Elaine – stop now, but Elaine would just carry on. It was unbelievable.”

239.4 On page 1891 there was the following record of an exchange between Mr Healey and Ms Melissa Alexander:

‘PH: Do you have any comments or observations of your own to make which might help us understand Elaine and Annabel’s relationship?’

MA: “It’s complicated. They had conflicting views on things – like what Arts Marketing was and should be. Elaine was difficult to manage; complex. I found it difficult. I didn’t want to be involved, but I didn’t think she was right to the role because she didn’t want to work in a team. We had to repeat things to her because she didn’t understand. She came up with hyped-up ideas about her abilities but didn’t demonstrate them in the way she was working.”

PH: Have you got any worries? Or anything we can support you with?

MA: “I have suffered stress and anxiety from this. There has been tension in the team. I rely on marketing and it led me to have low self-esteem. I gave Elaine a lot of hand-holding, and it made me feel as though I was doing a full-time job in 0.8FTE. The set up of our office didn’t help either because we had two others [non-UH Arts staff members] and Annabel wasn’t there with us. I felt I had to tell tales. I

had to take on that role and it became stressful for me. On a personal level, I liked her and befriended her, but she would use that. She wanted to get me to be her witness to things in those first 6 months. I knew she was trying to drag me into it and I didn't want that."

240 We also took into account the fact that Ms Lucas acknowledged, both on 26 March 2018 and at all times after then (see further paragraph 317 below), the claimant's abilities as a marketer, including through her use of social media. That was one of the factors which in our view showed that Mrs Lucas' approach was balanced.

241 In the circumstances as we found them to be, namely as stated in the preceding paragraphs above, we concluded that there was nothing in the facts before us that could justify the drawing of the inference of discrimination against the claimant because of her race or her religion in what occurred on 26 March 2018. We concluded that to the extent that Mrs Lucas referred expressly to the claimant's accent, that was because, and only because, for the reasons stated in the body of the email of Ms Withers set out in paragraph 66 above (which Mrs Lucas had tweaked so as to make it an accurate record of what she had said to Ms Withers), the claimant's accent affected her comprehensibility. We also concluded that the claimant's accent was not the only thing that affected the clarity and intelligibility of her speech: in addition, her use of the English language was poor because her command of the English language was not as good as Mrs Lucas genuinely and for good objective reason thought that it needed to be for the claimant to be able effectively to perform some essential aspects of her job.

242 We were completely satisfied that Mrs Lucas' stance on 26 March 2018 which was the subject of complaint in paragraph 1 of the Schedule was the result of a genuine perception of the claimant's strengths and weaknesses in the post in which she was a probationary employee, which was in fact objectively justified but was in any event in our view completely untainted by discrimination because of the claimant's race or religion. It was also, as a consequence, not conduct which was in any way related to either of those protected characteristics.

243 For all of those reasons, the complaint in paragraph 1 of the Schedule did not succeed and was dismissed.

*(2) Paragraph 2: "The Claimant's probation period was extended"*

244 We did not see this allegation, numbered 2 in the Schedule, as adding anything to complaint number 1. It too therefore did not succeed and was dismissed.

*(3) Paragraph 3: "The Respondents never scheduled a meeting to clarify why the Claimant got her probation period extended in May 2018."*



245 We had difficulty in understanding this allegation, given the sequence of events that we describe in paragraphs 61-67 and 101-109 above. It was possible that the claimant thought that there was a need for a further meeting to explain what had happened at the meeting of 20 April 2018, but such a meeting would have been superfluous. Given those factors, we concluded that the complaint in paragraph 3 of the Schedule of direct race discrimination, harassment with the protected characteristic being race, or victimisation, did not succeed, and we accordingly dismissed it.

*(4) Paragraph 4: "The Claimant was advised by KW to not go ahead with a grievance form while she was on probation, as it would aggravate the relationship with her line manager."*

246 This claimed event was stated to have occurred on 7 June 2018. Given our conclusion stated in paragraph 121 above showing that we accepted and preferred to the claimant's evidence the evidence of Ms Withers in paragraph 50 of her witness statement, which we have set out in paragraph 111 above, allegation number 4 in the Schedule did not succeed and was dismissed on the facts. The claimed event did not occur.

*(5) Paragraph 5: "Despite informal complaints about discrimination to the Dean, Dr Borstock, the decision to extend the Claimant's probation period was made by R2 without his consent."*

247 This allegation was of direct discrimination because of race and victimisation and was stated to relate to the events of May 2018 and to be about the acts or omissions of both Mrs Lucas and Ms Withers. The allegation was well-founded on the facts in that (1) Mrs Lucas made her decision that the claimant's probation period should be extended without seeking the consent of Dr Borstock to such extension, and (2) Ms Withers did not advise her not to do that.

248 However there was in the evidence before us no indication that the making of a complaint of any sort, let alone an informal complaint, about discrimination would have led a manager in the position of Mrs Lucas in the employment of UH to seek, let alone require, the consent of her line manager to the extension of an employee's probation period. It may be that the allegation resulted from a misunderstanding on the part of the claimant about the way in which the respondent's organisation (like that of all comparable organisations which we had each individually encountered in our work and in sitting in the employment tribunal) worked. In any event, the claimant relied (as with almost all of her complaints) here on a hypothetical comparator. We were completely satisfied that no other employee's probation period would have been treated differently by either Mrs Lucas or (to the extent that she was involved in any actions here, as opposed to advising Mrs Lucas) Ms Withers. This complaint therefore failed and was dismissed.

*(6) Paragraph 6: “R2 interfered in the Claimant’s mentoring programme by emailing the Claimant’s appointed mentor, Megan Knight, showing concerns about this matter. Megan Knight informed the Claimant that she put the mentoring program on hold and never contacted the Claimant again to speak about the mentoring sessions.”*

249 We have not so far in our description of the evidence and our findings of fact referred to the factual background relating to this allegation. This allegation overlapped with the next one. As a result, we now set out allegation number 7 in the Schedule and address the two allegations together.

*(7) “The Claimant was never involved in the partnership with EBAC in Brazil. Megan Knight was enlisted to introduce the Claimant to the International Office, but it never happened.”*

250 This allegation was stated to be made against Dr Knight only, and was of both direct race discrimination and victimisation. The comparator was a hypothetical one.

251 The claimant’s witness statement evidence on allegations 6 and 7 in the Schedule was this:

“352. As per Job Ad, Job Description and as per my induction with Judy Glasman, I should be supervised and work closely with Associate Dean Recruitment Partnership and International at the University of Hertfordshire

353. My Job Description expressly states in ‘supervision received’ that I should be supervised by the Head of UH Arts and working directly with Dean and Associate Dean for Recruitment and Partnerships.

354. During the material time, the Associate Dean for Recruitment and Partnership was Megan Knight (MK).

355. In February 2018, I had a meeting with Megan Knight, and she informed me that she would be my mentor and that she wanted me and Joe Fordham to move to another office near UHArts, where we could work with the School’s marketing team.

356. MK also informed me about the plans to start working with the EBAC team in Brazil. MK said that the partnership with EBAC was established and that I would help to host the team during the visit to the UK.

357. On 17th March 2018, the claimant [sic] sent an email to AL informing her:

*“As you know, the School is facing declining recruitment in creative subjects, especially in music and art and design. As marketing manager with passion, great skills and customer acquisition experience I want to help Megan with Outreach/International projects and Jack/Nick on marketing with students.” [1498]*

358. On 24 March 2018, not knowing that AL was planning on not confirming my contract, I emailed AL saying:

*‘I am meeting with Megan soon for some mentoring sessions, as she can be a great help on how I can set up a strong marketing team, aligned with university and SCA goals.’*

359. As AL wanted to isolate me from others, on 26 March 2018, AL wrote to MK to maliciously interfere with my relationship with Megan Knight [770].”

252 The email of 26 March 2018 at page 770 from Mrs Lucas to Dr Knight was in these terms:

“Dear Megan

I hope you are having a fantastic trip – I have concerns about Elaine and her suitability for the role and as such I am planning to extend her probation period for 3 months until end August. I know you are meeting her in a mentoring role and so it would be good if we could join up with our approach going forward - obviously the next few months are critical.

My concerns centre around her communication skills and ability to build effective relationships/partnerships.

Perhaps we could grab a coffee when you get back (I am away all next week, back Tuesday 10 April)

Many thanks  
Annabel”

253 After setting out the majority of that email, the claimant’s witness statement continued:

“361. On 28 March 2018, AL sent me an email saying:

362. *‘As we discussed earlier this week, please could you hold off getting involved in these projects until you really have the UH Arts marketing*

*and press under your belt. You have said today that you are short of time to deliver the press work we need, so please hold off for now on additional tasks for SCA/central marketing team...* [1498]

363. By falsely accusing me of not having the UHArts marketing under my belt, AL started to isolate me from the rest of the School of Creative Arts (SCA) and Central Marketing's activities.
364. During the subsequent meetings, AL made it clear that she didn't want me working closely with Megan Knight. She also opposed the mentoring sessions.
365. AL said that Megan Knight was not a respectable professional. According to AL, Megan was a bully, a troublemaker, commercial, and AL didn't want UHArts associated with Megan Knight and her work practices.
366. AL formalised her negative opinion about Megan Knight when she changed my Job Description, as AL wrote it in her notes:

*'we both acknowledged the need for caution here in terms of association with Megan and her work practices'* [1106]

367. After 26 March 2018, Megan Knight never contacted me again. I was never invited to meet the Central Marketing team or International Office. AL precluded me from being involved with the partnership with EBAC or any project involved Megan Knight."

- 254 The claimant's job description and person specification was at pages 383-387. Under the heading "Supervision Received" on page 385 there was this (and this only):

"Supervised by the Head of UH Arts and working directly with Dean and Associate Dean for Recruitment and Partnerships".

- 255 Under the heading "Mentoring Elaine Carozzi", Dr Knight said this in her witness statement:

"6 My recollection is that Judy Glasman asked me to act as an informal mentor to Elaine, since my remit included marketing and promotion. This was informal, as the University did not have a formal mentoring scheme.

7 We had a few meetings, I do not recall how many, in which we discussed marketing and the role in general. The main focus of those meetings was on my explaining the functions and roles of the University to Elaine, and providing general advice. I think I may have introduced her to some of the staff in the University's central Marketing and Communications team, and to my small team within the School. I recall that Elaine did mention

her dissatisfaction with Annabel in these meetings, and began to push me to override Annabel's management of her, which made me uncomfortable

- 8 I have been told that Elaine suggests that in March 2018 I informed her that I was putting the mentoring programme on hold (see paragraph 129 page 74 and issue 6 on page 311). I do not recall telling Elaine I would stop mentoring her or that the programme was on hold. The first part of 2018 was a time of considerable change in the School, with a new Dean coming in, and I very likely pulled back from these meetings. I had spoken to Annabel at some point about Elaine seeking to play us off against each other, or use me to override Annabel, and we had agreed that I would limit my discussions with Elaine to her own development and career, and not to her role or her working relationship with Annabel.
  - 9 It is correct that I received an email from Annabel on 26 March 2018 about Elaine and mentoring (see page 770). As the email suggests I was away from the University at the time on business - my role requires considerable travel. Annabel told me she had concerns about Elaine and informed me that she was planning to extend her probation period for 3 months until the end of August 2018. It was relevant for me to know this if I was to be mentoring Elaine. Annabel sensibly proposed that we meet to catch up so that we could join up with our approach going forward.
  - 10 We did catch up when we were both back at the University, just in passing I believe. We had a short conversation when we bumped into each other in the Dean's lounge outside the School office. Annabel did not ask me to stop mentoring Elaine. I suggested, and Annabel agreed, that I would support Elaine with discussions about career development and approaches to marketing in general and the University context, but that I would not get involved in the detail of UH Arts, to avoid mixed messages from the two of us.
  - 11 After this, I do not recall Elaine requesting further mentoring sessions and I do not recall further sessions taking place. At the time I was extremely busy with a number of issues/projects of my own (and at this point the then acting Dean had informed me that I was no longer responsible for marketing within the School) and in any event I generally take the view it is not for the mentor to arrange these sessions, but for the mentee to take responsibility if they wish to have a session. If Elaine had requested a mentoring meeting I would have arranged it."
- 256 In cross-examination, Dr Knight stood firmly by those paragraphs. She also said that she had not seen, or known in any way about, the words in the claimant's job description set out in paragraph 254 above. She said that Ms Glasman drafted them without consultation with her, Dr Knight.

257 We accepted all of Dr Knight's evidence to which we refer in the preceding two paragraphs above.

258 Mrs Lucas' witness statement contained this passage:

"283 Megan was informally appointed as Elaine's mentor, I cannot recall how it came about, it may have been my suggestion or have come from Megan. I have had a number of mentors throughout my career and so was very supportive of the idea of this relationship.

284 In the bundle at page 708 is a text message exchange I had with Elaine on 9 and 10 February 2018. Elaine messaged me to say she was having a coffee meeting with Megan Knight. I replied positively about this and I commented that I saw her as a bit of a mentor for Elaine.

