EMPLOYMENT TRIBUNALS

Claimant: Dr R Hou

Respondent: University of Manchester

HELD AT: Manchester (by CVP) **ON:** 28, 29, 30 June 2021, 1, 2, 5, 6, 7 July 2021, 2, 3, 6, 7, 10, 22 December 2021 (and in chambers on 20, 21 December 2021)

BEFORE: Employment Judge Batten
L Atkinson
E Cadbury

REPRESENTATION:

Claimant: In person
Respondent: C Breen, Counsel

JUDGMENT having been sent to the parties on 11 January 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim form dated 28 December 2019, the claimant presented complaints of unfair dismissal, direct race discrimination, direct age discrimination, victimisation following the submission of a grievance on 16 April 2018, a failure to provide written reasons for dismissal and detriment for whistleblowing. On 29 January 2020, the respondent presented its response to the claim.

2. On 16 March 2020, a case management preliminary hearing took place at which a list of complaints and issues was drawn up. The parties were directed

to finalise the list of issues between themselves but never managed to do so before this hearing. At a further case management preliminary hearing on 23 February 2021, deposit orders were made in respect of 3 allegations.

3. On 12 May 2021, the claimant made a number of applications for disclosure of 5 items and documents. The applications were considered at the start of this hearing and refused, as follows.

    a. The first 2 items sought were the audio recordings of 2 grievance investigation meetings which took place on 31 July 2018. The notes of the meetings had been disclosed and the respondent had reported that the recordings were not available because they had corrupted. The claimant was not satisfied with the respondent's explanation; in essence, he did not believe what the respondent said. However, the claimant brought no evidence to suggest any intention or action by the respondent to destroy such evidence and the claimant gave the Tribunal no reason to disbelieve the respondent. Further, the claimant was unable to explain why he needed these items and/or how they were relevant to the issues to be determined. The Tribunal accepted that the recordings were corrupted and of no use and therefore refused this application.

    b. The claimant sought disclosure of "all and any documents" surrounding the recruitment process for a laboratory manager role, in 2018-2019. The basis of the claimant's application was that, because he was the only redeployee in the recruitment process, he wanted to see what the respondent was doing and/or considering at the relevant time. The claimant was unable to identify any specific documents that he sought and said that he thought that something might turn up. The Tribunal considered this request to amount to a fishing expedition and disproportionate to the issues in the case, and so refused it. The claimant was told that he could cross-examine the respondent's witnesses on the laboratory manager recruitment process in any event.

    c. The claimant sought disclosure of "all and any documents or communications" around the resignation of Dr De Hert in May 2019. The claimant said he was not told about this resignation at the time and, in essence, the claimant did not believe what Professor Hardacre says about when he knew of the resignation. It was agreed that the claimant was under notice of redundancy on 20 February 2019 and that Dr De Hert had resigned on 31 May 2019. There was no obligation on the respondent to inform the claimant of Dr De Hert's resignation. The claimant's case was that the resignation created a vacancy that he could have filled. The respondent disputed that a vacancy arose on the basis that it intended to review the CAFE4DM project progress and direction, including staffing roles and requirements. The Tribunal considered that the claimant was again hoping that something would turn up to show that Professor Hardacre knew about the resignation before he said he did. However, the question of whether Professor Hardacre was told of Dr De Hert's resignation immediately or whether he was told at some point later on was not relevant to the issues to be determined in the claim. The Tribunal also considered this request amounted to a fishing expedition and so refused

it. The claimant was reminded that he could cross-examine Professor Hardacre on the matter if appropriate.

d. The claimant sought disclosure of "all notes and documents" relating to the compilation of the appeal outcome letter dated 22 August 2019, which appears in the bundle at page 1210 onwards. It was the claimant's position that he does not believe that the contents of the letter reflect the decision of the appeal panel. In addition, the claimant pointed out that the letter had not been signed by Mr Buxton but, instead, was signed by another person and 'pp'd'. In those circumstances, the claimant believed the letter had not been approved by the appeal panel. Again, the Tribunal did not consider this to be relevant to the issues in the claim and amounted to a fishing expedition. The claimant was reminded that he could cross-examine the respondent's witnesses on the appeal decision and the contents of the letter. This application was therefore refused.

4. <u>Application item c. above was revisited</u> in the course of the hearing when it arose in cross-examination of the respondent's witnesses. As a result, Dr De Hert's resignation letter was voluntarily produced by the respondent, together with the minutes of a meeting held on 25 June 2019 to review the CAFE4DM project. The claimant was then able to cross-examine witnesses on these documents.

Evidence

5. A bundle of documents comprising 1591 pages, comprising 2 full lever-arch files, was presented at the commencement of the hearing in accordance with the case management Orders. A number of further documents were added to the bundle in the course of the hearing including Dr De Hert's resignation letter and the minutes of a meeting on 25 June 2019 to review progress of the CAFE4DM project – see paragraph 4 above. References to page numbers in these Reasons are references to the page numbers in the bundle.

6. At the beginning of this hearing, the claimant clarified that his comparators for his direct discrimination complaints were: Dr Sergio De Hert in respect of the direct age discrimination complaint; and Dr Bernard Treves-Brown for the direct race discrimination complaint. These comparators were incorporated into the list of issues below.

7. The claimant gave evidence himself from a lengthy witness statement and a supplemental witness statement. The respondent called 6 witnesses, being: Professor Paul Townsend, Faculty Head and dismissal appeal panel member; Sarah March, Faculty Head of HR; Professor Christopher Hardacre, Vice Dean and Head of School; Professor Philip Martin, academic leader on the CAFE4DM project; Dr Thomas Rogers, Senior Lecturer and interview panel member; and Anne O'Neill, HR partner. Ms O'Neill also tendered a supplemental witness statement. All of the witnesses gave evidence from written witness statements and were subject to cross-examination.

8. In addition, the Tribunal was provided with a cast list and 2 chronologies (one prepared by each party). Each party produced skeleton arguments at the

start of the hearing. These documents were revised and resubmitted at the end of the hearing by each party as written submissions.

The issues to be determined

9. At the outset of the hearing, the Tribunal discussed the complaints and issues with the parties. It was agreed that the issues to be determined by the Tribunal at this hearing were as follows:

Jurisdiction and time points

1. Did the Claimant bring his claim within 3 months of the unlawful treatment (taking into account any adjustments to that 3 months' period time limit for early conciliation purposes)?

2. If not, were the acts and omissions to which the Claimant's complaint relates an element of conduct extending over a period?

3. If so, when did that period end and did the Claimant bring his claim within 3 months of that period ending (taking into account any adjustments to that three months' period time limit for early conciliation purposes) such that the acts and omissions to which the Claimant's complaint relates were nonetheless in time in accordance with Section 123(3) of the Equality Act 2010?

4. If not, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint?

5. If the answer to paragraph 1, 2 and/or 3 above is yes, does the Tribunal have jurisdiction to consider the claim?

Unfair dismissal

6. Was the Claimant's contract deemed to be one of indefinite duration by the application of Section 8 and Section 9 of The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002?

7. Was the Claimant dismissed by the Respondent?

8. What was the reason for the Claimant's dismissal?

9. Was the reason, or the principal reason, for dismissal one falling within Section 98 of the Employment Rights Act 1996, or some other substantial reason as would justify the dismissal of an employee holding the position the Claimant held?

10. If so, did the Respondent act reasonably in treating the reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources, and having regard to equity and substantial merits of the case?

11. Was dismissal within the band of reasonable responses?

Written reasons for dismissal

12. **Did the Respondent provide the Claimant with a written statement giving particulars of the reasons for the Claimant's dismissal pursuant to Section 92 of the Employment Rights Act 1996? *The claimant says he requested reasons on 23 August 2019.***

Direct discrimination because of the protected characteristic of age

13. **Has the Respondent subjected to the Claimant to the following treatment falling within Section 13, Section 39 and Section 111 of the Equality Act 2010?**

    a) **Refusing the request of Claimant's direct appointment or contract extension to the CAFE4DM PDRA post without giving reasonable explanations (paragraphs 11.1 to 11.4 of the Particulars of Claim (hereafter, the Particulars));**

    b) **Failing to provide the Claimant with a written statement giving particulars of the reasons for the above less-favourable treatment (paragraph 24 and paragraph 26 of the Particulars);**

    c) **Deliberately ignoring the Claimant's Redeployee status at the interview stage of the recruitment process (paragraph 14 of the Particulars);**

    d) **Denying the Claimant training because he "*had been a post doc for 18 years and so the gap too large to fill in*" (paragraph 18.3.1 of the Particulars).**

14. **Has the Respondent treated the Claimant, as alleged, less favourably than the Respondent treated or would have treated a comparator? *The Claimant's comparator for the purpose of his age discrimination claim is Dr Sergio De Hert.***

15. **If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of age?**

16. **If so, what was the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?**

17. **Alternatively, does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?**

Direct discrimination because of the protected characteristic of race

18. **Has the Respondent subjected the Claimant to the following treatment falling within Section 13, Section 39 and Section 111 of the Equality Act 2010?**

    a) **Omitting to consider the Claimant's suitability for the role of Lab Manager before the vacancy was advertised (paragraph 19 and paragraphs 19.1 to 19.2 of the Particulars);**

b) Depriving the Claimant of the benefit of a Redeployee interview and subjecting him to a formal recruitment interview instead (paragraph 19.5 of the Particulars);

c) Failing to provide the Claimant with a written statement giving particulars of the reasons for the above less-favourable treatment (paragraph 24 and paragraph 26 of the Particulars);

d) Denying the Claimant of training because *"The interview panel thought you had an appreciation of the technical aspects required of the role of Laboratories manager but that you were unable to answer the questions sufficiently at interview to provide the panel with enough evidence that with training and within a reasonable timeframe that you could reach the required levels for this front facing key school management role…"* (paragraph 19.6 of the Particulars);

e) Omitting the involvement of the HR Partner of the School of CEAS in the Claimant's redeployment process (paragraph 19.7 of the Particulars);

f) Telling the Claimant that *"Any vacancy (within the School) would have to be advertised. … Your application gets you shortlisted, but it is the interview that gets you the job"*. (paragraph 22.3, paragraph 22.3.1 and paragraph 22.3.2 of the Particulars).

19. Has the Respondent treated the Claimant, as alleged, less favourably than they treated or would have treated a comparator? *The Claimant's comparator for the purpose of his race discrimination claim is Dr Bernard Treves Brown*.

20. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of the Claimant's ethnic origin?

21. If so, what was the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Victimisation

22. Did the Claimant do a protected act or acts for the purposes of Section 27 of the Equality Act 2010? *The protected act contended for is the claimant's grievance of 16 April 2018.*

23. Did the Respondent believe that the Claimant might do a protected act, namely bringing proceedings under the Equality Act before the Employment Tribunal and/or taking further steps for the purposes of or in connection with the Equality Act?

