



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Simon Pipe

v

Coventry University Higher Education Corporation

### FINAL MERITS HEARING

(CONDUCTED FOR THE MOST PART BY THE CLOUD VIDEO PLATFORM)

Heard at: **Birmingham** On: **1 to 3 and 6 to 10 December 2021 and in chambers 13 & 14 December 2021**

Before: **Employment Judge Perry, Mr E Stanley & Mr T Liburd**

#### Appearances

For the Claimant:

**Mr Joshua Jackson (counsel)**

For the Respondent:

**Mr Anthony Johnston (counsel)**

### JUDGMENT

- 1 The respondent did not breach its duty to make reasonable adjustments in relation to the claimant, the claimant was not discriminated against because of something arising from his disability and he was not indirectly discriminated against by reference to his age or disability in contravention of Part 5 Equality Act 2010. Those complaints are dismissed.

### REASONS

*References below in circular brackets are to the paragraph of these reasons. Those in square brackets to the page of the bundle or where preceded by a document reference or the initials of a witness, that document or witness statement. A number after a paragraph mark symbol "¶" refers to the paragraph number of a witness statement or document. For those witnesses who provided supplementary statements we refer to their principal statement as "initials"1¶... and supplemental as "initials"2¶....*

- 1 Whilst we set how and why this claim came about at length below, at its heart, this claim concerns the disadvantage Mr Pipe asserts he was put to through his inability to progress to what he describes as a more senior and respected role by reason of his ADHD, a sleep disorder and/or his age. In his witness statement Mr Pipe gave the reasons for his resignation thus:-

*"My situation had become untenable: I felt I could not go on in a demeaning role, and I had exhausted all means of escaping that role, other than leaving my job. I asked myself whether I could reconcile myself to a low-paid, low-status role, stop*



*trying to achieve, and enjoy an easy life with some creativity, knowing I had other sources of income; I decided I could not.*

*It took me a long time to decide to resign. I did not do so in May 2020, following the grievance dismissal, or after rejection of my final request for adjustments in July 2020, partly because I was not able to consider my situation clearly.” [SP1§208-9]*

- 2 We sought clarity of the position of the University (as we shall refer to it) in relation to disability and knowledge for the purposes of the ss. 15 and 20-22 Equality Act 2010 ('EqA') complaints. It was not disputed that Mr Pipe was a person with a disability within the meaning of s. 6 EqA at the material time. . We sought to clarify exactly what was disputed in relation to knowledge (given a respondent can have 'constructive' knowledge for the purposes of the both the different tests in ss. 15 and 20-22 EqA).
- 3 We were told that the University's knowledge of disability was not disputed from 2016 but both disadvantage and its knowledge (or "*constructive*" knowledge) of disadvantage for the purpose of the reasonable adjustments complaints was disputed at least until it was advised of Mr Pipe's ADHD diagnosis in September/October 2018. Further the University argues "*... that is of particular significance when it comes to considering the reasonableness of the adjustments contended for, given that the need for teaching staff in Journalism was thereafter reducing (see [651])*" [R Skeleton/24].
- 4 As to the age complaint Mr Pipe was born in August 1961. By the time of the hearing, he was aged 60.
- 5 Mr Pipe sought a number of adjustments during the hearing including regular breaks which we scrupulously adhered to. When he gave evidence that was done in person so he did not have the distraction of giving evidence via video. He raised no issue before us about being cross examined by Mr Johnston via video as he and the respondent's witnesses appeared and gave evidence remotely. The tribunal also considered the guidance on taking evidence from and hearings persons with



ADHD in the Equal Treatment Benchbook and Toolkit 5 of the Advocate's Gateway.

- 6 A list of issues was agreed as set out in Appendix A. As the hearing progressed Mr Jackson was able to confirm that in relation to the “*some things arising from disability*” heads 11(b) and (c) were merely contexts and thus the only “*something*” that was pursued as the basis for a complaint in itself was 11(a). Similarly in head 16(a) was accepted as context only.
- 7 The law was not contentious. The representatives were able to agree the statement of law we attach at Appendix B below. The only omission from that was a case Mr Johnston referred us to [\*Buchanan v Commissioner of Police for the Metropolis\*](#) [2016] IRLR 918, EAT at [43]. That concerns the principle where A's treatment of B is the direct result of applying a general rule or policy to B, whether B's treatment is justified will usually depend on whether the general rule or policy is justified. Mr Jackson very helpfully confirmed that was not contentious.
- 8 We are very grateful to the representatives for their considerable assistance and the cooperation they displayed in assisting the Tribunal. That is to the substantial credit of both.
- 9 The principal documents before us were us a bundle, supplementary bundle, chronology, opening submission from Mr Jackson, closing submissions from both parties and a document prepared by the ADHD Foundation, “*ADHD in Adults*”. That is not intended as an exhaustive list as various documents were provided as the trial progressed.
- 10 We heard from the following witnesses; Mr Pipe, Dr Shaun Hides (the respondent's Academic Dean of the Faculty of Arts & Humanities) who heard Mr Pipe's 2017 grievance appeal, Ms Carmen Nicholson, one of the University's People (that is to say HR) Advisors (see (128)) , Mr Stephen Dawkins (who was Mr Pipe's line manager from October 2017 until his resignation) and Professor Damien Foster (see (170)) who investigated Mr Pipe's 2020 grievance.



**Mr Pipe**

- 11 Mr Pipe told us in terms at the start of him giving evidence that he was not “*everyone’s cup of tea*”. He gave one example why people might think in that way about him just before the first break after lunch on the first day he gave evidence, where he told us he had let himself down by being picky and obstructive. Before us he sometimes lost his train of thought, went off on tangents and was verbose. Those matters collectively might explain why *he felt* some people might not like him. We as a panel found him a highly engaging and candid individual and as to the latter when certain matters that we will come on to, were explained to him he accepted notwithstanding that view was adverse to his case that he had not thought of matters in that way previously. That is to his credit.
- 12 Before he joined the BBC in 1994, from 1979 Mr Pipe was a news paper/agency journalist. Apart from a short break in 1996/7 he remained with the BBC until late 2011, progressing to the position of senior broadcast journalist. He thereafter commenced an MA in Health Journalism at the University. He subsequently transferred to an MA in Online Journalism at Birmingham City University (“BCU”).
- 13 It is Mr Pipe’s case he has had a lifelong sleep disorder, characterised by insomnia and poor sleep hygiene. He told us he frequently sleeps less than four hours per night, resulting in constant fatigue and impacting his concentration and cognitive functioning. Mr Pipe asserts he has a “*very fine balanced coping mechanism*” for dealing with insomnia.
- 14 While Mr Pipe was employed at the BBC he was referred to its occupational health advisors on the basis that he had recently been identified as suffering from insomnia and was thus encountering attending work in the mornings. A report of 10 June 2011 [872-874] recorded that Mr Pipe had has suffered from sleep problems throughout his life but that the issues at play were more complex than merely lack of sleep. The irregular nature of the work and sleeping patterns, need to obtain stories, monitoring at work, stress, which was made worse by anxiety and the sleep disorder and that he had reached a stage in his career where his



hierarchy of needs (Maslow's pyramid) was such that he desired peer recognition as demonstrated by his desire to undertake an MA contributed to his being sensitive to pressures and less resilient to them. Further those matters were aggravated by the lack of support he perceived his employer.

15 It recorded Mr Pipe would be likely to be assessed as disabled under the EqA and that he was to be referred to a sleep specialist.

16 Mr Pipe told us he underwent extensive NHS sleep testing from around 2011/12. He acknowledges sleep is a relatively new medical specialism and it was difficult to arrive at a clear diagnosis with the result he was misdiagnosed with sleep apnoea in 2014. That aside the tests continued and indeed he was still undergoing test in March 2017 to the extent he was asked by a colleague why he had electrodes on his head [SP§82].

17 Despite that Mr Pipe did not expressly disclose the sleep disorder to the University when he was employed by it instead stating it would have known about this as result of him undertaking his MA at the University. We find the University was not informed of that by him such that it was or should have been put on enquiry.

18 It is not in disputed that by 2016 at the latest Mr Pipe had declared to the University that he suffered from a mental impairment in the form from a sleeping disorder. He described this in his Development & Performance Review in September 2016 as impacting on his health through fatigue [433m]. He also described it in a meeting with Simon Smith and Sam Burdett on 18 November 2016 as an "unspecified sleep disorder" [438-440].

19 In late 2012/early 2013 following an informal invitation (that is to say not via a competitive interview process) Mr Pipe commenced employment with the University as an hourly-paid lecturer ('HPL') at grade 6, an assistant lecturer, role. Profiles for a grade 6 assistant lecturer & 7 lecturer amongst others were before us [489-492 & 493-499].



- 20 In early 2013 Mr Pipe taught a first year journalism module to two cohorts at BCU as a visiting grade 7 lecturer. Later that year he applied for two positions with the University as a grade 6 (assistant lecturer) & 7 (lecturer). He was unsuccessful at interview for the lecturer role but was successful at interview for the assistant lecturer role. Thus, with effect from 11 November 2013 Mr Pipe was appointed as a full-time assistant lecturer in Journalism and Media in the University's School of Media and Performing Arts. That school formed part of the University's Faculty of Arts and Humanities
- 21 Mr Pipe then undertook a Postgraduate Certificate in Academic Practice in Higher Education, a qualification in relation to teaching in Higher Education establishments. He gained a distinction in September 2015 [979]. As a result of his new qualification, he became a Fellow of the Higher Education Academy (FHEA).
- 22 On 13 April 2016 Mr Pipe made a flexible working request. It was granted and he began working part-time (three days a week (or 0.6)) with effect from 1 January 2017. He told us that was because he felt he had no prospect of a career at the University, because the internal progression scheme was not open to assistant lecturers, he wished to begin building up work in a new field on his non-university days and his sleep disorder meant he could not do this on top of a full-time job [SP§62 and see (26)].

### **The University**

- 23 The University is now made up of four Faculties and various research centres. The Faculty of Arts and Humanities is the smallest of the four faculties. By way of illustration and adopting merely one of a host of potential contextual measures, it comprises 4,500 of the University's 25-30,000 students.
- 24 The University currently employs 3022 staff (excluding HPLs) of which 1461 are academic, 1156 professional services (HR etc), 312 research and 93 senior management. In addition, it employs 544 HPLs. Of the academic staff, 242 are employed at Grade 6 and 473 at Grade 7.



- 25 In 2015 the University introduced a Corporate Strategy to 2021. The 2018 update appears at [296]. The Corporate Strategy included a policy to increase the number of academic staff with doctorates by 30% and set a target in respect of the number of PhD completions within the University by 2021.
- 26 With effect from January 2017 the University created a new academic framework (*the Framework*) for (internal) progression [363-371]. For internal grade 6 staff seeking "*promotion*" to grade 7 that gave rise to a pathway that previously did not exist, because grade 6 staff formerly had to apply for roles via a competitive external interview process for advertised roles.
- 27 *The Framework* involved a four stage paper based process which firstly involved a standard form application, which was then endorsed with the applicant's line manager's comments; the second stage involved a consideration by the applicant's head of school. If supported, by the head of school the application was referred to a faculty panel before a final stage consideration by the University's senior leadership team.
- 28 As a prerequisite, roles that were externally advertised required an assessment that a role existed/needed to be created and filled.
- 29 In addition to applicants demonstrating the required achievement/standards because any appointment would necessarily have an effect on budgets *the Framework* required a business case to be made out for progression. Given responsibility for budgets was delegated to schools, likewise responsibility for providing that business case was delegated to the applicant's head of school.
- 30 Achievement was initially required to be demonstrated in 2 (and latterly 3) of four areas:-
- 30.1 Teaching and learning;
  - 30.2 research and scholarship;
  - 30.3 enterprise, and



30.4 leadership and management (within and outside the University).

31 The criteria for progression from Grade 6 to 7 identified that applicants must:-

- *“demonstrate activity which illustrates their ability to meet the requirements as described in the role profile for the relevant Grade 7 role.*
- *successfully have completed their probationary period and be actively engaged in the Performance Appraisal process (CORE).*
- *have attained a PhD or, exceptionally, demonstrate equivalence in contribution to professional practice. If from a professional practice background, applicants will require a good Honours Degree (and/or Masters Degree) and appropriate professional qualifications and/or membership and/or equivalent professional qualifications which can be considered as equivalent to the PhD.”*

see for example [367]

32 Prior to making three progression applications under the *Framework*, between 2014-2017 Mr Pipe unsuccessfully applied for seven grade 7 lecturing posts at other universities. In summer 2015 he unsuccessfully interviewed for a grade 7 lecturing post with the University. We heard Priya Rajasekar was the successful candidate.

33 We were provided with monitoring data relating to the 2018 and 2019 progression applications supplied to the University’s Vice Chancellor. Whilst Mr Pipe complains of that was supplied late and asks us to draw adverse inferences from the same, we also note that substantial prejudice has been caused to the University by virtue of the delay in bringing this claim by Mr Pipe. Whilst the monitoring data was available that from 2018 & 2019 (see respectively (118-119 & 150)), data relating to rejections at the Head of School stage in the progression framework was not available for 2017 (see (45)). Further a considerable number





of the University's staff had left its employ over the intervening period. We therefore decline to draw those adverse inferences.

- 34 In contrast, as we say below (see (58)) as early as September 2017, Mr Pipe referred to having contacted ACAS. Mr Pipe was a highly intelligent man who based on the Freedom of information requests and other applications that he made, demonstrated he was able to locate materials setting out the law, how and when to bring complaints, and how and where he could obtain advice from. We find he had both the practical, intellectual and financial means to be able to do so, and indeed taught modules on media law.

### **The 2017 Progression Application**

- 35 On 13 February 2017 Mr Pipe made an application for progression under the *Framework* [442-450]. It was supported by testimonials [451-453]. He was informed it had been unsuccessful on 6 March. It was rejected at the Head of School Stage (the second of the stages we outline above). It was not in dispute he was notified on 10 March. The University accepts that rejection and the subsequent rejections of his progression applications in 2018 & 2019 were unfavourable treatment pursuant to s.15 EqA.
- 36 We were referred to data identifying the outcomes of applications for progression under the *Framework* in 2017. Within the Faculty, figures were not available for those rejected at the head of school stage, 4 were moderated at the faculty stage, all of which progressed to University moderation. All were ultimately successful save that one applicant applied for progression from grade 6 to 7 and 6 to 8 and but was only successful as to the former.
- 37 University wide again no data was available for refusals at the head of school stage but there were 14 applications from applicants holding a grade 6 post for a grade 7 role that got to faculty, three were refused and of the 11 that were moderated at the University stage, 10 were successful although the unsuccessful application



related to applicant who applied for both progression from grades 6 to 7 and 7 to 8.

38 As to how the various stages were approached Dr Hides told us that that once applications got to the faculty stage the view was that it was not right to send applications forward that would not be successful. He acknowledged that there was a dual ethos at the head of school stage in that it was acknowledged that heads of school were likely to want to act as an advocate for their staff and heads of school were likely to allow borderline cases that the head of school wished to be tested to identify if progression was appropriate to the faculty stage.

39 One of those successful candidates within the faculty was also from the School of Media and Performing Arts, Ms Emma Lambert, who was previously an assistant lecturer in photography.

40 Mr Pipe referred to Ms Lambert in his 2018 application [602] stating that she had been allowed to progress in 2017 without a PhD. In his witness statement [¶94] he relayed that in September 2017 she had emailed fellow assistant lecturers explaining how she had succeeded in gaining promotion stating she had met the research requirement by preparing two conference presentations on her work as a photographer. Mr Pipe explained that had involved doing “a significant amount” of work in her own time, but he could not do this to the same extent because he frequently experienced deep fatigue in the evenings.

41 He told us just after the afternoon break on the first day he gave evidence that in 2017 she had told him she had not embarked on a PhD and was under no pressure to do so. In contrast Mr Dawkins and subsequently Mr Pipe (see (176)) subsequently appeared to suggest that by some point she was studying for one. Mr Jackson in closing suggested that Mr Dawkins had said that was at the time she had applied. Our note of Mr Dawkins’ evidence was that she was only at the proposal stage when she progressed, but that Mr Dawkins acknowledged he was not involved in that process so had only a limited knowledge of it.



42 That issue aside, it was suggested to Mr Pipe that a PhD was not required in all cases but in any event in practice applicants needed to be on a “pathway” to a PhD. He responded stating that required more than just being signed up for a PhD and referred to Ms Lambert studying for a PhD. He also indicated that there had been a hardening in the University’s position after 2017. We return to this below (212).

43 On 21 March Mr Pipe sought that Dr Garrett Brown, his head of school, re-consider her decision giving a rationale for her to do so [486-488]. A meeting was arranged for 28 March for her to give Mr Pipe feedback.