285 Also in the bundle is an email dated 26 March 2018 (page 770). I knew that Megan was due to meet Elaine in a mentoring role (Elaine mentioned in an email to me on 24 March 2018 – page 788) and I wanted to share my concerns about Elaine as it seemed to make sense for us to have a joined-up approach to attempt to address the concerns and support Elaine. I hoped that Megan could positively influence the situation through mentoring of Elaine. I explained that I had concerns about Elaine's suitability for the role, that my concerns centered around her communications skills and ability to build effective relationships/partnerships, and I indicated to Megan that I was planning to extend her probation period for three months until the end of August.

286 The email ends with me suggesting grabbing a coffee when Megan got back. We did meet to discuss. Megan and I had a short chat about this in the Dean's Lounge (a seating area outside the School office) and we agreed that Megan would support Elaine with discussions about approaches to marketing in general and the University context, and she would not get involved in the detail of UH Arts, to avoid mixed messages from the two of us. This seemed a very good solution and in Elaine's best interests. As the email indicates I did not ask Megan to stop mentoring Elaine, on the contrary I asked her to continue the mentoring but with a broader focus.

287 To be clear, I did raise my concerns about Elaine with Megan; however, I do not see anything unreasonable about this. I also had no concerns with Megan mentoring Elaine, if this is what Elaine is suggesting. I do not believe my email could be considered me interfering in Elaine's mentoring programme, I was just sharing relevant information for Megan as Elaine's mentor. I did not suggest that Megan should put her mentoring program on hold."

259 We accepted all of that evidence of Mrs Lucas, both on the balance of probabilities, as it accorded with our perception of what was likely to have occurred and because it co-incided with Dr Knight's evidence, which as we say above we also accepted, and because we found Mrs Lucas to be an honest witness, doing her best to tell the truth. In coming to this conclusion, we took fully into account the words that Mrs Lucas had written in the document at page 1106, set out in paragraph 366 of the claimant's witness statement, which we have set out in paragraph 253 above. Mrs Lucas did not explain those words in oral evidence, but she was not asked to do so. The words in question were put to Dr Knight by the claimant, in that the claimant wanted to ask Dr Knight what she said about them, but EJ Hyams said that Dr Knight did not need to respond to the question since she had not written the words and could have no idea to what they related. EJ Hyams said that instead, if the claimant wanted to put them to anyone, they should be put to Mrs Lucas (who had not by then given evidence). The claimant did not then put the words to Mrs Lucas. Whatever the words meant, they could not in our view in the circumstances (bearing in mind that Mrs Lucas was not asked to explain them) be interpreted as being supportive of a claim that the claimant was being treated by Mrs Lucas writing those words any less favourably than she would have been if she not been of Brazilian national and Jewish ethnic origin and/or religion.

260 For those reasons, we found that allegation 6 of the Schedule was not well-founded and we dismissed it.

261 As for the issue of the claimant being involved with EBAC, Dr Knight's evidence in her witness statement was this:

“15 EBAC is a private college in Brazil with which the University has a franchise arrangement – they offer our courses under license. I oversee the partnership.

16 Elaine claims that I was enlisted to introduce Elaine to the International Office but that this did not happen (paragraph 130 page 74). She references a visit to Sao Paulo in September 2018.

17 This was never suggested to me, and it would have been completely inappropriate. EBAC is an entirely separate enterprise and the franchise contract with the University lays out areas of responsibility very clearly. Marketing is entirely the responsibility of the franchisee.

18 I was asked for the purpose of these proceedings to look for any emails or other documents relating to Elaine's appointment and participation in projects such as EBAC. Apparently, Elaine believed there might be emails between me and Judy Glasman about this. I was unable to find any and I do not believe there were any. I think it is right that Judy asked me to mentor Elaine - she might have mentioned EBAC, but if she had I would not have agreed this was appropriate.”

262 We ourselves could not see why the claimant should have been involved in marketing EBAC, as its target market was potential students in Brazil. EJ Hyams asked the claimant to respond to that proposition, and she said that she had not said anything in her claim about the marketing of EBAC. She was not able to say what, if it was not about marketing, would have been the purpose of involving her in the partnership with EBAC or of introducing her to the International Office.

263 In those circumstances, we accepted the evidence of Dr Knight set out in paragraph 261 above in its entirety. We could see nothing in the circumstances from which we could draw the inference that the fact that the claimant was not involved by Dr Knight in the partnership with EBAC or introduced by Dr Knight to the International Office had something to do with the claimant's race. We could not see, and the claimant did not draw our attention to, any protected act which could have affected Dr Knight's judgment or decision (if she made one) not to involve the claimant in the partnership with EBAC or introduce the claimant to the International Office. For all of these reasons we were completely satisfied that Dr Knight's failure to involve the claimant in UH's partnership with EBAC and to introduce the claimant to the International office had nothing whatsoever to do with the claimant's race or the fact that she had made any allegation (in whatever shape or form) of a breach of the EqA 2010. Accordingly, the claim numbered 7 in the Schedule did not succeed and was dismissed.

*(8) "The Claimant did not have the training and relevant inductions to prepare her for essential aspects of her role, such as LCEP (Local Cultural Education Partnerships) and fundraising."*

264 This allegation, numbered 8 on the Schedule, was made in respect of Mrs Lucas' conduct only. It was claimed to be directly discriminatory because of the claimant's race, and victimisation. A hypothetical comparator was relied on. Mrs Lucas' evidence in this regard was in the following paragraphs of her witness statement:

"43 I note that Elaine now claims (point 8 page 311) that she did not have the training and relevant inductions to prepare for her work on LCEP, but that was not available to any of us – and I imagine anyone else on the country setting up a new LCEP.

44 LCEP stands for Local Regional Cultural Partnership. LCEP was a new project for the University and the first time a county-wide 'Cultural Education Partnership' was being established and so there was no set training that could be offered. All those involved were learning together on the job, through discussion and looking at other LCEP models. It was a complex and organic project to be working on. Elaine carried out considerable desk research at the time and I believe was offered 'informal training' in the form of further conversations with Sally Manser,



Head of Royal Opera House Bridge – I may be wrong but I do not think Elaine took up this opportunity.

- 45 In her claim form (at paragraph 57, page 64) Elaine says she was offered an opportunity to get trained in LCEPs by a senior member of staff from the Opera House. She says I refused to pay for this. I have no recollection of Elaine asking me if we could pay for formal LCEP training. I believe that had I been aware of this, I would have agreed to this. Of course I would have had to make a judgment as to whether it represented value for money and was directly relevant to her in the early stages of the project. As mentioned, I had thought in any event she had been offered informal conversations/shadowing with Sally Manser's team."
- 265 The most that the claimant could say she should have been given by way of training for doing work in relation to the LCEP was that one of the organisations that was involved in the LCEP or, it may be (it is not material), another LCEP, organised a conference on LCEPs and charged £300 for attendance. She did not make it clear in oral evidence, but we believed from that evidence, read with paragraphs 507 and 508 of the claimant's witness statement, that it was the conference referred to in the email at page 920 dated 15 April 2018 concerning "the ROHBridge annual conference" which was entitled "The paths children take" and was subtitled "Securing excellent cultural learning journeys for all". It was the claimant's oral evidence, given in cross-examination, that Mrs Lucas said that she was not going to authorise the payment of that money for attendance at the conference, as it should have been free. The claimant also said in such oral evidence that she agreed with that decision and that the only thing she would have done differently is that she would have tried to get the organiser to let her attend for free as she was "very good at things of this kind".
- 266 The claimant accepted that she had had a meeting in Lewisham which lasted for about 5 hours and concerned LCEPs, and that she had had informal training on LCEPs from Ms Sally Manser, the head of the Royal Opera House's Bridge. Except in so far as Mrs Lucas wrongly thought that the claimant had not had the latter informal training, we accepted her evidence in paragraphs 43-45 of her witness statement, which we have set out in paragraph 264 above. We also accepted the claimant's oral evidence to which we refer in the preceding paragraph above.
- 267 In those circumstances, we could see nothing in the facts before us from which we could draw the inference that the claimant was denied by Mrs Lucas training in relation to the LCEP, or LCEPs in general, to any extent because of race. We were satisfied in any event from Mrs Lucas' evidence that the fact that the claimant did not go to the ROHBridge annual conference of 2018 had nothing whatsoever to do with the claimant's race. We concluded as stated in paragraphs 205 and 206 above that no protected act had been done by 15 April 2018. However, in any event, we could see nothing in the facts before us from which

we could draw the inference that the claimant was denied by Mrs Lucas training in relation to the LCEP, or LCEPs in general, to any extent because the claimant had made any kind of allegation (assuming for present purposes that had done so at a relevant point after 15 April 2018) of a breach of the EqA 2010. Accordingly, claim number 8 in the Schedule did not succeed and was dismissed.

*(9) Mrs Lucas “informed the Claimant that she was not being invited to important meetings because ‘they’ were not sure yet if she was the ‘face’ that they wanted for UH Arts, that her accent was embarrassing for someone with a manager status”*

268 This was allegation 9a in the Schedule. All of sub-paragraphs a-n of allegation 9 were stated to be of “ongoing negative remarks about the Claimant’s culture, religion and accent” and were stated as far as Mrs Lucas was concerned to be allegations of direct discrimination against the claimant because of race and/or religion. They were also stated to be harassment within the meaning of section 26 of the EqA 2010 and victimisation within the meaning of section 27 of that Act.

269 Allegation 9a was an allegation of conduct stated to have occurred “26<sup>th</sup> March 2018 onwards”. As we have found by implication in paragraphs 64-67 above, and we now expressly record, Mrs Lucas referred on 26 March 2018 to the claimant’s oral communications and fluency in spoken English, but not her accent. She also did not say at least then “We are not sure yet if you are the face that we want for UH Arts” or anything like it.

270 Mrs Lucas did, however, on 20 April 2018 as recorded in paragraph 101 above, refer to the claimant’s “very strong accent” in the passage of her own “speaking note” for the meeting of that day. It was Mrs Lucas’ evidence that she did not refer to the claimant’s accent after then, and we accepted that she did not recall doing so when giving evidence.

271 In cross-examination, Mrs Lucas, when asked why she had said on 26 March 2018 that she was not comfortable about taking the claimant to external meetings said that that was not because of the claimant’s accent but, rather, because of the content of what the claimant said. She explained that in this way (in EJ Hyams’ notes, which on the day when they were made, we discussed and agreed):

“Accent means the accent that you have from growing up in Brazil. The content of what you were saying was separate to that. What I was observing on content was that it was often confusing, not logical, not linear; there was no structure to what you were saying. It was tangential, anecdotal; and it made it very difficult for me and other team members to get a grasp on what you were doing. It was difficult for me to get a grasp on what your grasp was of your role and UHA and what you should be doing.”

272 We accepted that evidence of Mrs Lucas.

- 273 We saw in Mrs Lucas' reference to the claimant's accent, including by referring to it as a "very strong accent", nothing that was intended to be in any way disrespectful or undermining. Thus, the claim of harassment on the basis that in referring to the claimant's accent Mrs Lucas had the "purpose ... of (i) violating [the claimant's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for" her did not succeed.
- 274 Nor did we think that in referring to the claimant's accent Mrs Lucas did something which had the effect of "(i) violating [the claimant's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for" her. That was mainly because in our view, in the circumstances in which Mrs Lucas referred to the claimant's accent (namely the need for the claimant to be intelligible to the persons to whom she spoke in the course of her work at UH, in particular when working with partners of UH, as stated succinctly in the extract set out in paragraph 101 above), it was not reasonable for it to have that effect. In addition, we concluded that the claimant herself did not perceive it as being of that effect, given that (as we have concluded in paragraph 79 above) she herself referred twice to elocution lessons in the context of a need for her own oral communications to be clearer.
- 275 We have stated in paragraph 203 above our conclusion on the question whether Mrs Lucas ever said to the claimant that her accent was embarrassing, namely that she did not do so.
- 276 We saw nothing in the circumstances from which we could draw the inference that in referring to the claimant's very strong accent, Mrs Lucas was (1) directly discriminating against the claimant because of the claimant's race or her religion, or (2) treating the claimant detrimentally because the claimant had done a protected act. In any event, we were completely satisfied on the basis of the evidence before us that Mrs Lucas did not have that unlawful motivation to any extent when she referred to the claimant's very strong accent.
- 277 As for the allegation that it was said by Mrs Lucas that she was not sure whether or not the claimant was the face that she wanted for UHA, or that UHA wanted, the first time that the claimant made an allegation of that sort was in the final paragraph of her email to Ms Withers of 19 August 2018 at pages 1086-1087. Mrs Lucas was sure that she had not said those words, or words to their effect, and that the claimant was mistaken and may have misunderstood what she (Mrs Lucas) had in fact said. We concluded that whatever Mrs Lucas did say, it was consistent, and consistent only, with the documents to which we refer, including by setting out the relevant parts of them, in paragraphs 61 to 68 above. We saw nothing in those words that constituted harassment within the meaning of section 26(1) of the EqA 2010 of the claimant in that it was in our view in no way conduct related to the claimant's race (i.e. her Brazilian national origin) or her religion or Jewish ethnicity. In addition and in any event, we did not see that in writing and saying the things which she did in fact say about the claimant being a representative of UHA, Mrs Lucas had the "purpose ... of (i) violating [the

claimant's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for". Nor in our view did it have the effect of "(i) violating [the claimant's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for" her. That was because what Mrs Lucas said and wrote could not in our view reasonably be regarded as having that effect: it was (applying section 26(4)(c) of the EqA 2010) not "reasonable for the conduct to have that effect". In the rest of this document, for the sake of brevity (if that word can be applicable in the context of such a long set of reasons), when we say that a claim of harassment did not succeed, it is on the same basis as we state here that this claim did not succeed.

