



## EMPLOYMENT TRIBUNALS

**Claimant**  
**Dr Kajal Sharma**

**Respondent**  
**University of Portsmouth**

**V**

**Heard at:** Southampton

**On:** 3,4,5,6 and 7 October 2022 and 14 October 2022 ( In chambers)

**Before:** Employment Judge Rayner  
Ms A Sinclair  
Ms C Date

### **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr N Smith, Counsel

## **Judgment**

The Claimant was discriminated on grounds of race by the respondent by the following actions

- 1.1. on or around 8 January 2016 the respondent required the claimant to report on various work-related items before allowing her to travel to India upon the death of her father;
- 1.2. on 14 January 2016 Gary Rees contacted the claimant regarding work-related matters during a period of bereavement leave;
- 1.3. in or around January 2016 the respondent failed generally to respect the claimant's bereavement leave;
- 1.4. in or around February 2017, and during the critical illness of her infant son the respondent failed to provide the claimant with support she requested;

- 1.5. In or around September 2018 Mr Rees declined to discuss the interview of Karen Harman with the claimant, who was chair of the interview panel and instead discussed such matters with another member of the panel;
  - 1.6. In 2018 /2019 Mr Rees discouraged the claimant from undertaking the Senior Fellow of Higher Education Academy Qualification
  - 1.7. The respondent failed to notify or otherwise bring to the claimant's attention the internal advertisement for the role of Associate Head of Subject Group in Organisational Studies and Human Resource Management (the role);
  - 1.8. the respondent did not reappoint the claimant to the role;
  - 1.9. the respondent appointed Kerry Collier to the role
  - 1.10. the respondent failed satisfactorily or at all to provide the claimant with feedback on her unsuccessful application for the role
2. The Claimant was Victimised by the respondent in that
    - 2.1. the respondent refused to provide the claimant with notes of the selection process
3. The following claims were dismissed on withdrawal by the Claimant:
    - 3.1. The respondent failed to complete its investigation into the grievance within 3 to 8 weeks as per its grievance policy or otherwise within a reasonable period.
    - 3.2. The respondent failed to provide an outcome of the grievance within eight weeks of the grievance meeting as per its grievance policy or otherwise within a reasonable period.
    - 3.3. The respondent failed generally to handle the grievance with sufficient efficiency and alacrity
    - 3.4. The respondent declined to provide notes as requested of the selection panel
4. The claimants remaining claims of victimisation against Mrs collier are dismissed

# REASONS

## The hearing

1. This case was listed for a five-day liability only hearing on the 3, 4,5,6 and 7 October 2022. The evidence in the case was heard over four days with submissions and closing statements made on day four at lunchtime. The panel started deliberation on day four but were unable to sit on day five and therefore reconvened on October 14, 2022. We explained to the parties that given the time constraints, we would reserve judgement unless any additional or alternative suggestions were made. I reminded the parties that reserved judgement meant that the judgement would be publicly available whereas an oral judgement will not be, unless written reasons were requested by either party. Dr Sharma indicated that she would request written reasons and therefore we reserved our judgement.
2. We heard evidence from the claimant and her husband, Mr A Sharma on the first and second day of hearing. We heard evidence from Prof Gary Rees, Prof. Ait-Boudaoud and Mrs K. Collier on behalf of the respondent on the following days.
3. The respondent had intended to call Mrs M Wall and submitted a witness statement for her, which we read, but did not call her to give evidence once the claimant had clarified that her allegations about the grievance process and the delay in the process were complaints about the way the respondent handled her grievance but were not allegations of direct discrimination on grounds of race.
4. The case was first case managed on 21 October 2021. A further case management hearing was listed on the 10 August 2022, before Employment Judge Salter. At that point there was no agreed bundle and statements had not been exchanged. There was a dispute between the parties as to whether or not certain documents should be included, and much of the hearing was taken up with determining which documents should and should not be included within the bundle.

5. At the start of this hearing and issue arose over some additional documents from each party for inclusion in the bundle.
6. The claimant sought to insert various documents concerning Ms Newman's selection for an appointment. I noted that EJ Salter had declined to order their inclusion on the basis that Ms Newman's appointment was not an issue identified by the claimant. I note that the claimant relies upon Ms Newman, and her treatment by the respondent as a comparator or as evidence of a hypothetical comparator, and that this has been clarified since that hearing.
7. The respondent produced a variety of documents which it says supports their contention that the claimant was interviewed by Prof Gary Rees for the Associate Head role in 2015. The claimant says that she was not interviewed by Prof Rees, but was interviewed by a panel of five other people she has named within her witness statement.
8. The respondent asserted that these documents were relevant because they tend to show that Prof Rees did conduct the interview of the claimant, supporting the contention that he did not discriminate against the claimant in the later selection process or otherwise, and that it goes to the claimant's credibility.
9. After discussion, it was agreed that both sets of documents would be inserted into the agreed hearing bundle, primarily on the basis that it was arguable that each were relevant, neither set of documents were particularly lengthy, each party was adamant that their documents were important, and it was in line with the overriding objective to include them. Both parties agreed pragmatically to this approach.
10. The tribunal was provided with a bundle of the 711 initial pages and about 20 additional pages.
11. Throughout the hearing, the Judge reminded both the claimant and the respondent of the need to ensure that the timetable agreed at the start of the hearing and reviewed each day was kept to. Both parties worked hard to ensure that all the evidence was dealt with in the agreed time frame, and we are grateful

to both Counsel for the respondent and Dr Sharma, who represented herself, in this respect.

12. We were provided with an agreed list of issues which had been drafted by counsel for the claimant in October 2021.
13. The issues in respect of the claimant relies upon named comparators and a hypothetical comparator in respect of her allegations of direct race discrimination and victimisation.
14. The claimant asserts that she was discriminated against on grounds of her race contrary to section 13 of the Equality Act by the following acts or omissions
  - 14.1. on or around 8 January 2016 the respondent required the claimant to report on various work-related items before allowing her to travel to India upon the death of her father;
  - 14.2. on 14 January 2016 Gary Rees contacted the claimant regarding work-related matters during a period of bereavement leave;
  - 14.3. in or around January 2016 the respondent failed generally to respect the claimant's bereavement leave;
  - 14.4. in or around February 2017, and during the critical illness of her infant son the respondent failed to provide the claimant with support she requested;
  - 14.5. in or around September 201 Mr Rees declined to discuss the interview of Karen Harman with the claimant, who was chair of the interview panel and instead discussed such matters with another member of the panel;
  - 14.6. in 2018 /2019 Mr Rees discouraged the claimant from undertaking the Senior Fellow of Higher Education Academy Qualification
  - 14.7. the respondent failed to notify or otherwise bring to the claimant's attention the internal advertisement for the role of Associate Head of Subject Group in Organisational Studies And Human Resource Management (the role)
  - 14.8. the respondent did not reappoint the claimant to the role;
  - 14.9. the respondent appointed Kerry Collier to the role
  - 14.10. the respondent failed to give satisfactory or a regard to the claimant's previous experience in the role;

- 14.11. the respondent failed satisfactorily or at all to provide the claimant with feedback on her unsuccessful application for the role
- 14.12. the claimant's role reverted to senior lecturer on 1 January 21
- 14.13. the claimant's salary was reduced from grade 9 to grade 8 on 1 January 2021

Allegations 14 -18 in the CMO concerned the claimant's grievance. During the course of the hearing, the claimant confirmed that she did not consider the five allegations the allegations of race discrimination but she referred to them as complaints about the respondent's treatment of her. They are not therefore repeated here as the claimant agreed that it would not be necessary for the panel to determine whether or not there were acts of discrimination and they would be dismissed upon withdrawal by the claimant. They are set out in the body of the judgement above.

The remaining allegations are:

27.19. Did any of the alleged acts amount to less favourable treatment when compared with actual or hypothetical comparator, and if so, was that less favourable treatment on grounds of the claimant's race and/or nationality?

15. The claimant made the following allegations of Victimisation contrary to section 27 Equality Act 2010. The claimant relied upon her grievance and the respondent admits that the grievance amounted to a protected act within the meaning of section 27 (1) (2) Equality Act 2010

16. Did any of the following alleged acts of discrimination take place

- 16.1. Mrs Collier accused the claimant of refusing to give me a *solid handover* or words that effect
- 16.2. Mrs Collier deployed inappropriate language and tone
- 16.3. Mrs Collier wished the claimant *all the best* in her new role, or words to that effect as an implied threat
- 16.4. from 1 January 2021, Ms Collier amended the claimant's workload without consulting the claimant
- 16.5. Ms Collier refused to allocate to the claimant hours work for the claimant had already undertaken
- 16.6. Mrs Collier allocated extra work to the claimant and

- 16.7. the respondent refused to provide the claimant with notes of the selection process
17. was the claimant subjected to any of the alleged detriment, because
- 17.1. she had submitted the grievance and or
- 17.2. the respondent or one of its employees, agents, directors believed that the claimant had done, or may do a within the meaning of section 27(2) EqA 2010.

## Findings of fact

### Overview and chronology

18. The claimant is a university lecturer and in 2015/6 she applied for and was appointed to a 5-year fixed term secondment as Associate Head for Organisational Studies and Human Resources Management. The invitation for applications states amongst other things that ideally *the successful candidate will have fellowship of the HEA and Willingness to work towards senior fellowship of the HEA.*
19. Her original appointment was in the autumn of 2015. The claimant applied for, was interviewed on 22 October 2015 and appointed to the role of Associate Head of Organisational Studies and Human Resource Management . She states that she was interviewed by several people, none of whom were Gary Rees.
20. Her appointment was confirmed by letter dated 14 January 2016 , and took effect from 1 January 2016. The appointment was for a five-year term which ended on 31 December 2020. The Claimant could reapply for the post, if she wished to continue in it, but it would be an open competition.
21. During the course of the investigation into the claimant's grievances, Professor Ait-Boudaoud spoke with Prof Paul Hayes, the Deputy Vice Chancellor. The DVC explained that using fixed terms for academic managerial posts was a long-standing university practice which provided staff development opportunities and the ability to gain management experience without having to commit to making a long-term career decision. He also explained that there was no expectation,

express or implied, that an incumbent employee would remain post at the point of renewal when the process was competitive.

22. Towards the end of the Claimant's five-year term, the post was advertised by an internal advertisement, and she applied for and was interviewed for the post. Three people were shortlisted, and the interview panel unanimously agreed that all were appointable but that one had done less well in the interview. He was discounted. The two remaining candidates were the claimant and Mrs Collier. The claimant, Dr Sharma, is an Indian woman who speaks with a marked Indian accent and cadence, Mrs Kerry Collier is a white English, or British woman.
23. The panel considered the two women. One of the panel thought that the claimant was the top candidate, whilst the second panel member and Professor Gary Rees, the claimant's line manager at the time, thought Mrs Collier was better candidate. All agreed to appoint Mrs Collier to the post.
24. The claimant was very unhappy about this outcome and says that she asked for feedback about her failure to be selected, which she did not receive. She filed a complaint under the University's grievance procedure on the 19 November 2020, asserting that she considered that her national origins and diverse background, which we accept meant her race for the purposes of the Equality Act 2010, had been a factor in the decision not to reappoint her to the post.
25. She alleged that she and Mr Rees had a difficult relationship and that she considered that he had treated her less favourably than the white candidate, both in the application process, but also that he had treated her less favourably than he had treated or would have treated other white employees over the last five years, on grounds of her colour and diverse background.
26. She alleged a breach of a duty of care, by a lack of support, and discrimination and differential treatment.
27. Prof Ait-Boudaoud, Executive Dean of the Faculty of technology, was appointed to investigate the claimant's grievance after the original investigator became



unavailable. He was supported by Maria Wall, HR Adviser. He carried out interviews with various people; asked for various statistical information and made enquiries in respect of documentation and policies.