44 The day before the feedback meeting Dr Garrett Brown emailed Mr Pipe thanking him for the additional information he provided and having outlined Mr Pipe’s strengths she identified where she viewed the application as deficient:-

- *“Evidence of having completed or begun a PhD or demonstration of equivalency*
- *Evidence of trajectory towards peer reviewed publications, a national profile and/or income generation through association with research and/or enterprise projects.*
- *Evidence of peer teaching observations & related module evaluations to substantiate discussions around own teaching strengths.” [484-5]*

45 The same day Mr Pipe attended an occupation health assessment [465-467]. The advisor who was not named was “unable to say” if Mr Pipe fell within the definition of disability with the EqA. Adjustments were identified in relation to field trips and support for and extra time at interviews and whilst him having applied for and not having been successful applying for jobs at the University led him to feel he was not listened to, unsupported, not treated with respect and humiliated, and those workplaces issues were aggravating his stress and anxiety at that stage promotion outside the *Framework* was not suggested.



46 Mr Dawkins told us [¶5 & 6] that Mr Pipe asked him for advice about the application for progression to a Grade 7 Lecturer in early 2017 and they had several discussions about how Mr Pipe could maximise his chances. Mr Dawkins stated he explained the process to Mr Pipe, emphasising that a big part of the application was a solid business plan for where his role would fit within the structure, how it would add to the school and cautioning that his application may not be strong in that regard. Mr Pipe made clear he wanted to try for progression anyway.

47 As part of a subsequent grievance investigation in early 2020, Professor Foster interviewed Mr Dawkins. The note of their meeting [768-770 at ¶9] records that Mr Dawkins discussed the 2017 progression application with Mr Pipe before it was lodged and had told Mr Pipe there was no business case for a role for him.

48 Mr Pipe told us [¶75] he had assumed his strong teaching qualification, industry experience, extensive skills and classroom success would be enough to secure promotion to grade 7. He also told us he viewed the extent of the progression requirements excessive and that Mr Dawkins had not given him advance warning of them, such that his application was ever likely to succeed.

49 Given Mr Pipe suggested he had failed interviews previously and that an interview process placed him at a disadvantage, he did not explain how that fitted with his assumption he would be successful under the Framework. Given that discrepancy and our comments about Mr Pipe's evidence generally, where it is at odds with that of Mr Dawkins on that issue, we prefer the evidence of Mr Dawkins, and specifically that he had explained the process to Mr Pipe, what it entailed, that a strong business case was needed, and Mr Pipe had not provided one.

50 We find despite having been given extra time to make the application Mr Pipe had not engaged with the *Framework's* requirements. If that was as he stated because he had assumed it would be successful, that was misguided because the *Framework*, as any such process, requires applicants to demonstrate their ability to fulfil the role and has to be robust in that regard.



- 51 On 4 April 2017 Mr Pipe submitted a grievance [467a-b]. An undated document supporting the grievance was also before us [468-473]. That grievance was not pursued.
- 52 On 22 June 2017 PhD Pipe was assessed by Dr Zenobia Zaiwalla, a consultant in Clinical Neurophysiology. He told us [SP§84] that *“I told Dr Zaiwalla I was under pressure to embark on PhD”*. Based on the correspondence from Dr Zaiwalla that we refer to below we find that was Mr Pipe’s view at that point and based on subsequent events, that remained his view.

### **Mr Pipe’s 2017 grievance and grievance appeal**

- 53 Four days after his assessment by Dr Zaiwalla Mr Pipe on 26 June submitted a further grievance [475-479]. Dr Zaiwalla reported to Mr Pipe’s GP on 10 July 2017 indicating that Mr Pipe had an average sleep time of 4 hours per night, stating, *“In view of the severity of his sleep disorder he will find it very difficult at present to successfully work towards achieving a higher degree”* [883-4]. Also, on 10 July 2017 Dr Zaiwalla provided a letter addressed to *“whom it may concern”* [885] stating

*The severity of his sleep disturbance is likely to have an impact on his daytime functioning. with in particular difficulty in planning and organisation and retaining information in addition to constant tiredness. Treatment options are being considered, but this sleep disorder can be difficult to treat especially when compounded by stress. In view of the severity of his sleep disorder he will find it very difficult at present to successfully work towards achieving a higher degree.*

- 54 We were told that was provided to the University as part of Mr Pipe’s grievance appeal<sup>1</sup>. He told us that following receipt of that advice *“I thought a tribunal would class my sleep disorder as a disability”* [SP1§89]

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<sup>1</sup> The grievance outcome [518] stated Mr Pipe had only recently received a full diagnosis but made no reference to the diagnosis having been provided



- 55 Mr Pipe had already achieved a Master's degree and Post Graduate Certificate in HE teaching and was undertaking teaching as a grade 7 lecturer at the time, yet Dr Zaiwalla made no reference to them in that report [883-4] and letter [885]. Unless he had failed to disclose those matters to the only apparent explanation for that was that it was temporal, as suggested to Mr Pipe (see (62, 65 & 67)).
- 56 In July Mr Pipe met with Sam Burdett of the University's HR Department (or was it was known internally, its "people team") and Dr Garrett Brown to discuss reasonable adjustments [480 & SP§88]. He told us the suggested adjustments related solely to his existing role and whilst not suitable, he felt were a valid effort. His complaints before us were threefold (1) that no one in the room had insight into what adjustments would be appropriate – himself included, (2) that specialist advice was not sought and (3) that adjustments to help him progress to a role that reflected his experience, knowledge, skills and qualifications were not considered. In contrast to what Mr Pipe told us about his view of that meeting, the emails from that time indicated the meeting was *"to discuss the feedback from your OH appointment"* [480] which in our view suggested specialist advice had been sought and thus insight into what adjustments would be appropriate had been obtained. What that Occupational Health was, was surprisingly not before us.
- 57 Mr Pipe's grievance was heard by Ms Kollette Super on 20 September 2017. Mr Pipe was accompanied by his UCU trade union rep. Mr Furrukh Aslam. The grievance was rejected on 29 September [518-521]. Mr Pipe told us the result of comments made by Ms Super about the need for the policy to be applied uniformly that he began to research disability discrimination and discovered the principle that underlay indirect discrimination (although he states he did not come to understand the concept of group disadvantage until later [SP1§97]).
- 58 The documents show that following rejection of stage 1 grievance he sent an email to Mr Aslam on 29 September to say *"I have already contacted ACAS but have asked them not to make contact until the outcome of the hearing; I'll wait until Monday at least before asking them to intervene"* [522]. In that email he referred to there being clear evidence of disability discrimination.



59 Mr Pipe appealed the grievance outcome. The appeal was heard by Dr Hides on 27 November and was minuted [533-541]. Mr Pipe's annotated copy of the minutes were also before us [558-574]. Mr Pipe was not accompanied at the appeal.

60 Dr Garrett Brown was interviewed by Dr Hides on 6 November [542- 549], Mr Dawkins on 16 November [550-551 & SD§9], Ms Burdett on 20 November 2017 [552-554] and Ms Super on 27 October 2017 [533-541].

61 Mr Pipe's grievance appeal was rejected by Dr Hides on 8 January 2018 [575-584]:-

*"You made clear that you felt, from the feedback you received, that your progression application was not put forward because you had not shown an international reputation; you added that you felt this had been a "ridiculous requirement."*

*Although it was brief, the written feedback you received on your application - again under 'Areas for Development' - identified specific areas that required further development of your research profile; these were directly related to the research criteria for progression.*

*This feedback was consistent with Natalie's account of her interactions with you about the outcome of the application. The feedback stated that your application required more evidence of a "trajectory towards peer-reviewed publications, a national profile and/or (research) income generation. Although you asserted that your work on the St Helena website constitutes research as practice and you cited several colleagues, academics and professionals who had supported that view, the criteria for progression and indeed the feedback comments are concerned with research outputs and their standing. [578]*

...



*Furthermore, in terms of the Research pillar of the CU Corporate Plan, the CU Research Strategy and the criteria for progression, for research activity to be counted as such, it needs to result in REF-able outputs: peer reviewed journal articles, monograph books, peer-reviewed chapters, or similar.*

*... this chapter was not REF-able and you have not as yet managed to develop your academic publication profile further. Were you to develop a track record of such publications then the impact you cited would become very significant*

*You have subsequently acknowledged that your submission could have been improved but that you did not understand this at the time of submission.*

*During our meeting we discussed the need for a Head of School to create a business case for support in progression and as such I will not elaborate on this again here. [579]*

*... the University is seeking to increase the number of staff with doctorates by 30% to increase the number of PhD completions to 1875 by 2021, which gave a strong message to staff about the University trajectory. Additionally I find that by adding in a progression framework which gives staff at Assistant Lecturer level the opportunity to apply for progression where there had previously been no system in place to consider this as a positive way forward for University staff at this level.*

*To successfully achieve progression from Assistant Lecturer to Lecturer applicants are required to (amongst others):*

- Demonstrate at least two areas of activity from teaching and learning, research and scholarship, enterprise and leadership and management.*
- Have attained a PhD or be able to exceptionally demonstrate equivalence in contribution to professional practice*





*It is clear from these criteria that the expectation to achieve a PhD is also made explicit in the documentation supporting the progression process, whilst there is no absolute requirement for all staff to have obtained a PhD in order to successfully progress, it is the norm. However, you provided no evidence to support your claim that your professional experience constituted such equivalence. Further, had you wished to pursue a PhD, be that via the traditional route, or by the publication route you could have discussed this with your School Management Team even if there is currently no time allocation in your role, in order to understand what options may be available for you. During my investigations I have found no evidence to highlight that you sought guidance or support for undertaking a PhD, or that you asked for support for Research from Spring 2016, when you state that you were no longer able to do research in your own time due to your condition. [581/82]*

...

*You stated that it was not until June 2017 when discussing how you felt under pressure to undertake a PhD with your medical practitioner that they informed you that your condition made it 'out of the question' and it was this which prompted you to raise a grievance 2 days later. You stated that you were 'taken aback' by this response and as such asked that they confirm this in writing, which they did in July 2017. The letter states 'in view of the severity of his sleep disorder he will find it very difficult at present to successfully work towards achieving a higher degree and you presented this to the grievance panel in September 2017.*

*Given your acknowledgement that you were taken aback by the idea that you could not undertake a PhD due to your condition, as raised by medical practitioner in June 2017, and that you had previously chosen not to undertake a PhD as you could not see any likely benefit; I find it unreasonable to expect that the University would be aware of any impact your medical condition may have on your ability to undertake a PhD until*



*this time and the University cannot be held accountable for decisions you have previously taken.*

*While you stated that you did not feel under pressure to undertake a PhD now, the University can work with you and internal colleagues such as Academic Development and the Occupational Health team with a view to support you in undertaking a PhD should you wish to embark upon one. Indeed, other AL staff have been supported in undertaking various kinds of research activity, where it has been aligned with the business needs of their school and when it has been organised through their line manager. They can also be supported in commencing work towards a PhD, again, within the constraints of business needs. Alternatively other options could be explored with you such as a DBA. [582]*

...

*Based on our meeting I am clear that you remain keen to progress to a Lecturer and ask therefore, unless you have already taken this action for yourself, that you discuss this with your line manager. As noted earlier **should you wish to follow up** on the opportunity to investigate the possibility of undertaking a PhD **(or other alternative)**, please arrange to meet with me and your Head of School before the end of January 2018 so that we can discuss options. Where required we can involve the People Team for medical guidance and colleagues in Academic Development for support on possible options." [583/4]*

**our emphasis**

62 Mr Pipe questions Dr Hides rationale for offering to meet him to discuss ways he might embark on a PhD, given Dr Zaiwalla's medical advice was that this was "very difficult at present". It was suggested to Mr Pipe that was because Dr Zaiwalla's advice was temporal (see (55, 65 & 67)). We address what Mr Dawkins described as Mr Pipe's inconsistent views on embarking on a PhD below (see (87-89)). We



find that the reason Dr Hides offered to meet Mr Pipe before the end of January 2018 was so because the annual round of progression applications was to commence in March/April and that despite the view Mr Pipe had of Dr Hides (see for example (70, 75 & 76)) that Dr Hides was genuinely trying to assist Mr Pipe with future applications for progression.

63 Mr Pipe later indicated to Dr Hides he was not aware of the full extent of his disability, ADHD not having been diagnosed. As we state above Mr Pipe accepted he had been misdiagnosed in the past. We find that the issue of disability having been raised the respondent was attempting to explore what adjustments were necessary for Mr Pipe to facilitate him undertaking his role

64 Also, in January 2018 Mr Pipe commenced a role as a grade 7 HPL with the University [SP§117].

65 Between 19 January and 5 March 2018 [585-590] a series of emails passed between Mr Pipe and Ms Walden from the University's people team. In the first of those emails [590] amongst other matters Mr Pipe stated that *"The grievance process was not quite as pointless as he feared ... It was a hurdle had to be clear for wider reasons, but I learned some things I would not otherwise have learned, and I found the process cathartic."* He then stated that he was puzzled on one point and asked for her advice mainly given his NHS consultant (Dr Zaiwalla) has made it clear that because of his medical condition he would find it very difficult to successfully work towards achieving a higher degree (a PhD) why Dr Hides finished his letter by giving advice on how Mr Pipe could go about starting one.

66 As can be seen from our extract from the outcome letter above (61) that is not what Dr Hides said, as our emphasis highlights. We find that was because Mr Pipe had already formed the view as that earlier correspondence with Dr Garrett Brown identified that the only option available to him was to undertake a PhD we find that was not the case.



67 Ms Walden addressed the offer of a discussion with regards the PhD stating that was because the letter from Mr Pipe's consultant stated he would find studying for a higher degree very difficult "at present" and thus it did not exclude the possibility permanently.

68 That highlights an issue about the medical diagnosis at that time. ADHD, which whilst a lifelong condition, had not been diagnosed. What had been diagnosed was a sleep disorder and as Dr Zaiwalla's letter identified it was not clear if the effects on Mr Pipe's ability to undertake a PhD were lifelong.

69 Ms Walden went on to repeat that if a PhD was something Mr Pipe wished to pursue the University would take advice on the support and options available. We address that and her rationale for that below when we relay the subsequent correspondence.

70 In the early morning of 23 January Mr Pipe responded stating that he had a third sleepless night caused by Dr Hides' findings which he described as follows:-

*"They were not reasonable — an understatement. As you know, I said I could have no faith in a negative outcome from a hearing conducted by Shaun, because his position meant he could not, by any stretch, be considered impartial. I am at least glad to see my judgement was not faulty.*

...

*That said, I am of course willing to have a meeting about starting a PhD, though not with Shaun. Please tell me what I need to do in terms of involving the People team."*

71 Ms Walden responded later the same day stating that if Mr Pipe did not feel able to talk to Dr Hides she would find out who the most appropriate person in the faculty to liaise with was. She also offered another member of the people team to be involved as an alternative to herself. She repeated that if Mr Pipe wanted to pursue further studies (or further explore the possibility), the University could



make an Occupational Health referral on what may be possible in terms of support for him, but the discussion within the faculty needed to take place first so she could give the occupational health team an overview of what he might be considering as a study route. That makes clear in our view that the University considered there were various routes open to Mr Pipe. She explained that that might involve Mr Pipe's consultant to suggest reasonable adjustments. She explained that the views of the Academic Development Team might also be sought as it had supported other staff with adjustments in support of their studies. Having repeated her request for Mr Pipe to clarify his concerns regarding meeting with Dr Hides she encouraged Mr Pipe to speak to Dr Hides as per the offer in his letter. On a final note, she recorded that whilst Mr Pipe had stated that he did not require support/reasonable adjustments in his job role because of his medical condition during the appeal meeting, that should that change he liaise with his line manager

72 We find that the University genuinely wanted to investigate what adjustments and support could be provided to Mr Pipe. Before we return to the email chain (see (79)) between Ms Walden and Mr Pipe we first need to chronologically address other matters.

73 On 23 January 2018 Mr Pipe emailed Dr Garrett Brown, stating *"Shaun says I must seek a meeting with you about starting a PhD if I wish to progress. Could we meet?"* [593 & 595]. He added: *"I should say that I will be asking for a letter from my GP to clarify an uncertainty in the NHS consultant's letter regarding my ability to undertake a PhD, from a purely medical point of view."*

74 A meeting was scheduled for 26 January 2018. Dr Garrett Brown replied asking if Mr Pipe wished to discuss a PhD by portfolio [593 & 595]. He responded that he wanted to do a PhD by practice, but the University did not offer that.

75 Later the same day Mr Pipe also emailed Dr Rachel Matthews who had accompanied him at the grievance appeal hearing chaired by Dr Hides asking her if he should send an email that he had drafted to Ms Walden. That email to Ms Walden was not sent, and we have only the first part of the draft text, but that is



informative of Mr Pipe's view at the time. It queried why Dr Hides needed to be involved, stating it was unrealistic for Dr Hides to be part of a supportive relationship. It referred to previous discussions with Dr Garrett Brown about undertaking a PhD, but they had stopped having received his consultant's view but notwithstanding that he would like to do a PhD, but that Dr Hides had given no encouragement and guidance and complained about comments made by Dr Hides whether research was "REF-able" (see Dr Hides' outcome letter (61) & [579]) when it was not part of an assistant lecturer's role.