278 As for the allegation that this allegation (number 9a in the Schedule) and the other things referred to in row 9 of the Schedule constituted victimisation within the meaning of section 27 of the EqA 2010, we were unable to see any basis at all on which that was alleged except, in relation to conduct occurring after 9 June 2018 when the claimant sent her email at page 1005 to Ms Withers and Mrs Lucas, asking them to stop referring to her accent. Whether that could properly be said to be an implied reference to, or reliance on, section 13 and/or section 26 of the EqA 2010 is debatable, but for the sake of completeness we concluded that it could. We therefore considered what effect, if any, it had on Mrs Lucas' (and, so far as relevant, Ms Withers') subsequent actions. We concluded that in their subsequent actions, neither Mrs Lucas nor Ms Withers did anything that was affected in any way by the fact that the claimant had sent that email, except to cease referring to the claimant's accent. Thus, they did nothing that was detrimental to the claimant because she sent them the email at page 1005.

279 In so far as allegation 9a can be read as applying to what occurred after that email was sent and to any subsequent allegations of discrimination made by the claimant before she resigned, we were completely satisfied that the actions of both Mrs Lucas nor Ms Withers were not to any extent less favourable towards the claimant than they would have been if the claimant had not made those allegations of discrimination. Thus, we concluded, Mrs Lucas and Ms Withers' conduct towards the claimant was in all respects at no time detrimental within the meaning of section 27(1) of the EqA 2010 as a result of the claimant's allegations of discrimination contrary to that Act made before she resigned. This paragraph should be read as applying therefore to all of the other claims of the claimant of victimisation within the meaning of section 27 against both Mrs Lucas as a respondent and against UH as the employer of Mrs Lucas and Ms Withers in respect of the claimant's allegations of discrimination contrary to the EqA 2010 made before she resigned.

280 For all of these reasons, allegation 9a was not well-founded and was dismissed.

*(10) Paragraph 9b: "R2 also said, and emailed after, that 'they didn't feel' that the Claimant had the capacity needed to manage UH Arts marketing department, without evidence to support that proposition."*

281 We understood this to be an allegation about the content of the email at pages 981-982 to which we refer in paragraph 106 above, despite paragraph 9b being said in the Schedule to be a complaint about conduct occurring from “March 2018 onwards”. We saw nothing in that document from which we could draw the inference that the claimant was treated less favourably because of her race or her religion. Nor was it harassment within the meaning of section 26 of the EqA 2010.

282 For the above reasons, allegation 9b did not succeed and was dismissed.

*(11) Paragraph 9c: “R2 criticised the Claimant, verbally and by email, for speaking in Portuguese with a partner. AL informed the Claimant that ‘the team’ was also concerned that she was speaking on the phone in another language during working hours”*

283 The first part of this allegation concerned the situation referred to in the documents set out in paragraphs 61-63 above. That situation was amplified by Mrs Lucas in oral evidence, when she described the claimant conversing with a lady whose first name was Farhana in Portuguese during a tour of premises where an exhibition was planned, at which time material discussions were occurring, so that the claimant’s claim that it was only once the persons present had sat down in a formal meeting that she needed to speak English only. We understood the claimant to accept that that evidence of Mrs Lucas was accurate, but whether or not she did, we did accept that evidence of Mrs Lucas.

284 We saw in that situation nothing that constituted (1) direct discrimination against the claimant because of her race or her religion, or (2) harassment within the meaning of section 26 of the EqA 2010 (“harassment”). In regard to the claim of direct discrimination, the claim failed because we saw in the circumstances nothing from which we could draw the inference that the claimant’s treatment was less favourable than it would have been if she had been, say, English and either of no religion or Christian, and in any event we were completely satisfied that Mrs Lucas in criticising the claimant for speaking to a partner in Portuguese did not treat the claimant less favourably than she would have done if the claimant had been English and either of no religion or Christian and had spoken to the partner in Portuguese.

285 In what follows, if we say that a claim of direct discrimination fails and does not succeed, it is for the same reasons as those which we state in the final (long) sentence of the preceding paragraph above, applied to the facts as we found them to be concerning the claim of direct discrimination in question.

286 Mrs Lucas’ evidence on the second part of this allegation, namely that she told the claimant that “the team” was concerned that she (the claimant) was “also concerned that she was speaking on the phone in another language during working hours”, Mrs Lucas referred to this issue in paragraph 354 of her witness statement and when pressed on it in cross-examination said that she did not

criticise the claimant for speaking Portuguese in working hours. She then said this:

“We had a general agreement in terms of our team working practices that all personal calls happened in the corridor or the classroom outside [the office in which the team worked] as there were nine of us in a small office.”

287 We accepted Mrs Lucas’ evidence in this regard and we concluded that what she said to the claimant about personal telephone calls during working hours had nothing whatsoever to do with the claimant’s race or her religion, and that it was neither harassment nor victimisation.

288 For all of the above reasons, the claim in paragraph 9c of the Schedule did not succeed and was dismissed.

*(12) Paragraph 9d: “R2 told the Claimant that she didn’t know that the Claimant was Jewish, as she was Brazilian, with no ‘Jewish’ Surname, and she was not like other Jewish ‘weirdos’ with strange black clothes and wigs.”*

289 Given our conclusion stated in paragraph 100 above, that allegation failed on the facts and was dismissed.

*(13) Paragraph 9e, namely ‘KW sent the meeting notes and a list of areas where the Claimant should improve by September 2018, including “consider how her accent affects the delivery of her verbal communication, and work on ways to compensate [it]”, and related allegations in the Schedule, namely allegations 9h, 9i, 14, 16, 21, 22, 27, 28, 30, 34, 35, 38, 39 and 41-43.*

290 Allegation 9e was about one aspect of, or a part of the conduct of Mrs Lucas arising from, the process followed in deciding that the claimant’s probation period should be extended. That was the first of many similar allegations. We decided that if we could properly do so then we should deal with them compendiously. There was a lack of precision in a number of the allegations in the Schedule, so we analysed them carefully to see which of them could fairly and appropriately be seen as allegations concerning Mrs Lucas’ and Mr Healey’s motivation (using that word in the sense used by Underhill LJ in the case to which we refer in paragraph 18 above) in deciding that the claimant’s probation period should be extended, in other words that the claimant should not be confirmed as a permanent employee. In so far as they involved the acts of Ms Withers, we regarded what she did as being no more than advisory, but we nevertheless regarded the claimant’s case as being to the effect that to the extent that Ms Withers gave advice to Mrs Lucas or Mr Healey, then that advice was tainted by an unlawful motivation.

291 In our view allegations 9e, 9h, 9i, 14 (all of them), 16, 21, 22, 27, 28, 30, 34, 35, 38, 39 and 41-43 were of the same sort. All of them involved (or could reasonably be read as involving) only a claim of direct discrimination, harassment or

victimisation. To the extent that they were mistaken, we read them as allegations about the approach taken (or, in relation to oral communications made by Mrs Lucas, recorded) in all of the many documents detailing Mrs Lucas' assessment of (1) the claimant's strengths and competencies and (2) the areas in which the claimant was not performing sufficiently well to be retained in her position with UHA. One example is paragraph 9h, which referred to an email which was alleged to have been sent by Mrs Lucas to the claimant "to say that she was not allowed to talk to colleagues or engage within events inside the University, while she was concerned about her verbal skills". No such email was identified by the claimant, and what she claimed in that paragraph could sensibly be read only as a reference to what was actually said in one or more relevant email. Another example worth mentioning is the allegation in paragraph 14b that the claimant was given the target of "[launching] new website pages in less than 30 days (the Claimant says that the project should have taken around 3 – 6 months). (May/July 2018)". What actually happened was that the claimant was initially, i.e. at the start of her employment in December 2017, as shown by the document at page 624, given the objective (perhaps it would be better to call it the task) of reviewing the website pages ("Review website and propose quick wins to improve it immediately/align it better with social media activity (by 15 Jan).". The claimant then made some progress in that regard, but it remained an objective for her for March, as shown by the objective set out in Mrs Lucas' email of 21 February 2018 at pages 784-758, where one of the 14 bullet point objectives was to "Provide a list of free changes to UH Arts website for short-term improvement (end of March)". The claimant on 16 April 2018 sent the detailed email about that matter at pages 925-928, in response to Mrs Lucas saying in the long email at pages 935-937 to which we refer in paragraph 61 above: "I am surprised that the website re-vamp has not happened when this was on you[r] Dec/Jan objectives, and you are still not clear what changes can be made free of charge and I have not seen a proposal". Then, finally, in the only place in the documentary evidence before us on which the claimant could reasonably have based what she alleged in paragraph 14b, on 11 June 2018, in the email at page 1008, Mrs Lucas wrote:

"Here is the budget you have to spend urgently!

I need you to raise requisitions by Friday 6 July at the very latest!!

Please plan this and talk to Faye well in advance of end of June.

Changes to website            10000".

292 That reference to a budget of £10,000 was the first of a list in which there were ten further things for which the claimant had a budget which she had to at least "raise [a] requisition" by Friday 6 July at the latest. The claimant repeatedly said to us that in order to raise a requisition in relation to the website, she had to have had the relevant work done by the website provider. Mrs Lucas' response was that it was possible to buy in advance an agreed package, such as for the changes to be made in the following months. What Mrs Lucas said accorded with

our understanding of what was possible in practice and in any event satisfied us that Mrs Lucas, in sending the email of 11 June 2018 at page 1008 did not act unreasonably, but more importantly was not motivated in any way by the claimant's race or her religion, and was not in any way harassing or victimising the claimant.

- 293 Several of the allegations referred to by us at the start of paragraph 291 above were indicative either of a lack of understanding of how the law of discrimination works, or of a wilful blindness on the part of the claimant about what she could realistically achieve by protesting about the manner in which her performance during her probation period was being assessed. By way of illustration, in paragraph 21 of the Schedule, the claimant complained:

“The Claimant required the hearing to be cancelled by the fact that some of the content was discriminatory, aggressive, and not relevant. It was denied.”

- 294 We took all of the paragraphs referred to at the start of the paragraph 291 above together, therefore. For the sake of brevity, we do not set any more of them out here. In our view none of them succeeded because in all respects, we found what Mrs Lucas did (1) to be completely untainted by direct discrimination against the claimant because of her race or her religion, (2) not to be harassment, and (3) not to be victimisation. That was because we were completely satisfied in all respects that Mrs Lucas did not treat the claimant unlawfully in any way claimed by the claimant. The same was true of Mr Healey's acts and Ms Withers' advice where relevant.

- 295 We add that we accepted (after careful consideration, but after such consideration without any doubt) Mrs Lucas' evidence that she had genuinely wanted the claimant to be successful in her post, but that the claimant's inability to do some (not all, by any means) essential parts of her role was in Mrs Lucas' view incapable of being overcome by the claimant, no matter how much guidance Mrs Lucas gave her. By the end of the claimant's employment, there was no doubt at all that the relationship between Ms Lucas and the claimant was very strained, but in our view that was not the result of Mrs Lucas' own attitude or conduct. Rather, it was the result of the claimant's (1) refusal to accept that there was anything wrong with her performance and (2) her resulting belligerent stance.

*(14) Paragraph 9f: “R2 said that there was a culture in UH Arts that the Claimant would never fit.”*

- 296 This allegation was explained in paragraph 229 of the claimant's witness statement. The words used were claimed to have been said by Mrs Lucas in the meeting on 31 August 2018 with the claimant which we describe in detail in paragraphs 125-128 above. What we do not say there is to what extent we accepted the passage in Mrs Lucas' witness statement to which we refer in



paragraph 123, namely all of paragraphs 136-148. Having reviewed those paragraphs after making our above findings of fact, we considered those paragraphs to be completely accurate, that is to say, we accepted them. In paragraphs 138 and 139, Mrs Lucas said this:

“138 Elaine expressed surprise, expecting that I would praise her and she said that everything was good and on track at the end of July. Elaine says in her claim form (paragraph 42 page 62) that I assured her that she would have her contract by 2 September, by which I think she means she would pass her probation – I am confident that I never gave her this assurance.

139 I explained that whilst I recognised and appreciated her strengths, that were a real asset to UH Arts: including: increased traffic to website, digital marketing and increase in social media activity, positive impact on ticket sales and systems she now had in place to deliver communications plans for events, I still had areas of concern. I referred back to the areas of concern highlighted in April and July’s Review Meetings, especially focusing on communication and relationship building with the team, University colleagues, external partners and stakeholders.”

297 We concluded that the words claimed in paragraph 9f of the Schedule were not said. Rather, what was said by Mrs Lucas at the meeting of 31 August 2018 was precisely what she recorded, in the document referred to in paragraphs 125-127 above, herself to have said, or it was in precisely the same vein. Whatever Mrs Lucas said in that regard was in no way discriminatory because of the claimant’s race or her religion, nor was it harassment or victimisation. Accordingly, paragraph 9f of the Schedule was not well-founded.