24. Did the Respondent, by doing the following things, subject the Claimant to a detriment or detriments falling within Section 27, Section 39 and Section 111 of the Equality Act 2010?

a) Announcing different outcomes of the grievance investigation to the Claimant and the Claimant's grievance respondents (paragraphs 18.1 to 18.2, paragraphs 18.7 to 18.8 and paragraph 27 of the Particulars);

b) Professor Christopher Hardacre's sitting in the interview panel of the Claimant's Lab Manager interview (paragraph 19.4 of the Particulars);

c) Putting the Claimant onto an Extended Project Post (EPP) without notice and due procedure (paragraph 20.2 of the Particulars);

d) Depriving the Claimant of his legitimate entitlement of permanency by disguising the new contract with a contract extension (paragraph 20.4 of the Particulars);

e) Refusing to consider the Claimant's discrimination claims in the Claimant's appeal against dismissal (paragraph 37.1 of the Particulars);

f) Withholding the information of the CAFE4DM PDRA holder, Dr D's resignation from the Claimant for nearly 2 months (paragraph 37.2 of the Particulars);

g) Telling the Claimant's colleagues off and not to contact the Claimant for any work in order to create an intimidating, degrading and humiliating environment for the Claimant (paragraph 42.8 of the Particulars);

h) Making no effort to find a suitable and alternative role for the Claimant within the School of CEAS;

i) on the contrary, sparing no effort to prevent the Claimant from getting one when there was a suitable and alternative role for the Claimant within the School of CEAS, e.g., Lab Manager (paragraph 19 and paragraphs 19.1 to 19.7 of the Particulars), CAFE4DM PDRA (paragraph 28, paragraph 37, paragraphs 37.2 to 37.3, and paragraphs 37.3.1 to 37.3.2 of the Particulars), and MEG Rig (paragraph 42 and paragraphs 42.1 to 42.8 of the Particulars);

j) Rejecting the Claimant's appeal against dismissal on 22 August 2019 (paragraph 40 of the Particulars) and dismissing the Claimant on 31 August 2019 (paragraph 43 of the Particulars).

25. If so, was the Claimant subjected to any or all of the detriments because either:

a) The Claimant had done a protected act or acts;

b) The Respondent believed that the Claimant might do a protected act.

<u>Unreasonable failure to follow the ACAS Code of Practice</u>

26. Was this a case to which the ACAS Code of Practice applies?

27. If so, was there a failure to follow the ACAS Code of Practice by the Claimant and/or Respondent?

28. If so, was the failure unreasonable?

29. If so, is it just and equitable in the circumstances, for any award to be uplifted/decreased by up to 25%?

30. If so, what shall be the uplift or decrease?

<u>Remedy</u>

31. If the Claimant succeeds in the unfair dismissal claim, what remedy or compensation should be ordered?

32. If the Claimant succeeds, in whole or in part, in the unlawful discrimination claims, what remedy or compensation should be ordered?

<u>Whistleblowing detriment</u>

33. Did the Claimant make a protected disclosure within the meaning in sections 43A - H of the Employment Rights Act 1996 at the meeting on 18 June 2019 by telling the Respondent that it was in breach of legal obligations under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and also the Respondent's Policy and Procedure on Contracts of Employment?

34. If so, did the Claimant suffer a detriment for blowing the whistle, namely

(i) the rejection of the Claimant's appeal against dismissal; and

(ii) the alleged failure to address in the appeal outcome letter the discussion that took place during the appeal hearing?

Findings of Fact

10. Having considered all the evidence, the Tribunal made the following findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

11. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal have not simply considered each particular allegation, but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

12. The findings of fact relevant to the issues which have been determined are as follows.

13. The claimant is of Chinese origin and nationality. He was 58 years old at the date of termination of his employment. The claimant was employed by the respondent on a succession of fixed term contracts, from 17 June 2013, as a post-doctoral research associate and later as an Experimental Officer, each

role being on grade 6 of the respondent's job grading scales. The claimant's first contract was for a year, to 16 June 2014. That contract was extended by funding for almost an extra 4 months, to 31 October 2014. From 1 November 2014, the claimant secured a 3½ year fixed term contract as a grade 6 Experimental Officer, funded by Unilever to 30 April 2018. When that contract came to an end, it was extended firstly for a month, then for a further 5 months, and then for another 7 months, with a final 3 months' extension until the claimant's dismissal for redundancy on 31 August 2019. Throughout the claimant's employment, he worked in the respondent's JCB pilot hall and he was managed by Dr Peter Martin.

Relevant policies and procedures

14. The respondent has a number of relevant policies and procedures which were referred to in evidence, as follows:

14.1 A "Procedure for the dismissal of members of staff by reason of redundancy", which appears in the bundle at page 1290 onwards. Paragraph 10 provides:

"*In instances where a redundancy is to be effected … without the application of selection criteria, each such member of affected staff shall normally receive … an invitation to attend a meeting at which she or he may make oral or written representations. Such a meeting may, if appropriate, include a discussion of the opportunities for redeployment to other appropriate duties in the University*".

14.2 A "Policy and Procedure on Contracts of Employment" which appears in the bundle at page 1322 onwards. This commences with a statement that the document clarifies the type of contracts the respondent uses for different working arrangements and explains the use of fixed term contracts and permanent contracts and the redundancy/termination arrangements that apply in each case. It also says that it is the respondent's general policy to, wherever possible, appoint members of staff on contracts of an indefinite duration. The Tribunal considered this statement did not apply insofar as the claimant's situation was concerned. The respondent's evidence on the matter comprised numerous and various explanations for why the claimant could not have been appointed to a contract of indefinite duration at any stage. The Tribunal considered such evidence demonstrated the efforts made by a number of individuals to avoid appointing the claimant to anything other than a fixed term contract, or to avoid acknowledging the claimant's permanent status despite the provisions of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

14.3 In the "Policy and Procedure on Contracts of Employment", under the heading "Objectives", is a statement that the procedure:

"*seeks to provide fair, effective and transparent mechanisms by which decisions relating to the use of fixed terms contracts and permanent contracts can be taken and implemented*".

14.4 The "Policy and Procedure on Contracts of Employment" contains procedures for the extending and termination of a fixed term contract, at sections 5.6 and 5.7, on page 1325 of the bundle. A separate procedure for permanent staff at risk of redundancy due to grant/project end date is at section 6.1, on page 1327 of the bundle. Section 6.1C states that:

"*permanent staff will be placed on the redeployment register*".

In contrast, section 5.7B states that:

"*If appropriate, fixed term contract staff will be placed on the redeployment register*".

There is therefore a difference, and a lesser entitlement for fixed term staff when compared to permanent staff, despite the provisions of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

14.5 The respondent's "Redeployment Policy" appears in the bundle at page 1335 onwards. Several of the respondent's witnesses made a point of telling the Tribunal that this Policy had been agreed with the respondent's recognised trade unions which the Tribunal understood to be some sort of attempt to justify it and, by implication, to suggest that it could not be challenged. The principles of the "Redeployment Policy" include that employees on the "redeployment register", will automatically be considered first for any vacant post within the University at their current grade, and before other internal or external applications. The Policy provides that, before vacancies are advertised, the "redeployment register" will be checked by HR to determine if there are any potentially suitable candidates for redeployment, and that consideration should be given to individuals who may be able to fulfil the role providing suitable training is available. Further, the Policy provides that all vacancies will initially be advertised for 5 working days as ringfenced to applications from staff on the "redeployment register". In addition, where a member of staff becomes eligible for redeployment after a post has been opened up to internal and external candidates, the recruiting manager must give due consideration to the redeployee's application and arrange to interview them as soon as possible if they are considered suitable for the role. The interview will be used for determining the redeployee's suitability for a vacancy and will be conducted as informally as possible. The key objective is to establish whether or not a ringfenced employee meets or can be trained in a reasonable period to make the essential criteria in the person specification.

14.6 Despite these worthy statements, and the existence of the "Redeployment Policy", several of the respondent's witnesses admitted in evidence that there was, in fact, no such "redeployment register" in existence at the University, nor any central place where a record of potentially redeployees was kept, nor any consistent mechanism by which redeployees could be identified for and/or notified of vacancies that might be available or which were expected to arise. Given that

redeployees are supposed to be given "priority" in recruitment, the respondent's witnesses were unable to explain how this was to, or did, happen in practice consistently or how "priority" could be put into effect in the absence of a "redeployment register", nor any process to identify redeployees when required. Such processes for redeployment as existed were very much hit and miss at best, and often depended on who knew who. The "redeployment register", despite being agreed with the respondent's trade unions, was a fiction.

14.7 Further, several of the respondent's witnesses sought to suggest that all vacancies must be advertised externally to comply with UK visa and immigration requirements. This suggestion conflicts entirely with the terms and purposes of the "Redeployment Policy" and in particular the mechanism for the priority treatment of redeployees.

14.8 In light of the evidence before it, the Tribunal failed to see how redeployees at the respondent could effectively and consistently be given priority if there was no redeployment register. The Tribunal concluded that the "Redeployment Policy" was never adhered to by the respondent, despite having agreed it with the trades unions, and that the statements in the "Redeployment Policy" were almost meaningless.

14.9 The respondent's Statute XIII is entitled "<u>Academic and Academic Related Staff, Dismissal and various other procedures</u>". It appears in the bundle at page 1354 onwards. It covers, amongst other things, dismissal by reason of redundancy arising from the termination of a limited term appointment. At section 7, it provides that:

"*The respondent's President and Vice Chancellor, or persons designated by him or her, in every case where a limited-term contract is due to terminate by virtue of a limiting event …, shall review all the circumstances, including where appropriate the availability of the postholder to resume the duties of the appointment and shall determine*

(i) whether instead of terminating by virtue of the limiting event … the limited term contract should be extended or an appointment of indefinite duration be offered; or

(ii) *in circumstances where there has been more than one limited term appointment within a continuous period of employment such that the provisions of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 are applicable, instead of the appointment terminating by virtue of the limiting event, whether there are objective and justifiable reasons for further extending the appointment, or whether an appointment of indefinite duration should be offered;*

whether there are opportunities for the redeployment of the member of staff to other appropriate duties in the University."

14.10 The Tribunal was shown evidence that the consideration of individual cases, as provided by the respondent's Statutes in fact never happened. Instead, the responsibility for the review of individual cases was delegated to a senior leadership team but they considered only basic statistics giving the numbers of employees who had over 4 years' service and whose employment was at risk. There was no evidence of any review of individual postholders' circumstances, and no evidence that the applicability of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 was addressed in any case. The Tribunal considered that this state of affairs contributed to the continuing confusion surrounding the claimant's employment status, precisely because of the respondent's failure to address the claimant's status under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, as a deemed permanent employee, and the failure by HR and the respondent's senior management to communicate with the claimant in an open or transparent manner, or at all, in the period from when he was first warned of redundancy in October 2017.

<u>October 2017</u>

15. On 13 October 2017, HR notified Dr Peter Martin, who was the claimant's supervisor, that the claimant's employment under his fixed term contract was due to end on 30 April 2018, and HR set out options for the claimant's future.

16. Dr Peter Martin replied to HR, enquiring about a permanent contract for the claimant and pointing out that the claimant met the requirements of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, and he sought clarification as to whether the claimant was automatically deemed to be permanent because the claimant had more than 4 years' continuous service under a succession of fixed term contracts. There was evidence in the bundle that the respondent had formally acknowledged this deemed permanent status under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, in writing, in respect of other employees. The respondent's witnesses were unable to explain why this was not done in the claimant's case. When challenged, the respondent's evidence amounted to a suggestion that the claimant had been treated as if he was permanent in any event and that status as a permanent employee would have made no difference to his treatment. The Tribunal considered this to be an attempt at ex-post facto justification of a number of failings by the respondent.

17. On 13 October 2017 the claimant was given 6 months' notice that his contract would end on 30 April 2018.

<u>The CAFE4DM project inception and recruitment</u>

18. On 19 October 2017, the respondent and Unilever announced a new research project known as "CAFE4DM". The principal investigators were to be Professor Hardacre from the respondent and Professor Kowalski, Principal Engineer of Unilever's Research and Development Department, who is also a

visiting professor at the respondent and who was the claimant's Industrial Manager.