76 We find by the time that email was drafted Mr Pipe had a very negative personal view of Dr Hides and had concluded Dr Hides did not support him. We find that was unwarranted and Mr Pipe had formed that view because Dr Hides had reached a conclusion that Mr Pipe did not like. We find contrary to the view formed by Mr Pipe we find that Drs Hides and Garrett Brown, were attempting to provide support to Dr Pipe, were suggesting he could undertake different forms of PhD, that a discussion be held discuss what was the best option(s) for Mr Pipe and further what support could be offered by seeking occupational health advice. In contrast Mr Pipe had formed a view that the potential resolution was a "*PhD by practice but Coventry did not do that*" and that he did not want Dr Hides involved in the process.

77 Mr Pipe's negative view of those matters is in part demonstrated by the comment we refer to at (73) "... *Shaun says I must seek a meeting with you about starting a PhD if I wish to progress*" when in fact he had been given the option to meet and it included but was not limited to a PhD.

78 Later, on 23 January Dr Matthews [591] responded to Mr Pipe :-

*"I wouldn't send it. I think the offer to discuss doing a PhD sounds genuine and what ever we think about it, it is a recognized academic marker of status and the uni needs more, so there is a strong institutional push to get people down them. If it's NOT possible for you to do one, then there is an opportunity*



*ask what the alternative might be - for instance doing the conferences - and if that could be considered under reasonable adjustments.*

*... this would be a good opportunity to talk through how you might progress with the Dean - which is more than most people get. Get someone from HR in there too. I am happy to support you in developing your research profile in which ever way possible."*

79 That in our judgment reinforces the view that contrary to Mr Pipe's perception of events at the time Drs Hides (and Garrett Brown) were giving him an opportunity to discuss how he could progress with the Dean, Dr Hides, that colleagues did not have.

80 Whilst Mr Pipe did not send the email he did not ultimately take her advice and meet with Dr Hides. As will become apparent even when the University suggested if Mr Pipe did not wish to meet with Dr Hides alternatives could be found Mr Pipe did not explore that option either

81 Returning to the email chain between Ms Walden and Mr Pipe, on 2 March Mr Pipe responded to say he did not understand why Dr Hides

*"... had to be involved. He would not be involved for other people. He has not demonstrated a good understanding of my condition or the practicalities of it and given his lack of evident empathy, it is unrealistic to believe he could be part of a "supportive" relationship. That being the case, please suggest someone else in the faculty I could speak to. I have had meetings with Natalie Garrett Brown, my head of school, and with my research mentor, Rachel Matthews, about embarking on a PhD, and am willing to proceed - although I must be clear there is little possibility of my completing. My difficulty now is in seeing where my research plans fit in with the university structure: I need guidance on this."*

82 He went on to say he had had discussions with Dr Garrett Brown the previous spring, and at her recommendation had approached Jill Journeaux, who said she



was unable to help. That was at the point he received his test results and the consultant's view that a PhD was *"out of the question"*, and the process stopped. He then accepted his consultant's letter was not unequivocal, but that she had said his condition was very hard to treat which he took to mean it was likely to remain a persistent problem. He went on to say he had suffered mental health problems because of his treatment by the University and he was very wary of taking on a project that would further threaten his health stating that people with sleep problems are more than usually susceptible to depression, as were people who, like him, had had a severe episode of depression.

83 He continued by seeking an explanation of what was meant by *"further studies"*, if that did not mean a doctorate given he had an MA (with distinction) and a PgCert in academic practice (with distinction).

84 He then stated that Ms Burdett, Dr Garrett Brown and he had had a positive and helpful discussion about reasonable adjustments and an adjustment he wanted to suggest was a teaching-focused lecturer post with scope for doing research when appropriate. He explained that *"Given that a full—time lecturer has only one day for research - leaving four for teaching and other academic duties - this would in effect mean that I was doing the teaching/academic part of a full—time role, and was "off" for the research part."*

85 On 5 March 2018 Ms Walden replied repeating the reasons for the offer of a discussion with OH was that if Mr Pipe decided to undertake a PhD Occupational Health could be asked what support he might need but that she needed to understand the PhD route that he was undertaking before she could make the referral. She recorded that Mr Pipe stated that he had spoken with Dr Garrett Brown and Dr Matthews and that he was willing to proceed with a PhD, but he was having difficulty seeing where his research plans fit within the University structure and needed guidance. She suggested Mr Pipe "link in" with Dr Garrett Brown and/or Damian Sutton (the Acting Head of School for Research) or Neil Forbes (the Acting Associate Dean for Research for the guidance) and again repeated it would be needed for a referral to OH t. She clarified that further studies





were used in the context if he wanted to pursue his PhD and nothing more. Finally, she suggested that it might be helpful if Mr Pipe, Dr Garrett Brown and she meet rather than emailing.

86 Again, that reinforces our view the University were trying to engage with Mr Pipe but that he was not reciprocating.

87 Whilst Mr Pipe did have discussions internally with colleagues no specific detail of what was discussed was before us. We find Mr Pipe was also in two minds whether he wished to undertake a PhD. He states before us now that he yielded to pressure to investigate a PhD. Mr Dawkins told us [§26] that his experience with Mr Pipe was that he was not consistent in his views about it and that sometimes Mr Pipe referred to it negatively, referring to “being forced” to do a one and on another day, he would be enthusiastic, say he wanted to do a PhD and had spent a lot of time discussing the pros and cons with Mr Dawkins.

88 Mr Dawkins also told us [§27] he discussed alternatives with Mr Pipe, including journalistic research and encouraged him to explore that option. Mr Dawkins’s view was that a PhD by Publication was a better route for Mr Pipe, and he made Mr Pipe aware of that. Mr Dawkins stated the PhD by Publication route uses existing research as the basis for the PhD and is traditionally much shorter than standard PhD thesis. Mr Dawkins told us Mr Pipe’s enthusiasm for that route also varied and whilst he told us he was aware Mr Pipe made some enquiries about that route it did not progress very far.

89 We find the contemporaneous correspondence we refer to above supports Mr Dawkins’s perception of events that Mr Pipe at the very least was giving mixed messages if he wanted to consider a PhD.

90 Whilst Mr Pipe states he had been advised a PhD was out of the question by Dr Zaiwalla (see (53)) with respect to her unless and until a route had been identified, explored or for that matter occupational health advice sought, we do not see how Dr Zaiwalla or any other professional was in a position to comment either way



until s/he knew what was proposed or what that entailed and that is what the university was trying to do.

- 91 Returning to the email chain Mr Pipe responded to Ms Walden later on 5 March to say he would respond in a couple of days as he was investigating the possibility of research at another university. We cannot find any trace of a response from Mr Pipe before he made a second application for progression a week later but what Mr Pipe did was to locate a supervisor and topic for a PhD (see (110)). Thus, the meeting envisaged by Dr Hides to discuss alternatives and for an occupational health referral to then ensue before the next progression round commenced did not take place.
- 92 In contrast to what he told Ms Walden in the contemporaneous email chain when asked before us what his objection to Dr Hides' further involvement was, Mr Pipe explained that Dr Hides was a close colleague of people against whom he was making the complaint and thus not independent. He explained that Dr Hides and Sarah Jones<sup>2</sup> were allies and had mutual interests; Dr Hides having appointed her. He alleged they had an unhealthy close relationship but did not explain to us why.
- 93 We find that is something Mr Pipe or his union rep. could and should have raised prior to the grievance appeal hearing. We were not pointed to any prior complaint to that effect.
- 94 Orally Mr Pipe gave us different accounts of his response to the outcome letter. On the one hand he told us *"I couldn't read it but can't explain why"*. Yet at other points accepted that he had read through it at some point through because he told us the *"unfortunate effect of the letter was that I found aspects of it hostile"*, *"something in it was an exercise in hostility"* and so for *"the benefit of my mental health I decided not to consider it"*.

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<sup>2</sup> She was the deputy head of school. She had left that role by January 2018 [SP1§117]



95 He commendably accepted before us that the passage of time meant that he did not feel that anymore. He accepted before us it was “*really good advice if set out in different context*” but was “*lost on me because of where and when it was*”.

96 When asked if he accepted Dr Hides was trying to help, Mr Pipe explained there was a problem with Dr Hides’ tone, that whilst he admired Dr Hides, Mr Pipe found him “slightly sinister” and the message conveyed was the right thing, but the wrong way. He explained that he thought Dr Hides’ conduct in the grievance appeal hearing was “inhumane” and the “positive advice came across as what kind of idiot are you”. He gave no explanation why he believed Dr Hides to be sinister.

97 Mr Pipe elsewhere accepted with the benefit of hindsight that Dr Hides was looking to assist him, and the context having been explained, when asked if what Dr Hides was suggesting was a holistic approach, he acknowledged that, that it went against his existing understanding and stated he had just understood the point.

98 We find that whilst with the benefit of hindsight, before us Mr Pipe accepted what Dr Hides was trying to do to assist, but that was not Mr Pipe’s view at the time, that skewed his view about not only Dr Hides, but the advice Dr Hides gave and the help both Dr Hides and the University were trying to give him. As a result, we find that Mr Pipe did not want Dr Hides involved any more notwithstanding the contrary advice from his chosen companion, Dr Matthews. Notwithstanding the University’s offer of alternative individuals to speak to, instead of taking up the course the University suggested Mr Pipe went out and found his own PhD supervisor, Dr Jim Clarke whom Mr Pipe subsequently accepted was a poor choice.

99 Notwithstanding his failure to take up that offer and advice Dr Garrett Brown escalated Mr Pipe’s 2018 progression application to faculty level despite what we find were her clear reservations about the business case. Those were not the actions of someone who was not trying to assist. We find the University were trying to engage with Mr Pipe as best as it could, but he did not do so. Mr Pipe told



us he did not consider and engage with Dr Hides' grievance appeal outcome because he could not engage with it.

100 Mr Pipe was a person who clearly knew his own mind and held very firm views. For instance, despite Access to Work ("A2W") subsequently making a number of suggestions Mr Pipe queried their merits; specifically, as to the suggestion of an Echo Pen he questioned why one was to be provided to someone who was inherently forgetful like him and thus could lose such a valuable piece of kit. Whilst he also questioned the practicalities of the training we find that was so he could understand what was on offer (see (159-160)).

101 Beyond that he made it clear to us that some of the views held by the University were wrong. For instance, he argued that a Head of School was not the best person to take a view of a business case because the Head of School would not be appraised of current thinking and thus areas of teaching that were deficient. He maintained that view even though he accepted he was not aware of budgets across the school, staffing levels, targets etc. Nor did he take into account that processes should be in play for those messages to be fed back from both internal and external mechanisms such as inspections, league tables, student surveys, one-to-ones and appraisals.

102 A further example of the way Mr Pipe sometimes viewed matters is his email of 28 January 2018 (see (73)) where he misconstrued Dr Hides' outcome. Dr Hides gave Mr Pipe *a choice* of how he wished to proceed and *an offer* of help if he wanted it. Mr Pipe misconstrued what Dr Hides said on a highly significant issue. We find that was because he had at best not properly read the outcome letter at the time or on one version of his account, at all (see (94)) and thus had not taken on board what Dr Hides told him.

103 The wider point we draw from the latter two examples are that where he was presented with a perspective in conflict with his own view, Mr Pipe was highly likely to reject it and the basis for it, even if objective evidence pointing to the contrary existed. A further, but for the purposes of this claim more fundamental



example of that mindset, was that Mr Pipe held the view that a traditional PhD was the only pathway on offer. We find that was not only not what Mr Pipe was being told by Dr Hides but the *Framework* itself referred to equivalents and the appointment of Ms Lambert provided some support for that.

104 Whilst we find that Mr Pipe did not perceive matters in that way at the time, the University genuinely wanted to meet with him to identify how he could best evidence that he could achieve the required standards for progression and to then refer him to occupational health to identify what support was required and could be made available for him. Further, Dr Hides suggestion of a meeting in January 2018 was made so matters could be put in progress in advance of the 2018 progression process.

105 As we state above Mr Pipe was commendably frank. The Judge's note of what he told us at the end of the second full day of his evidence (3 December) was thus:-

*"What coloured my thinking was my specialist Doctor said I can't do this [studying for a PhD] and all way through coloured by that – why am I being pushed down this route".*

106 We find that the perspective from which Mr Pipe viewed the way the University was behaving thereafter was through the prism of a negative view of Dr Hides and that Mr Pipe considered a traditional PhD was the only route available required when the actuality was otherwise. . Had Mr Pipe looked beyond that he would have seen that was so.

107 Before we move on we return to the Mr Pipe's contention that a traditional PhD route was against the advice of Mr Pipe's consultant.

107.1 The first principal difficulty with that contention given the evidence before us, was that at that prior to 1 October 2019, the only advice that could refer to was the July 2017 advice of Dr Zaiwalla (see amongst others (53 & 62)). We found that advice was based on what Mr Pipe had told Dr Zaiwalla he believed he was being asked to do to progress. It was unclear if he had



appraised her of his academic background and current role or if her advice was temporal. As subsequent events showed we find that a PhD was not necessarily the route the University wished to go down. What it wanted to do was to meet with him to discuss if a PhD or alternatives were available, and having discussed that, to take OH advice on those matters. Any such comment from his physician was thus in our judgment based on a false premises namely (1) that a PhD, whatever his physician Dr Zaiwalla understood by that, was the mechanism that was open and that was suitable and/or (2) that he had appraised her of his academic background and current role.

107.2 The second principal difficulty was that Mr Pipe did not fully engage in that process availing himself of the help offered by the University and as recommended by Dr Matthews, instead he went out and amongst other matters instead embarked on his own course.

107.3 The third principal difficulty is that at certain times the Claimant stated to the University he wished to consider the PhD route and indeed he went out and located a supervisor for a PhD, Dr Jim Clarke (see (133)). Whilst Dr Clarke was someone whom Mr Pipe accepted before us, that was not the best choice to carry out that role Mr Pipe deserves credit for locating a supervisor as the subsequent events and in particular the additional progress his 2018 Progression Application made beyond those in 2017 demonstrate.

### **The 2018 Progression Application**

108 The University's progression policy was amended in 2018 to require applicants to demonstrate achievement and potential in three (rather than the previous two) out of four areas of activity.

109 On 12 March 2018 Mr Pipe made a second application for progression [596-606].



110 Within his application Mr Pipe stated that he secured a PhD supervisor and topic, had abstracts accepted for an international conference, had become the grade 7 HPL and sought to address the feedback from the previous year [602]. The application also stated that following tests in 2017 he had stopped working towards starting a PhD [603].

111 Mr Dawkins, Mr Pipe's line manager's comments started *"Although this is quite a poorly-written application, his previous lecturing experience, continuing professional development and his research activities provide evidence of his ability to work effectively at Grade 7 level."* Mr Dawkins went on to say that with the appropriate support and encouragement he had no doubt that Mr Pipe would be able to function well at grade 7 [604].

112 Unlike in 2017, Mr Pipe's head of school Dr Garrett Brown supported the application. Her rationale was as follows:-

*"Since his last progression application Simon has been working with his Research mentor to develop a pathway towards PhD study through a consolidation of his existing practice and research. His work in the teaching and learning sphere as an AL has demonstrated Simon's ability to operate at an L level in the classroom. He has supported the new course roll out including the law modules and adoption of the mobile journalism ethos. As an L member of staff he would continue this work alongside assuming ownership of module leadership, as appropriate, for modules within all courses including the incoming BA International Communication*

*As an existing 0.6 AL member of staff Simon is supporting BA and MA Journalism teaching. In addition to the increase in salary scale there would potentially be additional hours required at AL level to backfill the teaching and learning support activities which do not sit under the remit of a L level member of staff."* [605]



113 The application was considered at faculty level. It was rejected on 2 May 2018. The rationale for the rejection was as follows:-

*“This application for progression demonstrates some significant progress over that of last year. There is a clear demonstration of some areas of excellence in teaching and learning and the capability to operate at the higher level in that respect. The application and the managers comments indicate that the research agenda is now better understood; however, the activities and outputs listed do not yet form the basis of a coherent research direction and can’t as yet constitute research activity at the expected level. Finally the evidence under leadership and management are not constructed so as to make a convincing case. As an overall observation the application would benefit from some editing and revision — it is not coherent and persuasive as it needs to be and it includes comments that are not relevant to this process.” [605/606]*

114 In addition to that rationale the application form required responses to two further questions :-

*“Recommendation to proceed to University Moderation YES/NO*

*Confirmation of budget availability YES/NO”*

115 Both responses were completed in the negative.

116 In this case responsibility for that decision rested ultimately on the Academic Dean of the faculty. That was Dr Hides. He made no reference to that decision in his witness statement.

117 The claimant was provided further feedback in relation to that application and met with Dr Garrett Brown and Mr Dawkins on 21 May 2018 [SP§130 & 132]. During that meeting Mr Pipe accepted he had been promised support to make a case for applying for progression under the Enterprise category.





118 The data recording progression application outcomes for 2018 shows no applications for progression from grade 6 to grade 7 were rejected at the head of school stage across the University. Mr Pipe's application was the only one considered within his faculty in 2018. Given it was rejected no applications from the faculty were escalated for moderation at university level.