*(15) Paragraph 9g: ‘During meetings, regularly using the expression “our culture”, and “you are not like us”, and “you need to live UH Arts values”.*

298 This was an objectionably vague allegation, and if the case had been better case-managed before it got to trial, then the claimant would have been required to say precisely when Mrs Lucas, against whom it was obviously levelled, had said those words. Mrs Lucas’ response to it was in paragraph 342 of her witness statement, which was in these terms:

‘At issue 9.g. (page 313) Elaine has claimed that I “During meetings, using regularly the expression “our culture”, and “you are not like us”, and “you need to live UH Arts values”. I am not sure what Elaine is talking about here. Yes, during her employment I would have referred to UH Arts / the wider University’s working practices and culture, all of us need to live the University’s values as employees of the institution, but I have no recollection of saying that Elaine was not like us.’

299 In fact, one of UH's mantras is the acronym "FACES", which was stated in the person specification for the claimant's post at page 1544 in the row for "Values", in this way:

"Embrace and provide leadership in FACES, our University values, by being:

- Friendly
- Ambitious
- Collegiate
- Enterprising
- Student-focused".

300 We concluded that what the claimant had done in making allegation 9g was to rephrase the things that Mrs Lucas was saying about the claimant's interactions, both with colleagues and with external partners of UH, i.e. UHA as representing UH. We concluded that what Mrs Lucas said in those regards was in no way discriminatory against the claimant because of race or religion. Nor was it harassment or victimisation. Allegation 9g therefore did not succeed and was dismissed.

*(16) Paragraphs 9j, 9k, 9l, 25 and 26 of the Schedule*

301 Given our factual conclusions stated in paragraphs 132-135 above, we concluded that in doing the things about which complaint was made in paragraphs 9j, 9k, 9l, 25 and 26 of the Schedule, Mrs Lucas in no way discriminated against the claimant because of race or religion and that what she did in that regard was neither harassment nor victimisation. Accordingly, the allegations in those paragraphs of the Schedule were not well-founded and were dismissed.

*(17) Paragraph 9m: "R2 informed the Claimant, in November 2018, that she was not happy that the Claimant was part of the Students' Union Jewish Society activities, and that she couldn't participate in a badge making event during Hanukkah. The event was outside the Claimant working hours"*

302 Given what we say in paragraphs 170-177 and 181-182 above, allegation 9m in the Schedule was not well-founded on the facts and was dismissed. The claimed conduct did not occur.

*(18) Paragraph 9n: "R2 complained, in front of KW, that the Claimant attended to an evening event in the University, as part of the Jewish Society"*

303 Given what we say in paragraphs 170-177 above, allegation 9n in the Schedule was not well-founded on the facts and was dismissed. The claimed conduct did not occur.

*(19) Paragraph 10: "The Claimant was prevented from exercise [sic] her job as per her job description and contract, and undermined by her line manager and HR."*

304 This allegation was in two parts, which we will call paragraphs 10a and 10b. The first was that Mrs Lucas "continued to introduce the Claimant as an officer or assistant, not as a manager, including after the Claimant asked her to stop several times". In her witness statement, the claimant expanded on this allegation and Mrs Lucas' response to it at the time in this way:

"433. On 20 June 2018, I complained about Annabel Lucas introducing me as a 'Social Media Officer' while introducing the team to an external partner. In this email, I also address the issue around Joe Fordham's position and support [1015].

434. I also addressed this in another email on 22 August 2018 [1092] when I said:

*'Please make sure you don't introduce me as an officer or something else.'* [1092]

435. AL replied:

*'Marketing Officer is printed on my mind from 4 years of UH Arts having a Marketing Officer post...'* [1017]

436. AL likes having both ways. If Marketing Officer was printed on her mind, why didn't she extend my probation? AL always argued that my role was too high-profile for me."

305 We were not sure what the claimant meant by the first part of paragraph 436 of her witness statement, but it was in any event a comment, and not evidence.

306 Mrs Lucas responded to the complaint stated in paragraph 10a in paragraphs 278-281 of her witness statement, which were in these terms.

"278 I do not believe that I ever introduced Elaine as an Assistant, but I believe that I may have, on two occasions that I can recall, in error introduced her as 'Marketing Officer'. This was a slip of the tongue and I apologised. We have a mixture of 'managers' and 'officers' in our team, and likewise within the St Albans team with whom we work very closely, this was a simple mistake.

279 There is an email in the bundle from Elaine to me dated 20 June 2018 (page 1015) in which Elaine asks me to start introducing her as a marketing manager instead of as an officer. To my knowledge there were 2 occasions when Elaine picked-me up on this mistake. On both occasions, I immediately apologized for this (see email page 1017).

280 I never intentionally introduced her as an officer instead of a manager, it was simply an error. I asked that she read nothing into it other than Marketing Officer was printed on my mind from UH Arts having had for 4 years a Marketing Officer post not a Marketing & Engagement Manager post. I apologised for any upset caused and said I would be careful not to make the error again. I do not believe I made the error again.

281 The error I made in respect of this had nothing to do with her race or religion, and I was not trying to undermine her or her role, it was simply a mistake.”

307 With the exception of the first part of paragraph 281, which was about the ultimate issue in this regard, we accepted Mrs Lucas’ evidence in those paragraphs. While there was in the row numbered 10 in the Schedule no statement of how this conduct was alleged to have been unlawful, we assumed that the claimant had meant to allege that the conduct was (as with all of the other similar allegations in the Schedule) direct discrimination, harassment and victimisation. Having considered all of the evidence, we concluded that it was none of those things. Thus, allegation 10a was not well-founded and was dismissed.

308 Allegation 10b was that “R2 didn’t allow the Claimant to line manager [sic] Joe Fordham. For example, R2 had private one-to-ones with Joe Fordham and never disclosed notes from these sessions to the Claimant”.

309 We were not sure what the claimant could have been alleging in this regard, as we did not see how it could be alleged as discriminatory conduct unless the claimant was claiming that she was unreasonably criticised for not doing those things that Mrs Lucas did in regard to the management of Mr Fordham.

310 We saw that the claimant wrote in her email of 20 June 2018 at page 1015, to which she referred in paragraph 433 of her witness statement, which we have set out in paragraph 304 above, this (but only this) about Mr Fordham:

“I am a manager and Joe is the marketing officer that should support me (as per the header of his job description he reports to the Marketing, Engagement and Partnerships Management).”

311 Mr Fordham’s job description was at pages 388-390. That referred merely to working “under the direction of the Engagement Manager”, and “[devising] in collaboration with the Engagement Manager” and stated this:

“SUPERVISION RECEIVED

Engagement, Marketing and Partnerships Manager”.

312 In no place therefore in Mr Fordham's job description did it say in terms that he was to be managed only by the claimant, and although it was possible to read the description as envisaging line management only by the claimant, their relationship was shown in the table at page 407 and there was there an indication that the various members of the team had several lines of responsibility. In addition, Mr Fordham's job description did not state anything specifically about line management. Mrs Lucas' response to this allegation, allegation 10b, was in paragraphs 297-304 of her witness statement, which we accepted in their entirety. In paragraph 299 of her witness statement, Mrs Lucas said this:

“Judy [Glasman] set up the team with the assistants having ‘dotted lines’ [sic] to other managers if their roles overlapped – this was the case with Joe who had a dotted line management to Elaine. In their case, Elaine oversaw the majority of Joe's day-to-day tasks, while I was his line manager and met him weekly to set these tasks within the context of the team and to support Joe's transition into his first job post graduating. Please note, that whilst I was Joe's line-manager, I consulted with Elaine on regular occasions to get her feedback on Joe, including for his annual appraisal, and invited Elaine to attend a number of my meetings with Joe.”

313 That and the other parts of paragraphs 297-304 of Mrs Lucas' witness statement in our view showed that what Mrs Lucas did by way of exercising her (as we found them to be) own line management responsibilities towards Mr Fordham, had nothing whatsoever to do with the claimant's race or her religion, and was therefore neither direct discrimination nor harassment. Nor was it victimisation. For these reasons, allegation 10b was not well-founded and was dismissed.

*(20) Paragraph 11: “R2, alongside the Visual Arts team, started to make more and more comments comparing the Claimant to the previous marketing officer, Hazel Foxon, during UH Arts team meetings.”*

314 The persons said in paragraph 11 of the Schedule said to be responsible for this claimed unlawful conduct were (1) Mrs Lucas, (2), Ms Elizabeth Murton, (3) Ms Inna Allen, and (4) Ms Samantha Maitland. The conduct was said to be direct discrimination because of race, harassment and victimisation.

315 One major problem with the allegation that this conduct was discriminatory against the claimant because of her race (not, we noted, in this instance, her religion), as well as harassment and victimisation, was that it was imprecise. In addition, if the claimant's performance was increasingly being called into question then that would be an objective phenomenon which would explain why, if it happened, the claimant's performance was increasingly compared with that of her predecessor. Ms Foxon was indeed the claimant's predecessor.

316 The allegation was simply of comparing the claimant with Ms Foxon, and not of comparing the claimant's performance with that of Ms Foxon.

317 In fact, in paragraph 409 of her witness statement, the claimant said that the members of the UHA team “would try to throw me off balance with comments that Hazel was doing an excellent job and ‘*when are we going to reach Hazel’s results?*’, or ‘*can we check with Hazel how we have done in the past?*’”. That, of course, was about Ms Foxon’s performance. The claimant in the following paragraphs of her witness statement gave evidence about the extent to which her marketing in the digital domain had been rather more effective at least in some respects than that of Ms Foxon. In fact, Ms Foxon was only able to do several days per week in the role, and the claimant was full-time in it, but in any event, Mrs Lucas on a number of occasions, as can be seen from what we say in paragraphs 46, 69, 126, 202 and 211 above, was appreciative of the claimant’s performance as a marketer.

318 In paragraph 290 of her witness statement, Mrs Lucas said this:

“290 Elaine claims (point 11) that I, alongside the visual arts team (I am assuming she means Inna Allen, Liz Murton and Sammy Maitland) started from March 2018 to make more and more comments comparing Elaine to Hazel Foxon during UH Arts team meetings. This is untrue.

291 Hazel was engaged on a short-term consultancy agreement from 1 August 2017 (see pages 490 to 492). She had worked previously for UH Arts reporting into a previous manager Matthew Shaul. As can be seen from her agreement, she was engaged to provide specialist arts marketing cover for UH arts, at a time when we did not have this expertise. Hers was an interim role whilst we recruited for the permanent post.

292 Elaine does not set out what the comments were alleged to be. I have no recollection of anyone comparing Elaine to Hazel during UH Arts team meetings. If I had made any comments, this would not have been as a way of criticising Elaine and I certainly would not have been comparing them in any way for any reason due to Elaine’s race or religion or because Elaine had raised any complaints with me, but as I have said I do not believe anyone did compare Elaine to Hazel anyway.”

319 Of the other claimed wrongdoers in this regard, only Ms Maitland gave evidence. She addressed this issue in paragraph 19 of her witness statement, in which she said this:

“I have been told that Elaine alleges that from March 2018 onwards Annabel and the visual arts team started to make more and more comments comparing Elaine to Hazel Foxon during UH Arts team meetings (issue 11 page 315). I do not recall any comments being made at team meetings comparing Elaine to Hazel.”

320 In those circumstances, we were not satisfied on the balance of probabilities that any comparisons of the sort that the claimant claimed had been made between her and Ms Foxon (or between her performance and that of Ms Foxon) were in fact made during UHA team meetings, or otherwise by the persons claimed to have made such comparisons. As a result, the allegation in paragraph 11 of the Schedule did not succeed and was dismissed.

*(21) Paragraph 12: "R2 was cancelling all one-to-one meetings, including the Probation Review Meetings scheduled to 4th May and 18th May 2018."*

321 This allegation was levelled against Mrs Lucas as a claim of direct discrimination because of race and/or religion and of harassment and victimisation. The time-frame given for it in the Schedule was "May-August 2018". Mrs Lucas' response to the allegation was in paragraphs 325-327 of her witness statement, which we accepted as showing at least that she did not deliberately cancel one-to-one meetings with the claimant during May to August 2018. In fact, Mrs Lucas was away for three weeks during that period, 27 July to 17 August 2018 (as she said in paragraph 129 of her witness statement, which was not challenged and in any event which we accepted).

322 Mr Sheppard's response to this allegation in closing submissions (as corrected orally) was this:

"Denied. There was no less favourable treatment/C was not subjected to a detriment. C was informed at 20 April 2018 meeting that her probation period was to be extended; see B981-982. Accordingly, the meeting scheduled for 4 May 2018 was not necessary, as C accepted in evidence. C has not established that there was a meeting scheduled for 18 May 2018 that was cancelled. The weekly 1 to 1s with AL continued. Meetings took place with AL on 4 July [B1027-1028]; 10 July [B1034-1035] and 16 July 2018 [B1102-1103]; AL was away on leave from 27 July to 17 August 2018; AL and C had a catch up meeting on 21 August 2018 [see additional disclosure of AL's diary]; a probation review meeting took place on 31 August 2018 [B1128-1131]."

323 We accepted those submissions in so far as they were an accurate description of the factual background to allegation number 12 in the Schedule.