28. The process took some significant time, and the claimant became increasingly unhappy with the length of time matters were taking.
29. The claimant became very unhappy about her treatment by her successor in post. She raised a further grievance, before the outcome of the first, asserting that she believed she was being victimised by Mrs Collier because she had made complaints of race discrimination.
30. The respondent then determined that both the grievances would be considered. This led to a further delay.
31. In early 2021 the claimant approached ACAS for early conciliation and a certificate was granted on 1 February 2021. The claimant filed her claim to the Employment Tribunal on 11 March 2021 and the respondent provided their ET3 and grounds of response, on 13 May 2021.
32. Prof Ait-Boudaoud completed his investigation and submitted his report to the Respondent in March 2021. The report was sent to the Claimant on the 18 March 2021. The report had 37 appendices. We have been referred to it and have taken note of both the detail of the investigation and the findings and recommendations set out within it.
33. By the time the report was sent to the claimant she had been signed off sick with work related stress. The claimant appealed against the decision to dismiss three points of her grievance and to only partially uphold one of them. She submitted her appeal on 3 September 2021.
34. The claimant returned to work following a period of sickness absence on 8 March 2022. An appeal took place on 16 March 2022 and the outcome of the appeal was finalised and given on 23 March 2022.

## Findings of fact on the Issues

***on or around 8 January 2016 the respondent required the claimant to report on various work-related items before allowing her to travel to India upon the death of her father – issue 29.1 above***

35. The claimant's father died on 8 January 2016. The claimant immediately made arrangements to travel to India. At this point she was 8 months pregnant, and we accept that on the 8 January 2016, she had a number of things to do, including finding and booking flights, making arrangements for her older child and making an appointment to see her doctor to ensure that she was fit to fly.

36. The Claimant and her husband tell us that Mr Sharma was told by the claimant's family that her father had died, but that he did not tell her because he did not want to give her that shock whilst she was away from her family and 8 months pregnant. He told her, with the agreement of the family, that her father was seriously ill. We accept that this is what happened. The claimant was therefore travelling to India in the hope that she would see her father. She had a lot to do that day, and we accept that she did not wish to do work, or deal with work, as well as organise her travels and all the other things that needed doing.

37. Her tickets show that she was booked onto a flight from London Heathrow at 18.25 on Friday 8 January 2016. She booked a return ticket, returning on the 19 January 2016.

38. Mr Sharma gave evidence to the ET that he rang the university and was put through to Mr Rees. He says that he told Mr Rees that the claimant's father had died and that she had to travel to India, but that he had not told the claimant, who thought her father was seriously ill. He told us that Mr Rees asked about work, and so he handed the phone to the claimant. The claimant says that there was then a conversation in which Mr Rees asked her about some issues and asked her to complete various tasks.

39. The claimant and her husband have produced their phone records for that day, and it shows a phone call being made to the university phone number at 9.01 am. The claimant and Mr Sharma assert that the call was made to Mr Rees's pa, who put the call through to him. Mr Rees does not recollect this call and is now adamant that he did not receive a call at that time in the morning.
40. The Claimant asserts that during that phone call she was asked to do some work before leaving and that this is the only reason she sent the emails she has referred us to.
41. She says she was very upset and had many things to do as result of the sudden need to travel to India and that she would not have done any work if not asked to do it by Mr Rees.
42. Mr Rees was first asked about this in his interview with Professor Ait–Boudaoud in January 2021. At that point he was not able to remember, understandably, what he may or may not have said.
43. In his conclusions of the report, Professor Ait–Boudaoud states that Professor Rees had “no recollection of the incident and feels compromised and disadvantaged due to the passage of time. He says he had tens of thousands of emails and suspected many of them would have been deleted.”
44. Before us he denies that he asked or required the claimant to do any work prior to leaving.
45. He says he did receive a phone call from the claimant’s husband that morning, and that it was the one recorded on the phone log as being to his direct number at 10.51 am. He says that he was told by the Claimant's husband that the claimant was on her way to the airport because her father was very ill and that he did not ask her to do any work. He accepts that he spoke to Mr Sharma. He denies that he was told that the claimant's father had in fact died.

46. We therefore considered the emails and correspondence around them. On the 7 January the claimant had written to Gary Pompa about some resourcing changes, and he had replied with confirmation that the changes she set out had been made.

47. On 8 January at 10.43 am, after the claimant says the first call took place, but before the one Mr Rees says took place, the claimant forwarded an e mail saying *just reporting on all actions yesterday...portal problems for all new changes have been made including Ash's Monday seminar.*

48. Her next email is to Gary Pompa and is copied to Gary Rees at 10.50 on 8 January 2016. She included three pieces of information with no preamble. She makes no reference to her situation or her flight or her leave.

49. She states: *Could you please make the urgent minor change on U23580) – Managing Human Resources specialism . Lecture should be from 9-11 every Monday staffed by Emma ( first 6 weeks) and cherry ( last 6 weeks) – AS THIS IS A LECTURE PLEASE CHECK THE ROOM SUITABILITY*

*Seminars should be from 11-1.30 (group E) in RB 2.02 24-25, Mondays and 13-15.00 (group f0 in RB 201 24-35, Mondays, these both will be staffed by Patrick Jones for all 12 weeks.*

*Many thanks Again*

*Regards KS*

50. The claimant says that she was very upset by the requirement to complete this work, as she had many things to do but that she did try to complete the work . She says that the only reason why she completed work and sent work emails on the 8 January 2016 when she had to deal with her own distress at the news that her father was seriously ill and when she had to deal with the various complications that arose from having to travel to India whilst 8 months pregnant was because she had been asked to do it by Professor Rees .

51. The claimant told us that she did contact Professor Rees again at 10.51 . This was after she had completed with various pieces of work . The evidence from all three witnesses was that their own version of the sequence of events was correct.

52. We find that all the emails written by the claimant that morning could be read as replies to a query or conversation. They do not appear to have context or explanation and they are short and hurried. The claimant gives no explanation and does not say that she is going to be away unexpectedly. This fits, and the emails read, we find, with her having already spoken to Mr Rees and explained the situation to him, or her husband having spoken to him and explained.

***on 14 January 2016 Gary Rees contacted the claimant regarding work-related matters during a period of bereavement leave;***

***in or around January 2016 the respondent failed generally to respect the claimant's bereavement leave;***

53. Mrs Sharma was referred to an e-mail exchange between her and Professor Rees whilst she was in India . Professor Rees had asked the claimant some questions about her work , having apologised for what must be very bad timing . the claimant replied stating that her father had died and also stating the date on which she would return. she said that the reason she wrote the words was because she was upset at being asked to do further work and that she wanted to confirm the date that she was returning to work and that she wanted to tell Mr Rees that her father had in fact died.

54. At this point, Professor Rees knew that the claimant was absent because she was on compassionate leave. We find nothing unusual in the fact that Professor Rees responded by offering condolences, rather than stating that he already knew that her father had died , if he already knew. This does not assist us in determining which version is correct.

55. We all observe that the correspondence from Professor Rees with the claimant at this time regardless of whether he was aware only that her father was seriously ill

or whether he was aware that her father had died is surprising . We would expect most line managers in such circumstances to seek to reassure staff that they need not carry out any additional work in the circumstances, or perhaps to help with any outstanding work or to ask if there was any outstanding work which could be done by somebody else in their absence. We also find it surprising that Professor Rees did not say suggest that she could simply leave the matters until her return. We find on the evidence we have heard that there was nothing that was urgent and we accept the claimants evidence in this respect.

56. We compare this exchange with an email exchange between Professor Rees and a member of staff CB in November 2018. CB requested bereavement leave because her uncle had died, and she needed to attend at the funeral for two days. His response is , *Sorry to hear of your loss, of course you must go, we will make arrangements for teaching.*

57. We find that although the situations were not identical, this is relevant evidence of how Professor Rees may treat a hypothetical white person in the same situation as the claimant.

58. Professor Rees did not have any cause to think about this exchange of emails or the events of 8 January 2016 again until the claimant complained and specifically raised these matters. The claimant in contrast travelled to India, was informed her father had died spent time with her family and attended at the funeral. She then returned to the UK , took up her new post and then within a short time, started her maternity leave. For her, a number of things happened which we all agree were likely to leave her with strong memories.

59. Her version of the events and her memories of them as she described them to us were convincing, understandable and appear to be supported by the documentary evidence we have before us as well as by her Husband's evidence.

60. In contrast, Professor Rees has many staff to manage, had no reason to think of this again until the claimant complained, and, when initially asked about it in the

course of the investigation, stated that he had not remembered the incidence and needed to refresh his memory. This is not a criticism of him. These were events that took place several years before, and we are unsurprised that he did not initially remember. We are also unsurprised that he cannot remember a particular phone call, and may not recollect what he said about work.

61. We prefer the evidence of the claimant and her husband on this point.

62. This is important in our subsequent findings, because we do find that Professor Rees's memory had developed over time. We find that his recollection in this respect is unreliable. We find that he was told that the claimant's father had died, ; that he did, none the less ask her to complete work both before she left the country, and after he had contacted her in India, whilst on bereavement leave, and after being told that her father had died.

63. This was unsupportive and unreasonable of him. We consider below in our conclusions whether this was also on grounds of race.

***in or around February 2017, and during the critical illness of her infant son the respondent failed to provide the claimant with support she requested;***

64. The next issue arose chronologically the next year, following the claimants return to work from maternity leave, and concerns the claimant's baby son, who was unwell.

65. We all agree that the illness of the claimant's baby son have been very traumatic and upsetting for the claimant.

66. We find that the claimant did try to explain to Prof Rees that she needed some further support in her role, and did ask for support , such as had been offered to a previous head.

67. We find that Professor Rees did not provide any specific additional support to assist her, but did on occasions ensure that support was provided to other colleagues who were white.
68. We accept the claimant's evidence that another colleague YR was offered support.
69. We do not however know the circumstances in which support was offered to others, and do not know what was asked for and why.
70. We do find that Professor Rees did not fully appreciate at the time the potential severity of the baby's condition, or the stress that it was causing the claimant, and find that he did not realise that the claimant was asking for and needing support.
71. We have asked why he did not know, and why he did not realise that the Claimant was desperate at this point in time for some support and additional help in carrying out her role.
72. We find from the evidence we have heard that Professor Rees did not make extra efforts to engage with the claimant. From the evidence about his engagement with other members of staff, we find that he was interested and engaged and willing to help and assist staff, and to discuss personal matters with colleagues and that they had confidence to speak with him about a range of matters. He did not have the same type of relationship with the claimant. He seems to have been unwilling or unable to give her the same level of attention or support that he gave others. We have detected a reluctance to recognise the real challenges she faced, and find he lacked a willingness to engage with her with the same positive and enthusiastic approach we find he had for other staff. We rely here on his attitude to Cherry Hood, to Mr David Hall over the interview of KH and to Mrs Collier herself, as evidenced from his emails and his actions.
- 73.** We find that Professor Rees was understanding and sympathetic to other staff. We find that the claimant was treated differently to others, and that there were differences between her race and colour and native origins and others.