119 Across the University of the 11 applications for progression from grade 6 to grade 7 that were considered at faculty level, 8 were rejected. Two out of the three applications that were considered at University level were successful. Again, that is potentially misleading on the basis that the "unsuccessful" application of was withdrawn because the applicant had secured a promotion elsewhere.

120 On 26 March 2018 Mr Pipe's GP, Dr Sue Pritchard wrote a letter addressed "To whom it may concern":-

*"This is to confirm that Simon Pipe suffers from a sleep disorder for which he is under the Churchill Hospital. His initial sleep studies gave a diagnosis of delayed sleep phase syndrome, however recent sleep studies did not confirm this diagnosis but showed very disturbed night sleep. His average sleep time was approximately 3 hours 45 minutes. This obviously gives him marked impact in difficulty functioning during the day time due to extreme tiredness. It can massively affect his concentration and he can find it very difficult to organise himself at times.*

*I understand that he is currently in the process of studying for a PHD and obviously his issues with his sleep does impact on his ability to study for prolonged periods." [891a]*

121 On 2 July 2018 Mr Pipe was assessed by Dr Sharp, a clinical psychologist, to exceed the diagnostic criteria for ADHD and that a further clinical assessment was needed to consider a formal diagnosis [SP1§136].

122 On 12 September 2018 Mr Pipe was called at home by Mr Ben Falk, who had recently been appointed the new course director for BA Journalism, as a matter of



courtesy to inform him that his job share, Lisa Perry, had been made a lecturer [SP§137-9]. She had applied for one of two part-time externally advertised vacancies created by the departure of Dr Bianca Wright to another course in the school. We heard that Ms Perry and Ms Una Murphy were both appointed without doctorates or being required to embark on PhDs once in post and neither had either published research [137-9]. Mr Pipe also complained that despite the school management knowing he was keen to gain a grade 7 role he was not made aware the posts had been externally advertised although he accepted he had not watched for the advertisements because he had been told that the new roles involved expertise far removed from my own. No complaint was made before us regarding that process.

- 123 A PhD in an appropriate subject “or equivalent professional qualifications that might be considered as equivalent to a PhD.” were listed as an “essential” requirement for both jobs, yet both Lisa Perry and Una Murphy were both appointed without doctorates or, indeed, published research. Mr Pipe asserts neither was required to embark on PhDs once in post. Insofar as that is relevant in our view that supports rather than detracts from the University’s position that it was prepared to take into account equivalent qualifications.

**Formal ADHD Diagnosis**

- 124 On 1 October 2018 Mr Pipe advised his line manager, Mr Dawkins of his possible ADHD diagnosis [609]. He was formally diagnosed by Dr Bescoby-Chambers, Consultant Psychiatrist on 10 October 2018. It was not in dispute that this was confirmed to the University a few days later [611].

- 125 Having addressed certain diagnostic criteria scores Dr Bescoby-Chambers said this

*“It appears that throughout most of his life organization and planning has been a real problem. He can’t organise himself to get started on projects and tends to leave things till the last minute even with the best intentions. He gets distractable and goes off in different directions and this leads to ongoing*



*difficulties at work ... He had a recent performance review and he has been all left feeling that the Dean does not like him and he believes he has been overlooked at work because of the difficulties that he faces as a result of his [ADHD]. ... [He] still has capacity to impulsively do things ....”*

126 What is unclear is whether Dr Bescoby-Chambers’ report 22 October [892-894] which was addressed to Mr Pipe’s GP was copied to the University and if so when.

127 In either December 2018 or January 2019 Mr Pipe was informed that he was to be allocated a HPL grade 7 role teaching a module on media law and ethics in addition to his first year teaching. That equated to approximately three hours teaching per week. Whilst Mr Pipe states that he was told that the teaching was all set up the materials were out of date, and he had to undertake a considerable amount of work to prepare the course [SP§144-5].

128 In early 2019 Mrs Nicholson was appointed as the Faculty’s People (HR) Advisor taking over the role previously occupied by Ms Burdett (and others). Mrs Nicholson was line managed by Ms Jennings who we were told fulfilled a more “strategic” role than she did, whereas Mrs Nicholson was more “operational”. Ms Jennings was in turn line managed by Ms Walden.

129 On 14 January 2019 Mr Pipe informed Mrs Nicholson of his ADHD diagnosis and that his consultant had advised he should be using the EqA to address his work situation. He sought that his 2018 progression application be reconsidered as a reasonable adjustment in light of the diagnosis on the grounds that the condition would have had “*a significant impact on my ability to meet the requirements set out in the progression system*” [618-620] and made it clear he did not want Dr Hides to deal with the application, preferring it to be dealt with outside the faculty.

130 On 30 January Mrs Nicholson responded to Mr Pipe [624] to say the progression application had been considered on merit and it was not possible for it to be reviewed. She suggested in the light of the upcoming progression process Mr Pipe might wish to discuss with and get feedback from his line manager at an early



stage. Given he had been granted an extension to make his progression application in 2018 she suggested that it might be possible for that to be repeated in 2019. She went on to indicate the given Mr Pipe's recent diagnosis there was merit in an occupational health referral being made to the advice and guidance on potential changes and adjustments regarding his disability.

131 There followed an exchange of emails between Mr Pipe and Mrs Nicholson in which Mr Pipe questioned Mrs Nicholson about a comment Mrs Nicholson made in her email of 30 January about how she had liaised with her line manager, Ms Katie Jennings as to how the progression process worked. Mrs Nicholson having addressed that, Mr Pipe agreed to an occupational health referral. It was agreed that on receipt of the advice from occupational health and it would be discussed with him [622-624].

132 On 1 March Mr Pipe again emailed Mrs Nicholson to say that he had received what he described as an offensive and possibly discriminatory leaflet from the city council alongside a letter informing him that he had been allocated an occupational health appointment at a time he was meant to be teaching. He queried how the occupational health advisor would be likely to know about his condition and whether an occupational health assessment was appropriate [626-627]. Mrs Nicholson replied on 5 March [628] allaying Mr Pipe's concerns because later that day he thanked her and indicated he would make a further attempt to contact occupational health. We return to the occupational health referral and its outcomes below (see (135)).

133 On 7 March 2019 there was an exchange of emails between Mr Pipe and Dr Clarke [638] in which Mr Pipe explained he had secured an extension to the period to apply for progression but acknowledged it was unlikely a business case could be made because of falling student numbers. Mr Pipe offered to teach media law to Dr Clarke's course. Dr Clarke responded saying there were various problems with that suggestion and it was clear from his reply that whilst at that point Dr Clarke's own course would be running the following year, its future the year after was uncertain again due to falling numbers. Dr Clarke indicated he had decided not to



apply for progression. No mention is made in that exchange of Mr Pipe's PhD and Mr Pipe indicated to us it had "fizzled out" at some point but that he could not recall when. We find it *fizzled out* by then because no mention of it was made either in that exchange or Mr Pipe's subsequent application for progression.

- 134 That exchange supports the University's assertion that there was no business case for progression in 2019 which is what we turn to next.

### **The 2019 progression application**

- 135 On 25 March 2019 [641-649] Mr Pipe made a further (third) application for progression. Within that application amongst other matters Mr Pipe stated he had been offered help to meet the requirements for progression through the enterprise route, but no such help had materialised. Dr Dawkins was not specifically challenged on that. Mr Pipe also refutes that enterprise was a viable alternative route.

- 136 Dr Garrett Brown determined that progression application on 1 April 2019 although Mr Pipe was not informed of the outcome until 30 August (see (148)). Having referred in her rationale [651] to Mr Pipe's positive contribution to the teaching and learning of Journalism, the strength of results, the particular expertise Mr Pipe brought to those areas and identified that Mr Pipe had demonstrated ability to operate at grade 7 in terms teaching, she continued

*"... At this Point however the application cannot be supported as Simon's research profile is not yet in line with the academic role descriptor for grade 7 nor is their evidence of a clear pathway to PhD or equivalency underway.*

*From a business case-perspective We are unfortunately not currently able to support a growth or extension of level in the staff base with Journalism due to falling application numbers which indicate a smaller student cohort for 19—20 intake. (Applications have fallen from 196 in 2017-18 cycle to 119 in 2013-19 cycle). The School leadership team are working with Faculty to*



*devise growth plan for Journalism I with a view to opening up progression possibilities in the future.”*

**The 2019 occupational health referral**

137 Mr Pipe was referred to Occupational Health who provided an initial response [655-658] on 17 April 2019 [657]. The University’s occupational health advisors obtained Mr Pipe’s consent to seek replies from Mr Pipe’s treating consultant, Dr Bescoby-Chambers for information and clarification on his condition, and amongst other matters how that could be better managed going forward.

138 Dr Bescoby-Chambers provided a response on 17 July 2019 [900-902]. It explained the impact of Mr Pipe’s ADHD upon him. A final occupational health report, incorporating the input from Dr Bescoby-Chambers was provided on 15 August 2019 [661-662] confirming the ADHD diagnosis and recording that Mr Pipe had seen some minor improvement in symptoms as a result of the medication he was taking. It recorded an increase in the dose was to be considered at the next review.

139 The impacts of the ADHD on Mr Pipe’s daily life were outlined as including difficulties with concentration (leading to distractibility), organisation and planning (which could affect task completion including trying to plan and write up research timeously), misplacement of items, prioritisation (such that it was important that the University clearly demark his role and tasks and not assign difficult or complex tasks to him at short notice).

140 The report recorded

*“Simon has suggested, that he be considered for promotion outside of the normal process to a non-research university teaching role which Mr Pipe states exists at a number of universities (I am unable to give an objective view in this). This might also be considered a reasonable adjustment. His consultant has advised that it is ADHD that makes the normal routes difficult for him.”*



and regarding the issue concerning demarking his role that Mr Pipe be

*“... offered by a secure teaching role appropriate to his qualifications. He feels that his disabilities have prevented him from securing a substantive lecturing post. Given the difficulties he reports to have faced at work as a result of his underlying neurodevelopmental condition he has felt an impact on his mood, causing depressive symptoms as a consequence.*

*His consultant notes that the pressure placed on him by the suggestion of completing a PhD would have a significant impact on someone with ADHD. Due to deficits in some of the skills that are often required to complete a PhD successfully, it would be extremely unlikely that Mr Pipe could complete the task without a significant impact on his mental health. His consultant has advised that he does not think that this is achievable for him.”*

141 The report went on to identify that Mr Pipe’s consultant advised that there were several things that could be done to assist and advised a meeting with Mr Pipe be arranged to discuss what he felt would be beneficial for him.

142 On Wednesday 28 August Mrs Nicholson and Mr Pipe met to discuss the occupational health report. The day after their meeting Mrs Nicholson emailed Mr Pipe providing links and names that might help with the issues he had raised [671]. They included links to the University’s coaching academy, its doctoral college, its academic development team (giving the name of someone he could contact), the names of the two faculty learning technologists who might be able to help and the details of A2W who she said were “*great at offering the right support in work*”. She stated she would set up a meeting with Mr Dawkins to see what support the school could offer.

143 Mr Pipe told us that during that meeting [1§165] he discussed potential PhD subjects with Mrs Nicholson and suggested doing one based on his 20 years’ experience in traditional performance dance. Whilst he did not say this during their meeting he told us he subsequently came to view that Mrs Nicholson’s



encouragement for him to seek support for doing a PhD was a grossly irresponsible response in the light of the report warning of the serious health risks of his attempting a “probably unachievable” doctorate. He states he pointed that out in the subsequent emails.

144 It was not until two days after their meeting (Friday 30 August) that Mr Pipe was emailed by Dr Garrett Brown with the result of the 2019 progression application (see (148)).

145 There followed an exchange of emails between Mrs Nicholson and Mr Pipe that continued to 20 September [667-72]. Those emails suggest that Mr Pipe was concerned that his viewing the result of the 2019 progression application would cause him disturbed sleep over the weekend and he needed to be able to concentrate so he decided not to read the outcome email until the following Monday, 2 September.

146 By 3 September the email chain suggests [669] Mr Pipe had drafted a note of the meeting [663-5] albeit that note was undated and was not sent to Mrs Nicholson. Mr Pipe’s draft note of the meeting started *“I said that I was in my current position — which did not reflect my knowledge, skill, experience or qualifications — because I had a disability. ...”*.

147 That email chain also makes plain that Mr Pipe contacted A2W and had tried to contact the doctoral college website and associated sites but couldn’t see how to contact them. Mrs Nicholson later provided Mr Pipe with the name of a contact at the doctoral college - Carolyn Wynne [667-8]. Mr Pipe continued :-

*“On the basis of your encouragement to investigate a PhD, I have done some reading around and enjoyed it, but this has simply added to the number of things I have to think about and aggravated my problems with focus. I will still talk to the college if I can, but it’s not looking promising. I have had sick days last week and this following the rejection of my progression application. I am*





*functioning very badly; as mentioned above, my mind is swirling. My line manager is aware ...”*

**The 2019 progression application outcome**

148 On 30 August Mr Pipe was informed by Dr Garrett Brown by email [666] that his application for progression was unsuccessful. She offered to meet with him to discuss the areas of strength and those that require development for future applications.

149 Mr Pipe accepted that at no point did he take up Dr Hides January 2018 offer of a discussion (see (61)). Nor did he take up Dr Garrett Brown’s offer to meet with him although in part he told us that was because he was not well at the time, and partly because he emailed Mr Dawkins rather than Dr Garrett Brown and in Mr Pipe’s words Mr Dawkins not unreasonably replied that he would be happy to come along leading to a misunderstanding who would set up the meeting. Dr Garrett Brown left the University at the end of September and as a result of the misunderstand Mr Pipe accepted that meeting never happened.

150 In 2019 there were three applications for progression from grade 6 to 7 within the Faculty of Arts and Humanities, all were rejected at the Head of School stage because there was no business case. Accordingly, none were considered at Faculty level. Across the University there were 27 applications for progression from grade 6 to 7. Nine were rejected at the Head of School stage, four rejected at the faculty stage and 12 of the 14 that were escalated to the University level were successful.

151 On 18 September 2019 Dr Bescoby-Chambers wrote to Mr Pipe’s GP [903-4] following a consultation on 13 September stating that Mr Pipe was *“just not organised enough”* to be able to complete a PhD *“even with effective treatments”* and *“I have also suggested that he look at his pensions and whether he can retire on the grounds of ill health.”*

152 Within the bundle there was a fit note dated 20 September 2019 [682] setting out adjustments which included Mr Pipe undertaking a phased return to work on



amended duties between 20 September and 1 November; those amended duties appear to entail Mr Pipe focusing on the MA course, working in an alternative part of the University and identified that was because of mental health issues arising out of his career progression. No issue was raised before us that those adjustments suggested were not undertaken.

153 On 26 September Mr Pipe sought copies of his previous progression application forms with managers comments endorsed [688-9]. That was treated as a subject access request by the University. Copies of the 2018 and 2019 progression applications were provided on 20 November 2019 although the 2017 application form was not supplied.

154 The 20 November 2019 was also the earliest possible date for Mr Pipe to present a claim in time without it needing to form part of conduct extending over a period or Mr Pipe needing to rely upon any exercise of discretion by the Tribunal.

155 On 8 October 2019 A2W reported [699-707]. A2W's recommendations were :-

155.1 A Livescribe Echo pen that could record meetings and transcribe notes using voice recognition technology

155.2 a half-day of training on its use

155.3 Ten two-hour coaching sessions on coping techniques

155.4 Two three-hour "co-coaching" sessions with a neurodiversity coach, for Mr Pipe, his managers and close colleagues: mediated discussions to improve communication and understanding of his condition

155.5 Disability awareness support in the workplace for Mr Pipe's close colleagues and management to better awareness of ADHD and communication

156 Within the bundle was a further GP fit note dated 31 October [708] that required adjustments in the form of amended duties between 31 October and 17 January



2020. The adjustments required the continuation of the recommendations from the previous fit note together with Mr Pipe undertaking light organisational duties. The sicknote referred to the reason for its issue as ADHD & sleep problems.

157 Mrs Nicholson, Mr Dawkins & Mr Pipe met on 13 November to discuss the A2W report's recommendations. There followed an exchange of emails between Mr Pipe and Mrs Nicholson that continued until 25 November [713-716].

158 On 14 November 2019 under the subject "*ADHD training session*" Mr Pipe emailed Mrs Nicholson and Mr Dawkins expressing concerns that the discussion the previous day had suggested dropping or cutting neurodiversity coaching.

159 Mrs Nicholson responded on 18 November stating the purpose of the discussion was to explore if there was a bespoke approach to communicating the information regarding his condition to the team such as a facilitated discussion at a team meeting that might be more directly relevant than wider training. The context to that was that Mr Pipe had stated that he felt half a day of training was a lot for staff to attend and Mrs Nicholson acknowledged that diaries were very busy. She made it clear she thought it would be useful to have a further discussion but there was no reason why the training should not be run if Mr Pipe felt that would be the most useful way of addressing the issue and she was keen to reach a solution he was happy with. She stated that whilst the recommended training was aimed at Mr Pipe's immediate colleagues she was happy to attend if her diary allowed. She stated she would discuss matters with Mr Dawkins who would need to liaise with the faculty administration team to raise the relevant orders flowing from the A2W report. She also stated she had investigated the Echo Pen and that buying the pen was necessary for the training to take place. She asked if he wanted to move forward with buying the pen because he had said he was unsure if he would lose it. Mr Pipe acknowledged before us that was a concern for him.