324 In those circumstances, we could see no facts from which the inference of unlawful treatment within the meaning of sections 13, 26 and 27 of the EqA 2010 could be drawn in relation to the claim in paragraph 12 of the Schedule, and in any event we were satisfied at least on the balance of probabilities by Mrs Lucas' evidence that there was no such unlawful treatment. While our statements above which are simply to the effect that we concluded that conduct which was claimed to be discriminatory was not found by us to be unlawfully discriminatory include (as we indicate in paragraphs 277, 279 and 285 above) a statement to the same

effect as the preceding sentence of this paragraph, we make the statement in that sentence expressly here because the allegation in paragraph 12 of the Schedule was so unlikely to be well-founded on the objectively-ascertainable facts that we had difficulty understanding why it had been made. Certainly, we found that to the extent that Mrs Lucas cancelled any one-to-one meetings with the claimant during the period from 2 May to 31 August 2018, that was not unlawful conduct within the meaning of section 13, section 26 or section 27 of the EqA 2010, or any one of them. This allegation too therefore did not succeed and was dismissed.

*(22) Allegation 13: “When the Claimant’s niece died in Brazil R2 argued the Claimant was not in a position to take more holiday whilst on probation; R2 did not offer the Claimant any time off or any kind of support; and did not inform the team that the Claimant was grieving whilst working”*

325 Given what we say in paragraphs 71-73 above, we could not see anything that could remotely resemble factual circumstances which justified the drawing of the inference that the manner in which Mrs Lucas responded to the news of the claimant’s niece’s sad death was direct discrimination because of the claimant’s race or religion, or victimisation. It was on no view harassment. We therefore found allegation 13 in the Schedule to be unfounded and dismissed it.

*(23) Allegation 15: “R2 prevented /deliberately excluded the Claimant from taking part in the following projects / events:*

- a. St Albans Open night*
- b. Aurora Leadership project.*
- c. Hertfordshire Year of Culture 2020.*
- d. New Geographies meetings.*
- e. Lead UH Arts rebranding”*

326 This claimed conduct was said to be the result of direct discrimination because of the claimant’s race and/or religion, harassment, and victimisation. This allegation was founded in part, or at least it appeared from paragraph 58 of the claimant’s witness statement to be founded in part, on Mrs Lucas’ email at pages 935-937. We have set out that email in paragraph 61 above. The relevant claimed discriminatory, harassing and victimising words in the email at pages 935-937 were these, which constituted the final bullet point of the email, set out at the end of paragraph 61:

“I am not confident that you understand what audience development and audience engagement mean within the arts sector, which is problematic in terms of promoting New Geographies, St Albans and Hatfield arts events”.

327 We have already, in paragraphs 290-294 above, concluded that nothing in that email was directly discriminatory, harassment or victimisation. In addition, and in any event, we accepted paragraphs 344-346 of Mrs Lucas’ witness statement as a truthful response to allegations 15a, 15c and 15d and concluded that the



reasons why Mrs Lucas decided that the claimant should not participate in any particular event in which UHA had a part to play had nothing to do with the claimant's race, or her religion, and were not to any extent the result of the fact that the claimant had indicated in any way that she might have been discriminated against contrary to the EqA 2010. Paragraphs 344-346 were as follows:

- “344 At issue 15.a. (page 316) Elaine claims that I either prevented or deliberately excluded her in taking part in the St Albans [museum] opening night. This is not correct. The Museum held their own reception to launch the new building and tickets were extremely limited. I did not have input into the guest list. As I recall, as Head of UH Arts I was the only team member initially invited to attend the event, as places were so limited and this was a closed event for VIPs and donors. All UH Arts staff were welcome at all other exhibition openings and events.
- 345 In her claim form at paragraph 55 (page 64) Elaine refers to Elizabeth Murton calling the Museum for tickets. I recall that at the last minute, due to less RSVPs than they had anticipated I was given the opportunity to invite 2 more of the team – naturally I invited the Programme Managers for Visual Arts as they had inputted significantly in the exhibitions/lead-up – Inna Allen and Elizabeth Murton. The event clashed with Inna's birthday – so Liz came. I did not open the invite to anyone else from the team as it was not easy who to ask to fill one space, as Samantha Maitland, Faye Sarron, Asa Miller and Elaine had all contributed something towards the project, but no one of them more than the others.
- 346 It is also not the case that I prevented or excluded her from taking part in Hertfordshire Year of Culture 2020 (issue 15.c.) or New Geographies meetings (issue 15.d.) (page 316). My recollection is that Elaine attended at least one Hertfordshire Year of Culture meeting, but never completed the 'show reel' she was asked to produce. It was not relevant for her to attend the New Geographies meetings at this stage of the project, we already had 2 team members attending these.”
- 328 In regard to rebranding (allegation 15e), Mrs Lucas said this in her witness statement (which was not seriously challenged, but which we in any event accepted):
- 313 I am aware that Elaine claims that I prevented / deliberately excluded her from leading on the UH Arts rebranding project (point 15.e. page 316). She was not excluded / prevented from contributing. For example, see page 707, one of her February tasks was to contribute

to team discussions about UH Arts re-name and “light-touch rebranding”, initiated, and led by me.

314 I note the meeting invite from Daisy Way at page 913, Elaine was invited to this meeting which was to discuss the UH Arts website and our rebranding. She attended this meeting with me and the other invitees and a summary of the meeting from Daisy is at page 914. As can be seen we agreed to create a brief for our rebrand.”

329 The meeting to which Mrs Lucas refers in paragraph 314 was shown by the email at page 914 to have occurred on 11 April 2018.

330 In addition, we accepted paragraph 316 of Mrs Lucas’ witness statement, which showed that she was “leading on the rebranding conversations” which was because she was “very interested in it and had considerable experience in this area from previous roles.”

331 As for the Aurora leadership development programme, Mrs Lucas’ evidence in paragraph 158 of her witness statement was that the claimant was not eligible to go on that programme because she was still in her probation period. That was not challenged with any evidence to the contrary, and in any event we accepted it.

332 In the factual circumstances as we have found them in the preceding paragraphs above, we concluded that the allegations in paragraph 15 of the Schedule of unlawful conduct in the form of direct discrimination because of the claimant’s race and/or religion, harassment and victimisation, did not succeed and we therefore dismissed them.

*(24) Paragraph 17: “The Claimant was excluded from R1’s appraisals.”*

333 Mrs Lucas’ response to this allegation, which was said to be direct race discrimination and victimisation by both her and Ms Withers, was in the following paragraphs of her witness statement, which we accepted, at least as far as her conscious reasoning for not appraising the claimant in September 2018 was concerned.

“161 Elaine’s appraisal was in the diary for 24 September 2018. As this was shortly before her probation hearing where her performance and suitability for continued employment would be discussed it appeared that an appraisal at this time was not appropriate. I asked Karen whether the appraisal should therefore be postponed. Karen said yes, as Elaine was still on probation an appraisal did not make much sense (page 1212). I informed Elaine of this (page 1285).

162 This was the reason she did not have an appraisal, not because of her race, or any complaint of discrimination (which I am told is what victimisation is in his context).”

334 We saw it as being fanciful to suggest that the claimant should have been appraised as a matter of the law of contract, whether by reason of the implied term of trust and confidence or otherwise: we thought that it would have been odd if the claimant’s performance had been appraised using the respondent’s normal appraisal procedure given that she was in her probation period. In those circumstances we saw no factual basis for drawing an inference that the claimant was discriminated against because of her race or victimised by not being appraised under UH’s normal appraisal procedure. Thus, allegation 17 did not succeed and was dismissed.

*(25) Paragraph 18: “Interfering in the Claimant’s personal life”*

335 There were two limbs of paragraph 18 in the Schedule. The first, limb a, was that “R2 also said that the Claimant shouldn’t be involved with the Students’ Union societies or Jewish events.” That was said to have occurred in November 2018. Given what we say in paragraphs 170-177 above, paragraph 18a was not well-founded on the facts and accordingly had had to be, and was, dismissed.

336 Paragraph 18b was that “R2 opposed the Claimant being a local school governor, a volunteering work”. That was said to have occurred in “June to August 2018”. We have dealt with most of the factual basis for this part of the claim in paragraphs 145-148 above. The final sentence of paragraph 307 of Mrs Lucas’ witness statement was also relevant here. We have set it out in the next paragraph below, as paragraph 307 mainly concerned the allegation in paragraph 19 of the Schedule. Mrs Lucas’ conduct was said in row 18 of the Schedule to be direct discrimination because of race and/or religion, harassment, and victimisation. We could see nothing that would justify us in drawing the inference that Mrs Lucas’ approach in this regard was to any extent because of the claimant’s race or her religion, or because the claimant had complained about references to her accent (assuming, as we say above, for the purposes of considering the allegations of victimisation, that this was a protected act). Thus, the claim of direct discrimination, harassment (there being, for the avoidance of doubt, no conduct in this regard which was related to the claimant’s race or her religion), and victimisation in respect of paragraph 18b of the Schedule did not succeed and was dismissed.

*(26) Paragraph 19: “R2 and Karen Withers requested that the Claimant should notify R2 of her whereabouts at all times. The Claimant should write on the board, inside the office, where she was, with who and where.”*

337 We did not understand the claimant to have contested the evidence of Mrs Lucas that she had made the same request of all the members of the UHA team as that about which complaint was made in paragraph 19 of the Schedule. In any event,

we accepted that evidence of Mrs Lucas. We accepted what she said in paragraphs 306 and 307 of her witness statement, which went a little further than this allegation of notification of whereabouts, and applied also to allegation 18b in the Schedule. Those paragraphs were as follows.

“306 Elaine was not singled out in this regard. We have a white board in the office and all team members are asked to note down their absence for meetings or advise the Arts Assistant. Again, this had nothing to do with Elaine’s race, her religion, or the fact she raised a complaint of discrimination.

307 Please note, that one of the agreed actions in the action plan following the probation hearing on 18 October [2018] was for Elaine to let me know where she was and what she was doing and her activities. This was so I could understand the work she was doing and whether she was undertaking the right tasks and managing her time and workload appropriately. If Elaine thought that she had to ask permission to attend any event, even non-work during the day or outside of working hours, this was not the case, she did not.”

*(27) Paragraph 20: “Karen Withers informed HR that the Claimant never complained about race discrimination. (ET1 76) KW also informed that she didn’t find the notes from the two previous private meetings that she had with the Claimant in April and June 2018. KW also said that she couldn’t remember the content discussed during these meetings.”*

338 Somewhat surprisingly, this allegation was, in row 20 of the Schedule, levelled not only at Ms Withers but also Mrs Lucas. It was said to be victimisation only, the protected characteristic for that purpose being race (only, i.e. and not also religion).

339 Ms Withers responded to this allegation in paragraph 125 of her witness statement, where she said this:

‘At paragraph 76 of her claim form (page 67) Elaine says she “*emailed the HR Director, Phil Clerk, to complain about the whole situation. Karen Withers informed the HR that the Claimant never complained about race discrimination, despite email pieces of evidence. KW refused to provide notes from their meetings in April and June, saying that it was informal chats. The Claimant contends that it is not true.*” Elaine does not say when she emailed the HR Director and I am unclear if she did. However, I am clear that Elaine never asked me for the notes of the one to one meetings she and I had on 13th April and 7th June – I am not sure why she would have asked for them anyway, she would have been well aware that they were not formal meetings and I was very clear with her that I took no detailed notes in the June meeting with her agreement at the time. I’m not sure what she’s referring to about me telling “HR” that Elaine had not made

a complaint of discrimination. However, it is true that in these earlier meetings she had not done so.”

340 We have already, in paragraphs 74-80 and 110-121 above, considered the allegations of the claimant that she made complaints of discrimination to Ms Withers in her meetings with her of 13 April and 7 June 2018. Given our factual findings in those paragraphs, we concluded that the claimant made no complaint of discrimination to Ms Withers in either of those meetings. Accordingly, the first sentence of paragraph 20 of the Schedule could not be regarded as a valid complaint about what Ms Withers said about what the claimant said at those two meetings, since the sentence was (we concluded) true.

341 However, Ms Withers was mistaken in thinking that she had not been asked by the claimant for her notes of the meetings of 13 April and 7 June 2018. In a long email to her dated 4 October 2018, at pages 1333-1335, the claimant had asked for them, in the following sentence on page 1335:

“If you can provide your notes from our previous two face-to-face meetings, especially the one on 31 May, it would be great.”

342 Of course, the claimant was wrong to ask for notes of a meeting on 31 May, as there was no such meeting on that date. Ms Withers was not misled by that mistake, however, as she simply replied, in the email at page 2243 sent late on 4 October 2018:

“I see that you ask me for notes I made at the meetings that you and I had, but I’m afraid I didn’t take minutes as these were discussions we had, at your request. If you recall there were several things you told me that you did not want to pass on to anyone, as they were just your thoughts on the matters as you saw them and so I did not formally minute anything. I suggested you should contact Annabel directly to challenge what she had said at the April Meeting if you felt that what she had said was incorrect or unclear, and that is what you decided to do in early June.”

343 The first sentence in that passage was a correct statement, in that Ms Withers did not take minutes; she made handwritten notes in her notebook, and did not expect to make a formal record of the meetings, since in both cases, as we have recorded in paragraphs 74-80 and 110-121 above, Ms Withers did not expect there to be a need for minutes to be produced of the meetings. However, it was clearly an attempt to deter the claimant from pressing for copies of the notes which Ms Withers had made for her own professional (and therefore UH’s) purposes. Was that, we asked ourselves, done to any extent because the claimant had made a complaint of discrimination (assuming in her favour that she had by 4 October 2018 done a protected act, at least in the email of 5 September 2018 set out at the end of paragraph 221 above)?