***In or around September 201 Mr Rees declined to discuss the interview of KH with the claimant, who was chair of the interview panel, and instead discussed such matters with another member of the panel;***

74. The claimant alleges that she was treated less favourably by Professor Rees in respect of an interview an interview which she conducted as chair of the panel, sitting with a panel member David Hall and another person. The interview was in respect of a teaching position and two individuals were interviewed.
75. During the course of the interview, one of the candidates expressed the view that she had already been told that she would be appointed. The interview panel were concerned about this and following the interview Mr Hall sent an e-mail which was subsequently forwarded to Professor Rees, stating that the panel were concerned and wanted to meet with him before any decision was made to appoint any individual.
76. Professor Rees confirms that he did then meet with Mr Hall. He states that he understood that Mr Hall was concerned and therefore wanted to discuss the matter with him . We find it is perfectly clear from the e-mail that it was the panel as a whole that were concerned, and Mr Hall was just the person writing the e-mail. Professor Rees knew the claimant was the Chair of the panel.
77. The respondent has asserted that these interviews were part of a redundancy process and therefore provided that as the individual met the requirements, they would be appointed to the post. The claimant told us that she was not aware that the individuals were being interviewed as part of a redundancy redeployment process. It is not explained to us why she was not told this.
78. Doctor Sharma tells us, and we accept that subsequently she tried to speak to Professor Rees about the matter and that his response to her was that he had already spoken to Mr Hall about it and did not see the need to discuss it any further with her . We reject his evidence that Dr Sharma did not raise this with him. We find she did and we accept that the conversation took place as she has said. Professor Rees told Professor Ait-Boudaoud that he had information that he

did not think was relevant for the claimant to know. At this point he had decided that the individual would be appointed.

79. We find that the only information was the fact that the person was facing redundancy and therefore she would be appointed provided that she satisfied the criteria.

80. If this was true, we can see no reason why this information was not given to the claimant but was explained to Mr Hall. We find this bizarre.

81. Professor Rees states in his evidence that the treatment of the claimant and the treatment of KH arose in different circumstances, because KH was facing redundancy and Dr Sharma was reapplying for a job she had been doing for 5 years. We agree that the circumstances of their appointments were different. However, the Claimant is right to say that Professor Rees was clearly able to speak to a person he wanted to be appointed, in advance of an interview.

82. We find that Professor Rees was quite prepared to step in and make his own determination about an appointment, rather than accept the view of the interview panel, without explaining matters to Dr Sharma.

83. She is an Asian woman and was the chair of the panel, and Mr Hall is a white man, and member of that panel.

84. Professor Rees treated the Claimant and Mr Hall differently, in circumstances where we would all have expected him to talk to her regardless of who else he had spoken to. He gave different explanations for his behaviour, but we all agree that his refusal to discuss the behaviour of the candidate or her appointment with her, was extraordinary, unnecessarily rude and dismissive and without an explanation could lead us to conclude that the claimant's race was a factor. It requires an explanation. Professor Rees has explained why he did not speak to the claimant, but not why he thought his reason was an appropriate one. We do not believe that the reason he has given is the true reason.

85. We find that this example is evidence that demonstrates that Professor Rees was prepared to express views about candidates in advance, to speak to the candidate about the process, and to treat the claimant differently to a white person in the same circumstances as her (Mr Hall)

***in 2018 /2019 Mr Rees discouraged the claimant from undertaking the Senior Fellow of Higher Education Academy Qualification***

86. The claimant alleges that she discussed making an application for a fellowship with Professor Rees during her 2019 PDR . Professor Rees accepts that a conversation took place . The claimant asserts that he was unsupportive of her applying and that without his support she did not feel able to apply .

87. In his witness statement Professor Rees states that he is surprised at the allegation that he discouraged her from undertaking the qualification or that he blocked a professional qualification. He states that is not the case and that the qualification is dependant upon a self-application process. He said it was a real benefit to the Department and therefore to him personally as Head in having senior fellows on board and that he very much encouraged staff . he told us that it is a process that takes a long time and requires a lot of self motivation and drive, so whilst encouraging it, he did not put pressure on the staff to apply.

88. The claimant wanted to apply and spoke to her head of department about it. She compares her treatment to that of Cherry Hood. Prof Rees said that Cherry Hood chose to apply for the qualification and is working towards it, and that he had been supportive of that, as he would have been of the claimant had and she wanted to do so.

89. We have considered the documentary evidence.

90. The Claimant referred us to a professional development request form that had been filled in as part of her PDR meeting on 24 September 2019 and also referred us to an exchange of emails between Cheryl Hood; Mr Rees the claimant and Sally Walpole of 30 September and 1 October 2019 .

91. Firstly, the claimant initiated a request for professional development . We understand that a member of staff who was working towards the qualification could ask for a time commitment or allocation from their annual hours to be used for working towards the qualification.
92. The claimant made her request and noted it on the form. The form is at p 117. The claimant stated that she wanted to work towards the SFHEA, and noted that this was a departmental goal to have all staff working towards FHEA status or beyond. The claimant was to make initial enquiries with DCQE.
93. The claimant and Professor Rees agree that there was a discussion. The claimant asserts that he was unsupportive of her application. The claimant says that she had raised this request with Professor Rees on earlier occasions, and he had been unsupportive then as well. In her witness statement the claimant notes that the job advert for the Associate Head post in 2015 mentioned is the ideal candidate would show a willingness to work towards the qualification.
94. The claimant also refers to the university policy on continuing professional development. The policy sets out the University's commitment to encourage career development and to encourage underrepresented groups to take part in professional development opportunities. One of the initial development priorities is stated as being leadership and management programs for all staff with the leadership of people manager role. The guidance was also given on the role of managers and it is noted that most of the funds which support staff development activities and events will be held the local level and that in most cases, Deans and Heads such as Professor Rees will determine how resources can be prioritised.
95. From this we infer that there was an expectation that managers would be supportive of requests made by staff for professional development but further that they would take responsibility for ensuring that professional development was carried out, and that resources and time were allocated to support staff.

96. Prior to November 2019, Following the claimant's request for support, Professor Rees wrote on Claimant PDF form; *This is a very worthwhile activity to undertake but would urge focus on improving upon the timetabling and workload aspects of the role first.*
97. He then wrote at the end of the form; *I would like to see your research plans and progress form as well and discuss this with you. As a concluding comment I would like to thank you for all your efforts over the year. It is a great pity that much of this good work is undone by not communicating in appropriate ways with colleagues and ensuring workload and timetabling was managed more effectively. We discussed bringing in another colleague to assist with certain aspects of the role. I would like to discuss again in November/December 2019 please.*
98. We find that the comments written at this point were in part reflective of the fact that the claimant had asked for some extra support to carry out the role, as she had herself supported the previous post holder. We remind ourselves that Professor Rees had noted that the role had changed and expanded. Her request for support prior to November 2019 was made, we find on that basis, and Professor Rees knew this.
99. We also remind ourselves that Professor Rees, in his witness statement, states, when explaining why she was not reappointed, *this was not because of her race or because I or any one else disputed her experience in the role or felt she had not performed well as Associate head to date. ....it was simply the case that not withstanding Kajals previous experience in post two of the three panel members( myself included) felt that KC had given more compelling and detailed responses to the questions and scenarios posed.*
100. Professor Rees did not do anything further in respect of either identifying any shortcomings the claimant may have, and in the light of his sworn evidence we conclude that this was because there were not any real concerns about her performance.
101. The claimant argues that without his support at an early stage there was little point in her progressing.

102. Professor Rees told us that the process required the applicant themselves to be self-motivated in order to make the application and to do the work necessary and that no formal support was required from the head of department in order to make the application . He recognised that it was necessary for him as head of department to sign off on the actual application itself once it was made.

103. He said that had the claimant wanted to pursue the activity, it was a matter for her to initiate and then come back to him once she had filled in the various forms. He told us that once he had the forms his usual process would be to review them and probably meet with the claimant again to discuss the application before agreeing to it. He said that he would need to see the form to ensure that the details and contents of it were correct before signing off on.

104. Professor Rees accepts that he did suggest that the Claimant focus on other matters but says that it was a matter for the Claimant to determine whether she wanted to pursue the application or not . He said his reasons for his comments and thinking at the time was that there were numerous other pressures on both the Claimant and the department in terms of increased teaching pressures on college spending.

105. We agree with the claimant that this was not what he said to her at the time, and that his response was neither positive or encouraging to her request for support with an application to start working towards a professional qualification, which would require a time commitment.

106. On 30 September 2019, CH who we understand is a white woman, also asked for support from Professor Rees to pursue the same qualification. We have heard no evidence from her but have seen some of the correspondence because the Claimant was copied into some of it, and asked to take some action.

107. CH explains in her emails that she had spoken to the APEX co-ordinator who thought she may have the experience to apply. She planned to draft an application and attached a form to the email that Professor Rees needed to sign

to allocate her a mentor. She also says... *Sorry to raise the sordid subject of money but you mentioned there is a workload allowance for this....*

108. We find that this indicates that CH had not at this point made the application. Like the Claimant she was seeking support. She needed to be allocated a mentor, and allocated hours to free her up from other work commitments. This support could have been given to the claimant we find and was something that Professor Rees would have known.
109. Professor Rees replied the following day, on 1 October 2019. We find that the application form had not at that stage been drafted, and therefore Prof Rees could not have reviewed it. He did not meet with CH, but simply responded copying in his PA Sally Walpole and the claimant stating *sure Sally, please add my signature; Kajal, please add the 54 hours workload allowance.*
110. This email was sent within days of the claimant had asked for his support for the same senior fellowship program.
111. This colleague was a white woman who had filled in an application form and asked professor Rees to support her . We find that he did so without seeing the form and simply instructed his PA to sign off on it , contrary to his own evidence about the correct process, and the process that he thought he would follow, before approving the time commitment of support. He said that he would need to see the form to ensure that the details and contents of it were correct before signing off on.
112. We have no evidence that Prof Rees had previously had any conversations with CH, and his unquestioning support for her , before she had even filled out the application form is fundamentally different from the process which he said he would follow.
113. His treatment of CH is different to his treatment of the Claimant. He told us there was a complicated background. When asked to explain the apparent difference in treatment between the two women he did not explain further to us what that was and we have no other evidence about the comparator's situation

before us. We find that this is disingenuous. The claimant was seeking support and encouragement from her line manager, without which she would find it very difficult to pursue a CPD objectives so was CH.

114. Both women wanted to apply to study for the same qualification. Both were qualified. Both needed support from Professor Rees for the Mentor to be allocated and for a work allowance. Neither had made the application.

115. We have no evidence of any thing that make the circumstances of the two women different, other than their respective job roles. We find that this is not a material difference.

116. Professor Rees did not provide the same support or encouragement to the claimant that he gave days later to a white woman in exactly the same situation without even seeing her form. We also find that Professor Rees did nothing to discuss support on this issue or to discuss it at all with the claimant again in 2019.

117. The only difference on the face of it between the two parties is that the claimant was an Asian woman, and the other applicant was a white woman.

118. We find it was not unreasonable for the claimant to consider that she needed his support, since she would require time off from other work.

***the respondent failed to notify or otherwise bring to the claimant's attention the internal advertisement for the role of Associate Head of Subject Group in Organisational Studies and Human Resource Management (the role)***

119. The respondent did not bring the internal advertisement to the claimant's attention when it was first advertised. The Claimant was treated in the same way as every other person, but we all agree that she was in a different position to others, because she was in post and because she wanted to reapply for the job she was doing.