19. On 11 November 2017, as part of the CAFE4DM project, the respondent advertised a 2-year fixed term contract for a Post-doctoral Research Associate at grade 6. The deadline for applications was 10 December 2017.

20. Dr Peter Martin continued to seek clarification of the claimant's status with HR, but HR did not reply to his emails. On 16 November 2017, Peter Martin emailed Professor Hardacre, Professor Philip Martin and Professor Kowalski, to say that the CAFE4DM project post appeared very similar to the claimant's current Experimental Officer role and he requested that the claimant be appointed. Professor Hardacre replied, saying the claimant would be considered as 'a redeployee', although at that stage the claimant was not within 4 months of termination of his contract and so he did not qualify to be considered as a redeployee. The situation was further confused when another member of HR told Dr Peter Martin that the claimant would be "converted to permanent status" and, as it shows on page 119 of the bundle, the claimant would receive a letter to that effect "in the next few days". No such letter was ever issued to the claimant and the respondent's HR witnesses were unable to explain to the Tribunal why not.

21. On 1 December 2017, HR told Peter Martin that the conversion of the claimant's contract to "permanent underpinned by external funding" did not happen automatically and that it needed to be requested via a PCM form.

22. On 2 December 2017, the claimant also emailed HR to ask if permanency was automatic, and whether there was a difference between "permanency underpinned by external funding" and "permanency underpinned by internal finding" in relation to the respondent's redundancy procedures. The claimant did not get an answer from HR.

23. On 8 December 2017, the claimant applied for the CAFE4DM Postdoctoral Research Associate role. That same day, Benita Jackson of HR advised Professor Hardacre to remove the job advert and extend the claimant's contract for the term of the new role on the CAFE4DM project. That email appears at page 130 of the bundle. Professor Hardacre did not reply immediately and instead he forwarded the email to Professor Philip Martin for his views. Eventually, on 9 January 2018, more than a month later, Professor Philip Martin said the roles were in effect different.

24. In the meantime, on 20 December 2017, Ms Jackson replied to Peter Martin to say that she had had a conversation with Professor Hardacre and Professor Philip Martin, and she suggested that he should speak to them about the claimant's position. She did not give an answer to the enquiries he had made.

25. On 20 December 2017, Dr Peter Martin submitted a PCM form, on the claimant's behalf, to request that the claimant be made a permanent employee. The PCM form was eventually referred to Professor Hardacre, and

it progressed no further. No explanation for the respondent's failure to progress the PCM form was given.

26. It has been the claimant's case that a white employee in the School, Dr Bernard Treves-Brown, was made permanent at this time and that he was 10 years' younger than the claimant. In fact, the evidence presented to the Tribunal showed that Dr Treves-Brown had been made "permanent" back in mid-2014, and quite possibly earlier than that. There was no evidence of the circumstances in which or reasons why Dr Treves Brown was made permanent. However, it was apparent that Dr Treves Brown was made permanent before the respondent's "Policy and Procedure on Contracts of Employment" came into effect in 2016. In those circumstances, the Tribunal did not consider that the claimant had shown that Mr Treves-Brown's circumstances were the same or not materially different to his, in relation to being given "permanent" status, and that Mr Treves-Brown was not a valid comparator for a direct discrimination claim.

27. On 30 December 2017, the respondent's HR witnesses asserted that the claimant became a "registered redeployee" albeit that the witnesses admitted that the claimant was not on a "register" as such, nor was he registered anywhere, the redeployment register being a fiction – see paragraph 14.6 above. Under the respondent's Redeployment Policy, because there was 4 months to the claimant's contract end date, it meant the claimant should get "priority" for appointment to internal vacancies if he met the essential criteria for the post concerned or if he could do so within a reasonable period through training. If those conditions were satisfied, the Tribunal was told that a redeployee would be eligible for appointment.

28. On 8 January 2018, in response to further enquiries by Dr Peter Martin, about the claimant's future employment, Professor Philip Martin emailed Dr Peter Martin to say it was important to go through "due process" in relation to the CAFE4DM post. Professor Philip Martin did not say which "process" he meant.

29. On 23 January 2018, Dr Peter Martin was obliged to hold a redundancy discussion with the claimant. It was by then 4 months to the claimant's potential redundancy and Dr Peter Martin was endeavouring to follow the respondent's procedures for such. On the same day, Dr Peter Martin emailed Professor Hardacre and Professor Philip Martin, copying in HR, saying that, based on the job description for the CAFE4DM post, he and Benita Jackson of HR believed there was a degree of similarity between the CAFE4DM post and the claimant's post, that the claimant was "permanent underpinned by external funding", and therefore they believed that the respondent had a legal obligation to extend the claimant's contract and give the claimant the CAFE4DM post. Dr Peter Martin also enquired about the progress of the PCM form for the claimant. He was told that it was with the Head of School, Professor Hardacre, for approval and that the PCM could not proceed until the School approved it.

30. On 2 February 2018, the claimant attended an interview for the CAFE4DM post. There had been 18 applicants, out of which 3 candidates were selected

for interview. From the shortlisting records, it is apparent that only 1 candidate fulfilled all the essential criteria and that top-scoring candidate obtained another position before the interview date because, for reasons unknown, it took the respondent's management over 2½ months to arrange the interviews. There were therefore only 2 candidates who were interviewed – the claimant and Mr De Hert (who had not yet been awarded his PhD at the time). Both candidates had achieved the same total score in the shortlisting process but neither candidate met all the essential criteria. However, they had scored well above the next highest scoring candidate by a margin of 12 points.

31. Before his interview, the claimant was given a mock interview and some CV advice. The panel who conducted the interviews comprised Professor Philip Martin and Dr Rogers. Neither interviewer was told of the claimant's "redeployee" status. It was a competitive interview. Both candidates were asked the same questions. The interviewers made brief notes which constitute a very poor record of the recruitment post. There is no reference to the questions asked, and it was apparent from the documents that the question numbers on the notes made by the panel do not actually tally with the questions asked. The result of the interview process was that the CAFE4DM post was given to Dr Sergio De Hert. The claimant cites Dr De Hert as the comparator for his age discrimination complaint, and relies upon the fact that Dr De Hert is considerably younger than him and that Dr De Hert did not meet one of the essential criteria.

32. On 8 February 2018, the claimant was told, verbally, by Professor Philip Martin that he was not successful. The claimant's case is that he was a "redeployee" and that therefore he should have been prioritised for appointment. However, at the time the CAFE4DM post was advertised, the claimant was not a redeployee. He became a redeployee only during the recruitment process and, in such eventuality, the Policy provides that the recruiting manager must give due consideration to the redeployee's application and arrange to interview them if they are considered suitable for the role. The Tribunal noted that the respondent's "Redeployment Policy" wording does not say in terms that a redeployee would be prioritised *for appointment* at any point; rather, it says the respondent will "give priority". In any event, the claimant was not given priority consideration but his application was considered but the claimant did not meet the essential criteria. Nevertheless, the claimant was shortlisted and interviewed. There was, however, no evidence of how there was an assessment of whether the claimant could meet the essential criteria with time and training. Having said this, the Tribunal accepted the respondent's submission that an assessment was undertaken - the result was that the interviewing panel considered the claimant would not meet the essential criteria even with training, so the claimant was not given priority in the recruitment process for the CAFE4DM post.

33. The Tribunal also considered whether an informal initial interview would have made a difference and found on a balance of probabilities that it would not have done so. In reaching this view, the Tribunal took account of the evidence of the respondent's recruiters who described the claimant's performance in his interview, including the claimant's dogmatic approach and misunderstanding

of the CAFE4DM project. The Tribunal considered that such an attitude/approach would have come out in due course, whether the claimant's interview had been formal or informal: for example, when asked to describe his approach to the proposed project, despite being prompted and corrected, the claimant persisted in explaining a project that was not what the interviewers were recruiting for, nor was his approach what they were hoping for. In light of that evidence, the Tribunal considered that the recruitment panel could, and would, have reasonably concluded that the claimant would not, even with training, be able to fulfil the essential criteria in a short period of time. The interviewing panel in fact decided that the claimant did not have the open mind/blue sky thinking, or the research background, that the respondent was seeking for this important new piece of research work.

The claimant complains

34. Later that day, 8 February 2018, the claimant spoke informally with Ms Jackson of HR, and raised the possibility of discrimination and unfair treatment in the recruitment process. The claimant did not, at that stage, specify what he meant by "discrimination", but unfair treatment was understood. The Tribunal understands this to amount to a complaint because he did not get the CAFE4DM job and so was facing a redundancy situation.

35. On 21 March 2018, which is another 5 or 6 weeks later, the claimant was given feedback on his interview. The claimant was then told by Professor Philip Martin and Dr Rogers that he had not addressed the project correctly at interview.

36. By 16 April 2018, the respondent has found some spare money in its School budgets and Professor Hardacre emailed the claimant to say that he could have a one-month extension to his employment, with a view to a new 10 months' contract on a new project.

The formal grievance

37. Later that day, 16 April 2018, the claimant submitted a grievance about the CAFE4DM post recruitment. The grievance mentions discrimination and is accepted to be a protected act for the purposes of the claimant's victimisation complaint. The claimant submitted his grievance to the respondent, saying it was about his treatment in the recruitment process for the CAFE4DM Postdoctoral Research Associate role. The claimant complained that he had not been treated as a redeployee, and contended that not treating him as a redeployee was discrimination and unfair treatment.

38. On 1 May 2018, Dr De Hert, as he then was titled, started in the CAFE4DM role.

39. On 1 May 2018, the claimant's fixed term contract was extended by one month. The respondent explained that this was possible due to an underspend on another project. The Tribunal remained unclear as to whether the project from which the funding was taken was in fact a project which the claimant was working on, or not. There was no suggestion that the claimant

was not continuing his usual work and the original purpose of the funds used was never identified.

40. The nature of the work done by the claimant between 1 June and 20 June 2018 was unclear, including for whom or under what funding source. On 20 June 2018, the claimant's contract was extended for a further 5 months to 31 October 2018, the extension being in effect backdated, so as to be from 31 May 2018. The respondent's evidence was that this extension to the claimant's contract was funded by "additional money" from Unilever.

41. The respondent proceeded to investigate the claimant's grievance. On 30 July 2018 the claimant had a grievance interview with a panel consisting of Professor Rowlands and Ms March from HR. During his interview, the claimant struggled to articulate what he meant by discrimination and unfair treatment, eventually suggesting that the discrimination could be because of age, in that the claimant suggested his treatment was because he was too old. However, the claimant also said he thought it was because his supervisor, Dr Peter Martin, did not get on well with one of the interviewers, Professor Philip Martin. The Tribunal considered with care the detailed and lengthy notes from this interview, which appear in the bundle at pages 310 - 330, and found that the respondent failed in this interview, and also in the claimant's second interview, to probe the claimant about what he meant by "discrimination" or to get to the bottom of what the claimant's grievance was about.

42. In the course of the grievance investigation, Benita Jackson of HR was interviewed, Professor Philip Martin was interviewed, Dr Rogers was interviewed, Professor Hardacre was interviewed, and Dr Peter Martin was interviewed. Ms Jackson was interviewed a second time, and the claimant was also interviewed for a second time on 28 August 2018.

43. On 16 September 2018, a grievance outcome report was produced. That is the date on the report but, for some reason, the report was not sent out until November 2018. The delay was not explained.