344 In answering that question, we first looked at the content of the long email at pages 1333-1335, to which Ms Withers' email at page 2243 was a direct reply. We thought that by then the claimant had a firm plan to make a claim of discrimination if her probation period was extended again at the hearing of 18 October 2018, and she was seeking material to justify her doing so. The whole of the email at pages 1333-1335 was highly combative, but the claimant had so far (we have found as a fact) complained as far as discrimination was concerned only about references to her accent, and she had not made any kind of formal complaint or stated a grievance. We saw that the claimant had again, in that email, on page 1333, referred to her accent in the following passage:

“Please, can you include how stressed and affected I am by Annabel undermining me as manager and all criticisms about my accent? I mentioned these during the meeting, and during previous meetings and emails. I also spoke last meeting about she accused me of not being the face that she wants for UHArts.”

345 We concluded that Ms Withers, as an able and highly experienced HR professional, had a sense that the claimant was looking for ammunition for her intended complaints, of whatever sort the complaints might be, and was aware that she was not obliged to assist the claimant in that regard.

346 We asked ourselves how Ms Withers would have treated any person who had not complained about criticisms of his/her/their accent in this regard, and we also asked ourselves whether or not it could properly be said to be a detriment to the claimant not to tell her about Ms Withers' handwritten notes of the meetings of 13 August and 7 June 2018. We also asked ourselves whether Ms Withers had declined to give the claimant those notes to any extent because the claimant had complained about complaints about her accent.

347 We noted that Ms Withers hesitated when answering questions on this in cross-examination, and we concluded that she had been well aware that her reply at page 2243 which we have set out in paragraph 342 above was misleading.

348 Having considered the matter carefully, we concluded that Ms Withers' failure to give the claimant a copy of her handwritten notes was the result of a desire not to give the claimant ammunition of any sort in what Ms Withers guessed was a future complaint (whether internal, using the UH grievance procedure, or external, to the employment tribunal). She was, we concluded, well aware that the notes would be disclosable in employment tribunal proceedings, and, we concluded, decided that she would give them to the claimant only if she had to do so, i.e. if the claimant made a claim.

349 We concluded that Ms Withers would have done the same with any other employee who had indicated an intention to make a claim of constructive dismissal but who was not indicating an intention to make a claim of a breach of the EqA 2010. Thus, in declining to give the claimant copies of her handwritten

notes of the meetings of 13 April and 7 June 2018, Ms Withers did not, in our judgment, act to any extent because the claimant had complained about references to her accent. In addition, and in any event, we concluded that it was not a detriment to the claimant not to have copies of those notes, as they could have been required only for the purpose of making a complaint internally or to an employment tribunal, and by analogy with the decisions in *Khan* and *Cornelius* to which Lord Bingham referred in the extract from his speech in *St Helens Metropolitan Borough Council v Derbyshire* that we have set out in paragraph 20 above, what Ms Withers did in any event was not detrimental treatment within the meaning of section 27 of the EqA 2010.

350 Thus, in writing what she did in the passage set out in paragraph 338, Ms Withers did not contravene section 27 of the EqA 2010, and the claim of victimisation in that regard fails and is dismissed.

351 As for the final part of the allegation set out in paragraph 20 of the Schedule, which was that Ms Withers “said that she couldn’t remember the content discussed during these meetings”, we did not understand that to be pursued by the claimant, but in any event we could not see on what it was based factually. It was in any event inconsistent with the email at page 1393 from Ms Okaro, Ms Withers’ line manager, to the claimant, in which Ms Okaro referred to what Ms Withers had recalled at that time about the meetings of 13 April and 7 June 2018, and the recollection stated at that time by Ms Okaro was plainly reasonably detailed. On that basis, we dismissed this allegation as it was not well-founded on the facts in that the claimant had not satisfied us on the balance of probabilities that Ms Withers had said “that she couldn’t remember the content discussed during these meetings”.

*(28) Paragraph 23: “The Claimant asked for a work mobile phone or any light device to work on UH Arts social media as her laptop was too heavy, and it caused her back pain but R2 declined the request.”*

352 Given our conclusion in paragraph 141 above, the claim made in paragraph 23 of the Schedule could not succeed, and accordingly we dismissed it.

*(29) Paragraph 24: “HR declined a request from the Claimant to record the probationary hearing on 18th October 2018”*

353 Given what we say in paragraphs 157-161 above, the claim made in paragraph 24 of the Schedule could not succeed, and accordingly we dismissed it.

*(30) Paragraph 29: “R2 interviewed and rejected the Claimant’s nominated student to assist with the distribution of flyers and posters across the campus”*

354 Given what we say in paragraphs 142-144 above, the claim made in paragraph 29 of the Schedule (which was of direct discrimination, harassment and victimisation) could not succeed, and accordingly we dismissed it.

*(31) Paragraph 31: “KW suggested the Claimant to leave the past behind and for the Claimant to not place a formal complaint, so they could mitigate all issues informally. The Claimant contends that while she was advised to leave the past behind and don’t make a formal complaint, her line manager was still designing a way to end her contract”*

355 This claimed conduct was said in row 31 of the Schedule to have taken place on 7 November 2018 and to have been committed by both Ms Withers and Mrs Lucas. The claim was that it was directly discriminatory because of the claimant’s race, harassment, and victimisation. We had to interpret the words of paragraph 31 in the Schedule, as their meaning was not obvious, but we concluded that the paragraph was a claim that Ms Withers and Mrs Lucas sought to persuade the claimant not to make a formal complaint, and that this was less favourable treatment because of her race, or harassment, with the protected characteristic being her race, or victimisation because the claimant had objected to having her accent criticised. We were not sure what was meant by the use of the word “mitigate” here.

356 On its face, this was a far-fetched allegation since resolving disputes informally is usually thought to be beneficial. We therefore asked ourselves to what the claimant was referring in this regard. We did not find any assistance in her witness statement. We concluded that the claim in the first sentence of paragraph 31 of the Schedule must be read as being about these words in the email from Ms Withers to the claimant and Mrs Lucas of 7 November 2018 (to which we have already referred, in paragraph 169 above) at page 1572:

“We moved on to discuss the hearing outcome.

You will recall that the Dean’s letter to Elaine stated:

- Annabel and I will review this document together and agree on a final version going forward.
- The differences in understanding of work priorities between you and your line manager that are evident in the materials presented at the Hearing must be resolved so that you are both working together towards the same aims.
- You must understand that Annabel is your line manager and she is entrusted by the University to make decisions about the management of UH Arts and so it is important that you find a way to work with her, rather than seeking direction from elsewhere.
- I will be tasking Annabel with drawing up a clear action plan for you to review with her in the coming weeks, and will expect that you will meet with her at least once fortnightly in order for you both to carefully measure progress.



So – we talked through the draft action plan and clarified several points which will need to be amended. Elaine agreed that these actions were achievable.

It was made extremely clear, and was said several times by me, which all parties agreed – that we must draw a line on past matters and as of today, move forward positively. Performance will be reviewed using the action plan as our reference and all matters referred to will be new and current for the period from 7<sup>th</sup> November to the hearing on 28<sup>th</sup> January. We agreed that we would not revisit or go over again any matters covered by or discussed at the hearing or incidents/issues which predated this.”

357 There was nothing which was remotely objectionable in that passage. There was nothing therefore that fell within section 26 of the EqA 2010 in that passage and nothing from which we could draw the inference in the circumstances that the claimant had been discriminated against or victimised as claimed in the first sentence of paragraph 31 of the Schedule.

358 The second sentence of paragraph 31 of the Schedule, namely “The Claimant contends that while she was advised to leave the past behind and don’t make a formal complaint, her line manager was still designing a way to end her contract” was, in contrast to the first such sentence, readily comprehensible. However, we rejected the claim in that second sentence on the facts. That was for two reasons. The first was that we concluded that Mrs Lucas was unlikely to have been designing a way to end the claimant’s contract in the circumstances that (1) she had already proposed the termination of the claimant’s contract, so it was unlikely that she was now seeking to devise a new way to end the claimant’s contract of employment, and (2) the decision on the claimant’s future employment with UH had by 7 November 2018 been (to her relief, we concluded) taken out of Mrs Lucas’ hands by being given to Mr Healey to decide (in accordance with the probation policy at pages 405-406: see paragraph 44 above) that question. The second reason for rejecting the allegation in the second sentence of paragraph 31 of the Schedule was that we accepted Mrs Lucas’ evidence that she had, after receiving the outcome of the hearing conducted by Mr Healey on 18 October 2018, continued to engage in good faith in the process of seeking to assist the claimant to get her performance in all areas of her job description to a satisfactory level.

359 In those circumstances, the claim in paragraph 31 of the Schedule did not succeed and was dismissed.

*(32) Paragraph 32: “R2 emailed the Claimant to inform her that Inna Allen complained that during an Open Day evening event, the food was too close to important artworks, and that the Claimant could have prevented it.”*

- 360 This claim was of direct discrimination because of race and/or religion, harassment and victimisation. The email was at page 1571. It was dated 8 November 2018 and was in these terms:

“Dear Elaine

I am concerned to hear from Inna that the PG open evening last night was not monitored – you were on duty for this event and responsible for it for UHArts. I have asked you a number of times to find out what was taking place for this and other Open Day event and this was reinforced at the team meeting this week. There was already a clash with our own event taking place in the gallery due to your lack of communication.

Tables were set up extremely close the artworks and a large table of food was set up in the gallery – this puts the artworks at risk for damage.

I have made it clear that you manage the logistics for Open Days and that you need to consult with the team and provide them with clear information about what is happening at these events, especially when they take place in the gallery.

Please provide me with the information the team and I require by the end of this week – I need this to include the Open Day events for the rest of the year.

Please also consult with Sam or whoever was in charge of the Open Day last night to explain the risks to artworks and what needs to be done to mitigate this – please feed back on this conversation.

You know I was [sic; presumably “want”] UHArts to positively respond to Open Days and where possible programme for them, but artworks cannot be at risk. This cannot happen again, especially not for *Colour Snap* exhibition.

Many thanks  
Annabel”.

- 361 There was nothing objectionable in that email if the claimant was at fault, which, from the evidence of Mrs Lucas, she was. Mrs Lucas’ witness statement had this paragraph (244) about that email:

“I did email her on 8 November 2018 about a post graduate open evening event (see page 1571). Inna had told me that the event had not been monitored and that Elaine was on duty for the event and responsible for it for UH Arts. I was concerned, particularly as we had previously discussed this. I did criticize Elaine in my email to her, because I considered it was her fault, not because of her race or religion or because she made a complaint

of discrimination. She said it was nothing to do with her - I do not accept that this was nothing to do with her, it was part of her role.”

362 The claimant’s evidence on this was in paragraph 576 of her witness statement, which was in these terms (alone):

“I had absolutely nothing to do with the event. The Central Marketing organised it.”

363 The claim in paragraph 32 of the Schedule was in fact intrinsically linked with that which was in paragraph 33 of the Schedule, to which we now turn. We state our conclusions on them together, therefore, in paragraph 374 below.

*(33) Paragraph 33: ‘When the Claimant explained to R2 she had nothing to do with the Open Day event (see issue 32 above) R2 yelled at the Claimant, saying: “I am tired of you. You need just to take your responsibilities and obey. I do not care about what you think. I am going to email Karen and Phil now to say that I want you gone. I just can’t deal with you. I have people in the team who deserves a full-time job, and they are way better than you.”’*

364 This was also a claim of direct discrimination because of race and/or religion, and harassment and victimisation. The claimant’s witness statement continued after the paragraph the one which we have set out in paragraph 362 above:

“577. I thought that AL was confused, as I was working, at the same time, in another building promoting UHArts. When I started to explain, AL interrupted me and started shouting at me, saying:

*‘I am tired of you. You need to just take your responsibilities and obey. I do not care about what you think. I am going to email Karen and Phil now to say that I want you gone. I just can’t deal with you. I have people in the team who deserves a full-time job, and they are way better than you.’*

578. I told AL that I would report her abuse formally, and AL immediately left the room, shutting the door in my face.”

365 The claimant then refers to the emails at pages 2247 and 2248 from Mrs Lucas to Ms Withers. Those emails spoke for themselves, and they were important, so we return to them in a moment. However, at this point we record that in paragraphs 582-586 of her witness statement, the claimant said this:

“582. Despite written evidence of direct criticisms of my accent in the recent past, this email was written cynically with the sole purpose of putting something in writing, ‘on record’ as retrospective damage-control to cover her backside.

583. AL is saying again that I do not appear to understand what is being said. That is another racist assumption.

584. AL gives an example of a situation when *'I do not appear to understand what is being said, or misinterprets a conversation/request'*:

*'eg she thought that at the hearing my main issue was around her 'accent' when clearly it was not.'*

585. AL use the word accent maliciously and intentionally, and she wanted Alana Jelinek to do the same. She knew that the word 'accent' would throw me off balance.

586. The fact that AL tried to change her strategy by targeting my English comprehension doesn't make her conduct less racist. I am impressed that Karen Withers never noticed or said anything about AL's nasty comments towards me."