120. We also accept the claimant's evidence that in other internal selection exercises, the relevant vacancy has been notified to all staff by email, as a general practice. We accept that the only email sent out all staff was on 19 October 2020, telling staff that the closing date for applications had been extended from 21 October until the 23 October 2020.
121. We accept the claimant's evidence that when she applied for the post, in 2015, following the decision of Ray French to retire, the post was advertised and all OSHRM staff were informed the same day through an email.
122. During her interview with Professor Ait-Boudaoud on the 11 January 2021 , the claimant was asked whether her head of department had asked her in advance if she intended to reapply for the Associate Head post and whether there had been any indication that her application would be welcomed. The claimant confirmed that Professor Rees had asked her about her intentions during her PDR and she had queried whether he wanted her to apply for the post. She said that Professor Rees had not given a positive response saying instead that he was unable to suggest a course of action. The Claimant saw this as a lack of support from Professor Rees and we agree that it was.
123. We find that this was a fair reflection of the discussion and that Professor Rees knew, as a result, that the claimant was planning to reapply for the post.
124. We find this exchange surprising. We would expect that the HOD would give some encouragement or give some feedback to the incumbent, in the PDR, about areas that might need to be addressed or improved upon, if she wanted to be reappointed. Instead, the only comments made in any PDR appear to be in respect of the claimant having requested support in respect of other matters. We have already noted that no one suggests the claimant was not performing the role well.
125. From all the evidence we have seen, we have no doubt that, had he been actively supportive of the claimant's reappointment, he would have given her some encouragement at this point.

126. We find that the reluctance of Professor Rees to say anything at all was because he was not being supportive of the claimant making an application or being reappointed.
127. Professor Rees was the person with overall responsibility for the appointment process in 2019. He would have known when the post was being advertised and how. He would have known whether any applications had been received, and who from and he would have known that no applications had been received from anyone by 19 October 2020.
128. We find that by the 19 October he knew that the claimant had not put in an application form. We find that he must have been the person who decided to extend the time for applications.
129. He did not speak to her at this point to make sure she knew about the advert. We have asked why he did not flag up the advert to her at this point. He said that he did not want to be unfair to anyone else who might apply.
130. We find that there had been different practices in different departments over whether or not individuals should be told that the role had been advertised, and also whether or not the advert should say that there was an incumbent in the post.
131. We accept that the respondent and Professor Rees himself, did not want to put off prospective applicants by saying in the initial advert that there was someone in the role, as we find that this had happened in other cases, but we do not understand there to have been anything preventing Professor Rees from flagging up the advert to the person in post, or indeed to everyone in the department, particularly when no applications were received.
132. Professor Rees failed to flag up the advertisement of the vacancy of the job the claimant was doing, and which she wanted to continue to do, on two occasions. The claimant only became aware of it, at the same time as others.

133. We find that this was extraordinary, and not wholly explained by any concerns about fairness in process as a whole. We find that the scruples Professor Rees had about the advertisement did not apply for example to the process of interviewing , note taking or the giving of feedback, as we set out below.

134. We fail to see how reminding staff of an advert for the job they are doing already and want to be reappointed to, is unfair. We infer that he did not want to give her any encouragement. We infer that consciously or subconsciously he was hoping that she would not apply. We conclude that the reluctance to speak to the claimant as a matter of common courtesy, was in part at least, because it was the claimant, and Professor Rees was not prepared to make any effort at all to encourage or assist her in applying for the post.

135. We have considered below how far the claimant's race was a factor in her treatment, and whether or not she would have treated a hypothetical other person differently.

***The claimants interview panel in 2015.***

136. The claimant has raised an issue about who interviewed her when she was initially appointed to the role in October 2015 . This first came up during the course of her grievance interview on the 11 January 2021. The Claimant raised the issue by way of comparison.

137. The discussion was about the process followed in October 2020 and she had stated that when interviewed for her five-year tenure, the HoD (Professor Rees) had not been present whereas this time he had been the panel chair. She noted that the previous panel had been larger but could not recall if it was more diverse.

138. The claimant said in her interview that when she was appointed in 2016 the Head of Department role had transitioned from Charlotte Rayner to Gary Rees and therefore neither had been involved in that interview process. She was not, at that point, able to say who had chaired the panel.

139. Subsequently Mr Rees asserted that he had been the chair of the panel when the claimant had been appointed. No paperwork was produced for Professor Ait-Boudaoud.

140. Some documents were produced shortly before the start of this hearing by the respondents as set out above. They did not appear to have been included as part of the disclosure. By agreement they were admitted at this late stage

141. Professor Rees and the respondent assert that the documents support his sworn evidence, that he had been the chair of the initial appointment panel.

142. We do not agree with the respondents. Whilst the evidence produced does identify Professor Rees and whilst the claimant is also identified, we prefer the claimant's explanation of these documents as being in respect of a different recruitment process. We find that there are a number of significant differences between the role of associate head of department which the claimant applied for and successfully was appointed to and the paperwork provided to us.

143. In addition, we have found the claimant to be consistent on this point from the first time it was raised with her. We are satisfied that had Professor Gary Rees interviewed her for this position that she would have remembered and that she would have told Professor Ait-Boudaoud she had no reason not to do so.

144. We find it is more likely that Professor Rees who undoubtedly interviews a large number of individuals for positions at a senior level has made a mistake than that the claimant for whom the appointment was a significant event has made a mistake.

### **The Development of the role and support of the claimant**

145. In considering the evidence of how others were treated and supported by Professor Rees, both parties have referred to the claimant's performance.

146. It has not been suggested by the respondent that there were any significant or serious concerns with the claimant's performance before us, which would have justified Professor Rees in not supporting the claimant's application.
147. The claimant has positively asserted that she did well in her job, and that her performance in role should have been taken into account and that if it had been, then she ought to have been the successful candidate.
148. It is not until the claimant asked for support to pursue the fellowship, that any comment was made about the claimant's communication skills and timekeeping.
149. We accept the claimant's evidence that Professor Rees had never raised any concerns with her about the work she had been doing for the last 5 years until that point, and that even then, it was a vague and nonspecific criticism or observation and there was not offer of any support or steps ways for the claimant to improve.
150. We accept her evidence, supported both by Professor Rees to Professor Ait-Boudaoud, that the role had grown and developed over the course of 5 years, and that the claimant had been required to take on and manage new and additional areas of work.
151. Whilst we understand that a manager may have legitimate concerns about performance, there was ample opportunity for Professor Rees to engage with the claimant and have constructive discussions with her about her work. If he had criticisms, or if there were areas where she needed to improve, we would have expected them to be recorded or referred to her and would have expected him to take some steps to address them with her.
152. The only references we have seen is in the PDF form, and the claimant suggests in her witness statements that the reason he had said, *we discussed bringing in another colleague* was because she had been asking for support. She stated and we accept that there was no follow up, despite Professor Rees stating that he would like to discuss this again in December 2019.

153. We have seen no evidence either of the claimant falling short in her role in any respect, or of her requiring or being given unusual amounts of support over the 5 year period. Instead, we find that there was a failure to support the claimant even when she asked for support and even when Professor Rees himself noted that they had had discussion about extra support. This was in the context of an expanding role.

154. When professor Rees was interviewed by Professor Ait-Boudaoud about support he had given to the claimant, he suggested ad that he had been protective and over supportive, but that she had continued to have issues over matters such as communication with staff. He accepted that he had not provided her with development training and expressed the view that the issue was more about her approach.

155. The only objective evidence we have is that the claimant had performed well in a difficult role. We saw evidence which she produced from staff who had thanked her and appreciated her support over the years. We find that whilst there were staff who appreciated her approach and her style, Professor Rees did not appear to have a high opinion of her. We find that the only criticisms of her made by Professor Rees directly, arise after she has not been re- appointed, and when she has raised a grievance about the process and Race discrimination.

156. We find that he had never given the claimant any constructive feedback or discussed with her areas where she might improve or what she might to improve any perceived short comings. We find that Professor Rees had given the claimant no support to improve within the job, and had given no particular support to her to be able to manage the growing tasks day to day, even when she had requested them.

***the respondent did not reappoint the claimant to the role;***

***the respondent appointed Kerry Collier to the role***

***the respondent failed to give satisfactory or any regard to the claimant's previous experience in the role;***

157. These three allegations all refer to the interview and selection process and our findings are as follows.

158. The process did result in the selection of Mrs Collier. From the evidence we have, we find that the Claimant, as a person who had been doing the job for 5 years, and who had been doing it without any real criticism, and in challenging circumstances, would have been expected to be in a very strong position because she had direct experience of the role.

159. We have also been referred to the Statistical information, which was provided eventually to the claimant, via her FOI request, but which was not provided to Professor Ait-Boudaoud , who asked for it during the course of the investigation.

160. In her request, the claimant asked for information about the number of Associate Heads; Head of Department and other senior management role holders who had reapplied for their posts in the last 15 years and how many of them were reappointed; how many BAME candidates applied and were reappointed and how many of those BAME were female.

161. The University responded that 12 academic senior management vacancies had arisen since 2018 in which the incumbent had reapplied for the post, and that of those, 11 were reappointed. No BAME candidates had reapplied for their post within that period. We understood that all 12 posts were ones where the incumbent was a white person, and that in 91.6 % of cases, the person was reappointed.

162. The claimant was the only BAME any candidate at that level, that we were told of who had reapplied for their post and been unsuccessful. We have no evidence before us about the reasons why the one other person had not been reappointed.

163. On the evidence we have , and from the responses provided by the Respondent to the claimant, we conclude that the claimant was one of only two individuals who had not been reappointed to their post following reapplication .

164. All things being equal, the usual outcome when a person reapplied for their post, was that they would be reappointed if they wanted to be. Therefore , statistically, the claimant could have expected to be reappointed. The difference is that she is an Asian woman and the only BAME person in the sample.
165. We are aware that this is a small sample but we all agree that this is statistically significant. When asked under oath, Professor Ait–Boudaoud agreed that the statistics would have required an explanation, had he seen them at the time.
166. The purpose of monitoring data is to highlight anomalies so that questions can be asked about the reason for them, and whether or not race for example, might be a factor. This was an obvious anomaly on information available to the respondents, which was requested both by Professor Ait–Boudaoud , and the claimant on several occasions and was not provided.
167. The respondent ought to have been aware of this anomaly and we would have expected them to have looked at these sorts of statistics, as soon as the claimant raised a concern about the failure to reappoint her and suggested that her race may have been a factor.
168. Not only do the statistics themselves require an explanation for the respondent, but the reason for failing to provide the information to the claimant at an early stage, requires an explanation.
169. Together with the other information we have been provided with about the success rate of BAME staff following interview, ( which we set out in paragraphs below) and the proportion of BAME staff within the senior position at the university, we all agree that these are findings of fact from which we could, in the absence of an explanation conclude that the process was tainted with discrimination on grounds of race.
170. We started by considering the advertisement. No one replied to the first advert for the role of associate head of OSHM. The claimant did not see the advert and was not prompted by anyone that it was there. Had she seen it and applied first



time, she would have been the only applicant and would not have had to face a competitive selection exercise.

171. It was only when all staff were told that there was an advert and no applicants, that the three applications were received.

172. All three candidates were shortlisted and invited for an interview. The interviews took place over video link, and Professor Rees was chair of the panel and the other panel members were Caroline Strevens, Charles Barker. Sally Walpole was the trained interviewer but attended as a note taker. She did not take any part in the interviews.

173. The panel all agreed that all three candidates were appointable, but that the claimant and Mrs Collier, who was subsequently successful, were better candidates than the third candidate, who was removed from the final consideration.

174. The choice was between the Claimant, who had been doing the role for 5 years (save for a year on maternity leave) or Mrs Collier who was new to the role.

175. We accept that Mrs Collier may well have had much relevant experience and transferrable skills. She may have been the better candidate, but we have not been provided with that evidence. What we are told, is that they were both appointable.

176. The evidence we have is that the key reason for appointing Mrs Collier, was that two of the interviewers thought Mrs Collier gave better answers to questions than the claimant.