160 Mr Pipe reverted the same day stating he was planning to go back to A2W to query the team training and the difference between that and co-coaching, that he thought four hours was a big ask, given the way University staff worked, that it



was something to explore, but expressed a concern if people would turn up? As to the Echo Pen he asked her to hold off ordering it as he again needed to investigate that but would not be able to do that for a day or two.

161 Mr Pipe did not respond in that time. Instead, a few days later on 22 November he initiated early conciliation.

162 On 25 November 2019 Mr Dawkins emailed Mr Pipe asking “*Have you made any decisions about this yet? What do Carmen and I need to do next?*” [713]. Mr Pipe told us [SP1§186] that his recollection was that he verbally gave the full go-ahead. In contrast in Mr Pipe’s email of 13 December, he emailed Mrs Nicholson about the Echo pen and the training for it [742-4] but made no mention of the other training.

163 If Mr Pipe had verbally given for the full go-ahead concerning all the A2W recommendations his email of 13 December would have been unnecessary and on balance he would have also mentioned that in his subsequent email of 3 February 2020 (see (169)). He did not. We find Mr Pipe did not confirm his view to the University on those matters until 13 December and that was limited to the Echo pen and the training for it.

164 It was not in dispute that the Echo Pen was subsequently provided albeit there was a delay concerning that. We find that was because of the Christmas break, and then Mrs Nicholson was absent for some time in the early part of 2020. We note this was also prior to the first COVID lockdown at the March 2019.

165 In the interim Mr Pipe made a request that the University make reasonable adjustments. Although the body of Mr Pipe’s email [736-739] is dated 27 November it was actually sent on 28 November 2019 [740] Mr Pipe having initially omitted to send the attachment [741]. Within that exchange Mr Pipe indicated, if it helped, that could also be treated as a grievance.

166 Mr Pipe argued this was met with no response [740] elsewhere accepted the grievance was acknowledged but that no action was taken upon it and further that he was asked to re-submit it on the standard form [§190].



167 Mr Pipe later formally lodged a grievance on 10 January 2020 [747-754] that repeated in full the content of the request for reasonable adjustments and that the University “... ***consider*** promoting [him] to grade 7 without going through the normal progression system, ideally to a teaching role with no research requirement, as a reasonable adjustment under the Equality Act 2010” ***[our emphasis]***.

168 In the interim on 5 January 2020 early conciliation concluded.

169 On Monday 3 February 2020 Mr Pipe chased action on the A2W recommendations [767] stating “I’m concerned that perhaps I was supposed to do something to get things moving. If so, I don’t know what.” He acknowledged whilst things were moving with the grievance he was holding things up because he was having to concentrate on media law. The same day Mr Pipe told us that he consulted lawyers [SP#2§11].

170 About this time Professor Foster was appointed to hear Mr Pipe’s grievance. Between August 2013 and February 2020, he was Head of School for computing electronics and mathematics. He is now an Executive Director of what is now the University’s centre for computational science and mathematical modelling. That is one of the research centres that form part of the University but are outwith the four faculties. Mr Pipe raises no issue concerning Professor Foster’s independence.

171 On 7 February Mr Dawkins was interviewed by Professor Foster as part of Mr Pipe’s grievance [768-770]. The same day Mr Dawkins replied to Mr Pipe’s email of 3 February apologising for the delay in replying, stating he would chase it up [766].

172 Mr Pipe then commenced a period of sickness absence that continued from 6 February to 23 April 2020.

173 On 13 February 2020 Mr Pipe had an appointment with Dr Hassan, a psychiatric registrar concerning his ADHD [923-4]. Mr Pipe told us he decided to follow up on Dr Bescoby-Chambers’s previous suggestion of “early retirement” to the BBC



pension fund. Nine days later his GP, Dr Pritchard, provided a letter supporting that application to the health advisors tasked with assessing that request [925-6].

174 On 11 March 2020 Professor Foster chaired Mr Pipe's grievance hearing. Mr Pipe was not accompanied. Louise Hopkins of the University's people team was present. The meeting was minuted [777-782]. The date Mr Pipe annotated the minutes was not identified but they too were before us [807-820].

175 One section was of particular relevance. Adopting Mr Pipe's annotated version:-

*"SP referred to the requirement for a PhD; he knows in reality they bend it to be on a pathway towards a PhD. But the logistics to get his act together to find out how to do a PhD "has actually defeated me". ..."* [810]

176 When he was asked about that before us just before lunch on the third day of his evidence he said that meant that an applicant needed to be more than just signed up for a PhD and in Ms Lambert's case she did not have a PhD, appeared to suggest she was studying for one but there was no pressure to do that.

177 On 23 March 2020 the Covid 19 pandemic national lockdown commenced.

178 On the 26 and 27 March Professor Foster interviewed Paul Smith Acting Head of School - Faculty of Arts & Humanities (Doctor Garrett Brown's successor) and Shane Walker (associate head of School - Enterprise & Innovation) as part of his investigation of Mr Pipe's grievance via *Microsoft Teams* calls. Both interviews were minuted; respectively [783-785] and [786-787].

179 The claim form that gave rise to this claim was presented on 3 April 2020.

180 A further occupational health advice was dated 29 April 2020 [804-806]. That appeared to relate to Mr Pipe's absence between 6 February and 23 April. It recommended that a phased return would be helpful to Mr Pipe, who was benefitting from working shorter hours, that his hours be gradually built up, recorded that there were no imminent issues and that he was fit to attend to work. It referred to a request from Mr Pipe to be promoted outside any formal process



as a reasonable adjustment and recommended that this was discussed further with him.

181 On 20 May 2020 Mr Pipe was provided with Professor Foster's grievance outcome via a video call. The outcome was confirmed by letter [828-829] & DF§10 & SP§201-202

*"I found strong evidence of the Claimant's ability to teach and prepare material and assessment at the required level for a grade 7 position, however at that time there was no substantive position at grade 7 which was a 'teaching only' role. Having reviewed the Claimant's application, I was satisfied that it did not demonstrate the variety of skills at the higher grade required for progression to the grade 7 academic position (which is a position which incorporates not only teaching but other academic obligations). There was no option available for the Claimant to carry out a grade 7 teaching-only role.*

*I could see that the University had made significant efforts to support the Claimant. They had done this both in supporting the writing of his application and also, on a wider basis, in discussing possible ways of broadening his skill base to be able to progress in the future."*

182 Mr Pipe alleges that towards the end of the video call, Professor Foster made a comment that he had asked to be allowed to employ lecturers on teaching-only contracts and had been told he could not do so because of an agreement that prevented Universities post-1992 from doing so.

183 On 16 June 2020 Mr Pipe submitted a final request for reasonable adjustments to be appointed to a grade 7 teaching focused role after learning this information [836-837].

184 Ms Jennings rejected this request on 9 July 2020 stating that the University's position was that it did not consider promotion to grade 7 outside the academic



progression process, that its decision was final and asked him to desist from making further requests [850-851].

185 On 21 August 2020 Mr Pipe resigned by notice effective on 20 October 2020. For completeness we should record that there was no complaint of (constructive) unfair dismissal before us. We set out an extract from Mr Pipe's witness statement giving the reasons for his resignation at (1).

186 Mr Dawkins, someone who Mr Pipe told us he valued, told us that

*"33. I went through the promotion process several times with the Claimant, offering support and encouragement throughout each occasion. Whilst I do think that the Claimant was a loyal, hardworking member of staff and he could have done parts of the role well I do believe that the process followed in deciding whether he was suitable for progression was ultimately a fair one. The system for progression is, in my opinion, not a perfect one but the Claimant's applications for progression were dealt with in exactly the same manner as anyone else applying for progression. In my opinion, he was not disadvantaged by the process and his applications did not progress for valid reasons.*

*34. There were two key routes to progression, PhD or Enterprise routes. Both were open and available to the Claimant and he could have done either if he'd wanted to do so with adjustments to the process. He would have found a PhD challenging – it is a challenging process for anyone. He would however had access to support from me and the wider School team. My view was that the Enterprise route would have been better suited to the Claimant and whilst this would have been challenging in different ways he would have also been able to do this. At the University, we have many students who require adjustments who succeed (with adjustments) to achieve their ambitious academic objectives. We work with them to make sure the process is accessible to them. It would have been the same for the Claimant had he elected to stay and progress with us."*





187 Having heard all the evidence and viewed matters in the round we find that embodies what we find the respondent was trying to do, to apply a consistent system for progression. That does not mean the system was perfect or one where the same requirements could be or were applied across different faculties; that was not appropriate due to the different nature of the subjects taught in them. What was being sought was a consistent approach. How that was interpreted we heard was subject to some latitude and ultimately was moderated at the University level.

188 One of the difficulties for Mr Pipe with some of the assertion he makes in that regard is that he does not appear to have engaged with the body responsible for overseeing the University's standards, its doctoral college.

189 Fundamentally, what Mr Pipe was seeking was the creation of a role for him at Grade 7 that did not include the normal research and administration responsibilities that a Grade 7 role would entail. Mr Pipe envisaged that the role he wanted to be created would include aspects of the Grade 7 role such as responsibility for leading, creating and marking modules. As Dr Garrett-Brown made clear in her annotation on the 2018 progression application teaching and learning support activities alone did not sit under the remit of a Grade 7 Lecturer [605].

190 Essentially what Mr Pipe was seeking was the creation of a hybrid role outside the University's structure and he made a business case for that based on the limited additional cost to the University taking into account the existing hours Mr Pipe undertook as both a 0.6 assistant lecturer and HPL.

191 Whether Professor Foster was correct in what he told Mr Pipe in their call or not (see (182)) we find that the role specification for full time Grade 6 & 7 posts at the University identified a substantive difference between Grades 6 & 7 in that whilst Grade 6 was essentially a teaching role, Grade 7 was a far wider role and the additional requirements Grade 7 encompassed skills required to undertake both the teaching and administrative aspects of that role.



## OUR FURTHER FINDINGS & CONCLUSIONS

### Generally

192 Given that any proportionality assessment of legitimate aims necessarily requires a consideration if there was a failure to make reasonable adjustments we address Mr Pipe's reasonable adjustments complaints first.

### Adjustments – Knowledge

193 It was denied by the University that it had actual/constructive knowledge of the substantial disadvantage prior to being advised of Mr Pipe's ADHD diagnosis in September/October 2018 and thus it denies that the duty to make reasonable adjustments arose prior to then.

194 It was not disputed that by 2016 Mr Pipe had declared to the University he had a sleep disorder. It was not dispute that in his 2015/2016 Development and Performance Review of 26 August 2016 (DPR) that he had alleged the impairment impacted on his health through fatigue [433m] and he sought that he be promoted to a lecturer. He described in the DPR that he had also applied to go part time to create space to develop a career in another field in which his *“very strong skills and experience might be valued”*. Mr Pipe described the impairment in a meeting with Ms Burdett (and Simon Smith) on 18 November 2016 as an *“unspecified sleep disorder”* [438-440].

195 There was thus an issue before us as to what that disorder was, its effects and what Mr Pipe had told the University about that.

196 As to the latter Mr Pipe was assessed on 10 June 2011 whilst still working at the BBC by its occupational health advisors ([872-874] and see (14)). Mr Pipe did not allege before us that he had disclosed that to the University. Indeed, Ms Super's grievance outcome of 29 September 2017 [518-521] said this:-



*"I then asked you some questions regarding your grievance to gain a clearer understanding of the situation. I asked you who you had declared your condition to and you replied that you could not remember exactly. You said you had told the disability office when you were a student and that you had had the condition all of your life, but had only recently received a **full diagnosis**. You also indicated that you were still finding out the impact of the condition and working out how it affects you. **You stated that some of your lecturers had known whilst you were a student.** You also said that on previous applications you had been told to not disclose your disability.*

*However, you did declare it for the role you have now which is an Assistant Lecturer. You have had this role since 2013."*

***our emphasis [518-519]***

197 Our reading of her outcome was that Ms Super made no definitive finding on that issue. Instead, she was merely recording what Mr Pipe had told her. That related to what Mr Pipe referred to as the misdiagnosis of sleep apnoea in 2014 (although he continued to undergo further tests into 2017 [SP1§6]). He told us it had been difficult to arrive at a clear diagnosis.

198 The **full diagnosis** Mr Pipe referred Ms Super to, was not of ADHD but the advice of Dr Zaiwalla of 10 July 2017 which identified a sleep disorder. The effects of that were:-

*"... an impact on his daytime functioning. with in particular difficulty in planning and organisation and retaining information in addition to constant tiredness. Treatment options are being considered, but this sleep disorder can be difficult to treat especially when compounded by stress. In view of the severity of his sleep disorder he will find it very difficult at present to successfully work towards achieving a higher degree."*



199 Whilst Mr Pipe was assessed as exceeding the diagnostic criteria on 2 July 2018 he was not ultimately diagnosed with ADHD until October 2018 [892-894]. He informed the University of that in October 2018 (see (121 & 124-126)).

200 That was later confirmed by a further Occupational Health advice in August 2019 [661-662] which in turn followed the provision of a note dated 17 July 2019 from Dr Bescoby-Chambers [900-902

201 We are not concerned with the label applied to him nor do we need to decide if there were any substantial (non-trivial) adverse effects on his ability to undertake normal day to day activities because disability is conceded. What is not conceded was whether the University knew, or could reasonably be expected to know, that Mr Pipe had a disability and in the case of the adjustments complaints, if he was, or was likely to be, placed at a substantial disadvantage.

202 The EHRC Code at ¶5.15 (which concerns the s. 15 EqA test) states that is not enough for an employer to show that they did not know that the disabled person had the disability and in relation to reasonable adjustments the Code adds at ¶6.19 “... and is, or is likely to be, placed at a substantial disadvantage”. Both go on to state that an employer must do all it can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances and that is an objective assessment.

203 An example is given in the EHRC Code in the case of the test for adjustments:-

*“6.21 If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that*



*information together to make it easier for the employer to fulfil their duties under the Act."*

204 Thus, at the time of the first Occupational Health advice obtained by the University in March 2017 (see (45)) Mr Pipe's condition was misdiagnosed by his treating physicians and the occupational health advisor was "*unable to say*" if Mr Pipe fell within the definition of disability within the EqA. Whilst some adjustments were recommended, promotion outside the *Framework* was not suggested and those that were did not include the adjustments now sought.

205 Dr Zaiwalla had identified by the time of her assessment of 22 June 2017 and her letter of 10 July 2017 that Mr Pipe would find it very difficult "*at present to successfully work towards achieving a higher degree*". As we say above that appeared to be based on the premises we set out (107.1) and we identify the difficulties that gives rise to at (55). After that advice amongst other matters the University sought to engage with Mr Pipe as to what alterations could be made to the *Framework* to facilitate his progression. We found he did not engage in that process to the extent he should because he had formed a view about it. Absent that engagement and/or the full medical diagnosis the University could not and in our view should not be seized with knowledge of the disability; it had done was what reasonable to appraise itself of Mr Pipe's medical position and the disadvantages it caused and latterly he had failed to fully engage with that.

206 We find the University neither knew nor had actual knowledge of the disability or of the disadvantage prior to September/October 2018.

207 Those findings aside we address the remaining substantive issues.

### **Adjustments - promotion**

#### ***The PCP***

208 It was accepted a provision, criterion or practice, the *Framework* ,was applied:-



“... that applications from Grade 6 assistant lecturers to be promoted to Grade 7 lecturers in the Academic Framework Progression Process would be determined in accordance with the requirements of the Academic Progression Process.”

- 209 It was in issue what the *Framework* entailed.
- 210 We found the *Framework* was introduced to harmonise internal progression across the University as a reflection of the University’s aim to maintain and indeed increase academic standards.
- 211 The *Framework* required a demonstration of academic standards and within that peer reviewed research or learning, whether it be theoretical or practical. That was because that demonstration of academic standards was considered a prerequisite of the demonstrating the ability to teach.
- 212 Whilst the *Framework* formally required a PhD or exceptionally equivalence (see (31)), we heard that Ms Lambert was successful in her progression application despite not having obtained a PhD at the time (see (40)). There was a difference over what stage that she had reached (see (41 & 176)). Mr Dawkins lacked direct knowledge but told us that Ms Lambert was only at the proposal stage. Mr Pipe’s account differed stating at one point that she had not embarked on a PhD and another appeared to suggest that she was studying for one but there was no pressure up her to do that. Given those disparities we prefer the version given by Mr Pipe to Mr Foster (see (175)) and find that a flexible interpretation of the requirement for a PhD was applied by the University. What that meant was that in practice a PhD was not required for progression, nor for that matter was it required that a Grade 6 be formally signed up for a PhD but instead they be on what was described to us as a “*pathway*” to one. What we understand by the term “*pathway*” is that a proposal and/or a supervisor had been identified. That that was so is reinforced by the additional stage that Mr Pipe’s 2018 progression application reached in 2018 (when he had located a supervisor, Dr Clarke and was discussing proposals) compared to in 2017 & 2019.