366 At 09:52 on 8 November 2018, Mrs Lucas wrote to Ms Withers (page 2248):

"Dear Karen

This is not working – I have just had a heated discussion with Elaine about her liaison role for UHArts and Open Days, she refuses to listen or understand what I am asking her to do. This is a simple task and part of her JD.

Please advise. This is not a tenable working relationship at present. I need more support.

Annabel"

367 In an email sent "on the move", Ms Withers responded at 10:03 (page 2247):

Annabel - I'm in a meeting all morning, so will catch up later. What support do you need? You're the manager, you need [sic] to keep your cool and persevere.

Soeak [sic] soon

Karen".

368 Ms Lucas responded at 10:16 (at the top of page 2247):

"Dear Karen

I feel I have been put in an impossible position – there are huge issues with communication. You have experienced these issues, when Elaine does not appear to understand what is being said or asked of her, or misinterprets a conversation/request, eg she thought that at the hearing my main issue was around her 'accent' when clearly it was not. Without comprehension and understanding, and shared foundation on which to build, how can we move

forward? How can I work with her to deliver an Action Plan, it all sounds so easy in principal?  
Annabel”.

369 Mrs Lucas’ evidence in response to this allegation was in the following paragraphs of her witness statement:

“245 I am aware that Elaine has accused me of shouting at her on 8 November 2018 in respect of this matter. I provided my response to this incident later to Phil Healey and said the following which is an accurate reflection of what happened:

246 Elaine’s account of this ‘incident’ is not a true account of the interaction that occurred. See my account in blue page 1852. Sometime between 9 am and 9.36 am on Friday 8 November Elaine and I entered room AA191 (adjacent to the UH Arts Office) to continue a conversation about Elaine’s role managing UH Arts’ contribution/response to School Open Days and Interview Days – we had started the discussion in the office but there was disagreement and so I took the decision to continue privately next door. The discussion become heated, Elaine did not agree with what I was saying and kept interrupting me when I tried to explain. The conversation was wholly about Elaine’s role managing UH Arts’ contribution/response to School One Days and Interview Days. The conversation was going nowhere and so I said so and closed it down. I left the room and returned immediately to my desk to email Karen Withers. I sent the email at page 2248 to Karen informing her of the ‘heated discussion’ and that the working relationship was not good. After this interaction I told Karen that I was not prepared to have further one-to-one meetings with Elaine, that someone else would always need to be present. I did not shout or yell at Elaine as she alleges.

247 Elaine alleges that I said to her *“I am tired of you, you need to just take your responsibilities and obey. I do not care about what you think. I am going to email Karen and Phil now to say that I want you gone. I just can’t deal with you. I have people in the team who deserves a full-time job, and they are way better than you”* (issue 33, page 319). I did not say this, it is a fabrication.

370 This was another major conflict of evidence between the claimant and Mrs Lucas. Mrs Lucas said that the walls between the room next to the UHA office were thin and that (1) if she had shouted at the claimant then that would have been heard by colleagues in the office, and (2) she had subsequently asked her colleagues who were in the office at the time whether or not they had heard anything and none of them had done so (or at least none of them had said to her that they had done so). EJ Hyams’ note of what Mrs Lucas was asked in cross-examination

before saying that and the first part of her answer (with the text tidied up) was this:

“Q: Did you attempt to break our professional relationship?

A: No. I felt frustrated; that you were not listening to me and what I was saying and I could not find a common ground to start unpicking what was going wrong. Everything was a shifting sand. There was no place to grasp as a starting point, such as “let’s go back to here and go back to the issues and find out what has gone wrong”, as everything I was saying was disputed. I actually removed myself from the situation so that I did not get cross or lose my temper.”

371 We concluded (after very careful consideration and, as with all of our conclusions resolving a conflict of evidence between the claimant and Mrs Lucas in the course of which we concluded that the claimant had made something up, reluctantly) that the claimant had fabricated the allegation that Mrs Lucas had said the words *“I am tired of you, you need to just take your responsibilities and obey. I do not care about what you think. I am going to email Karen and Phil now to say that I want you gone. I just can’t deal with you. I have people in the team who deserves a full-time job, and they are way better than you”*. That was in part because those were not words which we would have expected Mrs Lucas to say and because they were, rather, the sort of words that the claimant would have used. Even if we had interpreted them so that they were in the kind of language that Mrs Lucas would have used, however, then we would still have concluded that Mrs Lucas did not say words to that effect. That was not only because it was not the sort of thing that Mrs Lucas would (we concluded) have said as a matter of substance, so that the balance of probabilities in the circumstances as we found them to be favoured Mrs Lucas’ account, but also because we believed what she said, and we disbelieved the claimant, not least because what Mrs Lucas wrote in the emails set out in paragraphs 366 and 368 above was completely consistent with the claimant’s stance both in the latter stages of her employment with UH and before us. That stance was to rely on references to her Brazilian accent as a justification for asserting that she had been discriminated against because of her race and as a justification for refusing to accept that Mrs Lucas’ criticisms of her were justified, at least in Mrs Lucas’ own mind.

372 We then went back to the allegation stated in paragraph 32 of the Schedule and asked ourselves whether Mrs Lucas had made up her criticisms of the claimant stated in the email at page 1571, which we have set out in paragraph 360 above. We did not hear evidence from Ms Allen, on whose information Mrs Lucas had relied when sending that email. The claimant’s response in her witness statement to that email was that (see paragraph 363 above) she had “nothing to do with the event”. Mrs Lucas gave measured and careful oral evidence on this when she was cross-examined. EJ Hyams’ notes of the question and answer in that regard, tidied up, are these:

“Q: You say I was responsible for food being near the artwork in the gallery when the event was not in the gallery?”

A: The 2 events were part of the same process: the open day programme. If we needed more team support then it was your responsibility [to arrange it by getting] staff cover. It was not to be in 2 places at once. But I expected you to know or to have delegated to a colleague, or have a colleague know where the catering was if there were vulnerable artworks at the time and it is part of the picture of not taking responsibility or listening and being clear with the team and having a clear plan regarding open days. It was a problem not just with this incident.”

373 We accepted that evidence of Mrs Lucas, not least because it was completely consistent with the extensive contemporaneous documentary evidence before us showing the claimant’s attitude at that time and in the period after 8 November 2018, in particular as exhibited in the meeting of 6 December 2018 to which we turn in the next (and final two) sections below, dealing with the final two allegations of the claimant concerning her employment before she resigned.

374 In all of those circumstances, we concluded that both of the complaints in paragraphs 31 and 32 of the Schedule were not well-founded. There was in our conclusion nothing in the circumstances to which those paragraphs related which was directly discriminatory of the claimant because of her race or her religion, there was no victimisation, and there was no harassment. The claims made in those paragraphs were therefore not well-founded and were dismissed.

*(34) Paragraph 36: “In a meeting on 6th December 2018, Karen Withers breached confidentiality by informing R2 that the Claimant had made a formal complaint against R2.”*

*(35) Paragraph 37: “In a meeting on 6th December 2018, Karen Withers threatened the Claimant by saying she would call another hearing ASAP to terminate her contract.”*

375 These two allegations were both levelled only against Ms Withers and were about what happened at one meeting, not two separate meetings on the same day. That was evident from paragraph 101 of the details of the claim (page 70; we set it out in the following paragraph below), which formed the basis of both paragraph 36 and paragraph 37 of the Schedule. Paragraph 101 implied (it did not state it expressly) that it was a claim of victimisation (and only victimisation). Paragraph 36 of the Schedule was stated (in the column with the heading “Type of discrimination”) to be a claim of victimisation for making a claim of race discrimination and discrimination because of religion (this being apparent only from the inclusion in the “Protected characteristic” column of both of those protected characteristics). Paragraph 37, on the other hand, was stated in the

Schedule to be of victimisation and direct discrimination, but the protected characteristic column contained only the word "Race".

- 376 In considering this allegation, we had to refer ourselves back to paragraph 101 of the details of the claim, both because it helped us to see what paragraphs 36 and 37 of the Schedule were about and because it enabled us to see why it was alleged in paragraph 36 that Ms Withers "breached confidentiality". Paragraph 101 was in these words:

"On 6th December 2018, before the probation review meeting, the Claimant informed KW about her formal complaint, in private, before her line manager arrives to the meeting. The Claimant was not sure on how to proceed during the Probation Review Meetings, once her line manager has been cancelling one-to-one meetings and mistreated her. Also, KW and Phil Healey didn't reply to the Claimant emails. KW reacted badly asking if the Claimant made a complaint about her as well. When AI entered the room, KW exposed the Claimant in front of her line manager, telling her about the Formal complaint. Karen Wither threatened the Claimant by saying that she would ask to call another hearing, ASAP, to terminate her contract. The Claimant reminded her that it was Victimisation, prohibited by the Equality Act 2010."

- 377 Ms Withers' evidence relating to the allegations in paragraphs 36 and 37 of the Schedule was mainly in paragraphs 99 and 100 of her witness statement, which we have set out in full in paragraphs 189 and 190 above, both of which, as stated in those paragraphs (189 and 190) we accepted.

- 378 In paragraph 101 of her witness statement, Ms Withers responded to the specific allegation that she had "reacted badly", and that paragraph also needs to be set out in full. It was this:

'Elaine claims at paragraph 101 of her claim form (page 70) that I "reacted badly" in this meeting, asking Elaine if she had made a complaint about me as well. I do not agree that I "reacted badly". Perhaps she is referring to me taking the lead in the conversation, which I did because Annabel had just been told that Elaine had raised a formal complaint about her. I asked Elaine a series of questions in order that we were clear about what she was telling us, and I did ask her if she had complained about me also (mainly because I wanted to know for sure that her complaint was all about Annabel). Annabel said to me straight after Elaine had left the meeting that she was grateful for me taking the lead and was impressed at how calm and collected I had been throughout, which I believe I was.'

- 379 Having heard and seen Ms Withers give evidence, we concluded that it was much more likely that she had been calm and measured than annoyed with the claimant. As for the claimant's attitude at the start of the meeting (or, in private, before it), our assessment of it was assisted by the claimant's own evidence in



paragraphs 622 and 623 (which was a single sentence) of her witness statement, which were in these terms:

“On 6 December 2018, I went to the Dean’s office to talk to Phil Healey. I told him that I didn’t want any further probation review meetings with KW and AL. AL was extraordinarily aggressive and KW not helpful. PH said that I should attend the meeting and speak to KW.”

380 In those circumstances, we accepted Ms Withers’ evidence in paragraph 101 of her witness statement in its entirety.

381 Having accepted paragraphs 99-101 of Ms Withers’ witness statement in their entirety, we were bound to find that the allegation in paragraph 36 of the Schedule was factually not well-founded, and to dismiss it, which we did. As for paragraph 37, we were not quite so clearly bound to find that it was factually not well-founded, but if we read it literally, then we were so bound.

382 If, however, we read it in context and by reference to what we concluded Ms Withers did in fact say, namely in paragraph 100 of her witness statement, which we have set out in paragraph 190 above, then we rejected the complaint in paragraph 37 of the Schedule on the basis that it was about something about which no complaint could reasonably be made and in any event which, we concluded, was said without victimisation or direct discrimination because of the claimant’s race. For the avoidance of doubt, we concluded that what Ms Withers said as stated by her in paragraph 100 of her witness statement was in no way caused by the news that the claimant had said that she had made a complaint against Ms Lucas. Nor was it less favourable treatment of the claimant than the claimant would have received from Ms Withers if the claimant had been, say, English rather than Brazilian/Jewish. Accordingly, the claim made in paragraph 37 of the Schedule did not succeed and was dismissed.

*(36) Paragraphs 44-46, concerning the response to the fact that the claimant became a Masters student in the UH Law School after she had resigned*

383 Paragraph 44 was a complaint of “Seeking to get the Claimant banned as a student”, and was claimed to have been done by Mrs Lucas, Ms Withers and Mr Healey, and was said to be direct discrimination because of “Race/religion”, as well as harassment and victimisation.

384 Paragraph 45 was in these terms:

“Phil Healey, the Dean of the School of Creative Arts, enlisted Karen Withers to contact Penny Carey, the Dean of the Hertfordshire Law School, to discuss the Claimant’s enrolment as a student, violating the Claimant’s dignity and breaching her privacy.”

385 This allegation was levelled against Mrs Lucas as well as Mr Healey and Ms Withers, and, like the allegation in paragraph 44 of the Schedule, was of (1) direct discrimination because of “Race/religion”, (2) harassment and (3) victimisation.

386 Paragraph 46 was a complaint of “Accessing the Claimant’s student’s data outside its purpose and without her consent”, and was about the acts of not only Mrs Lucas, Ms Withers and Mr Healey but also those of Ms Carey. That was a complaint of direct discrimination because of “Race/religion” and victimisation, but not harassment.

387 We have set out the factual background to these complaints in paragraphs 196-200 above. There was nothing in Ms Withers’, Mrs Lucas’ or Mr Healey’s witness statements about the emails which we have set out in paragraphs 197 and 199 above. The claimant’s witness statement contained nothing relevant, as she was not involved to any extent in the events which gave rise to the complaints in paragraphs 44-46 of the Schedule.