177. We would expect the differences between Dr Sharma and Mrs Collier to have been clearly highlighted through the records of interview, and would expect that the reason for appointing Mrs Collier, rather than reappointing Dr Sharma, would have been clear and objective and easily identifiable and capable of being explained to the claimant. This is what we looked for in the evidence.

178. No one has produced a record of any scoring of either candidate on any questions asked.
179. Mr Rees took no notes of the answers at all.
180. We were referred to an email forwarded to the employment practice manager Maria Ainslie on 10 November 2020, enclosing the email that Prof Rees had sent
181. Professor Rees stated as follows *I know that you have a very packed diary so I thought I would send some information about the associate head interview process that occurred on 31 October..... It was advertised to the OSH group, in alliance with University procedures. We had three colleagues apply. All three were shortlisted as they met the role description or criteria. The interview panel on the 31<sup>st</sup> October consisted of three faculty executive members, as is usually the case and what happened six years ago when the job was appointed. The panel consisted of Caroline Strevens as head of law school, Charles Barker as A.D. academic and myself as head of OSHRM. We also had Sally Walpole as the trained HR interviewer and note taker.*
182. He explained that when the three interviews finished, the panel had ranked the three candidates. One candidate was ranked third by all three and eliminated.
183. From the evidence we have heard we find that there was then a discussion, and that two panel members thought that Mrs Collier was the better candidate because her answers had been better with more examples.
184. Professor Rees rang the successful candidate on the Friday afternoon and arranged virtual meetings to unsuccessful candidates, the following Monday. He said that when he broke the news to the claimant, she was naturally very disappointed. He explained that there had been three appointable candidates but another colleague unnamed presented better than her, and had accepted the role.
185. He said that he then went on to talk to her about her work in the new year and asked her to think about some of her career ambitions.
186. They agreed to speak later in the week, but the claimant cancelled the meeting

187. He then stated that he felt that the way in which this process was conducted was in alignment with university process and protocol.

188. Prof Rees provided a further statement on 11 January 2021 as part of the investigation. He says the interview was conducted electronically that the preprepared questions were agreed and all asked of all three candidates. He says he was aware that Sally Walpole would take sufficient notes and therefore concentrated on conducting the interviews.

189. He said that *in terms of notes from the meeting the differentiating factor was the way in which candidates answered questions with Kerry not just saying what she would do, but also how she would do that too. There was a strong emphasis upon building teams, gathering colleagues trust and adopting an empathetic approach to working relationships. She brought in various examples from work experience to backup comments made. Kerry presented very well; answered all the questions in a calm and detailed way. Kajal, by contrast did not go into as much detail with her answers and said what she is. I am a good..... and had scope on several occasions to back up her response with practical examples. There was a disappointing lack of depth with some of the responses .*

190. There were several discrepancies about the notes taken, the process and what happened to the notes following the interview .

191. The notes we have seen from the two panel members do not record in detail what was said by each candidate and we find that the notes made by Mrs Walpole were not seen by the interviewers at the time.

192. We accept that the decision as to who to appoint where there are two well qualified candidates will be difficult and may come down to fine distinctions.

193. We have considered whether the thinking that the answers of Mrs collier were better than those of the claimant is demonstrated on the evidence.

194. We find that the Claimant and Mrs Collier both did well in interview, but that the panel agreed to appoint a white woman with no experience of the job, instead of an Asian woman with 5 years experience in the job.
195. Coupled with the statistical evidence we have been referred to, we consider that in this case, the burden of proving that the decision was not one tainted with discrimination, shifts to the respondent to provide an explanation, and that this required an objectively verifiable explanation of reasons for not appointing the claimant , or for appointing Mrs Collier.
196. We therefore considered whether or not this was a true reason or the only reason.
197. There is the suggestion from Professor Rees, during the investigation that the decision was influenced by knowledge of the candidates. He was the only member of the panel who knew both candidates and this can only have come from him. He does not explain what this meant, or how big a part it played.
198. Professor Ait-Boudaoud asked Professor Rees and the panel about the notes from the interview.
199. In response Sally and Charles give their responses to the manner in which the decision was made.
200. The responses provided by Mr Barker and by Caroline Stevens are important. They have not given evidence but both provided further responses.
201. Mr Barker refers several times to the comparison of his scoring with the scoring of others.
202. Professor Rees has told us that he did not take any notes. Either he is lying or any scoring he had done, or his assessment post interview was from memory. Mr Barker suggests that they all discussed their scoring by comparison with the job description and person specification. He has not been called by the Respondent to explain what he meant by this, and we take it at face value.

203. If there were scores or scoring sheets, we have not seen them, and they have not been disclosed.
204. All we have seen are the typed notes taken by Sally Walpole. These notes were not shown to the interviewers at the time, as it was all on video, and there is no evidence before us that anyone looked at them to ensure that they were correct or fair before they were put onto the system.
205. We have seen some handwritten written notes provided by both Caroline Strevens and Charles Barker. They are very short from CS and longer from CB, but they include no scoring.
206. On 7 April 2022 the claimants then solicitor, Mitesh Patel wrote to the R noting that there were documents now provided which had not been provided as part of the disclosure or previously. These were the handwritten notes from CS and CB and some additional statistics. No one has been able to explain why these documents were not provided at any stage prior to then. Since they existed, they should have been provided at the outset of the investigation. They should have been on the file. What we have been provided with are photocopies of notebooks. These are not documents which were uploaded to the electronic record of the process.
207. We find that the panel members did “score” the applicants, but not in any formal way. If there was any written record of each panel members scores, none have been kept or recorded on the file.
208. We find that the process of interview and the record keeping after the process is unsatisfactory. This was not a process where there was scrupulous record keeping or a focus on an objective decision-making process. It does not appear that there was any agreement in advance as to what a good answer would be, or how to assess the answers given.
209. Instead we find that there was a general discussion. We have taken into account the dicta from a number of cases in which the courts have looked at

recruitment and selection processes, particularly internal procedures. We remind ourselves that a person does not have to intend to discriminate, and that the discrimination may instead manifest through a subconscious bias. This may be that one person does not fit in as well as another, or the perception that one person is better in answers or communications than another. Without objective evidence, it is difficult to pin down what it is that leads to one person being considered better than another.

210. Here, the two people who did not know the claimant had different views.

211. We all agree that the reason the claimant was not reappointed was that Professor Rees did not think she was the best candidate and the panel agreed with him after the discussion. We all think that on balance, as head of department and knowing both candidates he would have influenced the outcome and did so.

212. We have found that he was not particularly supportive of her application, or other career development.

213. We have found he treated her differently to how he treated other members of staff who were white in a variety of circumstances. We all agree that the reason given by Professor Rees for not appointing her, unsupported by any objective data or examples, is subjective.

214. The University is a large and well-resourced organisation. It employs competent and appropriate human resources professional and has detailed and clear policies both on recruitment and on monitoring of recruitment. We are told that those involved in interviewing are training in subconscious bias and fair processes.

215. The respondent's explanation that Mrs Collier performed better at interview could easily be demonstrated by paper work properly filled in, or by feedback sensibly given at the time and identifying what it was that she did better than the claimant.

216. The paperwork does not demonstrate the reasons for the appointment; the record keeping is fundamentally flawed; no feedback was given despite being asked for.

217. The facts we have found do not support the explanation given by the respondents for the appointment of Mrs Collier, unless we accept the evidence of Professor Rees as wholly truthful.

218. We have been critical of the evidence given by Professor Rees in a number of respects. We have also identified different treatment of the claimant and other white colleagues. One example is that Professor Rees was not supportive of the claimant applying for the fellowship. We have also concluded that Professor Rees was not supportive of the claimant reapplying for the role.

219. The key question for us is whether or not that, and the failure to appoint the claimant was anything to do with race, either consciously or subconsciously. In the absence of a full explanation, and taking into account all the facts we have found, including those which follow, we conclude that the claimants race was a factor that consciously or subconsciously influenced the decision of Professor Rees throughout this appointment process, not to reappoint her, and to appoint another person.

***the respondent failed satisfactorily or at all to provide the claimant with feedback on her unsuccessful application for the role***

220. The claimant says that she asked for feedback to explain why she had not been appointed. She complains that she was not given feedback at all by Professor Rees or otherwise.

221. Prof Rees was interviewed by Prof Ait-Boudaoud on the 13 January 2021. The scope of the claimant's grievance was outlined, including discrimination due to skin colour and discrimination due to the diverse prep round and Prof Rees was informed that the claimant had requested, but has so far not received any formal written feedback on the performance during the interview at that point. Prof Rees informed Professor Ait-Boudaoud that he was unaware of the Claimant having

requested written feedback. He explained the panel decision has been agreed on Friday, he contacted Dr Sharma on Monday to inform her that she been unsuccessful and provide verbal feedback. he stated during that online meeting became apparent that Dr Sharma was not necessarily taken on board what he was saying. He had suggested they reconvene on the Wednesday. Dr Sharma subsequently cancelled the meeting and he had been notified that she had raised a formal complaint.

222. Professor Ait-Boudaoud told Professor Rees that the claimant had written to Sally Walpole, the trained interviewer of the panel, requesting written feedback. GR stated he would have happily provided this had been aware of the request.

223. We were referred to an email exchange , in which Sally Walpole had written to the Claimant on the 2 November 2020 at 13.42. She said, *Just to let you know that I am liaising with HR to find out about what your pay will be when it reverts back to SL. I have emailed Gary to ask if he can give you feedback and he said he will notify the group of who the new associate head will be in due course.*

224. We heard no evidence from Ms Walpole and it has not been suggested before us that this email was not sent. Professor Rees has no explanation, other than to say that he said he was not aware of a request and did not know he had been asked for feedback.

225. We do not accept his evidence. We find that the claimant made the request for feedback, and that it was passed to Professor Rees. It was important to the claimant to understand why she had not been reappointed to a job which she was doing and as she stated in her initial letter to Professor Graham Galbraith, the Vice chancellor, *I had never got the indication that there are lack of skill or ability or that I needed any improvement to do my job role.*

226. We find that when Professor Rees was sent an email by Sally Walpole passing on the request from the claimant for feedback he either deliberately ignored it or failed to prioritise it, but in any event, he knew of it and failed to deal with it. We have no evidence that he ever tried to rectify the matter subsequently, or to find the email and apologise to the claimant for failing to give feedback. Instead, he



simply maintained that the claimant had not asked for it. He ought to have been able to search for the email, and if he had done so, we think it highly probable that he would have found one.

227. The Claimant wrote to Professor Galbraith *I will not take the decision of not been reappointed as associate head on its face value without any rational reasoning behind this . I would like you to conduct a complete audit and investigation of the whole process merits and demerits of all the candidates and the persons who conduct this process. In the absence of proper reasons, I would like to take this complaint further and there should be no surprise responsible people and the organisation faces humiliation for loss of face and finances due to my first.*

228. At this point the claimant was asking for an explanation as to why she had not been reappointed.

229. On the same day, Prof Galbraith replied to the claimant saying that he was sending the response to the director of HR. He said she would instigate the appropriate steps to investigate the matters raised. He said, *as you have sent this to me as a formal complaint, it is important that before the proper process will act like this, and she will contact you to outline the steps taken.* He also stated that the University will not tolerate racism of any sort in its decision-making, whether in relation to appointments to university or promotion in the first, the email was forwarded at some point Maria Ainslie wrote back to Alison Thorn Henderson saying *to confirm a conversation last week, the panel chair was Gary Rees and the other panel members were Caroline Strevens Charles Barker and Sally Walpole was the trained....* . There is then part of the page cut off.