44. In the meantime, on 31 October 2018, the claimant's extension to his fixed term contract expired. He continued to work for the respondent.

<u>The grievance outcome report</u>

45. On 2 November 2018, the grievance outcome report was finally circulated. It appears in the bundle at pages 396-397. The Tribunal considered the contents of the grievance report and found it to be lacking in a number of ways. The report is badly written and wholly unclear as to its conclusion(s). Nowhere in the grievance outcome report report does it explicitly address the claimant's points about discrimination and unfair treatment despite that these words appear in the first few paragraphs of the claimant's grievance on the first page. It is hard to miss them. Nowhere in the grievance outcome report does it actually state that the claimant's grievance is not upheld although the respondent's witnesses all seemed to understand that to be the outcome. And the covering email, sent from HR to the claimant with the report, is

equally unclear because it also does not say whether the grievance has been upheld or not, although it does say that the claimant has 'a right of appeal' as if to imply that the claimant should work out the conclusion for himself. The report also does not make clear that the respondent is not going to comply with any of the claimant's requested outcomes. Buried in the myriad recommendations is a suggestion that certain of the respondent's personnel need training and will be spoken to and there is, at best, a vague acceptance that the claimant had not been treated as a redeployee. However, the report goes on to say that treating the claimant as a redeployee would not have made a difference. The Tribunal considered the report to be a fudged response to the issues raised.

46. On 9 November 2018, the claimant emailed Ms March of HR to say that he felt vindicated and was happy to accept the findings, but he requested a meeting about a few concerns on some of the issues in the report. The claimant said, "Overall I feel that my grievance has been vindicated". Despite that the claimant's understanding of the outcome was clearly at odds with that of the respondent, HR did nothing to correct the claimant's view of the matter. The claimant believed he had been vindicated because, at finding number 9, the report said the claimant "should have received the benefits of being interviewed as a redeployee". As the thrust of the claimant's grievance was that the redeployment policy was not followed, the Tribunal considered the grievance findings (number 9) effectively upholds that complaint.

47. For reasons which were never satisfactorily explained, the grievance report was sent to Professor Hardacre in a different format to that received by the claimant. Unlike the claimant, Professor Hardacre had the benefit of a covering email stating that none of the complaints had been upheld. As explained above, the Tribunal considered this to be an incorrect statement. Professor Hardacre also received a summary of 5 out of the 9 recommendations in the full report.

48. HR sent Professor Philip Martin and Dr Rogers a very brief summary of certain of the grievance outcomes, limited to those which impacted them personally. In the case of Professor Philip Martin, one of the outcomes was that he should receive some training; the implication being that he had done something wrong. The Tribunal noted that Professor Philip Martin later asked to know what it was that he is meant to have done wrong. He was as puzzled by the report and its outcomes as the Tribunal were.

49. On 22 November 2018, a PCM was produced in respect of the claimant's contract, albeit with wrong dates on it, including an extension to the claimant's contract from 1 March to 31 May 2019. This administrative mistake resulted in a further, automatic extension of the claimant's contract to 31 August 2019.

<u>The Laboratory Manager position</u>

50. On 28 November 2018, the respondent advertised the role of Laboratory Manager in the School in which the claimant worked. This role is a 'Professional Support Service' position at grade 6 and on a fixed term contract to July 2021, despite that it appeared to the Tribunal that the Laboratory

Manager post was in effect a permanent position and part of a service to the School on a continuing and long-term basis. The use of a fixed-term contract for such a position was never explained.

51. On 10 December 2018, the claimant applied for the Laboratory Manager position.

52. On 12 December 2018, the claimant had a discussion about his grievance outcome, at a ‘post-grievance meeting’ with Ms March of HR. The claimant raised objections to a number of things in the grievance outcome report. It is not clear that Ms March did anything with the claimant’s objections.

53. On 2 January 2019, the claimant's fixed term contract was extended again to May 2019, and backdated to start on 1 November 2018, with 4 months funded by Unilever, and the period from 1 March to 31 May 2019 funded by the respondent as an extended notice period, called “an extended project period”. The claimant's case was that this period was disguised as a contract extension but the Tribunal did not find this was the case; rather, the additional 3 months extension was the result of an administrative mix-up with the end date. The claimant benefitted from the administrative mix-up because he got an extra 3 months’ employment that he would not have got otherwise.

54. In January 2019, the Head of School, Professor Hardacre, announced that the respondent had decided to re-activate the Meg Rig, which is a very large item of equipment at the respondent, and to use it for teaching. At this point in time, the claimant was the only member of the respondent’s staff who knew how to operate the Meg Rig.

55. On 31 January 2019, Dr Peter Martin met the claimant for a ‘4-months to redundancy’ consultation meeting, and the claimant became a redeployee once again.

56. On 7 February 2019, HR sent the claimant a redundancy notification letter confirming the termination of his employment on 31 May 2019. That date was later found to be wrong due to an error in the PCM.

57. On 15 February 2019 the claimant was told he had been shortlisted for the Laboratory Manager role. Prior to his Laboratory Manager interview, the claimant was given training on interview techniques and was subject to a mock interview and received feedback on his performance.

58. On 18 February 2019, Professor Philip Martin emailed the claimant with further feedback on his grievance and further explanation as to why the claimant was not appointed to the CAFE4DM role. On this occasion, Professor Philip Martin advised the claimant that the CAFE4DM role was a role which required “blue sky thinking” and also that the claimant needed to have published more academic papers.

59. On 19 February 2019, the Laboratory Manager post interviews were held. The claimant was treated as a redeployee and interviewed before the other candidates. The claimant was not appointed, and he was informed of this by

email an hour after the interview. The claimant accepted in evidence that he did not interview well for this position.

60. The claimant had been interviewed by Professor Hardacre, Mr Patricia Turnbull (a former Laboratory Manager) and Gary Burns (the recruitment manager). The notes from this recruitment process appear in the bundle at pages 519-524. The notes record the process that was undertaken by reference to the questions asked, and show full notes of the claimant's answers. Feedback was given to the claimant on his lack of people management skills which were considered essential for the Laboratory Manager's role.

Notice of redundancy

61. On 20 February 2019, the claimant was given formal notice of redundancy.

62. On 21 February 2019, the claimant's contract was extended by 3 months from 31 May to 31 August 2019, being the extended notice period of 3 months which arose due to the administrative mistake earlier, in the PCM. The claimant was therefore under notice of dismissal to be effective on 31 August 2019.

63. On 27 February 2019, there was a meeting to give further feedback to the claimant on the CAFE4DM role and further job seeking support was also given to the claimant.

Appeal against dismissal

64. On 4 March 2019, the claimant appealed his dismissal on the basis of unfair selection for redundancy and also complaining that he did not get the CAFE4DM post when he believed his Experimental Officer post had strong similarities. The claimant asked for "this decision to be reconsidered" but he did not make clear whether this was an appeal about the CAFE4DM appointment or about his subsequent selection for redundancy or both. The appeal letter appears in the bundle at pages 529-530. In any event, the Tribunal noted that the claimant had been unsuccessful in his application for the CAFE4DM post almost a year before this appeal was submitted and, by this time, Dr De Hert had been working in the CAFE4DM post for over 6 months.

65. On 15 March 2019, the claimant wrote to Ms March of HR requesting a written statement of the reasons for "… those less favourable treatments [he had] been subjected to as a fixed-term contract researcher". He quoted sections 3 and 5 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 – see bundle pages 543 – 544. Following a meeting with the claimant, Ms March replied by referring to the findings of the grievance and she sent the claimant a further copy of the grievance report. The claimant contended that such a reply was inadequate and did not answer his complaints in full. The Tribunal found that to be the case because the reply and grievance report do not address the claimant's subsequent complaint,

within his letter of 15 March 2019, about the Laboratory Manager selection process.

66. On 29 April 2019, the claimant submitted a bundle of documents to the respondent, to accompany his appeal. The claimant's appeal bundle is approximately 60 pages long. It consisted of documents covering the CAFE4DM recruitment and the claimant's grievance and also paperwork for the Laboratory Manager recruitment. In an email to HR, dated 24 May 2019, the claimant suggested that his appeal was about whether the decision to dismiss him was compliant with the respondent's procedures. The respondent submitted its own bundle of documents, of over 100 pages.

67. On 31 May 2019, Dr De Hert resigned from the CAFE4DM project. He was not replaced. The respondent decided that it would take the opportunity to review the CAFE4DM project work packages at that stage. The CAFE4DM project had been running for about a year and certain results had been produced from the research. The Tribunal accepted the respondent's evidence about this aspect and considered it was appropriate and reasonable to undertake a review before deciding on the project's future direction and future recruitment.

68. On 1 June 2019, the claimant started his "extended project period" which was a precursor to his dismissal for redundancy. The claimant was placed on a form of gardening leave in that he was still under contract and being paid but he was given time and space together with access to the respondent's facilities, so that he could job search for other roles/contracts.

69. In June 2019, the claimant was interviewed for a Project Manager post at the respondent but he was unsuccessful. All the candidates were redeployees, as was the claimant, and all were treated equally in the recruitment process.

<u>The appeal hearing</u>

70. On 18 June 2019, the claimant's appeal hearing took place. It was conducted by Professor Townsend, Gary Buxton from the respondent's Board of Governors, and Jason Eddleston, the respondent's Deputy Director of Workforce Organisation. A summary of the management case was prepared for Professor Hardacre by Ms O'Neill of HR. The appeal hearing commenced and was adjourned. The reason for the interlude was for the appeal panel to take an opportunity to check the respondent's Statutes, Ordnances and procedures, including seeking an explanation from the School of Engineering as to how they followed the process of terminating the claimant's contract, and also asking the claimant to clarify what he said had not been consistent about his dismissal. At this point the claimant sent in additional submissions in which he cited comparators for claims of age and race discrimination.

71. On 1 July 2019, during the adjournment of the appeal hearing, the respondent confirmed that the claimant's notice period would run to 31 August 2019. The letter which the claimant received said his employment would be terminated on 31 August 2019 unless a suitable alternative offer of employment was made or alternative funding was identified in the meantime.

72. The claimant replied to the appeal panel's enquiries, setting out what he believed had not been consistent about his dismissal. His reply appears in the bundle as a letter at page 1048, which is accompanied by a detailed paper headed "Item 3" which runs from page 1049 to page 1057. The claimant's case was that this was an act of whistleblowing, after the meeting on 18 June 2019, whereby he told the respondent it was in breach of its legal obligations under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, and also in breach of its "Policy and Procedure on Contracts of Employment". It is the claimant's case that he suffered detriment or detriments for that whistleblowing because he was treated as a fixed-term contract researcher when he should have been treated as a permanent employee in terms of recruitment and in particular having to apply for new roles or extensions to his contract.

73. On 29 July 2019, the appeal hearing reconvened. At this hearing, Professor Hardacre announced that Dr De Hert had resigned from the CAFE4DM project and therefore would be working on the project only until the end of the summer.

74. On 20 August 2019, the claimant was approached for advice on operating the Meg Rig.

75. On 22 August 2019, the claimant was given an outcome letter turning down his appeal. The claimant took issue in particular with the second paragraph of this letter, which appears at page 1211 of the bundle, and which says that the appeal panel was not prepared to discuss the claimant's previous grievance. The Tribunal found it was reasonable for the respondent to take that position. The claimant had not appealed the outcome of his grievance when he could have done so and it was unclear what the claimant wanted or, indeed, what the respondent could do about a matter which had been concluded over a year ago and when another person, Dr De Hert had been working in the CAFE4DM post for about 12 months, albeit that he had since resigned.