- 213 As events also demonstrated that flexibility was also applied to the type of PhD and we find that there were various alternative routes to a traditional PhD route that the University was prepared to consider such as the enterprise route (see (117)).
- 214 That flexibility was a necessity given the *Framework* applied to academics across a wide spectrum that included engineering and the performing arts. The wide ranging skills taught across the University thus necessitated flexibility in how the *Framework* was applied and how those skills were demonstrated/assessed.
- 215 Similarly, we find that flexibility would have been applied to the requirement to demonstrate achievement in the required areas had Mr Pipe engaged with the discussions the University wished to have with him.
- 216 To that end the respondent established a doctoral College to provide advice. Whilst we found Mr Pipe did make enquiries as to whom to speak to Mr Pipe led no direct evidence of the result of that advice. When Dr Hides had offered to provide help in advance of the 2018 process Mr Pipe sought to “plough his own furrow” rather than seek to identify what the University required and perhaps what was best suited to him. Mr Pipe subsequently accepted the furrow he had ploughed had resulted in a poor choice of supervisor.
- 217 Thus, the *Framework* as applied by the University did not require an applicant to attain a PhD but required an applicant demonstrate a *pathway* to a PhD or an equivalent. Similarly, flexibility was applied in relation to the nature of the PhD or an equivalent. To that end there were various alternative routes to a traditional PhD route such as the enterprise route but in any event the Framework allowed for progression exceptionally by demonstrating equivalence in contribution to professional practice. Similarly, that flexibility would have been applied to demonstrating achievement across the required number of areas had Mr Pipe engaged with the discussions the University wished to have with him.
- 218 Accordingly, the PCP contended for, was not in practice applied.



***Disadvantage***

- 219 Notwithstanding our determinations above we have gone on address this issue.
- 220 Insofar as the *Framework* had necessitated Mr Pipe holding a PhD and/or demonstrating achievement in a number of areas, by virtue of the evidence we heard about his disability and given the low threshold that the statutory test of disadvantage test entails, we find Mr Pipe would have been placed at a substantial, that is to say non-trivial disadvantage in obtaining a PhD, equivalence and/or demonstrating that achievement.
- 221 Whilst we find Mr Pipe has demonstrated that he faced deficits in certain skills, and these were more than trivial he did not engage with the Framework's requirements or what the University was seeking to put in place following its discussions with him.
- 222 The fundamental requirements of the *Framework* were embodied in the two basic questions identified in the progression application form [e.g., 450]:
- 222.1 Was there a recommendation to proceed to the next stage i.e., had the applicant demonstrated that s/he had met the required standards? and
- 222.2 Was there a budget i.e., business need for a role?
- 223 In advance of the 2017 application Mr Pipe had not engaged adequately with what the *Framework* because whilst he had spoken several times to Mr Dawkins (see (46 - 49)) as both Mr Dawkins had cautioned in advance and the feedback Mr Pipe received following that application (see (44)) there was no business case for a role.
- 224 In 2018 Dr Garrett Brown commented on the application form that there was no business case, and in 2019 no applications were progressed beyond the Head of School stage. Further we saw Mr Pipe's exchange with Dr Clarke (133) that embodies the position in the context of the 2019 progression application. That





applied not just to the faculty but based on the data before us (see also (136 & 150)) was University wide.

225 In each year there was thus no business case for progression (see (2017: 47 & 49; 2018: 114; 2019: 133, 134 & 136)) and given that formed an essential requirement of the progression *Framework* the absence of a business case for a role for Mr Pipe meant that neither he nor the group of which he formed part were put to a disadvantage; there was no business need for a role for him or any disabled or non-disabled person at the relevant times.

### ***The adjustments***

226 Again, notwithstanding our determinations above we have gone on address this issue.

227 The adjustments contended for were :-

*(a) Using alternative means of assessing the Claimant for the role, namely assessing a combination of his qualifications, his track record in teaching and his experience and skills more generally.*

*(b) Introducing a teaching focused professional practice role.*

228 The way Mr Pipe argues this claim is that both adjustments were necessarily required. As Mr Johnston put it the first adjustment in isolation, would not have been effective alone to ameliorate the disadvantage resulting from the operation of the progression policy because it was also Mr Pipe's case that he could not, in fact, have undertaken that role, hence the second adjustment contended for *teaching focussed professional practice role.*

229 In our judgment the adjustments complaints necessarily conflate three elements

229.1 the process by which the applicant demonstrated achievement/the necessary standards to undertake a grade 7 role,



229.2 the (created) role to facilitate Mr Pipe undertaking that role, and

229.3 the necessity for the creation of that role.

230 As to the first adjustment contended for the adjustment of the *assessment process* neither the advices of Dr Zaiwalla nor Dr Bescoby-Chambers addressed what adjustments could have been made to the *assessment process*. Instead, the focus in the advices was on a traditional form of PhD and the bypassing of the need for it.

231 By way of example of that lack of engagement with what adjustments could have been undertaken Mr Pipe suggested to us that he could not work the additional hours in his own time to establish a pathway or equivalence (see (40)) and so he had reduced his hours to 60% from January 2017. That does not address why he subsequently accepted and continued to accept additional hours from January 2018 (see (62)) and he, Dr Zaiwalla nor Dr Bescoby-Chambers did not engage with whether it would have been possible to undertake the additional study/research he suggests was required in that time or if an option would have been for the University to provide non teaching time to facilitate him undertaking that work.

232 We find that stemmed from Mr Pipe's own view. His 2017 progression application having been rejected, notwithstanding the contradictory contemporaneous evidence from the University's witnesses and his own account to Professor Foster (see (175)), Mr Pipe adopted the view that that the only alternative open to him to progress was a traditional form of PhD.

233 We find Mr Pipe had come to that fixed view of the need for him to hold (or study for) a PhD before he was diagnosed with ADHD (formal diagnosis: 10 October 2018. Dr Zaiwalla's advice in that regard, Mr Pipe's repeated reference to it, his seeking out Mr Clarke as a supervisor and the contemporaneous correspondence demonstrates (see (65)) that that was so.

234 Dr Zaiwalla had identified by the time of her assessment of 22 June 2017 and her letter of 10 July 2012 that a PhD was not appropriate. That appeared to be based on what she assumed a PhD entailed.



235 Notwithstanding the advice from Dr Zaiwalla and the subsequent advice from Dr Bescoby-Chambers, for the reasons we gave at (87-89 & 107.2) a PhD was also something that at times appealed to Mr Pipe and he gave the University confused messages about whether he wished or if he was able to go down that route. His account before us was that having weighed the pros and cons (see below (295)) a PhD was not something he wished to do. We find that supports at the very least that he was in two minds about it.

236 For whatever reason that was, Mr Pipe focussed on that being the only route rather than engaging with the alternatives within the *Framework* and the dialogue the University was seeking to consider by virtue of the dialogue it wished to have with him to facilitate his progression. We note that was contrary to the words of advice from Dr Matthews (see (75 & 78)) who considered the University were genuinely trying to engage with Mr Pipe.

237 Whilst he did speak to colleagues he essentially “*ploughed his own course*” and went out and found a supervisor for a PhD (Dr Clarke). That was based on the view he had fixed upon by then that a PhD was the only way forward. Accordingly, the discussion with him about an alternative pathway was not identified and as a result occupational health advice on the adjustments required for Mr Pipe bypassed.

238 We find that the University sought to engage in a dialogue with Mr Pipe to identify a *pathway* that was both an acceptable mechanism to the University and for Mr Pipe to demonstrate the required levels of achievement across the various areas and which also took into account the adverse effects of Mr Pipe’s disability upon his ability to meet the requirements of the *Framework*. The University wished to discuss that and then refer the matter to occupational health for their advice.

239 In our judgment the University genuinely wish to engage in that process and responsibility for the absence of a pathway to a traditional PhD lay at Mr Pipe’s door.



240 We found there was no business case for a grade 7 lecturer nor was there a teaching focused professional practice role within the university's existing academic structure.

241 As to business need Mr Johnston encapsulated the issue as follows

*"... at the time of rejecting C's 2019 application for progression, there had been a significant reduction in student numbers, such that the School could not justify employing a further G7 Lecturer in Journalism. Having regard to budget constraints, the inevitable consequence of increasing expenditure upon staffing upon one course (which did not actually require increased staffing resource) would be a need to reduce or limit expenditure elsewhere (where potentially the need for increased staffing resource was greater). In the premises, it is submitted that the adjustment would inevitably cause substantial disruption not only to the directly impacted members of Journalism staff, but also to the School and/or the Faculty more widely."*

242 As to the absence of the role within the university's academic structure Mr Johnston said this

*"... such a step would necessarily have had ramifications not only for C, but also for all of the other teaching staff employed both specifically upon the Journalism course (the contention in evidence effectively being that teaching hours allocated to those teaching staff ought to have been reallocated to C, with those teaching staff then being required to undertake other duties) and more widely across the Faculty, School and University.*

...

*Moreover, it is respectfully submitted that the creation within R's academic structure of a teaching focused professional practice role would necessarily have a broader impact across the university more generally. It is respectfully submitted that, in the premises, the adjustments contended for cannot and should not be regarded as objectively reasonable."*



243 We find based on the evidence before us that there was no *teaching focused professional practice role* within the University's academic structure. The application for reasonable adjustments as put before us therefore necessitated the third element we identified, the creation of such a role for Mr Pipe.

244 As we state above both Dr Zaiwalla and Dr Bescoby-Chambers failed to address what adjustments to the assessment process were required. As to the second and third elements, the nature of the role and necessity for its creation, we find the various advices given by both Dr Zaiwalla and Dr Bescoby-Chambers were based on what Mr Pipe had told them about what he understood the requirements of the *Framework* to be and thus both were based upon a flawed assumption.

245 That aside both Dr Zaiwalla and Dr Bescoby-Chambers also fail to address what any role that Mr Pipe was to undertake could (or could not) entail and why the new role should be created for Mr Pipe as a reasonable adjustment.

246 Accordingly, the evidence before us does not show that the adjustments contended for were reasonable on the basis that those various elements were conflated, the evidence to support the adjustments contended for was missing and the evidence that there was before us, was based upon flawed assumptions. For those reasons the reasonable adjustments complaints in relation to promotion fail.

### **Adjustments – A2W**

247 We found the A2W report arose from a suggestion of the University. It was genuinely trying to identify adjustments for Mr Pipe. Good practice dictates that adjustments are discussed with a party before they are undertaken and the occupational health report of 15 August 2019 [661-662] made clear that should have been done in this instance (see (141)).

248 The University did just that and sought to discuss the A2W report with Mr Pipe. Having done so Mr Pipe was uncertain if some of the adjustments would and/or what that involved (e.g. the training for colleagues) and whether they were appropriate help (e.g. the Echo Pen). Mr Pipe's email exchange with Mrs Nicholson



demonstrates there was a misunderstanding about what the University was suggesting. That confusion was clarified in that email exchange (see (157-161)).

249 The way matters were left thereafter was that Mr Pipe said he was going to investigate about the Echo Pen and training. Despite reminders he did not update the University on how he wished to proceed until 13 December, that was 2 months after the A2W assessment (8 October). That suggests there was no urgency on his part at that stage. Whilst he did pursue his request for another adjustment, promotion outside the academic framework, it was only on 3 February [267] there is evidence he responded in relation to the remaining aspects of the A2W report. By that stage Mrs Nicholson was on sick leave and Mr Dawkins had to pursue the point on his behalf.

250 We find that what events demonstrate is that the impairment having been brought to its attention the University was actively engaging to try to address issues Mr Pipe had related to the role he was undertaking.

251 The Echo Pen was eventually ordered that was not pursued as a failure before us.

252 As to the other A2W recommendations we were not pointed to where Mr Pipe had identified if or how he wished for them to be applied. We find the University cannot be said to have unreasonably failed to make adjustments when Mr Pipe had specifically asked for the matter to be left with him to consider how to proceed and then had not reverted to it about them.

**Discrimination because of something arising from disability**

253 Three elements of unfavourable treatment are accepted as having occurred:-

*a) Rejection of the Claimant's application for promotion by Dr Natalie Garrett Brown on 6 March 2017.*

*b) Rejection of the Claimant's application for promotion by the faculty Dr Zaiwalla on 2 May 2018.*



*c) Rejection of the Claimant's application for promotion by Dr Natalie Garrett Brown on 1 April 2019 (the Claimant was notified on 29 August 2019).*

254 The fourth was not:-

*d) Placing the Claimant under pressure to undertake a PhD between March 2017 to August 2019 (CSKEL §98-101).*

255 As to the fourth that was not applied. Firstly, it was Mr Pipe who was pressing for progression and what that entailed not the University. That being so he needed to satisfy the *Framework*. The *Framework* required a PhD or equivalent. We found above (see for example (217)) in practice that required applicants for progression be on a '*pathway*'. Whilst the University explored with Mr Pipe the possibility of him undertaking a PhD it also wanted to consider alternatives. Mr Pipe did not fully engage with that process for the reasons we have already expanded upon at length.

256 As to pressure being applied that was the very antithesis of what the University was trying to do and any pressure stemmed from him. It wanted to discuss options with him how he could satisfy the *Framework* by alternative means. As we explain above Mr Pipe could not see that or at least that that was genuinely what the University was trying to do because his view was skewed by the lens through which he was looking at events. Further he personally was in two minds about undertaking a PhD notwithstanding how he portrayed the medical advice (see (235)).

257 The only "*something*" pursued by the conclusion of the hearing (the others referred to in the list of issues having been confirmed as relating only to context and disadvantage) was :-

*The relevant symptoms of his ADHD and/or sleep disorder are: inattentiveness and impaired concentration; difficulties with task completion; poor organisational, prioritisation and planning skills; constant fatigue; impulsiveness and hyperactivity.*



258 The University accepted that “*something*” arose from Mr Pipe’s disability but not that the “*something*” caused the unfavourable treatment.

259 In relation to Mr Pipe’s progression applications for the reasons we give at (224) there was no business case for a role in any of the years 2017-2019. Even if Mr Pipe had met the progression criteria, his applications would have necessarily failed because there was no role for him.

260 The failure of his progression applications were thus in no sense whatsoever caused by the something arising from his disability but because of the absence of an available role/business case for a role.

261 In any event Mr Pipe demonstrated he did not meet the required standards of a role because of his ADHD, his sleep disorder or some combination of the two. It may be that would have been the case but having been open to the possibility of alternative pathways Mr Pipe did not engage with the University in identifying one and thus that was not properly explored.

262 We are thus not satisfied the rejection of his applications were caused by the “*something*”; instead, they stemmed from the absence of a business case for a role for him and/or his failure to engage with the University in identifying a progression pathway for him.

***Justification s.15***

263 Notwithstanding our determinations on the something arising from being the cause of the unfavourable treatment we have gone on address the justification issue.

264 For discrimination because of something arising from disability complaints it is the unfavourable treatment that must be “justified”.

265 The University relies upon four aims:-

*(a) adopting a consistent and transparent approach to academic progression;*





*(b) maintaining consistently high standards in its Grade 7 Lecturers;*

*(c) maintaining the Respondent's reputation as a provider of quality higher education;*

*(d) maintaining a balance of staff within individual Schools and Faculties commensurate with the requirements of its business (having regard, inter alia, to student numbers and course needs).*

266 We found the fourth of the acts of unfavourable treatment was not applied. As to the first three, we find the University has shown that the aims were legitimate; the first to ensure fairness and transparency, as to (b) and (c) these were to enable it to survive and prosper in the marketplace and (d) to only engage staff where there was a business need, thereby balancing the provision of services against the proper utilisation of public funds.

267 As we say above it was common ground that where A's treatment of B is the direct result of applying a general rule or policy to B, whether B's treatment is justified will usually depend on whether the general rule or policy is justified<sup>3</sup>.

268 As to the proportionality question, the *Framework* was appropriate, reasonably necessary and no more than reasonably necessary to achieve those aims. The University demonstrated that the *Framework* was adopted to provide a transparent and consistent approach across the various Faculties (and the differing skillsets and requirements within them) but also to ensure standards were maintained which in turn linked in to maintaining the University's reputation and to place staff where there was a business need for them.

269 Given those differing skillsets and requirements the *Framework* needed to be just that, a framework and process for decision making, and what is more, to be applied flexibly. Too much discretion could give rise to partiality and favouritism.

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<sup>3</sup> [Buchanan v Commissioner of Police for the Metropolis](#) [2016] IRLR 918, EAT at [43]



Too little, an inability to address the differing needs of staff across the various faculties and the wide range of disciplines taught within them.