230. The next line states *requested the notes from the HRSC that have been uploaded onto the system and they are below . I do not know what feedback was given to Kajal but hopefully Jeremy will est...* The page then cuts off again

231. We were also provided with a printout of what appears to be information entered onto a template about the interview and the claimant. We find that this was about the unsuccessful candidates. There is a vacancy title; vacancy number

subject group, the names of the panel members. the trained interviewer who is named as Sally Walpole; the interview date; applicant's name and then a section of headings going left to right across the page. The first is *specific knowledge and experience*, second *skills and abilities and so on*. The document appears to be incomplete.

232. Under *specific knowledge and expertise* it says *ranked second. interviewed well with confidence. ranked her slightly lower ...skills and abilities would have liked some of the questions answered differently consid...* The sentences cut off at that point. No One has been able to explain who filled this in, what they used or why the full details or the complete documents were not provided to the claimant or the tribunal.

233. The Claimant was entitled to receive complete documents as part of disclosure, and these were of direct relevance to her claim. This is not the only example of the Respondent failing to provide the Claimant and the Tribunal with relevant documentation.

234. We find that the failure to provide the documents the appropriate times is indicative of a reluctance on the part of the respondents from the point of her initial complaint to provide her with any of the information she needed to challenge the decision made. We have asked whether or not this was due to incompetence but find that it was not.

235. On 5 November 2020 the claimant was contacted by Maria Ainslie and told the investigation had been set up and that she would be notified when an investigating manager been identified.

236. On 6 November Jeremy Howells wrote to Prof Rees. He said he was looking forward to the meeting to discuss OS SHRM and then said *I am afraid, however, part of our discussion will have to be around a complaint KS regarding the recent interview process is associate head. We will have to formally look into it but at this stage a short discussion about the interview process.* We assume that it is in response to this, that Prof Rees wrote the emails we have referred to earlier in this judgment.

237. Following an email exchange, asking for the notes from the interviews and the feedback that had been uploaded Maria Ainslie was sent an interview assessment in the form of an Excel spreadsheet. That spread sheet has not been provided to the Employment Tribunal, but it may be that that was part of the document to which we have referred above. We would have expected the respondent to be able to clarify this, but they have not done so.

238. Since the claimant was complaining about a lack of feedback, it is extraordinary that no one chased Professor Rees to give the feedback at that point. It appears that the expectation was the Jeremy Howells would pursue this. We find he did not.

239. If there was a valid reason for not appointing the person who had been doing the job without any obvious issues for 5 years, and instead appointing someone who had no experience of the job, that was the time to explain this to the claimant.

240. In fact, no feedback was given to the claimant at all. Instead the respondent conducted a lengthy and drawn out investigation.

***the claimant's role reverted to senior lecturer on 1 January 21 and the claimant's salary was reduced from grade 9 to grade 8 on 1 January 2021***

241. As a matter of fact, this reduction in grade and pay was the consequence of the claimant reverting to her previous role. The claimant does not suggest that there was anything inherently discriminatory about this, but we accept that this is a matter for remedy.

### **Statistics and FOI request and University Policy**

242. On 15 December 2020, the claimant made a request under the Freedom of Information Act 2000, to the office of the director of corporate governance of the respondent.

243. The claimant asked a number of questions specifically about the a.m. in staff selection and retention and also asked for a number of documents to be provided to her.

244. On 15 January 2021 the respondent provided amongst other details, the following information:

244.1. Of the employed full-time academic and research staff, of whom 17.4% or 177 staff were known to be black or minority ethnic origin.

244.2. 82.6% or 838 members of the full-time academic and research staff were described as white. At the principal lecturer level 6.8% of staff were black or minority ethnic, at reader level 14% were black or minority ethnic at Professor level 22.6% were black and minority ethnic and at senior academic level 4.4% were black or minority ethnic.

244.3. We understood these figures to mean that Portsmouth University fell below the national benchmark in that they employed fewer black or minority ethnic academic staff than the national benchmark, at these levels.

245. The claimant asked *what is the difference in the proportion of interviews leading to a hiring of white and BAME candidates academic research and management roles in the University*. The response was that 46% of white interviewees received a job offer and 37.2% of BAME applicants received a job offer. There was a 9% difference between white and BAME applicants.

### **The notes of the Interview process**

246. As part of her freedom of information request, the claimant asked for copies of all notes made by these those who were involved in the selection process she was complaining about. The response from university, was that it was not possible for the University to provide copies of all notes made by the recruitment panel as they are only retained for one year after positions had been filled. This could have been a standard response, but it was clearly wrong. The claimant was asking for notes in respect of the post she had applied for in 2019. Those notes were available and have subsequently been provided. No one from the

respondents has given evidence to explain why the claimant's request was not dealt with properly at that time.

### **The respondent's policies and procedures**

247. The respondent has a recruitment and selection policy dated September 2016. It sets out the procedure that human resources and recruiting managers are required to follow in the event of recruitment of staff.

248. It states in its foreword that no job applicant or employee will receive less favourable treatment because of their race, sex, religion or belief or other protected characteristic. The policy sets out requirements for record-keeping and management, and it states that the responsibility of the recruitment manager is to ensure that records are kept and this includes notes of meetings, emails, telephone calls and copies of correspondence. These should include the names of those involved dates action taken and follow-up. It states that the record management system aims to ensure that *records are accurate and reliable can be retrieved quickly and easily and are kept the no longer than necessary.*

249. Section 2.7 is headed *Recruitment Monitoring* and notes that equality monitoring is used to improve the recruitment process and ensure the University meets the requirements of the Equality Act 2010. It goes on to assert that monitoring helps the University understand if it's recruitment and selection procedures are fair and accessible to all. *accurate*

250. In the selection procedure we are concerned with, Professor Rees was the recruitment manager and under the policy he had responsibility for overall management of the selection process and including providing HR with appropriate information following interview, including a summary for all candidate interviews, and details of the successful candidates.

251. He also had responsibility for ensuring that all staff involved in the recruitment process should have had appropriate training and have the core equality and diversity and unconscious bias online learning.

252. We also considered the respondents equality and diversity policy statement, dated February 2017.
253. The University has equality objectives and we were provided with the ones for 2018-2020. The objectives include equality and diversity monitoring both of recruitment and selection and of staff numbers.
254. Staff equality objective eight is tackling potential bias in the recruitment process and equality objective nine is challenging race inequalities across the University. In respect of monitoring of staff it is stated that *monitoring data would ensure that the University could enable recruitment interventions to reach the widest pool of applicants and monitor for bias or discrimination in our staff policies and procedures*. It states that recruitment data will *be monitored to ensure our recruitment process is inclusive and equitable success is to be measured by raised declaration rates for ethnicity and to eliminate any statistically significant issues in recruitment cycle*.
255. We note that one of the reasons for tackling bias in the recruitment process is because of a 25% versus 15% white to BME success rate of staff in recruitment to academic and research roles. It is noted that in 2015 to 2016 BME staff made up 11% of the respondent's academics compared to a national benchmark of 14%. BME staff make 5% of professional support staff compared to a national benchmark 10%. It was noted that only 6% of senior academic staff were BME and that the difference in the proportion of interviews leading to a hiring was statistically significant for white BME academic and research roles.
256. We find that the observations in the respondents own policy and its own stated intention to ensure that recruitment processes are conducted in a fully fair manner and that records of recruitment procedures would be kept and monitored were specifically aimed at understanding, tracking and addressing the impact of the recruitment processes on black and minority ethnic staff.

## Victimisation complaints

257. The Claimant relies upon the following matters in respect of victimisation:

**257.1. Mrs Collier accused the claimant of refusing to give me a solid handover or words that effect**

**257.2. Mrs Collier deployed inappropriate language and tone**

**257.3. Mrs Collier wished the claimant all the best in her new role, or words to that effect as an implied threat**

258. The Claimant was asked by to provide KC with a handover on 10 December 2020.

259. On 6 November KC asked the claimant, by email, if she will be free for a catch up on the Monday. We noted that the email is sent at 16.18 on Friday asking for an appointment on Monday at 9.30. KC agreed when asked by panel that this was on, reflection unreasonable of her. We observe that it gave the claimant no time to agree or organise for a meeting.

260. The Claimant could not meet on that date and asked what Mrs collier what the query was about. Mrs Collier stated that she hoped to clear the air between them and asked if the claimant was planning any Annual leave and said that she wanted to arrange a handover.

261. The claimant was at this point in post for another 6 weeks. This was only 5 days after the interview. Whilst Mrs Collier was obviously very keen to get started, she did not take over the post for 6 weeks, and it was perhaps insensitive of her to start to assert her position quite so quickly.

262. The Claimant replied stating that she would schedule a handover *next month*. We find this was reasonable of the claimant. In her witness statement Mrs Collier states that she thought this was a curt response. We do not think that it was and are surprised that Mrs Collier thought this at the time. She had just obtained a post which the claimant had been doing for 5 years and had wanted to continue with. We would have expected Mrs Collier to recognise that the claimant may not be ready to hand her post over. In addition, we are aware, as Mrs Collier was not, that the claimant had raised a grievance about the appointment.

263. On 19 November Gary Rees was contacted by the person appointed to investigate the claimant's allegations. At the start of the process this was not Professor Ait-Boudaoud who was only appointed after the original investigator withdrew from the process.
264. In early December, following the claimants request that she not have to deal directly with GR whilst the investigation was ongoing, he stepped back from her line management. In an email to JH on 4 December GR notes that JH will be the connection point between himself and KS . He says that he has some urgent questions with regard to workload planning and sets them out.
265. We understand that from that point KS dealt directly with JH in respect of her work and line management, who was also the commissioning officer for the investigation.
266. We have no evidence before us that anyone had said anything to KC at this point about either the investigation itself, or the allegations being made, or that there had been a change in line management of the claimant from Professor Rees to JH. There was no reason for them to do so, but the lack of communication may have caused some difficulties for Mrs Collier, who wanted to talk to the Claimant about taking on her new role. This lack of communication may have led her to feel that the claimant was not being co-operative.
267. On the 10 December 2021 at 10.42, Kerry Collier emailed the claimant and asked her for a meeting, saying that she would greatly benefit from a handover from the claimant. A meeting request had been sent to meet at 11.00 am that day.
268. The claimant replied saying she has met with JH and updated him, and it was decided not to go ahead with the meeting at 11.00am that day. The meeting was therefore cancelled.
269. Mrs collier then received the message from JH cc to KS and GR at 10.46 on the 10 December, saying I will set up a meeting with you next week to go through issues. (p 238)



270. This arrangement was put in place because the claimant had raised concerns about having to deal with Mr Rees as her line manager, when she was making complaints of discrimination against him. The investigator had suggested that she take this up with Jeremy Howells, which the claimant did. JH agreed that he would take on the claimant's line management and be the point of contact.

271. In the afternoon of 10 December there was an exchange of emails about a work issue and from a senior lecturer in Industrial relations. Mrs Collier responded stating , *I understand that Kajal will be looking into this before handing over to me.*

272. Of course, by then, the claimant had met with JH and agreed that JH would hand over to KC, so that KS did not need to meet with KC.

273. KS wrote back to KC, stating that KC was wrong and that the matters would become clearer to her going forward, and stating *I understand that you have been informed that you have a meeting regarding all these matters next week.* This was sent at 18.44.

274. The email exchange between them displays a certain irritation from both women– there is implied criticism of KS by KC and implied criticism of KC by KS.