76. On 23 August 2019, the claimant requested written reasons for his dismissal pursuant to section 92 of the Employment Rights Act 1996. The respondent never replied to that request.

77. On 31 August 2019, the claimant's employment with the respondent ended.

78. In September 2019, the respondent conducted a review of the CAFE4DM project as it had resolved to do in light of Dr De Hert's resignation. As a result of the review, Professor Hardacre made efforts to contact the claimant about a possible post on the CAFE4DM project. However, by this time, the claimant had found alternative employment at the University of Nottingham.

The applicable law

79. A concise statement of the applicable law is as follows.

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

80. Regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 provides that, where an employee is employed under a fixed-term contract which has previously been renewed or where the employee had previously been employed on a fixed-term contract before the start of his latest contract, the employee (if he has been continuously employed for a period of 4 years or more) shall be a permanent employee unless the employment of the employee under the fixed-term contract had been justified on objective grounds when the contract was entered into or when last renewed.

81. Regulation 9 provides that if an employee considers himself to be permanent by virtue of regulation 8, he can request from his employer a written statement as to permanency or the reasons why the contract remains a fixed-term contract. An employer must provide such a statement within 21 days. If the employer without reasonable excuse omits to provide the requested statement, the Tribunal may draw any inference which it considers it just and equitable to draw.

Redundancy and unfair dismissal

82. Under section 98 (1) and (2) of the Employment Rights Act 1996 ("ERA"), the Tribunal must first decide what was the reason for the claimant's dismissal. The respondent has advanced redundancy as the reason for the claimant's dismissal. Redundancy is a potentially fair reason for dismissal under section 98 (2) (c) ERA.

83. The definition of redundancy is set out in Section 139 (1) ERA:

> *… An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:-*
>
> *(a) the fact that the employer has ceased or intends to cease –*
>
> > *(i) to carry on the business for the purposes of which the employee was employed by him, or*
> > *ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business –*
>
> > *(i) for employees to carry out work of a particular kind, or*
> > *ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish.*

84. A reason for dismissal has been described by the Court of Appeal as 'a set of facts known to the employer, or beliefs held by the employer which caused it to dismiss the employee', see *Abernethy v Mott, Hay and Anderson [1974] ICR 323*. The burden of proving the reason for dismissal is upon the respondent as employer.

85. If the respondent can show a potentially fair reason for dismissal, the Tribunal must then consider the test in section 98(4) ERA: namely whether in the circumstances including the size and administrative resources of the respondent's undertaking the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant; and the Tribunal must make its decision in accordance with equity and the substantial merits of the case.

86. In assessing the reasonableness of a dismissal for redundancy, the Tribunal must follow the guidelines laid out in Williams and others v Compair Maxam Ltd [1982] ICR 156 having regard to the question of whether the dismissal lay within the range of reasonable conduct which a reasonable employer could have adopted. The factors to be considered include:

    84.1 whether an employee was warned and consulted about the redundancy;
    84.2 whether the pool for selection was drawn appropriately;
    84.3 whether the selection criteria were objectively chosen and fairly applied;
    84.4 the manner in which the redundancy dismissal was implemented; and
    84.5 whether any alternative work was available.

87. The Tribunal must also consider whether the dismissal falls within the band of reasonable responses available to an employer in the circumstances of the case.

Written reasons for dismissal

88. Section 92 ERA provides that an employee who has been continuously employed for 2 years is entitled to be provided by his employer with a written statement of the reasons for the employee's dismissal. The employee must make a request for such and, if he does, the employer must provide a written statement of reasons within 14 days of the request.

89. If an employer unreasonably fails to provide a statement of the reasons for dismissal within the 14-day period, the Tribunal shall award the employee a sum equal to 2 week's gross pay.

Discrimination complaints

90. The complaints of race and age discrimination were brought under the Equality Act 2010 ("EqA"). Age is a relevant protected characteristic as set out in section 5 EqA. Race is a relevant protected characteristic as set out in section 9 EqA.

91. Section 39(2) EqA prohibits discrimination by an employer against an employee by subjecting him to a detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

92. The EqA provides for a shifting burden of proof. Section 136(2) and (3) so far as is material provides as follows:

> *(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.*

93. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

94. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International PLC [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

95. Section 13 EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevant protected characteristics include age and race.

96. Section 23 EqA provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's race.

97. Further, the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including *Amnesty International v Ahmed [2009] IRLR 884*, that in most cases where the conduct in question is not overtly related to a protected characteristic, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, age or race) had any

material influence on the decision, the treatment is "because of" that characteristic.

Victimisation

98. Section 27 EqA provides that a person (A) victimises another person (B) if A subjects B to a detriment because:

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

99. A protected act includes making an allegation (whether or not express) that A or another person has contravened the Act. Making a false allegation is not a protected act if the allegation is made in bad faith.

100. There is a helpful analysis of the previous similar provisions by Mr Justice Underhill in Martin v Devonshires Solicitors UKEAT/0086/10 namely:

    "The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint."

Time limits - EqA

101. The time limit for a complaint of unlawful discrimination is found in section 123 EqA, which provides that such complaint may not be brought after the end of:-

    (a) the period of three months starting with the date of the act to which the complaint relates, or

    (b) such other period as the Employment Tribunal thinks just and equitable."

102. Conduct extending over a period of time is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it*, or does an act inconsistent with doing it,* or on the expiry of the period in which that person might reasonably have been expected to do it. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

103. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such

matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble:-

"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any request for information."

104. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal considered the application of the "just and equitable" extension and the extent of the discretion and concluded that the Employment Tribunal has a "wide ambit".

Whistle-blowing detriment

105. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure.

106. Section 47(1A) to (1E) ERA provide that an employer can be vicariously liable for the detrimental acts of its workers unless the employer has taken all reasonable steps to prevent the detriment. It is immaterial whether the act of detriment or deliberate failure to act was done with the knowledge or approval of the employer.

107. A "protected disclosure" means a disclosure of information, but not mere allegations, to the employer or to a prescribed person which, in the reasonable belief of the worker is in the public interest and tends to show one or more matters including a failure to comply with a legal obligation, that the health or safety of any individual has been endangered, or that a criminal act has been committed.

108. The Tribunal has jurisdiction to consider complaints of public interest disclosure detriments by section 48(1A) ERA. Section 48(2) stipulates that on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

109. A 'detriment' arises in the context of employment where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see for example, *Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL*.

110. In *Fecitt v NHS Manchester [2012] IRLR 64* the Court of Appeal held that for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the employer's action. The test is the same as that in discrimination law and separates detriment claims from complaints of unfair dismissal under section 103A ERA, where the question is whether the making of the protected disclosure is the reason, or at least the principal reason, for dismissal.

111. In the course of submissions, the Tribunal was referred to a number of cases by the claimant and by Counsel for the respondent as follows:

- Iceland Frozen Foods Ltd v Jones [1982] UKEAT/62/82
- De Souza v Automobile Association [1985] EWCA Civ 13
- Barclays Bank Plc v Kapur [1991] 2 AC 355
- Aniagwu v London Borough of Hackney and another [1998] UKEAT/116/98
- Swiggs and others v Nagarajan [1999] UKHL 36
- Waters v Commissioner of Police of the Metropolis [2000] UKHL 50
- Robinson v The Post Office [2000] UKEAT/1209/99
- Hendricks v Commissioner of Police for the Metropolis [2002] EWCA Civ 1686
- London Borough of Southwark v Afolabi [2003] EWCA Civ 15
- Laing v Manchester City Council [2006] IRLR 748
- St Helens Borough Council v Derbyshire and others [2007] UKHL 16
- Cordell v Foreign & Commonwealth Office [2011] UKEAT/0016/11
- Woodhouse v West North West Homes Leeds Ltd [2012] UKEAT/0007/12
- Onu v Akwiwu and another [2014] EWCA Civ 279
- Chesterton Global Ltd & Anor v Nurmohamed and another [2017] EWCA Civ 979
- Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640
- Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436

112. The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

113. The claimant presented detailed written submissions and also made a number of oral submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the claimant was employed on a succession of fixed-term contracts that meant he should have been accepted/treated as a permanent employee, as Dr Treves Brown had been; In October 2017, he was given 6 months' notice of redundancy but should have been appointed to the CAFE4DM post, due to the similarities between the claimant's EO role and the CAFE4DM post, and because the claimant was a redeployee; instead the CAFE4DM post was given to Dr De Hert, a white external candidate in his thirties; the grievance was badly handled as evidenced by the fact that the claimant was told a

different outcome to that given to the managers who were the subjects of his grievance; the claimant's redeployee status was ignored in the process to recruit a Laboratory Manager; the respondent rejected the claimant's appeal against dismissal despite the legal and procedural issues he raised; the claimant was victimised and subject to detriment for raising complaints, including his grievance about discrimination and complaints about his employment status; the claimant was unfairly dismissed because there was no genuine redundancy situation; the respondent failed to provide written reasons for the claimant's dismissal when requested; and the claimant was subject to unlawful age and race discrimination in the way he was treated by the respondent ever since the first notice of redundancy in October 2017 and therefore all of his complaints are in time as conduct extended over that period and up to the claimant's dismissal in 2019.

114. Counsel for the respondent also made a number of detailed submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the respondent's myriad funding streams mean that academic staff like the claimant are engaged on successive fixed-term contracts; that the claimant was, in any event, treated by the respondent as if he was a permanent employee by virtue of his service in excess of 4 years; that although the claimant became a redeployee in the course of the recruitment process for the CAFE4DM role, that did not entitle him to be "slotted in" to the post; the respondent concluded that the claimant was not appointable to the CAFE4DM post after a competitive interview; the claimant's grievance of 16 April 2018 did not specifically raise race or age discrimination; the grievance was thoroughly investigated and concluded that the claimant should have been treated as a redeployee but that even if he had been so, the outcome would be no different; the claimant benefitted from a number of extensions to his contract in 2018 – 2019; the claimant was unsuccessful in his application for the Laboratory Manger role even though he was given priority as a redeployee in the recruitment process; the claimant was dismissed for redundancy or some other substantial reason due to the expiry of his fixed-term contract; the claimant appealed his dismissal and his appeal was considered in detail including during an adjournment of several weeks whilst the panel gathered further information on the respondent's policies and procedures; it was reasonable for the respondent to refuse to consider the claimant's grievance outcome which had not been appealed a year beforehand; the claimant was not treated less favourably because of age or race and his comparators were not appropriate or made out; the claims of direct discrimination and victimisation under EqA are misconceived; and the claimant was not subject to a detriment for raising the Fixed Term Employee Regulations 2002 in June 2019 and the detriments relied upon occurred before that date, and the claimant has made no reference to whistle-blowing in his witness statement.