- 270 The *Framework* was just that, it had various checks and balances within it. Applicants only applied if they wanted to progress and were only progressed if they demonstrated they met required standards and there was a business need. The process was moderated at several levels and outcomes fed back to decision makers and applicants so applications and decision making could evolve to reflect those outcomes in later years. Likewise, support for demonstration of the required standards was met and supported by the University's doctoral college and moderated again at various stages and ultimately across the University.
- 271 We find the University has shown that the aims were legitimate and the means of achieving them was reasonably necessary. They were proportionate. Given the diversity of subjects and the consequential skillsets of staff it is perhaps apt to adopt an albeit imperfect metaphor from science to illustrate the point; the approach the University adopted was within the "*Goldilocks Zone*". The way the University balanced those competing objectives was "just right". Any unfavourable treatment that there was, was "justified".

### **Indirect discrimination - disability**

#### ***The PCPs***

- 272 It was agreed that a PCP was applied; that applications from Grade 6 assistant lecturers to be promoted to Grade 7 lecturers would be determined in accordance with the requirements of the *Framework* and Academic Progression Process.
- 273 The disadvantage relied upon was that due to the deficits persons with ADHD and/or sleep disorders have in certain skills [referring to the '*somethings*'] and the increased difficulty Mr Pipe and members of that group had to obtain a PHD and/or plan, fund, conduct, analyse, and publish research meant they were less



likely to meet the requirements of the Academic Framework and achieve promotion to Grade 7.

274 Thus, it is implicit that the *Framework*, expressly and/or in practice, required Mr Pipe to attain a PhD and/or plan, fund, conduct, analyse, and publish research.

275 We address the ‘somethings’ that formed part of his s.15 EqA something arising from complaints above.

276 Whilst acknowledging that individuals with ADHD and/or sleep disorders would face increased difficulty in undertaking a conventional PhD, and that, for these purposes, not every member of the group need be placed at the particular disadvantage, Mr Johnston argued that the progression process, as it was applied in practice,

276.1 did not provide that a PhD was the route to progression and in addition to other forms of PhD (by publication/ portfolio), it was open to applicants to demonstrate equivalence or to pursue an “Enterprise route” rather than a research route.

276.2 did not require applicants demonstrate achievement in research (even if this was one of the pillars relied upon for the purposes of the application) and

276.3 did not put people with ADHD and/or sleeping disorders at a substantial disadvantage because the *Framework* provided of a range of support to assist applicants in meeting the criteria for progression according to their individual needs.

277 Whilst it was acknowledged that, in light of the medical evidence, if Mr Pipe established group disadvantage, the University would face difficulty in seeking to persuade the Tribunal that Mr Pipe was not himself placed at that disadvantage, in contrast to the indirect age discrimination complaint, it was not inevitable that was so. Mr Johnston pointed us to:



277.1 evidence of Mr Pipe undertaking, and successfully undertaking, tasks requiring a substantial degree of executive functioning, specifically planning and delivering courses; and

277.2 the active steps taken by the University to try to support Mr Pipe to meet the requirements of the *Framework* and/or to explore with him alternative ways of meeting those requirements.

278 For the reasons we give above we found the PCP was not in practice applied.

***Disadvantage***

279 Save in that we acknowledge the different statutory tests the points we make as to disadvantage apply here not just to Mr Pipe but to members of the group, we adopt the points we make with regard to disadvantage in relation to the adjustments complaint at (219 - 225).

***Justification s.19 (disability)***

280 Yet again, notwithstanding our determinations on disadvantage in relation to the indirect discrimination complaint we have gone on address the justification issue.

281 Unlike discrimination because of something arising from disability where the unfavourable treatment must be justified for indirect discrimination complaints it is the provision, criterion or practice that has to be “justified”.

282 For indirect discrimination complaints it is the PCP not the unfavourable treatment that requires justification. The same four aims are relied upon as for the s.15 justification argument (see (265)).

283 As we say above (7 & 267) whether B’s treatment is justified will usually depend on whether the general rule or policy is justified. We found that they were, and the University has shown those aims were legitimate and the way they were applied was proportionate.



**Indirect discrimination - age**

**PCPs**

284 The same PCP is accepted as applied as for the indirect disability discrimination complaint (see (265)).

285 For the reasons we give above we found the PCP was not in practice applied. Our determinations on that issue aside we go on below to address disadvantage.

***The particular and group disadvantage***

286 Whilst it was not accepted by the University that the application of the PCP put people aged 55-59 at a particular disadvantage compared to persons in different age groups, it was acknowledged that any arguments in relation to individual disadvantage mirrored those in relation to group disadvantage, such that if the Tribunal found that there was a group disadvantage, it would inevitably conclude that Mr Pipe was placed at that disadvantage. We thus address them together.

287 The group was people aged 55-59 and the disadvantage that:-

287.1 *Persons in that age range and above are less likely to have a PhD because of the more restricted access to universities to carry out undergraduate degrees prior to the early 1990s.*

287.2 *Persons in that age range and above are less likely to try to obtain a PhD because of their proximity to retirement.*

287.3 *Consequently, persons in that age group will have increased difficulty (or, put another way, the reduced opportunity) than younger age groups in obtaining a PhD and achieving promotion to Grade 7.*

288 Whilst it was acknowledged by the University that persons in the 55-59 age range may be less likely already to have a PhD it was not accepted that,



288.1 under the *Framework* or in practice, it was necessary for an applicant to have attained a PhD,

288.2 persons in their late 50s are, by reason of their age alone, less likely to try to obtain a PhD, and

288.3 it was not inherently more difficult for someone in their late 50s to commence a PhD (Mr Johnston asserted that many individuals undertake PhDs in their late 50s and beyond).

289 Further, the University argued

289.1 it was possible to satisfy the PhD requirement under the *Framework* in a number of different ways, including by being on a trajectory towards obtaining different types of PhD, by demonstrating equivalence and, on the University's case, via the "Enterprise route",

289.2 that persons in their late 50s are more likely than those in younger age groups to have accumulated relevant professional experience and/or to have published material upon which they might seek to rely either for the purposes of equivalence and/or in order to seek to pursue a PhD by publication.

and thus, the relevant group disadvantage was not established.

290 As we state above a traditional PhD was not in practice required to satisfy the *Framework*. Instead, an individual needed to be on a *pathway* to one of the various forms of PhD or to demonstrate equivalence.

291 Given what we found were the alternative routes available to a traditional PhD the Claimant's age, per se, would not have been a barrier to him obtaining (or conducting research towards) a PhD and for him to meet the requirements of the Academic Progression Process.



292 The flexibility of approach the University applied was in our view directly to address the problems an inflexible rule such as that in *Games* caused whilst providing a consistent framework for progression to reduce the opportunity for favouritism and partiality.

293 Thus, professional and industry experience could be used for equivalence, and issues such as the lesser historic emphasis on PhDs and the lower likelihood older applicants would be able meet a requirement for a PhD was addressed by the ability to be studying for or be on a *Pathway* to a PhD, and the various forms of PhD was not present. Thus, here Mr Games would have been able to point to his professional work as demonstrating that equivalence and support on what was required was available via the University's doctoral college and the various opportunities Mr Pipe had had to discuss how those requirements could be met with senior staff.

294 In our judgment Mr Pipe did not demonstrate the necessary group disadvantage.

295 That is reinforced by Mr Pipe's responses to questions. In addition to the health and disability impact of undertaking a PhD when asked about why age would restrict his ability to progress he not only appeared to be in two minds whether he wished to undertake a PhD but had decided against that partly because of concerns about failure on the basis of memory and brainpower not being that when he was younger, increased health vulnerabilities and partly as a result of a cost/benefit analysis to him in terms of career progression and the immense amount of challenging work a PhD would entail. Those issues to us appeared to be an issue of personal choice rather than the effect it would have a on the (age) group of which he was part.



***Justification s.19 (age)***

296 Again despite our determinations above we considered Justification and the points we make at (280 - 283) apply equally to the indirect age discrimination complaint so we do not repeat them again here.

**SUMMARY**

297 For those reasons Mr Pipe's complaints fail and are dismissed.

*Signed electronically by me*  
**Employment Judge Perry**  
*Dated: 16 February 2022*

SENT TO THE PARTIES ON: 01/03/2022  
FOR THE TRIBUNAL OFFICE: Janisha Banga

**APPENDIX A - LIST OF ISSUES**

**INTRODUCTION**

1. As amended, the Claimant brings the following claims:
  - a. Discrimination arising from disability contrary to s.15 EQA.
  - b. Indirect disability discrimination contrary to s.19 EQA.
  - c. Failure to make reasonable adjustments contrary to ss.20 & 20 EQA.
2. For avoidance of doubt, all claims which are not substantively reflected in this list of issues can be taken as withdrawn.

**JURISDICTION**

3. The ET1 was presented on 3 April 2020 following a period of ACAS early conciliation from 22 November 2019 to 5 January 2020. Subsequently:
  - a. The Claimant made a de-facto application to amend on 9 September 2020 regarding events subsequent to 3 April 2020.
  - b. The Claimant's claims were then revised as set out in the orders of EJ Harding on 18 December 2020 and 21 January 2021.





- c. With respect to any and all applications to amend, the up-to-date claim is that set out in the Claimant's Amended Particulars of Claim, dated 5 November 2021 following the order of EJ Camp on 2 November 2021.
4. Against this procedural background, it is agreed that the Claimant's claims which relate to alleged acts or omission of the Respondent occurring on or after to 20 November 2019 (*with respect to the original claims*) and 10 June 2020 (*with respect to the amended claims*) are in time pursuant to s123(1)(a) Equality Act 2010 ('EqA'). For the avoidance of doubt:
  - (i) the original claims comprise all of the Claimant's complaints of discrimination arising from disability and his complaints of indirect disability discrimination, indirect age discrimination and failure to make reasonable adjustments insofar as these relate to any failures on or before 3 April 2020;
  - (ii) the amended claims comprise the Claimant's complaints of indirect disability discrimination, indirect age discrimination insofar as these relate to any discrimination after 3 April 2020 and failure to make reasonable adjustments insofar as these relate to any failures after 3 April 2020.
5. For acts and omissions before the aforesaid:
  - a. Do such allegations form part of an act extending over a period, the end of which was in time pursuant to s123(3)(a) EqA? And
    - i. The Claimant says there was a continuing acts as the acts relate to a single PCP and involve the same decision-makers (CSKEL §§122-123).
    - ii. The Respondent says that there is no continuing act. The Respondent avers that each of the applications for progression falls to be considered separately and that the relevant date in respect of each application for time limit purposes is (i) for the purposes of the s.15/s.19 claims, the date of the refusal of the application; and (ii) for the purposes of the s.20/21 claims, the date by which the Respondent ought reasonably to have made any adjustments in respect of that application.
  - b. If any alleged acts or omissions to which the Claimant's claims relate and which took place prior to 20 November 2019 and/or 10 June 2020 do not form part of an act extending over a period the end of which was in time, were the Claimant's



claims in respect of these allegations presented within such other period as the employment tribunal thinks just and equitable pursuant to s.123(1)(b) EqA?

- i. The Claimant says yes as he had a good reason for delay relating to his status as a litigant-in-person, his disability and ill health, and the impact on the evidence/Respondent is limited (CSKEL §§124-125).
- ii. The Respondent, whilst accepting that the Tribunal enjoys a broad discretion to extend time, notes that the burden of persuading the Tribunal that it would be just and equitable to extend time rests with the Claimant. The Respondent avers that, in all the circumstances of the present case, including the Claimant's knowledge of his rights and the various actions taken by him in full cognisance of those rights prior to presenting his claim/his application for amendment, the Tribunal ought not to find that it would be just and equitable to do so.

#### **DISABILITY – S.6 EQA**

6. As noted in the order of EJ Harding on 18 December 2020, it is agreed that the Claimant was disabled by way of ADHD and sleeping difficulties, and that whether or not the sleeping difficulties are caused by the ADHD or caused by a separate and distinct sleep disorder does not have to be decided for the purposes of this claim.
7. Knowledge of disability is accepted from 2016 at the latest.

#### **DISCRIMINATION ARISING FROM DISABILITY – S.15 EQA**

8. Did the Respondent subject the Claimant to the following acts or omissions?
  - a. Rejection of the Claimant's application for promotion by Dr Natalie Garrett Brown on 6 March 2017.
  - b. Rejection of the Claimant's application for promotion by the faculty panel on 2 May 2018.
  - c. Rejection of the Claimant's application for promotion by Dr Natalie Garrett Brown on 1 April 2019 (the Claimant was notified on 29 August 2019).
  - d. Placing the Claimant under pressure to undertake a PhD between March 2017 to August 2019 (CSKEL §98-101).



9. The Respondent accepts that the Claimant was subjected to the acts at 7(a) to 7(c) above. Whilst it is accepted that the Claimant was offered encouragement and support to meet the requirements of the Academic Framework, the Respondent denies that the Claimant was “plac[ed] ... under pressure to undertake a PhD”.
10. If so, did any of those acts or omissions amount to unfavourable treatment? The Claimant relies upon, *inter alia*, the financial detriment caused by not receiving a promotion, the worsening of his sleep disorder, and the psychological impact of being rejected for promotion and being put under pressure to undertake a PhD (CSKEL §94).
11. If so, it is agreed that the following “somethings” arise in consequence of his disability:
  - a. The relevant symptoms of his ADHD and/or sleep disorder are: inattentiveness and impaired concentration; difficulties with task completion; poor organisational, prioritisation and planning skills; constant fatigue; impulsiveness and hyperactivity.
  - b. His resultant difficulty in interviews due to a tendency to be unfocused, gabble, misunderstand questions, and process information. This meant it was more difficult for the Claimant to take advantage of the external route to promotion and made it more favourable (the Claimant says necessary) to go through the Academic Framework Progression Process to gain promotion.
  - c. His resultant difficulty in focusing on and writing academic publications, and the corresponding difficulty in demonstrating adequate achievement or experience in research and obtain a PhD.
12. The Respondent says that the Claimant was not required, as part of the Academic Framework Progression Process, to formulate the business case for his own promotion; this was the responsibility of the Head of School. For the avoidance of doubt, the Respondent avers that the Claimant would have been subjected to the acts at 7(a) to 7(c) in any event as it was ultimately not accepted that there was a business case for his progression.
13. The Claimant says the fact he had not attained a PhD and was not able to demonstrate achievement in research were fundamental to the decisions to reject his applications.



In any event, there was a clear business case for his promotion owing to, *inter alia*, his experience and capability as a teacher (see CSKEL §95-97).

13A. The Respondent says that the fact that the Claimant had not attained a PhD and/or was not able to demonstrate achievement in research was not the reason/cause (in the sense of having more than a trivial influence upon) the decisions to reject his applications (or any of them). It is the Respondent's position that the Claimant was not, in practice, required to have attained a PhD, nor was it necessary for him to have focused on or written academic publications in order to satisfy the research pillar of the academic framework. The Respondent further repeats paragraph 12 above.

14. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aims:
- a. adopting a consistent and transparent approach to academic progression;
  - b. maintaining consistently high standards in its Grade 7 Lecturers;
  - c. maintaining the Respondent's reputation as a provider of quality higher education; and
  - d. maintaining a balance of staff within individual Schools and Faculties commensurate with the requirements of its business (having regard, *inter alia*, to student numbers and course needs).

#### **INDIRECT DISABILITY DISCRIMINATION – S.19 EQA**

15. It is agreed that the Respondent applied a PCP to the Claimant that applications from Grade 6 assistant lecturers to be promoted to Grade 7 lecturers in the Academic Framework Progression Process would be determined in accordance with the requirements of the Academic Progression Process.
16. Did the application of the PCP put people with ADHD and/or sleeping disorders at a particular disadvantage to persons without the same?
- a. [*Context Only* - The Claimant says the Academic Framework, expressly and/or in practice, required him to attain a PhD and demonstrate achievement in three of four areas, including research.]



- b. The Claimant relies upon the increased difficulty (or, put another way, the reduced opportunity) persons with ADHD and/or sleep disorders have in achieving promotion to Grade 7 due to the deficits they have in certain skills (see paragraph 11 above) that are required in order to obtain a PHD and/or plan, fund, conduct, analyse, and publish research. This meant he was less likely to meet the requirements of the Academic Framework (CSKEL §110).
  - c. The Respondent does not accept that the application of the PCP put people with ADHD and/or sleeping disorders at a particular disadvantage. It is the Respondent's case that a range of support was available to applicants/potential applicants for progression in order to ensure that they would not be placed at any such particular disadvantage.
17. Did each of the alleged PCPs put the Claimant at that disadvantage?
- a. The Claimant repeats paragraphs 10 and 11 above (CSKEL §111).
  - b. The Respondent does not accept that the Claimant was placed at that disadvantage. The Respondent avers that it took active steps to seek to support the Claimant in order to enable him to meet the requirements of the Academic Framework and to explore with him alternative ways of meeting those requirements.
18. Was the above treatment a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aims:
- a. adopting a consistent and transparent approach to academic progression;
  - b. maintaining consistently high standards in its Grade 7 Lecturers;
  - c. maintaining the Respondent's reputation as a provider of quality higher education;
  - d. maintaining a balance of staff within individual Schools and Faculties commensurate with the requirements of its business (having regard, *inter alia*, to student numbers and course needs).
19. For C's position, §112 CSKEL.