275. In response at 18.58 KC wrote back to the claimant saying as follows: *Thanks you for uploading this information Kajal as it wasn't there last week when I went through it with Gary. I'm really surprised and disappointed that you are refusing to give me a solid handover and for some reason have passed this to the new executive dean instead who no doubt has more important issues to deal with. I wish you all the best in your new role.*

276. We all agree that KC was clearly frustrated and annoyed with the Claimant at this point, that her tone is rude, and that her last comment is capable of being read as passive aggressive. We understand why the Claimant felt that this was a threat, although we do not consider it was one.

277. However, we all agree that there is no evidence at this point that KC knew that the claimant had raised a complaint or might raise a complaint about race discrimination or anything else. Her wording suggests a genuine frustration and annoyance. We think her words, though a bit unprofessional, support her evidence that she did not, at this point, know about any complaints that had been made. We find that her reasons for writing this email was frustration and annoyance and not any knowledge of the complaint. We think that this was in keeping with the way she had dealt with the claimant from the point of her appointment.

***from 1 January 2021, Ms Collier amended the claimant's workload without consulting the claimant***

***Ms Collier refused to allocate to the claimant hours work for the work the claimant had already undertaken***

***Mrs Collier allocated extra work to the claimant and***

278. The second complaint of victimisation is that Mrs Collier amended the claimant's workload without discussion or agreement with the Claimant. She says this was done on the 15th January 2021

279. We accept the Claimants evidence that it was usual to discuss changes in workload with the individual and KC accepted when giving evidence that it would be usual to discuss changes in workload with the person affected before making those changes.

280. We find that on 15 January the claimant was told that her workload was being changed and increased. This had not been discussed with her in advance. We find that Mrs collier acted contrary to what she knew was usual practice. We have no evidence that she did this to anyone else. This was unfavourable treatment of the claimant.

281. The question for us, is why did she do it.

282. She says in her evidence that there had been an example of KS changing her workload on one occasion. She also said that she was under pressure and the Claimant had not given a handover. None of these statements seem to explain either why the workload was increased, or why it was not discussed.

283. Mrs Collier was asked why she did not discuss this with Dr Sharma, or go back to JH and talk to him about it and said that felt that JH was new to the role and had more important issues to deal with. On reflection she did accept that changes to KS role were important and accepted that this might cause the Claimant stress, but said she made the decision on the basis of the knowledge she had. She also said , when asked why the claimant had been treated differently, she said, *you (the Claimant ) refused to meet me*, and stated that she was frustrated with the situation and not being able to communicate with the Claimant. She forcefully denied that she did this because the claimant had raised complaints and asserted that she did not know that any complaints had been made at this stage.

284. We find that Mrs Collier did change the claimants work load without talking to her first, but because she was annoyed and irritated with the claimant and with not being able to talk to her. We find this was unprofessional , but that it was not motivated at all by any complaint made by the claimant. We find no evidence that points to KC knowing about the complaints at this point and find on balance that she did not know that the claimant had raised complaints when she changed the claimant's workload.

285. The claimant was upset by the change to her workload, and wrote to JH making a clear complaint that she believed that KC's email to her was victimisation. He writes back thanking her and tells her that he has arranged to meet KC to go through things.

286. KS did not send this email to KC, and therefore unless KC was told about it by JH, she would not have known of it.

287. The claimant then did complain to KC that she , KC had allocated her additional work. KC accepts that she did ask KS to do some additional work, such as being a second marker and asked to meet to discuss this with her. KS declined to meet

her. It was in her response that KS told KC that she had changed her workload without her consent. KC then asked KS to say when this had happened. She should have known that she had done this.

288. On 20 January 2021 the Claimant sent a further email to JH, this time copying in KC, in which she stated that she would be raising a formal complaint about KC. KC says that this was the first time that she was aware of any formal complaint or intention to raise a complaint.

289. At this point, there is no evidence that KC had been told that the claimant had either made a complaint against GR or that she, the claimant had raised an issue about victimisation.

290. It follows that the complaint cannot at that point have been a cause of her actions. We therefore dismiss that complaint of victimisation.

291. We have been referred to an exchange of emails which post date this.

292. On 15 February JH wrote to KC and Professor Rees and says , after my email just now, kajal is seeking to escalate the harassment and bullying claim so we will have to explore other options for Positive And Social Psychology which we discussed. Sorry about this. Djamel's report is due tomorrow.

293. The report was the one Professor Ait-Boudaoud was preparing in respect of the claimant's allegations about the failure to appoint her.

294. There was then an exchange of emails between Mrs Collier, Professor Rees and JH. This is at pages 388 in the bundle. text. insert text 388.

295. We all agree that this exchange only makes sense if Kerry Collier knew that the claimant had made her original grievance. KC said to us that she did not know what the report was or who Djamel was. She also accepted this was not something that she thought was about a complaint about her.

296. No one admits that Mrs Collier knew about the Claimants complaint about the appointment process. If she did not know at the point she received this email, we find it incredible that she did not ask what this report was, since it was clearly affecting the management of the claimants teaching.

297. We note that several weeks had passed and we all agree that it is possible and we think probable that something was said to KC before 15 February that informed her that the claimant had made a complaint that was being investigated. The email from JH is written to KC, and reads as if he assumed that both she and GR were aware of the context, which was the ongoing complaint about Discrimination, harassment and bullying by the claimant.

298. KC clearly did think that, at least, that this was an allegation of bullying and harassment about her and about the workload, and we find that her response, which is to suggest disciplinary action against the claimant is wholly inappropriate. This also explains the comment made by GR not to let spurious allegations get to her. We also find that the exchange demonstrates a relationship between Professor Rees and Mrs collier which is entirely different to the relationship he had with the claimant.

299. We have also considered the claimants allegation that she was victimised by KC when KC refused to allocate her hours for work she had already carried out.

300. We were referred to a document in the form of a table, dated 22 February 2021 This was the response from KC to JH and GR about Dr Sharma requesting that she should be allocated  $\frac{1}{2}$  the allowance for the Associate Heads role for work undertaken in the academic year from September 2020, because she had been in post for 4 months up to January 2021.

301. In this document KC sets out her response to the request and the reasons for not agreeing it. Both are entirely appropriate we find. KC then makes a reference to tribunals have failed on employers offering goodwill gestures as it is seen as a sign as admissions of wrong doing. Her explanation was that this was a general comment by way of information. We do not accept this as true and all agree that

this is far more likely to be a comment made because of and with reference to the ongoing dispute with the Claimant, who had, at this point obtained an ACAS certificate ( 1 February 2021).

302. We see no reason for KC to make any reference to an ET, unless she was aware of the dispute between the claimant and the respondent at that point. We find that by this point it is more likely than not that KC did know that there was a complaint about her and a complaint about other matters that pre dated it, and that is the reason for the comment.
303. We find that when both the email response in February 2021, and the comment about the ET, were written Mrs Collier did know that there was a complaint against her, but that she also knew that there was an ongoing complaint about other matters concerning other people.
304. We have been referred to evidence from several people, including emails from JH , who was asked if he thought that KC did know about the claimant's grievances and if so when. He asked this because he had to investigate the claimant's victimisation complaints. JH responded that he did not think that KC did know.
305. We note that Professor Ait-Boudaoud did not ask KC this question and that there was a lack of transparency, over this matter. It was obvious that if Mrs Collier was told about the complaint, then she could be accused of victimisation in the future, but that if she was not asked, then she could not defend herself against the existing complaints. This was not explained in this way by the respondents, but we do recognise that there was a dilemma about how to investigate this particular complaint.
306. None the less, we do not believe that Professor Ait-Boudaoud was told the whole truth. We have no evidence of any actual conversation and unsurprisingly no one has given any evidence or admitted any informal conversations. We infer from the evidence we have seen, and the sequence of events that it is more likely

than not that Mrs Collier did know about the investigation and the complaints made by February 2021.

307. She knew that the claimant had made a series of complaints , including complaints of race discrimination.

308. However, we find that the explanations set out on page 408 of the bundle, referred to above, were a valid justification for not granting the request made by KS. The reason given is logical and reasoned and includes a proposed solution. We all agree that the reasons set on-out in the table are the true and the only reason for the decision , and that the reference to the ET was an unhelpful remark. We are very concerned that this witness was disingenuous and that Professor Rees must also have known that KC knew about the complaints but told us she did not.

***the respondent refused to provide the claimant with notes of the selection process***

309. The claimant made a freedom of information request on 15 December 2020, and asked for various statistical information as well as the interview notes and the notes of feedback.

310. She received a response on the 15 January 2021 providing answers to many of her questions. In response to her request for the interview notes it said (insert 309) .

311. This was wrong. The interview notes taken by Sally Walpole were on the file. We have been provided with them and told that they were uploaded. We have no evidence before us that explains why the claimant was told that they were not available.

312. The report produced by Professor Ait-Boudaoud was sent to the claimant on 18 March 2021. It had 37 attachments and 17 appendices.

313. The claimant wrote back that she was unable to open the attachments and appendices. She was then sent a further copy. The appendices did not include the interview notes.

314. She was signed off on sick leave on the 19 March 2021.

315. On 3 September 2021 the claimant lodged an appeal. One of her complaints was that University had not provided her with a complete set of their evidence, such as copies of the handwritten notes of evidence of panel members at appendices 11-17. She had also not been provided with statistical evidence.

316. Professor Ait-Boudaoud carried out further investigations, and there was an appeal hearing and an outcome. The claimant was not provided with the handwritten notes then, or as part of disclosure.

317. The claimant was not provided with the handwritten notes. There were 5 occasions when she should have been given them.

317.1. As part of the investigation

317.2. As part of investigation report

317.3. As part of appeal

317.4. As part of her FOI request and

317.5. As part of disclosure for the ET.

318. We also find that there was a failure to give her any feedback, as set out above. The question we ask is why?

319. She needed the notes and was entitled to them, and they existed and should have been on the file. We are not clear when they were produced but they were relevant to the investigation before AB. She had made allegation of race discrimination. The notes are, we all agree, insufficient to demonstrate a fair and appropriate process by themselves, and do not show any evidence of scoring. GR told us he made no notes at all.



320. We find that the burden of proof shifts on the facts we have found to explain why the notes were not provided to the claimant. Professor Rees suggested that the staff had not understood that the notes were there all the time and sought to blame others. We reject this, and have no other evidence to explain it.

321. We do not accept that there is any valid and truthful explanation. The claimant put the respondent on notice at an early stage that she was really unhappy about the recruitment process, and the respondent knew or should have known that the notes existed and were of central relevance to the questions and allegation she was making. We can only conclude that there was a deliberate decision by the respondent on more than one occasion to prevent the claimant from seeing the notes, because she had raised the complaint of discrimination.

### **The principle Legal tests.**

#### **Direct discrimination (s.13 Equality Act)**

322. Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010 "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."

323. The protected characteristic relied upon was race. The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*

324. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

- (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.*

325. In deciding what were the ‘grounds’ for discrimination, we reminded ourselves that we are simply required to identify the factual criteria applied by the respondent, or the member of the staff who made the decisions, as the basis for the alleged discrimination. The respondent’s motive for discriminating, however benign, is not relevant. (*R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC*, per lord Phillips, president.)

326. We reminded ourselves that it is for the employee to prove that she suffered the treatment, not merely to assert it, and this must be done to the satisfaction of the tribunal after all the evidence has been considered. *Laing v Manchester City Council and anor 2006 ICR 1519, EAT*, per Mr Justice Elias, president)

327. We also considered the question of unconscious bias. In this case the respondent asserted that there was no evidence of a discriminatory motive or conscious discrimination.

328. We reminded ourselves of the judgment of the Supreme Court in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* and the words of Baroness Hale

there are other cases in which the ostensible criterion is [not inherently discriminatory] — usually, in job applications, that elusive quality known as “merit”. But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex.’