Conclusions (including where appropriate any additional findings of fact)

115. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Unfair dismissal

116. The Tribunal first considered the issue of whether the claimant's contract was deemed to be one of indefinite duration by application of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regulation 8, at the material time and concluded that it was. The claimant had been employed for over 4 years on a succession of fixed terms contracts from 17 June 2017 onwards. The respondent brought no evidence to suggest that the claimant was anything other than a permanent employee at that time, nor was it argued that he should not be. The Tribunal was told that the contract renewals and/or extensions, to which the claimant was subject, were created using spare funding from other projects. The nature of these projects and the purpose for which the funding had been given to the respondent remained unclear and appeared immaterial. In any event, the claimant continued in his same role, working uninterrupted on his original project. There was no evidence that he ever formally transferred to any other project from which funding was derived. The Tribunal understood that the claimant in fact worked on a series of contracts funded from a variety of sources. The respondent provided no objective justification for keeping the claimant on fixed term contracts, as opposed to deeming him permanent, as he was entitled to under the Regulations. Further, the claimant's requests for clarification of his status, either directly or via his line manager's enquiries, went unanswered as if the respondent sought somehow to deny the operation of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

117. Next the Tribunal considered the claimant's dismissal by the respondent with effect from 31 August 2019. The Tribunal considered that the reason for the claimant's dismissal was redundancy due to the expiry of funding for his fixed term contract. There was no more spare money to keep him employed. Redundancy is a fair reason for dismissal under section 98 ERA. The Tribunal therefore looked at whether the respondent acted reasonably in treating that reason (i.e., the end of funding, creating a redundancy situation) as a fair reason for dismissing the claimant and considered that it did. The respondent took a number of steps: first of all to warn the claimant of redundancy; then to consult him about redundancy; and it supported the claimant in his efforts to find suitable alternative employment in order to avoid redundancy. The respondent took a number of reasonable steps to avoid the claimant's redundancy by extending his contract using spare money to extend his employment so far as it was able, including funding pots which were not related to the claimant's work.

118. The Tribunal considered that the claimant was effectively on 'borrowed time' in essence, for the last 18 months of his employment with the respondent. He was consulted, given notice and supported in his efforts to find suitable alternative employment through CV training and mock interviews on at least two occasions. The claimant was at all times aware that he was facing a redundancy situation and likely to have his employment terminated. He had been employed under fixed term contracts in the Higher Education sector for many years and was aware of the processes involved. The Tribunal considered it was not unreasonable to ask the claimant to go through a competitive interview process, as a form of selection for vacancies at the

respondent, taking account of the fact that none of the vacancies for which the claimant applied were the same as the job that he had been doing. The claimant was treated as a redeployee and given priority in recruitment for the Lab Manager role. In respect of the Project Manager role, all the interviewees were redeployees. Therefore, those procedures followed by the respondent were not inherently unfair, despite the problems within the respondent's HR facility with regard to identifying employees who were redeployees and in the absence of a redeployment register. In any event, it was clear that, within the School of Engineering, management knew the claimant was a redeployee in his later applications, they treated him as such and gave him priority. Unfortunately, he was not successful with any of the selection processes for such roles.

119. Accordingly, the Tribunal found that dismissal fell within the band of reasonable responses open to the respondent in the circumstances of the claimant's case. The claim of unfair dismissal is therefore not well-founded and is dismissed.

Written reasons for dismissal

120. The claimant made a request for written reasons for his dismissal, pursuant to section 92 ERA, to the respondent on 23 August 2019. The respondent failed to respond to that request and never provided the claimant with written reasons for dismissal following his statutory request. The respondent was in default and gave no good reason for this situation. The respondent has a significant HR facility. The Tribunal rejected the suggestion, made by one of the HR witnesses that the claimant knew already that he was redundant and so it was not necessary to reply to his request. As can be seen from these proceedings, the claimant did not understand nor accept that he was redundant. The Tribunal considered that the claimant had made a statutory request and that he was entitled to receive an answer to that request, even if the reply had simply referred back to the claimant's redundancy notice and the grievance outcome. In those circumstances, the respondent's failure to provide written reasons in reply was unreasonable and largely unexplained. This claim therefore succeeds.

Direct discrimination because of age

121. The Tribunal considered the treatment complained of in respect of this complaint, as set out in the list of issues, section 13, which surrounds the CAFE4DM project recruitment.

122. The first allegation, 13 a) concerned the respondent's refusal of requests to directly appoint the claimant or extend his contract such that he took up the CAFE4DM post. Requests for the claimant's direct appointment were made by Benita Jackson of HR and also by Dr Peter Martin, the claimant's line manager. The respondent's interviewer panel for the CAFE4DM post decided it was not appropriate simply to slot the claimant into the role. In this regard, the Tribunal took account of the fact that the claimant had not been named in the research proposal, he did not fulfil the essential criteria, and the interviewing managers reasonably considered that the CAFE4DM role was

not the same as the claimant's job. They explained their views to the claimant at the interview, giving several reasons why the roles were different, holding a number of meetings with the claimant to that end but the claimant kept telling them it was the same and seemed unable to accept an alternative view. In his interview for the CAFE4DM role, when asked about the project, the claimant described a different project thereby displaying a fundamental misunderstanding of the CAFE4DM role. The interviewers gave evidence that what the claimant described at his interview was not the project envisaged and, when this was suggested to him, the claimant maintained that what he was describing was the CAFE4DM project.

123. The Tribunal noted that the claimant was not given priority in the recruitment for the CAFE4DM project and he was not given an informal interview, which he was entitled to when he became a redeployee during the course of the recruitment process. In fact, the interview panel were not told that the claimant was a redeployee – given the confusion surrounding the operation of the respondent's "Redeployment Policy" (see paragraphs14.5 – 14.8 above) this is perhaps unsurprising. However, the Tribunal considered that an informal interview, had it taken place, would have had to involve a discussion of the CAFE4DM project and an assessment of whether the claimant could meet the essential criteria for the role with some training. The Tribunal concluded on a balance of probabilities that, even at an informal interview, the claimant's dogmatic approach and misunderstanding of the CAFE4DM project would have come out. For example, in describing his approach to the project proposals, despite being prompted by the interviewing panel, the claimant persisted in explaining a project that was not what was intended. In those circumstances, the Tribunal found that the interview panel could, and would, reasonably have concluded (if they had conducted a redeployment interview), that the claimant would not even with training fulfil the essential criteria in a short timescale. In fact, as a result of the claimant's performance at the formal interview, the panel reasonably concluded that the claimant did not have the open mind that the respondent was looking for to conduct the CAFE4DM research work. The request for the claimant's direct appointment was not in fact refused; rather the respondent considered that it was not appropriate to directly appoint the claimant. It was not in the respondent's procedures to directly appoint an internal candidate, even if a redeployee, unless the essential criteria were met, and the claimant did not meet such for the CAFE4DM role. The claimant was put through a competitive interview process for the CAFE4DM role. As he was a redeployee, this was not the right process to undertake, but the Tribunal considered that it would have made no difference. The reasons why the claimant was not directly appointed to the CAFE4DM role were valid objective reasons relating to his performance at interview and had nothing to do with the claimant's age.

B. The second <u>factual allegation, 13 b)</u> for the direct age discrimination complaint relates to a request made by the claimant, on 15 March 2019, for written reasons for what he said was his less favourable treatment as a fixed-term contract employee in the CAFE4DM process. The respondent in fact replied to the claimant on 29 March 2019 (page 550 in the bundle) by referring to the findings of the grievance process. The Tribunal considered that a reference to the grievance outcome was a reference to a document which contained the

respondent's view of the claimant's complaints about the CAFE4DM recruitment process. The claimant's request on 15 March 2019 also included a reference to his treatment in the process to recruit for the Laboratory Manager role. This aspect was not covered in the grievance outcome, but the wording of this factual allegation is important: 13 b) in the list of issues, is worded in such a way as to relate only to the CAFE4DM role - the allegation uses the words "the above less favourable treatment" which the Tribunal understood as relating to the first allegation of direct age discrimination, being 13 a) within the list of issues, which is about the CAFE4DM role. In any event, the Tribunal conclude that this allegation must fail because the respondent did reply to the claimant's request.

124. In respect of allegation 13 c), it is correct to say that the claimant's redeployee status was not notified to the CAFE4DM interviewer panel, Professor Philip Martin and Dr Rogers. They did not know that the claimant was a redeployee. The Tribunal found no evidence of any deliberate act to conceal such nor a deliberate omission to tell the panel. As the Tribunal has found, the application of the "Redeployment Policy" and the identification of redeployees by HR or otherwise was, at best, inconsistent. In the claimant's case, the Tribunal considered that the failure to notify the interview panel of his redeployee status was not deliberate. Arguably, Professor Philip Martin should have realised the claimant might be a redeployee and taken advice. Benita Jackson of HR had told him that the claimant was going to be redundant but she did not make it clear that, in fact, the claimant would achieve redeployee status at some time during the CAFE4DM recruitment process, nor when that would happen. In any event, Dr Rogers had no idea that the claimant was or might be/become a redeployee. The claimant himself never raised his redeployee status nor did he challenge the format/formality of his interview at the time, and he did not question the fact that he was being put through a competitive interview process. The Tribunal considered that the claimant submitted to the process assuming that he would get the job.

125. There was nevertheless a failure by the respondent to understand the claimant's status, and no or no clear HR advice that the claimant was a redeployee but the Tribunal found no evidence that this state of affairs was deliberate as alleged, nor that it was in any sense because of the claimant's age. The Tribunal found, in effect, that the redeployee process was a bit of a mess. The Tribunal makes no criticism of the CAFE4DM interviewers for dealing with recruitment to the CAFE4DM role through competitive interview. That was a reasonable process to adopt in all the circumstances. Nobody in management or HR advised them to do otherwise nor was any issue taken with the process adopted, including by the claimant at the time. The respondent was entitled to take a view that the CAFE4DM role was not the same job as the claimant had been doing, and the interview records note this. In light of the evidence as to the claimant's performance at interview and his answers to some fundamental questions about the CAFE4DM project, the Tribunal did not accept the claimant's contention that, with priority treatment as a redeployee, he would have got the job.

D. Factual allegation 13 d) is of denying the claimant training because he had been a postdoc for 18 years. The Tribunal remained unclear as to what

training is referred to. However, the potential for training is one factor in the procedure for treating the claimant as a redeployee. The allegation arises because the claimant contends that, with priority treatment as a redeployee, he would have been appointed to the CAFE4DM job. Taking the strict wording of this allegation, the Tribunal found no evidence that the claimant was denied training at any time. The Tribunal considered what might have happened if the respondent had followed its procedures correctly, and found that the respondent would reasonably have concluded that the claimant could not fulfil the essential criteria for the CAFE4DM role even with training. In those circumstances, even if the panel had treated the claimant as a redeployee, he would not have been appointed to the CAFE4DM role. The claimant had no automatic right to the job nor a right to training in order to be able to do the job. The procedures required the respondent to assess whether they thought the claimant could meet the essential criteria of the post with training, and the Tribunal has found it was reasonable for them to conclude that he would not.

126. In light of the Tribunal's conclusions on each of the factual allegations above, which form the basis of the claimant's complaint of less favourable treatment because of age, the complaint of direct age discrimination must fail. In relation to the comparator contended for, the claimant's case was that he had been treated less favourably than Dr De Hert, a younger candidate, in effect because Dr De Hert was appointed to the CAFE4DM role and the claimant was not. The claimant has not shown facts from which the Tribunal could conclude that the difference in treatment between him and Dr De Hert was because of age. The Tribunal found that the claimant did not perform well in a competitive interview process and accepted the respondent's evidence that, even if he had been prioritised as a redeployee, the claimant would still not have been appointed. In addition, it was not apparent that Dr De Hert was in the same or not materially different circumstances to the claimant when considering the specific allegations – for example Dr De Hert had not requested to be directly appointed or to have his contract extended and he was not a redeployee as the claimant was. Further, the respondent has provided evidence of a number of non-discriminatory reasons for why the claimant was not appointed to the CAFE4DM job. The claimant was judged not to be the best candidate on the day and it was the respondent's view that he would not have got the job whether with priority treatment and/or if he was a permanent employee. In light of all the above, the complaint of direct age discrimination fails.