**INDIRECT AGE DISCRIMINATION – S.19 EQA**

20. It is agreed that the Respondent applied a PCP to the Claimant that applications from Grade 6 assistant lecturers to be promoted to Grade 7 lecturers in the Academic Framework Progression Process would be determined in accordance with the requirements of the Academic Progression Process.

21. If so, did the application of the PCP put people aged 55-59 at a particular disadvantage to persons in different age groups?

a. The Claimant relies upon (CSKEL §113-114):

- i. Persons in that age range and above are less likely to have a PhD because of the more restricted access to universities to carry out undergraduate degrees prior to the early 1990s.
- ii. Persons in that age range and above are less likely to try to obtain a PhD because of their proximity to retirement.
- iii. Consequently, persons in that age group will have increased difficulty (or, put another way, the reduced opportunity) than younger age groups in obtaining a PhD and achieving promotion to Grade 7.

b. R does not accept that persons aged 55 – 59 have a reduced opportunity to obtain (or conduct research towards) a PhD and/or to achieve promotion to Grade 7. Moreover, and in any event, it is not accepted that obtaining (or conducting research towards) a PhD is the only route to meeting the requirements of the Academic Progression Process.

22. Did each of the alleged PCPs put the Claimant at that disadvantage?

a. The Claimant says yes.

b. The Respondent avers that he was not. As set out above, the Claimant's age, per se, would not have been a barrier to him obtaining (or conducting research towards) a PhD and, in any event, there were other routes available to him to meet the requirements of the Academic Progression Process.

23. Was the above treatment a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aims:

- a. adopting a consistent and transparent approach to academic progression;
- b. maintaining consistently high standards in its Grade 7 Lecturers;



- c. maintaining the Respondent's reputation as a provider of quality higher education; and
- d. maintaining a balance of staff within individual Schools and Faculties commensurate with the requirements of its business (having regard, *inter alia*, to student numbers and course needs).
- e. For C response, §115 CSKEL.

**FAILURE TO MAKE REASONABLE ADJUSTMENTS – SS.20 & 21 EQA**  
**(PROMOTION)**

24. It is agreed that the Respondent applied a PCP to the Claimant that applications from Grade 6 assistant lecturers to be promoted to Grade 7 lecturers in the Academic Framework Progression Process would be determined in accordance with the requirements of the Academic Progression Process.
25. If so, did the application of the PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant relies upon the issues raised at paragraphs 11 and 16 (CSKEL §66-68).
26. If so, would the following adjustments have alleviated the disadvantage(s) identified?
- a. Using alternative means of assessing the Claimant for the role, namely assessing a combination of his qualifications, his track record in teaching and his experience and skills more generally.
  - b. Introducing a teaching focused professional practice role.
27. If so, did the Respondent make such adjustments, or can the Respondent show that the adjustment(s) was not a reasonable one to make? C position at §§69-70.
28. Alternatively, can the Respondent show, at the time of the alleged discrimination, that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability and was likely to be placed at the substantial disadvantage above?
- a. The Claimant avers that the relevant persons within the Respondent organisation had knowledge of his disability at all material times or, alternatively, reasonably ought to have had such knowledge.



- b. The Respondent accepts that it had knowledge of the Claimant's ADHD from October 2018 (the Claimant having been diagnosed in July 2018) and of his sleeping difficulties from at least 2016 (and, thus, at all times that are material for the purposes of his claim).
- c. The Respondent does not accept that it knew (or ought reasonably to have known) of the substantial disadvantage(s) upon which the Claimant now seeks to rely at any time prior to him informing the Respondent of his ADHD diagnosis.

**FAILURE TO MAKE REASONABLE ADJUSTMENTS – SS.20 & 21 EQA (ACCESS TO WORK)**

29. It is agreed that the Respondent applied a PCP to the Claimant that he was required to carry out all the duties of an Assistant Lecturer.
30. This required the Claimant to be able to process information, prioritise, manage his time, concentrate and focus:
- a. The Claimant says this caused substantial disadvantage because those skills are very hard for the Claimant because of his ADHD and caused him undue stress and anxiety.
  - b. The Respondent does not accept that the Claimant was caused substantial disadvantage in performing his duties as an Assistant Lecturer. The Respondent notes that many (although not all) of the concerns within the Access to Work Report are asserted to have arisen as a result of the Claimant feeling that he needed to take on additional work (i.e. research) in order to try to achieve promotion, which necessarily fall outwith the duties of an Assistant Lecturer.
31. If so, would the following adjustments have alleviated the disadvantage(s) identified?
- a. Delivering coaching sessions on coping strategies.
  - b. Delivering co-coaching sessions with a neurodiversity coach to provide the Claimant and management with strategies in areas of communication and understanding of ADHD, and to mutually identify coping mechanisms necessary to offset the impact of neurodiversity in the workplace.





- c. Delivering disability awareness training of the Claimant's colleagues and management so they are aware of the barriers he faces and are aware of how best to communicate with him.
32. These adjustments are reflected in the Access to Work Report of 9 October 2019. For avoidance doubt, the Claimant says this duty arose from the time the Respondent knew, or reasonably ought to have known, of his ADHD.
  33. If so, did the Respondent make such adjustments, or can the Respondent show that the adjustment(s) was not a reasonable one to make? For Claimant position, see CSKEL §87).
  34. Alternatively, can the Respondent show, at the time of the alleged discrimination, that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability and was likely to be placed at the substantial disadvantage above? The Respondent accepts that it had knowledge of the Claimant's ADHD from the time of its diagnosis. However, insofar as the Tribunal finds that the Claimant was placed at a substantial disadvantage, the Respondent denies that it had actual or constructive knowledge of the same at any time prior to its receipt of the Access to Work Report.

### **REMEDY**

35. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
36. In the event the Claimant is found to be discriminated against, what compensation is the Claimant entitled to? In particular:
  - a. What award should be made for financial loss? Of relevance:
    - i. Did the discrimination cause the Claimant to resign?
  - b. What award should be made for injury to feelings?
37. Has the Claimant reasonably mitigated his losses?
38. Should the Claimant's compensation be decreased to reflect contributory fault?
39. Should the Tribunal make any recommendations and, if so, what recommendations?
40. Should the Tribunal make any declarations and, if so, what declarations?



## APPENDIX B – AGREED STATEMENT OF LAW

Aside from a correction of the spelling of *Matuszowicz* by us this is the statement of the law agreed by the parties.

### A. **BURDENS AND STANDARDS OF PROOF**

1. Section 136 EqA provides for a “shifting burden of proof” in discrimination claims:

*“(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.”*

2. In other words, an initial burden rests with the claimant to establish, on the balance of probabilities, facts which the Tribunal could conclude that the employer has committed an act of discrimination in the absence of any other explanation.
3. If a prima facie case can be established, the burden shifts to the employer, who must show, on the balance of probabilities, that the treatment was not discriminatory. The Tribunal will expect cogent evidence to discharge the Respondent’s burden: *Igen Ltd v Wong* [2005] ICR 931 at §76.

### B. **SS.20 AND 21 EQA: FAILURE TO MAKE REASONABLE ADJUSTMENTS**

4. S.20(3)(a) EqA provides: *“where a provision, criterion or practice of [the employer]’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”*
5. Paragraph 20(1)(b) of Schedule 8 to the EqA provides:

*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably have been expected to know –*

...

*(b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*
6. As per *Project Management Institute v Latif* UKEAT/0028/07CEA at §§44-45, the burden is on the Claimant to establish:
  - a. Facts from which the duty to make reasonable adjustments is triggered, namely, that he has a disability and the relevant PCP caused substantial disadvantage;



- b. Facts from which it could be reasonably inferred, absent an explanation, that a reasonable adjustment should have been made; and
    - c. To identify the adjustment that would mitigate the substantial disadvantage.
  7. The burden then shifts to the Respondent to show either that that adjustment would not have eliminated or reduced the disadvantage, the adjustment was not a reasonable one to make, or that the Respondent does not know, and could not reasonably be expected to know the Claimant was disabled and is likely to be placed at the substantial disadvantage (see *Schedule 8, para 20*).
  8. In applying this analytical framework, the Tribunal must take into account:
    - a. The s.20 EQA duty is a “cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment”: *EHRC Employment Code* at §6.2
    - b. The purpose of s.20 EQA lies in requiring employers to treat the disabled person differently by taking reasonable steps to remove the disadvantage. In no sense can s.20 be satisfied simply by treating all alike: *Griffiths v Work and Pensions Secretary* [2017] ICR 160 (CA) at §§58-61.

PCPs

9. A broad construction of PCPs is supported by the purpose of the EQA in eliminating discrimination against those who suffer from a disability: *Ishola v Transport for London* [2020] ICR 1204 (CA) at §35.<sup>4</sup> The function of the PCP is to identify what about the employer’s management or operation caused disadvantage to the disabled employee, as it is this which is to be justified: *Ishola* at §36.
10. PCPs carry the connotation of a “state of affairs [...] indicating how similar cases are generally treated or how a similar case would be treated if it occurred again”: *Ishola* at §38. Where multiple PCPs are engaged, it is necessary to look at their cumulative effect in assessing substantial disadvantage and reasonableness: *Environmental Agency v Rowan* [2008] ICR 218 (EAT) at §27.

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<sup>4</sup> See also: *Lamb v Business Academy Bexley* UKEAT/0226/15/JOJ at §26.



Substantial disadvantage

11. A substantial disadvantage is a disadvantage that is “*more than minor or trivial*”: s.212 EQA. A comparison exercise is required to test “*whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability*”: *Sheikholeslami v University of Edinburgh* UKEATS/0014/17/JW at §53.<sup>5</sup> This is not a question of strict causation and does not require exact comparators: *Sheikholeslami* at §§48-53.
12. “*The fact [disabled and able-bodied people] are treated equally and may both be subject to the same disadvantage [...] does not eliminate the disadvantage if the PCP bites harder on the disabled*”: *Griffiths* at §58. Put another way, that disabled and able-bodied people may both be affected by a PCP does not preclude substantial disadvantage in circumstances where the likelihood or frequency of the impact is greater for the disabled person.

Proposed Adjustments

13. *Project Management Institute v Latif* UKEAT/0028/07 is authority the Claimant must identify the broad nature of the adjustment proposed so that the Respondent is given sufficient detail to enable it to with the question, but that need not be at the time of the alleged failure: §54-57.

Reasonableness

14. The duty is on the employer to take reasonable steps to make adjustments. This is an objective test which depends on all circumstances: *EHRC Employment Code* at §§6.23 and 6.29. As per *EHRC Employment Code* at §6.28, relevant factors include:
- a. The effectiveness of the adjustments: The proposed steps must “*be capable in principle of ameliorating the disadvantage resulting from the operation of the policy*”: *Griffiths* at §66. The adjustment must have a “*prospect*” of achieving this result: *Leeds Teaching Hospital NHS Foundation Trust v Foster* UKEAT/0552/10/JOJ at §17.
  - b. The practicability of the step.
  - c. The costs of making the adjustment, including non-financial cost and disruption.

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<sup>5</sup> See also: *Griffiths* at §58.



- d. The extent of the employer's financial or other resources.
  - e. The availability to the employer of financial or other assistance to make the adjustment.
  - f. The type and size of the employer.
15. It will be material whether the employer directed its mind or conducted an assessment or consultation with the disabled person of what reasonable adjustments may be required: *Cosgrove v Caesar & Howie* EAT/1432/00 at §9; *EHRC Employment Code* at §6.32.

**C. S.19: INDIRECT DISCRIMINATION**

16. EqA, section 19(1), provides that there will be indirect discrimination where an employer applies a 'provision, criterion or practice which is discriminatory in relation to a protected characteristic' of the employee. Section 19(2) provides that a PCP will be discriminatory if:

*'(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*  
*(b) it puts, or would put, persons with whom B shared the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*  
*(c) it puts, or would put, B at that disadvantage, and*  
*(d) A cannot show it to be a proportionate means of achieving a legitimate aim.'*

17. As to the purpose of the provision, indirect discrimination "*assumes equality of treatment [...] but aims to achieve a level playing field [...] to achieve equality of results [...] it is dealing with hidden barriers which are not easy to anticipate or to spot*": *Essop v Home Office* [2017] 1 WLR 1343 at §25.

18. The law on PCPs is that set out above.

19. The PCP must place the group the claimant shares a protected characteristic with at a particular disadvantage compared to groups that, absent the protected characteristic, were not in materially different circumstances: *Essop* at §25. Not every member of the group need be placed at the disadvantage: *Essop* at §27.

20. *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704 (SC) at §20 is authority the Respondent must show: (i) It has identified a sufficiently important aim; (ii) the unfavourable treatment was an appropriate means of achieving that aim; (iii) the treatment was reasonably



necessary; and (iv) the treatment struck a fair balance between the need to accomplish the aim and the disadvantage caused to the Claimant.

21. Where a Respondent, in law or in fact, has failed to make reasonable adjustments, the conditions for indirect discrimination will almost certainly be met: *Griffiths* at §§26-27.
22. In recognition of the reality that “*discrimination is often a multi-faceted experience*”, it is well-established that there can be combined disadvantage where an individual is placed at a particular disadvantage owing to multiple protected characteristics: *Ministry of Defence v DeBique* UKEAT/0048/09/MAA at §§164-170.

**D. S.15 EQA: DISCRIMINATION ARISING FROM DISABILITY**

23. Section 15 EqA provides that:

*‘(1) A person (A) discriminates against a disabled person (B) if –*

*(a) A treats B unfavourably because of something arising in consequence of B’s disability. And*

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

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

24. To have a claim, the Claimant must establish that (i) there is unfavourable treatment, (ii) the disability has the consequence of something, and (iii) there is evidence from which it can be reasonably inferred that the unfavourable treatment was because of the something arising from disability.

25. Per Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 305, EAT, at §26:

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



26. Unfavourable treatment is that which puts an individual at a disadvantage: *EHRC Employment Code* at §5.7. There is no need for a comparator.
27. Under the “because of” test, the “something arising” need not be the sole reason. The Tribunal needs only to be satisfied that the “something arising” had a significant or at least more than trivial influence on Respondent’s decision (and influence can be unconscious): *Secretary of State for Justice v Dunn* [2017] UKEAT/0234/16/DM at §54.
28. If proven, the burden is on the Respondent to demonstrate either that there was a different reason for the unfavourable treatment or that that the unfavourable treatment is a proportionate means of achieving a legitimate aim. Whether the Respondent knows of the connection between the Claimant’s disability and the “something arising in consequence of it” is irrelevant: *City of York Council v Grosset* [2018] ICR 1492 at §§38-40 and 47.
29. Regarding proportionality, *Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone* [2015] AC 1399 at §28
30. Where a Respondent has failed to make reasonable adjustments, liability will almost certainly be established: *Griffiths* at §§26-27.

## **E. JURISDICTION**

### The primary limitation period

31. As per EqA s.123(1)(a), claims must be presented to the Tribunal within ‘*the period of 3 months starting with the date of the act to which the complaint relates*’. Time in relation to amended claims will be calculated from the date the application for amendment is made: *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634 at §67.

### Continuing acts

32. EqA, s.123(3)(a) provides that ‘*conduct extending over a period is to be treated as done at the end of the period*’. The parties agree on the following propositions:
- a. The question is whether there was an act extending over a period, as distinct from a succession of unconnected acts: *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686 (CA) at §52. This will may be satisfied, *inter alia*, where there is a policy, rule, scheme, regime or practice in place.



- b. Separate acts can together amount to a continuing act if they form part of a “discriminatory state of affairs”: *Sridhar v Kingston Hospital NHS Foundation Trust* [2020] UKEAT/0066/20/LA (V) at §36.
- c. A relevant but not conclusive factor will be whether the same or different individuals are involved: *Aziz v FDA* [2010] EWCA Civ 304 at §33.

### Omissions

- 33. EqA, s.123(3)(b) provides that ‘*failure to do something is to be treated as occurring when et person in question decided on it*’.
- 34. EqA, s.123(4) provides that in the absence of evidence to the contrary, a person is taken to decide on a failure to do something when (a) a person does an act inconsistent with it, or (b) if person does not do a consistent act, on the expiry of the period in which the person might reasonably have been expected to do it.
- 35. The parties highlight *Kingston upon Hull City Council v [Matuszowicz]* [2009] EWCA Civ 22, *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194, and *Viridor Waste v Edge* UKEAT/0393/14/DM.

### Just and equitable extensions

- 36. EqA s.123(1)(b) allows the primary limitation period to be extended to ‘*such other period as the employment tribunal thinks just and equitable*’. The Tribunal has a wide discretion under this provision. As per *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 at §37, the Tribunal should assess all relevant factors in the particular case, including in particular the length of, and the reasons for delay. Other relevant factors include prejudice to the Respondent, whether extension would open up historic issues, and the impact of delay on the quality of the evidence: *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 at §§32-33.