329. To illustrate her point she referred to the following famous passage from Lord Nicholl’s judgment in *Nagarajan v London Regional Transport 1999 ICR 877, HL*:

*All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough investigation of a claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.’*

330. We considered the application of the burden of proof provisions and reminded ourselves that if we are satisfied that

*the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race".*

331. Looked at from the other side, we reminded ourselves that we must not ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance.' per Mr Justice Elias, then President of the EAT, in *Laing v Manchester City Council and anor 2006 ICR 1519, EAT*
332. In this case, in order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged.
333. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need show positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice.
334. As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but *less* favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).
335. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see *Fraser-v-Leicester University* UKEAT/0155/13/DM). In *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.
336. We reminded ourselves of Sedley LJ's judgment in the case of *Anya-v-University of Oxford* [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those

findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

### **Victimisation (s. 27 Equality Act)**

337. We also had to consider claims under s. 27. Although the Respondent did not dispute the fact that the Claimant had performed protected acts within the meaning of s. 27 (1) in the form of her grievances and her claim to the ET, it disputed the allegation that she had been subjected to detrimental treatment because of those acts.

338. The test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant has been victimised ‘because’ she had done a protected act, but we were not to have applied the ‘but for’ test (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425);. it is not necessary for the protected act to be the *primary* cause of a detriment, so long as it is a significant factor. In *Pathan v South London Islamic Centre EAT 0312/13* However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.

339. We recognise that the concept of “significant” can have different shades of meaning, and reminded ourselves that if in relation to any particular decision a discriminatory influence is not a material influence or factor, then it is likely to be trivial. ( see *Villalba v Merrill Lynch and Co Inc and ors 2007 ICR 469, EAT* )

340. In order to succeed under s. 27, the claimant needs to show two things; that she was subjected to a detriment and, secondly, that it was because of the protected act(s). We have applied the ‘shifting’ burden of proof s. 136 to that test as well.

### **Discussion and conclusions**

341. Looking first at the claims of direct discrimination, we have reviewed all our findings of fact about the way the claimant was treated by Professor Rees, across the chronology of events.

342. The fact that the claimant was not successful in applying for the job she had been doing for five years, meant that a hundred percent of the black and minority ethnic staff reapplying for their job had not been recruited, whereas 11/12 of white staff applying for their jobs had been recruited. We have already observed that

this is statistically significant and would have anticipated that this would have triggered some form of enquiry under the University's own policy and Equality Monitoring, even without the claimant herself, having raised the matter.

343. The claimant was a visible member of the black and minority ethnic staff. She speaks with a marked Indian accent. She had been doing the job for five years, albeit one of those years she spent on maternity leave, and the only criticism apparently made of her was at the end of the tenure and was directed towards her communication skills and some issues around timetabling.

344. The fact that she was not reappointed to a post was on the respondent's own statistics, extraordinary. The circumstances ought to have raised questions at if not a concern at some level. Instead, the fact that a senior member of the academic staff who was BAME woman was not reappointed to a post was ignored by the University.

345. When the claimant herself raised an issue about the appointment process within days of being told that she was unsuccessful, we would have anticipated an immediate and sensible explanation would have been forthcoming to explain clearly to the claimant and to the university, why the claimant was not appointed.

346. We would have expected that Professor Rees would have expected to give and been ready and willing to give specific and clear feedback to the claimant. he did not do so.

347. It was only when the claimant raised her complaint and suggested race discrimination that the University took any steps at all to look at the process followed. We find its process was unnecessarily slow, and that there was a reluctance to co-operate with the claimant to provide her the information she needed to represent her concerns.

348. Despite a protracted investigation, and the lengthy report, the respondents did not conclude that there was any real concern about the way Dr Sharma had been treated. There were no real concerns about the interview process and the

apparent lack of notes taken by the recruitment manager. There were no concerns about the apparent lack of any training of the individuals there were no concerns about the fact that the claimant had not been reappointed and was a statistical anomaly and there were no apparent concerns that when the claimant sought feedback at an early stage, none was provided.

349. We have found that the burden of proof requires the respondent to fully explain why the process of selection was not motivated consciously or unconsciously by race. We are not satisfied by the explanation.

350. On that basis we would have found that the process was tainted by race discrimination.

351. However, we have also considered our findings about the other allegations made by Dr Sharma of redirect race discrimination.

352. Her complaints about Professor Rees are all well founded we find.

353. Our findings are that he did treat her differently to named white staff on in several specific incidents, and he treated her in a way that we considered was different to the way he would have treated others, in areas such as support over her father death, and her child's illness.

354. We have preferred the evidence of Dr Sharma where there have been conflicts and have rejected some of the explanations given by Professor Rees as untrue.

355. We have considered carefully the way that Prof Rees conducted himself and we conclude that he did treat the claimant differently and that he treated her differently to white colleagues.

356. We find it extraordinary that within such a short space of time he offered support to one colleague who wished to pursue an academic qualification but declined to offer support to the claimant when she stated her wish to pursue it.

We find his explanations inconsistent, and we do not accept them. We find that he treated the claimant differently to a white woman in similar circumstances.

357. We also consider that Prof Rees was disrespectful of the claimant's role as chair of an interview panel and that his refusal to discuss the reasons for the appointment of a woman with her, whilst he had been prepared to discuss it with a white man who was not chair of the panel is extraordinary. We all agree that this reluctance to discuss serious matters with the claimant indicate is indicative of his attitude towards the claimant and is fundamentally different to the way he treated all the other colleagues about whom we have heard evidence. There is no valid reason provided to us for him refusing to discuss this matter with the claimant and we find his explanations unconvincing and we reject them.

358. We have considered the responses provided by Prof Rees to the claimant when a discussion took place about the claimant reapplying for the job. We find that he was unsupportive of her, but it is not clear why he was unsupportive of her.

359. We have considered the situation, which arose when the claimant's father died in India. We have borne in mind that these matters occurred some years ago and that memories do fade. Nonetheless, we all agree that the attitude of Prof Rees to the claimant and her husband at a time of great personal sadness, and at a time when she was eight months pregnant, and in the context of having to travel a significant distance in order to be with her family, showed a lack of empathy or support.

360. We have found that that he did expect the claimant to continue to do her work despite the crisis she was dealing with, and we conclude from all we have heard that he would not have responded in the same way to any other member of staff, who had similar family emergencies. All the evidence we have been referred to of other people having else for family emergencies suggests that Prof Rees is capable of great sympathy, empathy and kindness. We conclude that there was a difference in treatment.

361. The claimant has referred to and complained about the way she was treated when she was trying to deal with her baby son's illness. We find again that Prof Rees whilst not unsympathetic was not particularly supportive of the claimant. He was reluctant to accept that the claimant was justified in having serious concerns about her child's health, and did not appear to have taken any particular steps to offer the claimant any additional support .

362. We have considered the evidence in respect of the process for advertising the post that the claimant had spent the last five years doing and which she had indicated she wished to reapply for. Nobody including the claimant's own line manager, Prof Rees flagged up to that post had been advertised. We find this to be extraordinary behaviour. We find it almost incredible that Prof Rees as the claimant's line manager would not have said to her, something about the advert being expected that week He knew she wanted to apply, and there was no reason not to flag it up to her, or to any one else he knew might be interested. It seems to us to be such an obvious thing to do, that to fail to do it must raise questions about why.

363. The claimant very reasonably asked for feedback following her failure to be reappointed. The request was passed to Prof Rees . We Conclude that Prof Rees was reluctant to provide the claimant with feedback in respect of her interview and we have considered why this was . We conclude that this was because he was well aware both that the process had not been fully fair and fully transparent. But we also conclude that he himself was well aware that he had a marked preference for Ms Collier and that he was not supportive of the claimant . He would have been well aware that there was a difference in race between the two women and we conclude that at some level, conscious or unconsciously ,he did not wish to have to justify himself or his decisions .

364. Having considered our findings of fact in respect of each of the allegations of discrimination made by the claimant, and having taken into account the statistical evidence and the reluctance of the respondents to provide the claimant with full access to documentation at an early stage, we are satisfied that in the absence of



valid explanations from Mr Rees and the respondents, we could conclude that the claimant's treatment was on grounds of race.

365. We have therefore considered the various explanations provided by the respondent and by Mr Rees for the treatment of the claimant.

366. We reject the explanations and reasons provided by the respondent for the claimant's treatment in each and every instance.

367. We find the explanations inconsistent, lacking in transparency and in some cases being made up thought of after the event.

368. We conclude that Mr Rees, subconsciously or unconsciously, treated the claimant as he did, including failing to reappoint her to a job she had been doing for five years was, in part at least, on grounds of her race.

369. We conclude that this is a case of subconscious discrimination. Whilst Prof Rees is clearly a respected senior academic his reluctance to recognise the skills and abilities and aspirations of Dr Sharma , and his failure to support and encourage her in the way that he supported and encouraged other white members of staff , points towards a subconscious or unconscious bias . We conclude that his involvement in the recruitment process and his subconscious bias means that the failure to recruit claimant was an act of race discrimination.

370. This does not mean, in respect of the appointment process, that Mrs Collier was not necessarily the better candidate. She may have been. Our finding is that, on the basis of the evidence before us, we do not accept that there was an objective reason which was nothing to do with race. We all agree that at some level, the claimant's race was a factor which influenced Professor Rees, consciously or unconsciously.

371. We are not able to determine what would have happened if Professor Rees had not been involved in the recruitment process , and if the process had not been tainted with race discrimination .

372. The fact that the majority of academics who had applied for their own posts in similar positions had always been reappointed does not necessarily mean that the claimant would have been reappointed in this case . Two members of the panel about whom we have made no findings of unconscious bias at all had different views about who should be selected . The third member of the panel would therefore have a deciding vote.

373. We think that this must mean that the claimant had at least a 50% chance of being a successful candidate and , since statistically there is a high percentage chance of the incumbent being reappointed we think her chances must realistically have been higher than 50% . This will be a matter for discussion at a remedies hearing.

### **Conclusions on Victimisation**

374. In respect of the victimisation claims we conclude that the claimant was not victimised for having made a complaint of race discrimination by Mrs Collier. We have made some criticism of the communications from Mrs Collier and we also find that she has not been wholly truthful in her evidence with the tribunal, but we conclude that despite this, her reasons for her communications were a genuine frustration with the situation and with the claimant, which may perhaps have been affected by her not being fully updated or fully aware at all stages of the process are precisely what the claimant's concerns were.

375. We reject the claimant's allegations of victimisation against Mrs Collier for the reasons set out above.

376. We conclude that the refusal to provide the claimant with access to documents which she clearly required and the failure to comply with some basic aspects of discovery and disclosure during the process of the court proceedings was not the result of human error, or of poor administrative systems, but has been the result of a deliberate attempt to prevent the claimant from seeing documentation which might support her claim. There has been a deliberate failure by the respondents, to cooperate with the claimant from the point that she raised her grievance up

until and including the process of this hearing. We conclude that the claimant was victimised by the respondents when they failed to provide her with the notes of the selection process.

377. It is unacceptable for any large organisation which is well resourced and which has in its own legal advisers to fail to comply with the most basic requirements of disclosure. It has been observed on many occasions that a claimant in discrimination cases have an uphill struggle because much of the information required to support their case or as the case may be to disprove their case will be in the hands of the respondents. In this case the claimant had retained and had access to many of her own emails and contemporaneous documents. Had she not retained them or accessed them, there is no doubt that she would have found this case very difficult to pursue.

**Employment Judge Rayner**

Southampton

Date: 28 November 2022

Judgment & Reasons sent to the parties: 29 November 2022

FOR THE TRIBUNAL OFFICE