Direct discrimination because of race

127. The claimant's case in respect of this complaint rests on 6 factual allegations which arise from the Laboratory Manager recruitment and which appear in the list of issues at section 18. The Tribunal considered the allegations in turn.

128. First, the claimant contended that the respondent omitted to consider the claimant's suitability for the role of Laboratory Manager before the vacancy was advertised, on 28 November 2018. However, the claimant was not a redeployee at the time before the vacancy was advertised and so could not have been considered as contended for. Allegation 18 a) is clearly worded to say that it is about considering the claimant's suitability for the Laboratory

Manager role *before* the vacancy was advertised, but there was no reason for the respondent to do so if the claimant was not a redeployee and so the respondent reasonably did not consider the claimant for this role in advance. In any event, the Tribunal wondered how the respondent might be expected to know that the claimant might be interested until he applied. There was no evidence that the claimant had expressed an interest in the Laboratory Manager post or anything similar before it was advertised, and it was not something the claimant had done, as a job of work, before.

129. Allegation 18 b) is of depriving the claimant of the benefit of a redeployee interview. The Tribunal accepted Professor Hardacre's evidence, in his witness statement at paragraphs 49 and 50, that the claimant was in fact interviewed for the Laboratory Manager post before the other candidates who had been shortlisted. In addition, it was apparent that the claimant's interview was a more informal interview than other candidates were subjected to, and even though the Laboratory Manager post was very different to the work that the claimant had been doing for the respondent up to then. In light of this evidence, the Tribunal considered, on the balance of probabilities, that the claimant was treated in effect as a redeployee in the Laboratory Manager recruitment process. Here, the Tribunal noted that the claimant met the technical aspects of the role but he did not have the 'soft skills' required and the interview panel for the Laboratory Manager role concluded that he would not acquire the necessary 'soft skills' even with training, in a short period of time.

130. The third factual allegation, 18 c), is about a failure to provide the claimant with a written statement about less favourable treatment as a fixed-term contract employee. This relates to the statement which the claimant requested on 15 March 2019, to which the respondent replied on 29 March 2019 (at page 550 in the bundle), by referring to the findings of the grievance process. The Tribunal has found that there was no failure to reply to the claimant's request in respect of the CAFE4DM post because the reply that the respondent gave referred to the grievance outcome. However, the Tribunal noted that the claimant's request is a lengthy request, pages 542 to 546 in the bundle, and does at one point refer to the Laboratory Manager role recruitment process which was not covered in the grievance outcome. Therefore, by simply referring to the grievance outcome, the respondent has failed to answer the claimant's issues about not being treated as a redeployee in the Laboratory Manager recruitment process. The respondent could simply have denied that the claimant was not treated as a redeployee in the Laboratory Manger recruitment process. The Tribunal has found that the claimant was in fact treated as a redeployee – see paragraph 127 above, The respondent could for example have explained how the claimant was treated as a redeployee in the Laboratory Manager recruitment process, but it failed to address that point, and so this factual allegation is made out, so far as it relates to the Laboratory Manager recruitment.

131. Allegation 18 d) is of denying the claimant training in order to fulfil the essential criteria in a reasonable timeframe. This allegation relates to the assessment of the claimant as a redeployee and includes a quote from the respondent's email of 19 February 2019 turning down the claimant for the role

of Laboratory Manager. The email is written by Gary Buxton, chair of the interview panel and appears in the bundle at page 525. In considering this allegation, the Tribunal concluded that the claimant had misunderstood the respondent's "Redeployment Policy" which does not give a redeployee a right to training, and that the claimant has also misunderstood what Gary Burns is saying in his email. Where a candidate for a post is a redeployee who does not meet the essential criteria for the post, the respondent has to assess the redeployee in order to decide whether the redeployee could meet the essential criteria with training in a reasonable period of time. The respondent was entitled to conclude that the claimant would not meet the essential criteria for the Laboratory Manager post even with training in a reasonable period of time, There was little evidence as to how such an assessment was carried out in this case, although the Tribunal noted that the claimant did not challenge the respondent's assessment/conclusion at the time. There was therefore no denial of training, as such; there was no training on offer. The procedure involves an assessment of a redeployee's ability to acquire certain skills with training in a short period of time, and the respondent concluded that the claimant did not have such an ability.

132. The next factual <u>allegation, numbered 18 e)</u>, was that the respondent had omitted to involve the HR partner of the School of CEAS in the claimant's redeployment process. This is a broad allegation, which does not indicate how or when or where the HR partner should have been involved but was not involved. The Tribunal considered, in light of the evidence before it and on a balance of probabilities, that HR personnel had been involved in the administration behind the Laboratory Manager recruitment process. For example, at page 527 in the bundle, a document shows an HR administrator informing the interview panel for the Laboratory Manager role that the claimant is a redeployee, and setting him up for an informal interview, in accordance with the respondent's procedure for priority treatment of a redeployee. The claimant suggested in his evidence that the HR partner of the School of CEAS should have been a member of the interview panel for the Laboratory Manager role. It was apparent to the Tribunal that the respondent's HR managers did not, as a matter of course, sit as members of interview panels. There was no policy or procedure brought to the Tribunal's attention, to suggest that It was necessary or usual to have an HR representative on an interview panel. The Tribunal took note of the fact that that there was no HR partner, or similar, on the CAFE4DM recruitment panel - the claimant did not complaint about that matter. Therefore, the nature of the less favourable treatment arising from this allegation remained unclear to the Tribunal.

133. <u>Allegation 18 f)</u> was that the respondent had told the claimant that any vacancy would have to be advertised. The Tribunal understood this to be a reference to a comment made by Professor Hardacre, "Your application gets you shortlisted but it's the interview that gets you the job". The Tribunal considered this to be a statement of fact and not unreasonable - there was no detriment to the claimant. In the Laboratory Manager recruitment process, the claimant was treated as a redeployee and had his interview first. He admitted in evidence that he did not interview well for this post. The claimant was effectively suggesting to the Tribunal that he should have been appointed to the Laboratory Manager job without any formal process or interview at all, his

contention that being that, as a redeployee, he should have been automatically appointed. However, the Tribunal found nothing in the respondent's procedures to suggest that automatic appointment would be the case, albeit the Tribunal accepted the respondent's evidence, which the claimant did not dispute, that if an individual is named in a research proposal, then the named individual has to be appointed to the project. The role of Laboratory Manager was not part of a specific research proposal and so that rule did not apply to it. In any event, the claimant was not named in any research proposals relating to any of the jobs for which he applied and so had no automatic right to appointment. In light of the evidence, the Tribunal rejected the claimant's submission that there should have been an automatic appointment, of the claimant, as Laboratory Manager.

134. The claimant's comparator for his complaint of direct race discrimination is Dr Bernard Treves-Brown, a white employee. However, Dr Treves-Brown had not applied for the Laboratory Manager role when the claimant did, nor was there any evidence that he had done so in the past, nor that he had somehow been treated as a redeployee. In those circumstances, the Tribunal was unable to make a comparison between the claimant's circumstances and those of Dr Treves-Brown in respect of the factual allegations relied upon for this head of claim or at all. The Tribunal was shown evidence that Dr Treves-Brown had been made a permanent employee by mid-2014 and possibly before then. The claimant's submission was simply that he should have been made permanent like Dr Treves-Brown. However, the claimant was unable to explain how, or under what circumstances Dr Treves-Brown had attained the status of a permanent employee. There was no evidence of the circumstances in which or reasons why Dr Treves Brown was made permanent. However, it was apparent that Dr Treves Brown was made permanent before the respondent's "Policy and Procedure on Contracts of Employment" came into effect in 2016. The Tribunal therefore concluded that Dr Treves-Brown was not in the same, or not materially different circumstances to the claimant for the purposes of a claim under section 13 EqA, and was not a valid comparator – see also paragraph 26 above.

135. In light of all the above, the Tribunal concluded that the claimant had not shown primary facts from which it could conclude that any of the treatment complained of was direct discrimination because of race and no material from which the Tribunal could draw any inferences of such. Therefore, the race claim must also fail.

The victimisation complaint

136. The parties have agreed and the Tribunal accepts that the claimant's grievance of 16 April 2018 (bundle pages 209 - 216) constitutes a protected act for the purposes of the victimisation complaint. On the first page of his grievance, the claimant states that "My grievances are related to the systematic, persistent and subjective discrimination, injustice and unfair treatments (sic) I received during a recent recruitment process." In addition, there is mention of bringing proceedings within the paperwork so the respondent was effectively 'on notice' of the possibility that proceedings would result.

137. The Tribunal therefore proceeded to consider the 10 detriments contended for by the claimant as acts of victimisation. These appear in the list of issues at section 24.

138. Firstly, the claimant pointed to the fact that the respondent announced different outcomes of the grievance investigation to him as compared to that sent to the grievance respondents. The Tribunal has made findings of fact to the effect that this was badly handled and a fudge. However, upon examination of the different versions, the Tribunal failed to see what detriment arose here. The claimant's grievance focussed initially on the fact that he had not been treated as a redeployee in the CAFE4DM project recruitment process when he should have been and finding number 9 of the grievance report agrees with that contention. The respondent's managers were told only about certain aspects covered in the findings, or were given some part(s) of the report but not all of it, and Professor Hardacre was given a summary which said that none of the complaints upheld, when that was not correct. Nevertheless, when challenged, the claimant was not able to identify or articulate how any detriment arose from the fact that he was told of the outcome differently to the respondent's managers.

139. Secondly, the claimant complained about Professor Hardacre sitting on the interview panel for the Laboratory Manager role. The Tribunal found no evidence that this was detrimental to the claimant. He was treated as a redeployee in accordance with the respondent's procedures and he was given priority consideration in the Laboratory Manager recruitment process. The claimant agreed in evidence that he did not perform well at the Laboratory Manager interview. He brought no evidence that Professor Hardacre had somehow influenced the interview panel against him, and he did not challenge Professor Hardacre's evidence about the conduct of the interview or the interview notes.

140. Thirdly, the claimant complained about being put onto an 'extended project post' at the end of his employment, without notice or due process. The Tribunal found as a fact that this was what usually happened to an employee of the respondent in the final few months before redundancy due to the expiry of a fixed-term contract where funding ran out. It happened as it for the claimant did because of an administrative mix-up from which the claimant, in fact, benefitted because he had an extra 3 months' employment that he would not otherwise have got.

141. Fourthly, the claimant complained that the respondent deprived him of his legitimate entitlement of permanency by disguising a new contract with a contract extension. The claimant pointed to the fact that he was started on a new funding stream and project from 21 February 2019. It was the claimant's case that this was disguised as a 'contract extension' precisely so the respondent would not have to convert the claimant to a permanent employee. The Tribunal did not find any evidence to suggest or infer that there was an intention to deprive the claimant of permanency by giving him the 'extended project period' or the extra extension of 3 months. What in fact happened was that the respondent found some extra money, from work undertaken with Unilever, which it used to continue to employ the claimant. As far as the

Tribunal could ascertain from the limited evidence on applicable funding, the claimant had never been engaged on the respondent's core or baseline funding. The claimant had always been engaged on research projects which by their very nature were time limited. The claimant had proceeded to apply for the CAFE4DM and the Laboratory Manager roles in the face of the risk of redundancy and in the understanding that each position was for a fixed and limited term. The claimant was at all times aware that his post(s) would come to an end, and that he would be expected to make efforts himself to seek a renewal or extension to his contract, alternatively to find another job. The Tribunal considered that the additional 3 months' contract extension was an administrative mix-up from which the claimant benefitted. Further, had the claimant been formally given permanent status and/or treated as such under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, such permanent status would not have protected the claimant from redundancy where the money for the research project he was assigned to or worked on runs out. The claimant's case was that the respondent had wanted rid of him since the CAFE4DM recruitment. However, that argument flies in the face of the respondent's numerous efforts to find and use spare money to keep the claimant employed for a further 18 months after he was unsuccessful in the CAFE4DM role recruitment.