388 Mrs Lucas’ oral evidence added little to that which was evident from the email trails set out in paragraphs 197 and 199 above. The little that she did add in cross-examination was to say this (as noted by EJ Hyams at the time and tidied up for the purposes of these reasons) in response to Mr Bean asking her what was the point of finding out whether or not the claimant was going to be a student at UH:

“Well, the relationship was tense and challenging between Elaine and [me] by this stage, and we had both been through a considerable upset through the process and the relationship had broken down so I needed to know going forward whether I was going to bump into Elaine on campus, and so it was fair to me to know. It was also fair to my team to know, as they were aware of a very tense period.”

389 When asked whether it was fair to say that it was her (Mrs Lucas’) preference that the claimant was not a student, Mrs Lucas said this:

“My preference was not to come into contact with Elaine as we had had a difficult relationship for 6 months or so. I did not mind what she was doing – what were the next steps in her life – but I did not want to bump into her. It was a co-incidence that her being a student would lead to her being there.”

390 When she was pressed on that by the claimant in cross-examination, who put it to her that she did not want her (the claimant) to be a student, Mrs Lucas said:

“I do not think it was as straightforward as that.”

391 Mrs Lucas said that she was “quite surprised that if there were legal proceedings against the university” brought by a person who was seeking to become a

student, the student would be admitted, and that she thought that “student enrolment might have been deferred until the process was over.”

392 Mrs Lucas was clear in her oral evidence, however, that she had not queried the claimant’s status as a student to any extent because the claimant had claimed that she had been discriminated against by Mrs Lucas.

393 Ms Withers’ oral and witness statement evidence added little to what was in the email chains set out in paragraphs 197 and 199 above.

394 The evidence of Mr Ivie, who had from 7 July 2020 onwards investigated the claimant’s complaint, which was made in May 2020 (the complaint was at pages 2076-2082 and 2091-2100), was as far as we were concerned hearsay. Nevertheless, it was helpful. So far as relevant, he said this in his witness statement:

“22 We found that there was no evidence that any action was taken by the named respondents to Ms Carozzi’s complaints beyond enquiring to the Dean of the Law School whether Ms Carozzi was indeed a student in the Law School.

23 We found there had been no contact in any form whatsoever between Ms Carozzi and any of the named respondents since Ms Carozzi had become a student in the Law School.

24 It was correct that the Dean of School, Penny Carey, was made aware of the ongoing Employment Tribunal by Karen Withers (to provide the context for why she was calling), although when we spoke to Penny Carey, she appeared to have difficulty in remembering their phone call. She also had difficulty in placing Ms Carozzi as a student of the Law School when we interviewed her. There was no evidence that any other members of staff in the Law School were aware of Ms Carozzi’s circumstances.”

395 In fact, at page 2070, in notes made by Mr Ivie of an interview with Ms Carey, Ms Carey said that “she didn’t teach in the Law School” and that “she had been wracking her brain who the student was”. The note continued:

“CI asked whether PH had spoken to PC in a meeting break during a Chief Executives Group (CEG). PC said that she vaguely remembered PH asking about a student enrolment, but she was concentrating on the items coming up next on the CEG agenda.”

396 Mr Healey’s evidence in his witness statement (in paragraphs 61 and 62) on the issue of what happened when the claimant’s student status was queried was not challenged, but that passage in the notes on page 2070 was put to him and he was asked for his response to it. He said this (as noted by EJ Hyams):

“We meet every 2 weeks in Chief Executive Group meetings and that [i.e. what was said] was just at a coffee break and it was an unusual situation. So that was it. There was not a detailed discussion at all.”

397 Mr Healey said this in paragraph 62 of his witness statement:

“Later, Elaine raised a formal complaint about this matter. I was interviewed as part of the investigation into this complaint. Notes of this interview are in the bundle pages 2065 to 2066. As I said in this interview, we were not seeking to prevent Elaine being a student, that would have been wrong to do, but it was reasonable to want to know whether Elaine was a student or not in view of the ongoing Employment Tribunal process and the upset there was on both sides in respect of Annabel and Elaine.”

398 Ms Withers’ witness statement evidence on this issue was as follows:

“120 On 20 September 2019, I received an email from Annabel saying that she had been told that Elaine was starting an MA in the Law Faculty that academic year (page 1955). The email was also copied to Phil Healey and he asked me to speak to Penny, Dean of the Law School about it. I called Penny and she looked on the system and confirmed that Elaine was on the list to register as a student on the LLM course.

121 By this point, these legal proceedings were already ongoing, so I said I would speak to the University’s lawyers, primarily to make them aware, for example it was relevant to the question of possible remedy, namely if Elaine was a full-time student she would not be looking for paid employment. This I did. I also thought it was unusual for an individual who was pursuing legal proceedings against an organisation to wish to return to that organisation as a student, and I wanted to confirm whether our lawyers saw any difficulties with this, which they did not. Following this brief conversation with our lawyers I believe I spoke to Annabel shortly afterwards, likely by telephone, to simply relay the information I had learned.

122 On 11 November 2019 Annabel emailed me and Phil again (pages 1957 to 1958) to say that at a UH Arts concert the day before, Elaine had attended, spoken to one of the team and brought up the Tribunal proceedings, explaining that she was on a law course at the University which would help her in representing herself against the University. Annabel was uneasy about this. I understood her uneasiness but reminded her in respect of her concerns about Elaine’s enrolment as a student that we could not ban people from being students. My comment in my email about facing some form of discrimination case if we did ban people from being students was a bit flippant, but I wanted to explain the possible consequences to

Annabel in a human way, rather than being overly formal in my language. We took no steps to prevent Elaine being a student (and I note Elaine's claim in this regard is that we were seeking to get her banned as a student (see issue 44 page 321) but this was simply not the case at all). It was also not the intention she would be aware of these concerns being raised by Annabel – Elaine only became aware that we had even asked the question at all when these email exchanges were provided to Elaine following her making a subject access request.”

- 399 The claimant confirmed to us that she had indeed not known about the situation until after she had received documents following a subject access request.
- 400 That was the factual background to the complaints in paragraphs 44-46 of the Schedule. We have stated the legal tests to be applied in paragraphs 19 and 20 above. The claimant referred us in addition to the case of *Garry v London Borough of Ealing* [2001] EWCA Civ 1282, [2001] IRLR 681, which makes it clear that the maxim “ignorance is bliss” does not apply in this context, so that it will still be victimisation within the meaning of section 27 of the EqA 2010 even though the claimant was not aware at the time of the acts about which complaint is made.

### **A discussion**

- 401 Given what we say in paragraph 20 about *Khan* and *Cornelius*, we concluded that we should consider what would have happened if the claimant had made a claim to the county court of a breach of the implied term of trust and confidence through Mrs Lucas doing the same alleged things during the course of the claimant's employment with UH, but without a claim of a breach of the EqA 2010, and to ask ourselves whether Mrs Lucas' response would have been any different. If, for example, we concluded that she would have made the same queries about the claimant's status, because of anxiety caused to her (Mrs Lucas) by the thought of bumping into the claimant on UH's campus, then that would mean that there was no detrimental treatment by reason of the fact that the claimant had made her claim of a breach of the EqA 2010.
- 402 Another way of looking at the claim was to say that there is no detriment in an employee merely making an inquiry of a Human Resources adviser in comparable circumstances when all that the adviser does is (a) find out whether or not the claimant is going to be a student and (b) makes inquiries of the employer's lawyers.
- 403 Separately, it could be said that finding out what the facts are for the purpose seeking legal advice and then seeking that advice, cannot as a matter of law be, or alternatively was not on the facts here, a detriment within the meaning of section 27(1).

- 404 Generally, if we concluded that Mrs Lucas' motivation in querying the claimant's position as a student had nothing to do with the fact that the claimant had made (1) allegations of discrimination before she resigned, and (2) her claims to the employment tribunal of a breach or breaches of the EqA 2010, then that meant in our view that the second claim in these proceedings could not succeed against Mrs Lucas. In that regard we noted that the fact that the claimant made her first claim in these proceedings was not stated by her to be the protected act for the purposes of the second claim and therefore the claims stated in paragraphs 44-46 of the Schedule, but we thought it right to assume for present purposes that that was an oversight on the claimant's part and to treat the second claim as being based in part at least on the fact that the claimant had made her first claim in these proceedings.
- 405 In addition, we had to decide whether or not the claimant had made her claims of discrimination in good faith, as that would mean that any detrimental treatment which was potentially within the meaning of section 27(1) of the EqA 2010 would, by reason of section 27(3), not after all be within the meaning of section 27(1).
- 406 Another issue that we had to decide was whether, if we concluded that one or more allegations of discrimination was made in bad faith, that finding tainted the rest of the allegations, so that for example even if the original allegation of discrimination was made in good faith, that original allegation was tainted by the bad faith of a later allegation.

**Our conclusion on the claim stated in paragraphs 44-46 of the Schedule**

- 407 We concluded that Mrs Withers and Mr Healey did what they did so far as relevant to the second claim and therefore the issues stated in paragraphs 44-46 of the Schedule because, and only because, Mrs Lucas contacted them and raised the issues that she (Mrs Lucas) raised. Thus, only Mrs Lucas' motivation was in issue when we considered the claims stated in those paragraphs.
- 408 The one thing that we were clear about here was that Ms Lucas did not make any attempt to stop the claimant becoming a student: she did not herself call for example Ms Carey and try to persuade her that the claimant's offer of a place to study on the UH Law School course should be withdrawn. In the main, all Mrs Lucas did was to seek advice from Ms Withers and Mr Healey. To the extent that she went further, in part it was done with respect to her position in these proceedings (that being the case in regard to the third paragraph in the email of 11 November 2019 set out in paragraph 199.1 above), and in part it was done in response to a provocative comment made by the claimant as recorded in the first paragraph of that email, which is also set out in paragraph 199.1 above. We did not see what Mrs Lucas said in that first paragraph as being to any extent detrimental treatment because the claimant had made claims of discrimination. That was because to the extent that Mrs Lucas referred, in her email of 11 November 2018 set out in paragraph 199.1 above, to these proceedings, she did so only by asking whether or not the claimant being admitted would "undermine

the whole process – and [her, i.e. Mrs Lucas'] team.” She wrote that it “[put her] in a very difficult position”, and that was said, we concluded, only because Mrs Lucas thought that admitting the claimant as a student was inconsistent with her, Mrs Lucas’, rejection of the claimant’s contentions that she was competent in all aspects of the post from which she (the claimant) resigned. Asking, via Ms Withers, the respondents’ lawyers for advice in that regard could in our view not properly be said to be detrimental treatment within the meaning of section 27 of the EqA 2010.

- 409 In any event, we accepted (without any difficulty at all) that Mrs Lucas was very anxious about meeting the claimant on campus because of the difficult relationship that she and the claimant had had for six months. That difficulty was caused, we concluded, by the claimant’s, and not Mrs Lucas’, intransigence.
- 410 Partly as a result of Mrs Lucas’ understandable anxiety about meeting the claimant on campus, but in any event, we concluded that if the claimant had made a claim of a breach of the implied term of trust and confidence, or another claim of breach of contract arising from the manner in which Mrs Lucas had assessed her (the claimant’s) performance as a probationary employee, then Mrs Lucas would have asked the same questions and written the same things as those which she did in fact write about the claimant’s status as a student in the UH Law School.
- 411 As for whether or not the fact that the claimant had alleged breaches of the EqA 2010 by Mrs Lucas during the course of the claimant’s employment had caused Mrs Lucas to query the claimant’s intended and then actual position as a student of UH, having concluded that the queries raised by Mrs Lucas were in no way influenced by the fact that the claimant had made a claim to this tribunal, as opposed to a county court claim which (necessarily) would not include a claim of a breach of the EqA 2010, we concluded that the fact that the claimant had made complaints before her resignation of discriminatory conduct by Mrs Lucas had in no material way caused Mrs Lucas’ queries in her emails set out in paragraphs 197 and 199 above.
- 412 On those bases, the claimant’s claim of victimisation in paragraphs 44-46 of the Schedule did not succeed and was dismissed.
- 413 If we had not dismissed that claim then we would have concluded that at least in part, and possibly (it was not necessary to come to a firm conclusion on this) in all respects, the claimant’s complaints of discrimination were made in bad faith. That is because of our findings stated in paragraphs 98-100, 177, 213 and 219 above.
- 414 As for the claim that Mrs Lucas wrote her emails set out in paragraphs 197 and 199 above to any extent because of the claimant’s race or her religion, we were completely satisfied that those emails would have been written if the claimant had been of any other race or religion. In other words, those emails were in no

way written because of the claimant's race or her religion. For the avoidance of doubt, we concluded also that those emails were in no way related to either of those protected characteristics.

415 Accordingly, the claims stated in paragraphs 44-46 of the Schedule did not succeed and were dismissed.

**Constructive dismissal**

416 In the above circumstances, we saw nothing that was wrongful in what the respondent did. As a result, we concluded that there was no breach of the implied term of trust and confidence, and therefore that the claimant was not dismissed within the meaning of section 39(7)(b) of the EqA 2010.

**In conclusion**

417 In conclusion, none of the claimant's claims succeeded. They were accordingly all dismissed.

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Employment Judge Hyams

15 July 2021

Sent to the parties on:

10 August 2021

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For Secretary of the Tribunals