142. Fifthly, it was the claimant's case that the respondent had refused to consider his discrimination claims in his appeal against dismissal. The Tribunal understood this to relate to a statement made in the appeal outcome letter, in the bundle at page 1211, which is a statement from Gary Buxton, chair of the appeal panel, to the effect that the claimant's previous grievance was not considered at the appeal. The appeal outcome document signed by Mr Buxton concerned the claimant's appeal against dismissal. The claimant's grievance had been heard a year before and had not then been appealed. In the circumstances and given the length of time that had passed, the Tribunal considered that it was reasonable for the respondent to say that the grievance had been concluded and would not be revisited after that time. The claimant had the right to appeal at the end of the grievance process; he did not appeal it, and in fact he had declared, at the time of the grievance outcome, that he felt vindicated.

143. The sixth act of detriment contended for by the claimant concerned his allegation that the respondent had withheld information from him about Dr De Hert's resignation from the CAFE4DM project. The claimant thought he should have been told at the time of the resignation at the end of May 2019 but the Tribunal did not consider the claimant had any entitlement to be informed of such at any time. Dr De Hert's resignation did not trigger an automatic vacancy and, even if it had done so, the claimant had no entitlement to be appointed, as he implied in submissions, just because Dr De Hert had decided to leave. The claimant had never been told that he was a "first reserve" if things did not work out with Dr De Hert. In contrast, the claimant had been judged not to be appointable a year ago and, since then, there had been many meetings at which the respondent had made efforts to explain to the claimant the numerous reasons why he had not been successful. The fact that Dr De Hert had resigned was not something the claimant was entitled to know. Nevertheless, the Tribunal found no evidence that the respondent had

deliberately withheld the news albeit that it was not information that needed to be shared with the claimant and so it was not shared, albeit that eventually the claimant found out as might be expected as he shared a working environment and because news will eventually spread.

144. Seventh, the claimant alleged that the respondent has told his colleagues not to contact him. This arose when the claimant was on the 3 months' 'extended project period'. The respondent described the period as a form of "garden leave" during which time the respondent gave support, in terms of the time and facilities available, for the claimant to look for alternative work and told colleagues, in effect, to leave the claimant alone and not to bother him with work requests, for example, questions about the operation of the Meg Rig. The Tribunal did not find there was anything detrimental in the respondent telling the claimant's colleagues to leave him alone - the intention was not to isolate the claimant but rather to help the claimant, so he could focus on finding another job or extended funding. The 'extended project period' was in fact an entitlement for permanent staff, and, therefore, the claimant was treated as if he was permanent and afforded an enhanced benefit.

145. Eighth, the claimant alleged that the respondent made no effort to find a suitable alternative role for the claimant within the School. The Tribunal has found that the respondent did in fact make numerous efforts to find alternative roles for the claimant. Those efforts led to the claimant being kept on for a full 18 months after what was otherwise the end of the funding on the CASTLE project to which the claimant had been assigned. The respondent had no duty to keep the claimant on for such a period nor was it obliged to divert spare funds, as it did or at all. The Tribunal considered that, in reality, the respondent went out of its way to keep the claimant employed for as long as possible which was not a detriment. Having made such a finding, the Tribunal rejected the claimant's ninth allegation, namely the allegation that the respondent spared no effort to prevent him securing an alternative role, by "preventing" him from being appointed to the CAFE4DM role and/or the Laboratory Manager position. These were both vacancies for which the claimant was unsuccessful in his applications, after competitive interviews. The claimant accepted when challenged in evidence that he did not perform well in certain interviews. In this allegation, the claimant also suggests a role connected to the Meg Rig. However, there was no vacancy or role available in connection with the Meg Rig. The future of that piece of equipment was and, as far as the Tribunal understands, remains undecided.

146. Lastly, the claimant cites the rejection of his appeal against dismissal as an act of detriment for the purpose of his victimisation claim. The Tribunal considered that a rejection of an appeal, albeit arguably a detriment, is nevertheless a decision which a respondent is entitled to make, assuming a fair process has been carried out. In any event the Tribunal found no evidence to suggest that the claimant's appeal was rejected in August 2019 because he had brought a grievance in April 2018 nor because of the substance of that grievance. There was no connection, beyond the refusal to revisit the grievance itself during the dismissal appeal.

147. In light of all the above, the Tribunal did not find the matters complained of as victimisation were made out on the facts or as detriments save that the act of not upholding the claimant's appeal is arguably a detriment. However, the Tribunal found that this was not done because the claimant had submitted his grievance. The victimisation complaint therefore fails.

Whistleblowing detriment

148. This complaint arose because the claimant had told the respondent, at a meeting in June 2019 and in writing shortly afterwards, that he considered the respondent was in breach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. The Tribunal accepted that the letter which the claimant wrote, which was actually after the meeting and which he titled, "Item 3", at bundle pages 1049 – 1057, amounted to a protected disclosure.

149. The detriments contended for, as the basis of the claimant's complaint of detriment for whistle blowing, were: (a) the rejection of his appeal; and (b) the failure of the appeal outcome letter to address discussions which took place at the appeal hearing. The Tribunal found no evidence to link either of these matters to "Item 3" or to any matters concerning the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 as raised by the claimant in June 2019. Indeed, the Tribunal was unable to conclude that any failure to address, in the appeal outcome letter, a discussion which took place during the claimant's appeal hearing, was in fact a detriment at all.

Jurisdiction - time points

150. Although none of the claimant's complaints have succeeded, the Tribunal nevertheless considered the time points in the list of issues at sections 1 – 5, because they go to the question of the Tribunal's jurisdiction.

151. The bulk of the claimant's case and the majority of the cross-examination of the respondent's witnesses was focussed on the recruitment for the CAFE4DM research post. That process, and events connected to it, took place between October 2017 and February 2018. Such matters are therefore significantly out of time in respect of the primary limitation period of 3 months from the acts complained of, as the claim was presented on 28 December 2019. The conduct complained of by the claimant in these proceedings is conduct by a number of individuals at the respondent. The Tribunal found no evidence of any conspiracy or connection, despite that the claimant believes there was such. A number of apparent errors led the claimant to believe that there may be "something going on", but the Tribunal considered his conclusion, and those errors, all arose as a consequence of the lack of clarity surrounding the procedures the respondent was following, the lack of clarity about the claimant's employment status, and the inability of a number of the respondent's senior personnel to simply respond to the claimant's reasonable enquiries about his status or to explain to him clearly and succinctly, and only once, why he had not been appointed to the CAFE4DM post and, indeed, why the respondent had formed its view that the claimant was not appointable.

152. Having decided that those parts of the claim which relate to the CAFE4DM project recruitment process were presented out of time, the Tribunal considered whether it would be just and equitable to extend time for the presentation of any complaints that are out of time but decided it would not be. The claimant has had ample time to bring his complaints and he pursued them internally, regularly and voluminously, to the respondent, quoting legal provisions along the way and with the benefit of trade union advice throughout. In those circumstances, it would not be just and equitable in to allow the claimant to continue such a complaint so many years after the event, in relation to the CAFE4DM project and in particular his not being treated as a redeployee in that process, in effect some 22 months later.

Observations

153. The Tribunal was concerned that a situation had developed in this case, whereby the respondent had employed the claimant under a succession of fixed-term contracts, over many years, with renewals, new terms or extensions to those contract(s). The claimant formed a belief (which in part at least was a product of such circumstances) that, because he had covered many areas of work, in various posts over the years and, because he had his contract(s) extended and/or renewed over the years, he expected to be appointed to the CAFE4DM project in the same way, as a further extension or a renewal. But there was in fact no entitlement to be appointed directly, and somebody senior at the respondent should have made this clear to the claimant right at the beginning of the recruitment process.

154. The Tribunal considered that the respondent had not been clear and transparent with the claimant in 2 respects:

    a. The claimant's employment status - at times the respondent appeared unable and, the claimant concluded, unwilling to explain things or answer his questions about permanent status and/or his employment. Before the Tribunal, the respondent's senior managers and professors and HR who gave evidence and who are all experienced and intelligent people, were unable to explain with precision what the claimant's status was or should have been at a particular time. This led to some lengthy descriptions/explanations which involved opaque labels linked to funding, despite that the labels adopted are not referenced in the respondent's policies and procedures and just added to the confusion.

    b. The claimant's failure to be appointed to the CAFE4DN role - the respondent was clear and transparent with the claimant about his unsuccessful application. For reasons which the Tribunal never understood, the respondent continued to talk to the claimant about such, and give feedback, in a number of meetings spread over a year after the process ended, on each occasion giving a slightly different reason or explanation for the claimant's lack of success. The Tribunal considered that the respondent's inability to close down such discussion, of itself, sparked the claimant's continued complaints which the respondent also never satisfactorily resolved; for example, the grievance outcome which was a muddle. All of these matters have

resulted in the claims before this Tribunal, lasting over 16 days. It is hoped the respondent will therefore reflect on its handling of this matter and its communications with the claimant and endeavour to provide clarity in future.

Remedy

155. The claimant has succeeded in his complaint under section 92 ERA due to the respondent's failure to respond to, or even acknowledge, his statutory request for written reasons for his dismissal which the respondent accepted it had received.

156. The sanction for such default pursuant to section 93(2)(b) ERA is 2 weeks' gross pay. The Tribunal therefore awarded **£1,523.42** in respect of this complaint. This figure is arrived at from claimant's monthly gross pay shown as £3,300.75 at page 69 of the bundle, multiplied by 12 and then divided by 52, which gives a weekly gross pay of £761.71: 2 weeks is therefore £1,523.42.

Deposit orders

157. The claimant paid 3 deposits, of £200.00 each, pursuant to a Deposit Order sent to the parties on 25 March 2021.

158. The Tribunal considered that each of the 3 allegations which were the subject of the deposit order did not succeed and that the claimant acted unreasonably in pursuing them:

   a. In respect of the CAFE4DM role, the claimant has not established any facts to show, or from which the Tribunal could draw inferences, that there was a deliberate failure to find out that he was a redeployee nor that there was any conspiracy, and his CV was not superior to that of the appointed character. In particular, the claimant brough no evidence from which any inference could be drawn that his age was a factor; that the successful candidate was younger than the claimant is not enough to show age discrimination without something more;

   b. In respect of the issue of permanent status, the claimant brought no evidence from which the Tribunal could conclude that Dr Treves Brown was a valid comparator – see paragraphs 26 and 134 above; and

   c. The claimant admitted that he did not interview well for the Laboratory Manager post and that all the candidates had been redeployees.

159. In light of the above, the Tribunal determined that the deposits shall be paid to the respondent as provided by rule 39(5)(b).

Employment Judge Batten
25 February 2022

REASONS SENT TO THE PARTIES ON

8 March 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.